
PROSECUTORS AND RESPONSES TO VIOLENCE

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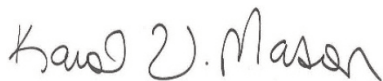
A Letter from the Co-Chairs of the IIP Advisory Board

The Executive Session on Reimagining the Role of the Prosecutor in the Community (Executive Session), hosted by the Institute for Innovation in Prosecution at John Jay College of Criminal Justice (IIP), is guiding high-level culture change in the field of prosecution. Through a series of facilitated convenings and conversations spanning three years, the Executive Session brings together the foremost experts in the field of prosecution – elected prosecutors, legal professionals, scholars, policy experts, and individuals directly impacted by the justice system.

The collaborative research and engagement that informs the Executive Session enables a thorough dive into some of the most complex topics facing prosecutors and their communities: reimagining the role of the prosecutor in a democratic society; producing public safety while reducing harms created by the criminal justice system; and addressing the legacy of racial inequality and structural injustice, to name a few. In order to disseminate these conversations into the field, Executive Session members partner to undertake research and author papers, with an eye towards developing innovative responses. The papers are based on the opinions of the authors, available research, and insight from Executive Session members. While the papers do not represent a consensus of all members, they have been informed by critical engagement and collaborative discussion amongst members. The expertise and diversity of members provide a nuanced lens to some of the most pressing topics in the field of prosecution, and to the criminal justice system overall.

The Executive Session and the papers emerging from it are intended to uplift the evolving role of prosecutors and their power to facilitate the creation of an increasingly equitable and effective American criminal justice system.

For further information about the Executive Session on Prosecution or the IIP, please write to IIP_JohnJay@prosecution.org.



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Prosecutors and Responses to Violence

Joseph Margulies¹ and Lucy Lang²

Prosecutors want to end violent crime in their jurisdictions, and for good reason. Violence shatters lives, sunders families, and cripples communities. Yet the pain and anger prosecutors see must not blind them to the evidence: our nation's enthusiasm for punishment as a response to violence has gone past a point that is morally just, fiscally sound, or penologically sensible. Prosecutors who are serious about preventing violence, restoring neighborhoods, and repairing lives must distinguish between vengeance and justice, and take a radically different approach to violent crime.³

Painstakingly gathered over half a century, the research shows conclusively that:

- i. **Violence is concentrated.** Most violence is caused by a tiny number of people who are alternately victim and perpetrator, and who engage in violence at a similarly small number of micro-locations. Even in neighborhoods with the highest rates of violent crime, the overwhelming majority of people and places have no involvement in either crime or violence.
- ii. **Violence is preventable.** Society does not have to accept violent crime as inevitable. Programs that carefully and comprehensively target the small number of people most likely

to engage in violence have successfully lowered rates of violent crime in locations across the country. We can prevent violence.

- iii. **Violence is transient.** Violence is almost exclusively the domain of young men. Offenders age out of violence more quickly and more completely than they do most other types of criminal behavior, and recidivism rates for people convicted of violent conduct are lower than for other offenders, sometimes by several orders of magnitude.

Taken together, these three insights—that violence is concentrated, preventable, and transient—should lead prosecutors to an entirely different approach to violent crime. Before discussing this evidence, however, we begin with a brief history of the current response.

I. WHAT IS AND WHAT MIGHT HAVE BEEN

When Richard Nixon took office in 1969, crime was on the march. Violent crime in particular was skyrocketing. Nixon had campaigned on a promise to end what he saw as liberal mollycoddling. In 1971, he created the National Advisory Commission on Criminal Justice Standards and Goals, which released six reports in 1973. By today's standards, the commission's recommendations were remarkably progressive,

¹Professor of Law and Government, Cornell University. My thanks to Anna Lifsec, Jessica Ritchie, Sarah Rogers, and Giancarlo Valdetaro for their invaluable research assistance. Thanks also to Alexi Jones of the Prison Policy Initiative for an early conversation that suggested some important studies that we should consider while preparing this report.

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³In this essay, we concentrate on street violence rather than domestic violence. We recognize the grave seriousness of both, and much of what we say applies to both, but they are not identical, and the prosecutorial response to domestic violence deserves a paper of its own.

and include many of the positions now championed by a growing movement of liberals and conservatives alike. Had we followed the path charted by Nixon’s Advisory Commission, we would have decriminalized public drunkenness and vagrancy. Minor traffic offenses would have been removed from the criminal code and treated as an infraction subject only to an administrative disposition.⁴ Incarceration would not have been an option for most of what we now call quality-of-life offenses, including prostitution, the possession and use of small amounts of marijuana, and gambling.⁵ Alcoholism, drug addiction, and mental illness would have been understood as diseases rather than crimes, and those who suffer in their grip would have been diverted out of the criminal justice system and into treatment.⁶ Vastly more resources would have been devoted to social service, and local communities would have been recognized as an indispensable part of the solution to crime and disorder, rather than the primary source of the problem.⁷

But most dramatically of all, our response to violence would have been completely different. Based on its exhaustive review of the known evidence, the commission recommended that the *maximum* sentence for the great majority of crimes of any type be capped at 5 years. Longer sentences would have been reserved only for the very small number of the most serious and dangerous offenses, and even then, the *maximum* would have been 25 years. No offense, and no offender, would have been subject to either a mandatory minimum or a lifelong prison sentence.⁸ These recommendations were based on the knowledge—already apprehended at the time of the commission’s work—that prison is itself criminogenic, that longer prison sentences weaken rather than strengthen communities, and that recidivism rates for violent offenders are low.

We leave others to ponder what the world might have been had this country followed the path set before it by the Nixon Advisory Commission. Would we have launched the failed war on drugs and produced the highest incarceration rate the world has ever known? Would law enforcement have made more than a quarter of a billion arrests in the past twenty years? Would we have spent trillions of dollars on the vast archipelago of police, prosecutors, courts, and corrections? We cannot know. This was the path not taken.

Where the United States went instead is now well known. The contemporary criminal justice system was built on the idea that the world can be neatly divided into good people and bad, and that the goal of the system is to separate the two for as long and as thoroughly as possible. Ronald Reagan once mused that people “are basically good,” but that some make “a conscious, willful, selfish choice” to be “evil.” For them, “retribution must be swift and sure,” because “society has the right to be protected.” In time, this approach became entirely bipartisan, with Democrats and Republicans all singing from the same hymnbook, jostling to claim the mantle of least forgiving, most vengeful, and farthest removed from the available evidence about violent crime.⁹

This has had a profound effect on American prosecutors, who played the leading role in transforming political rhetoric into criminal justice policy. Indeed, “if prosecutors were aware of the disproportionate impact of these new policies, they did not attempt to change the course. When prosecutors charged crimes with mandatory minimums, judges were mandated to deliver harsh sentences.”¹⁰ Although no statutes explicitly required “prosecutors to charge every individual at the highest possible level or even to charge at all,” it became largely commonplace for prosecutors to do just that.¹¹

⁴A NATIONAL STRATEGY TO REDUCE CRIME, THE CRIMINAL JUSTICE STANDARDS AND GOALS OF THE NATIONAL ADVISORY COMMISSION, at 15-16 (1973)

⁵*Id.* at 13-14.

⁶*Id.* at 18, 24-25.

⁷*Id.* at 8-9.

⁸*Id.* at 47.

⁹See KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY POLITICS 28-62 (1997).

¹⁰Angela J. Davis, John Chisolm & David Noble, *Race and Prosecution 5* A PAPER IN THE SERIES: REIMAGINING THE ROLE OF THE PROSECUTOR IN THE COMMUNITY, Jan. 2019.

¹¹Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1, 1-24 (2016).

One aspect of this history is particularly unforgivable. Widely accepted social theories grounded in Reconstruction era philosophies held that low-income Blacks were more inclined to criminal conduct, which in turn justified state control and incapacitation.¹² Law enforcement became the principal means of implementing these views, targeting crime control efforts in those communities, and in particular against young men of color.¹³ Disproportionate enforcement in low-income communities of color, premised on the view that people in these communities were more crime-prone, resulted in higher arrest rates in those neighborhoods. That justified increased enforcement, creating a vicious cycle.¹⁴ As a result, policy-makers across the spectrum, including prosecutors, “made a deliberate decision to respond to rising crime and disorder with increased law enforcement rather than attempting to address deficits in housing, employment, education, and healthcare.”¹⁵

Over the past 45 years, this racialized idea of good and evil—almost childish in its simplicity—has changed the entire landscape of American life. It has changed policing; we have dramatically expanded the power of the police to monitor, stop, search, and arrest members of the community, and have pressed them to adopt policies that hobble the communities we are trying to help while enflaming the tensions we need to soothe.¹⁶ It has changed prosecution; we have steadily shifted power from judges to prosecutors, giving them increasing authority to decide the punishment of those charged.¹⁷

It has changed democracy. Roughly one in three adults has been arrested by age 23. The FBI master criminal database contains more than 77 million names, and in the past 25 years alone, law enforcement has made more than a quarter billion arrests. Nearly two million people are in prison or jail; nearly four and a half million are under some form of community supervision. Nearly six million people in this country, including 1 in 13 Black adults, cannot vote because of a prior conviction.¹⁸

So too it has changed civic life. Often an arrest alone is enough to produce catastrophic consequences, even if no charges are filed or they are eventually dismissed. Arrests can trigger automatic notification procedures, leading to suspensions from work or eviction from housing. Arrests can also lead to compounding fines and fees that quickly become unmanageable, ending in a warrant, a new arrest, and time in jail. A conviction, meanwhile, can be an economic death sentence. Millions of Americans suffer from one or more of the thousands of disabilities imposed as a result of prior involvement with the criminal justice system. In some places, they cannot serve on a jury, get a loan to open a small business or attend college, live in public housing, serve in the military, join certain trades or professions, or travel in some parts of the community.¹⁹

Worst of all, it has changed us, for this simplistic view of the world combines with and reinforces deep-seated stereotypes about people of color and the poor, whose over-

¹²Elizabeth Hinton, “A War within Our Own Boundaries”: Lyndon Johnson’s Great Society and the Rise of the Carceral State, 102 J. OF AM. HIST. 100, 100-12 (2015).

¹³ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 182 (2016).

¹⁴*Id.* at 20-21.

¹⁵Davis, Chisolm & Noble, *supra* note 10 at 4

¹⁶See Michael D. White & Henry F. Fradella, *Stop & Frisk: The Use and Abuse of a Controversial Policing Tactic* (2016); German Lopez, *A Conservative Columnist Admits It: “We Were Wrong About Stop and Frisk*, VOX (Jan. 8, 2018), <https://www.vox.com/policy-and-politics/2018/1/8/16865730/national-review-stop-and-frisk-police>.

¹⁷See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM PROSECUTION AND END MASS INCARCERATION (2019).

¹⁸Robert Brame et al., *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21-27 (2012); Gary Fields & John R. Emshwiller, *For More Teens, Arrest by Police Replace School Discipline*, WALL ST. J. (Oct. 20, 2014); Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime* WALL ST. J. (Aug. 18, 2014); WENDY SAWYER & PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2019, (Mar. 2019), <https://www.prisonpolicy.org/reports/pie2019.html>; ALEXI JONES, PRISON POLICY INITIATIVE, CORRECTIONAL CONTROL 2018: INCARCERATION AND SUPERVISION BY STATE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>; CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 2016, (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

¹⁹See Gary Fields & John R. Emshwiller, *As Arrest Records Rise*, WALL ST. J., (Aug. 14, 2018.); Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953-980 (2018).

representation within the criminal justice system is taken not as evidence that the system is bedeviled by structural flaws, but as proof that these two groups include a disproportionate number of the “evil” people from whom the rest of us must be protected. The system thus acts as a powerful wedge, driving society apart along the fault lines of class and race. As these cleavages deepen and harden, the idea on which the system is built becomes more firmly embedded in public life: the world can be neatly grouped into good and evil, and we need the criminal justice system to separate one from the other.

The apotheosis of this approach—the quintessential expression of the past half century in criminal justice—has been in the national, bipartisan response to violent crime. For decades, legislators have competed with each other to demand longer, mandatory minimum prison terms for an ever-expanding list of offenses. As sentences grew longer, vengeance became policy. Today, the incarceration of people convicted of violent crimes propels mass incarceration:

- i. Half of the 222% increase in the state prison population for murder, sexual assault, robbery, assault, burglary, and drugs from 1980 to 2010 can be traced to increases in the time served for these offenses.²⁰
- ii. Between 1981 and 2000, time served for murder increased by more than 200%, sexual assault by nearly 100%, and robbery and aggravated assault by roughly 80%. In the 1990s, when crime rates began their long decline, time served became the number one contributor to the expansion in the prison population.²¹

- iii. The number of people sentenced to life without the possibility of parole increased 376% between 1984 and 2016, and forty percent of the people in the world who have been sentenced to life imprisonment are incarcerated in the United States.²² Prisons house more than a quarter-million people over the age of 50, including tens of thousands of elderly and infirm men and women who will die behind bars, thousands of whom were sentenced as children.²³
- iv. At current rates, by 2030 more than one in three prisoners will be over age 55, representing an increase of 4,400% in the past five decades.²⁴

II. THE EVIDENCE

Support for the current approach to violence rests on three pillars. First, it worked; violent crime rates have fallen to historic lows because we have locked up so many violent offenders and kept them in prison so long. Second, there is no alternative; we cannot prevent violence before it happens, we can only punish it after it occurs. Third, violent offenders are irredeemable; we must imprison them for as long as possible.

Each pillar collapses under the weight of the evidence. Our approach contributed very little to the drop in violent crime; violence is concentrated within a very small number of offenders and places and can be successfully prevented; and of all offenders, those who commit acts of violence are the most likely to change their behavior as they age, and the least likely to recidivate upon release from prison.

²⁰NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES. (Jeremy Travis et al., 2014) https://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf.

²¹*Id.*

²²ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA’S INCREASING USE OF LIFE AND LONG-TERM SENTENCES, (2017).

<https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/#III.%20Life%20by%20the%20Numbers>; NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, THE NEXT STEP: ENDING EXCESSIVE PUNISHMENT FOR VIOLENT CRIMES, (2019). <https://www.sentencingproject.org/wp-content/uploads/2019/03/The-Next-Step.pdf>.

²³The Osborne Association, *The High Costs of Low Risk: The Crisis of America’s Aging Prison Population*, 10 (2018).; AMERICAN CIVIL LIBERTIES UNION, FALSE HOPE: HOW PAROLE SYSTEMS FAIL YOUTH SERVING EXTREME SENTENCES, (2016).

https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlineingle.pdf.

²⁴The Osborne Association, *supra* note 23 at 10.

a. We Did Not Imprison Our Way Out of Violent Crime

Crime has fallen steadily since 1991, and most types of violent crime are at levels we have not seen since the 1960s.²⁵ Incarceration rates, by contrast, are at levels the world has never seen, though they have ticked down slightly in the past few years. These two trends—falling crime rates and rising incarceration rates—invite the inference that the latter caused the former: violent crime has fallen because we have locked up so many violent offenders and kept them in prison for so long, or so some might argue. The inference is simply wrong.

Social scientists have examined the relationship between incarceration and crime rates for many years. Using the most rigorous empirical methods, they have examined, at a granular level, decades of state-level data and differentiated among a host of possible factors that could plausibly have contributed to the drop in crime rates, including incarceration. In the most sophisticated models, they have also taken into account the diminishing return of additional incarceration—that is, the recognition that as the total number of incarcerated people climbs, the marginal effect of each additional person in prison falls. The contribution of incarceration to falling crime rates, in short, is subject to the law of diminishing returns, which means that incarceration might have had a greater effect on crime rates earlier in the incarceration boom than later.²⁶

The net of this scholarship is this: Incarceration may have contributed meaningfully to the decline in property crime rates in the 1990s, but nearly every researcher has found that incarceration had only a negligible effect on property crime in

the 2000s. Whatever contribution incarceration formerly made to the drop in property crime, it no longer has much impact.²⁷

But our concern is with the effect of incarceration on violent crime. Here, the evidence is even more compelling. Researchers who have examined data through the late 1990s consistently find that incarceration had only a small impact on the rate of violent crime, with an effect ranging from 4-10%. The more careful models, however, which account for the diminishing returns of additional incarceration over time, find that even in the 1990s, the effect of incarceration on the rate of violent crime was effectively zero. Indeed, one research team found a negative effect, meaning that incarceration increased the rate of violent crime in the 1990s. And nearly every study has found that by the 2000s, incarceration has had virtually no effect on the rate of violent crime.²⁸

In this extensive body of research, one study stands out as particularly thorough. The Brennan Center for Justice examined data for every state through 2013. Unlike most other researchers, the Brennan Center also took diminishing returns into account, which allowed it to arrive at a more accurate result. It is the most sophisticated research on this question conducted to date. Their conclusion is particularly stark: Throughout the 1990s and 2000s, **“increased incarceration had no statistically significant effect on reducing violent crime ... Increased incarceration has had no effect on the drop in violent crime in the past 24 years.”**²⁹

In sum, we did not incarcerate our way out of violent crime. The drop in crime—and especially violent crime—is likely the result of many factors, most of which have not been studied with the same rigor as incarceration.

²⁵See Jamiles Lartey & Weihua Li, *New FBI Data: Violent Crime Still Falling*, *The Marshall Project* (Sept. 30, 2019), <https://www.themarshallproject.org/2019/09/30/new-fbi-data-violent-crime-still-falling>; NATHAN JAMES, CONG. RESEARCH SERV., R45236, RECENT VIOLENT CRIME TRENDS IN THE UNITED STATES (2018), <https://fas.org/sgp/crs/misc/R45236.pdf>.

²⁶For a careful review of the existing empirical literature, See DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME (SEPT. 2017).

https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf.

²⁷See OLIVER ROEDER, LAUREN-BROOKE EISEN, JULIA BOWLING & VERONICA CLARK, BRENNAN CENTER FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 24-25 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Caused_The_Crime_Decline.pdf;

²⁸*Id.*

²⁹*Id.* at 15; Roodman, *supra* note 26 at 7 (“the best estimate of the impact of additional incarceration on crime in the United States today is zero. And, while that estimate is not certain, there is as much reason overall to believe that incarceration increases crime as decreases it.”).

As a result, we cannot yet state with certainty what factors contributed most to the crime decline and how much they mattered. We can, however, say this: The possible benefit incarceration may have had decades ago has long since ended; maintaining course has no effect on the rate of violent crime. The first pillar of the argument in favor of our current approach collapses.

b. Violence is Hyper-Concentrated

Many people believe that in certain areas, crime and violence are endemic. Indeed, our culture—to say nothing of our case law—repeatedly indulges the fiction that certain neighborhoods are “bad,” and that a large fraction of residents within them are either active participants in or passive beneficiaries of dangerously widespread criminality.

This is simply untrue. Crime of all sorts, but especially violent crime, is hyper-concentrated, and even in the neighborhoods with the highest crime rates, the overwhelming majority of people and places have no connection to criminal activity. As importantly, violence is not a random act committed by a single, unconnected person. It almost always takes place within a complex web of overlapping social networks, involving people with long histories as perpetrators and victims of personal and communal trauma. Violence occurs between a very specific set of individuals, in very specific places, as the product of network processes that depend upon the context in which they take shape. If we attend carefully to these networks, in all their personal, social, and economic complexity, ***we can prevent the violence they facilitate and foster.***

Students of the criminal justice system have long known that even in the so-called “bad” neighborhoods, the vast majority of crime is committed by only a very small number of offenders. No less an authority than Ronald Reagan spoke often of “study after study” demonstrating “that a small number of criminals are responsible for an enormous amount of the crime in American society.”³⁰ Recent research shows that violent crime in particular is even more tightly concentrated than we thought. A study of crime in over 20 cities found that less than 1% of the population accounted for more than half the incidents of urban violence.³¹ In Boston, for instance, from 1980-2008, three-quarters of the gun assault incidents and half the homicides were committed by less than one percent of the city’s youth (aged 15–24). Most of these people shared certain demographic features, including prior exposure to violence and trauma.³² As the Square One Project recently found, “youth in detention were three times more likely than those in the national sample to have been exposed to multiple types of violence and traumatic events.”³³

Likewise, every officer who has ever walked a beat can tell you that some places are worse than others when it comes to crime. Once again, recent research has shown that the connection between violent crime and place is even stronger than we suspected. In the same Boston study, for instance, researchers found that nearly 9 in 10 street segments and intersections over the entire 28-year period experienced zero firearm-related assaults that caused an injury. A little more than half of the remaining spots had only a single such incident. Most of the gun violence in Boston

³⁰Ronald Reagan, President, Remarks in New Orleans, Louisiana, at the Annual Meeting of the International Association of Chiefs of Police (Sept. 28, 1981). <https://www.reaganlibrary.gov/research/speeches/92881a> see Ronald Reagan, Radio Address to the Nation on Crime and Criminal Justice Reform (Sept. 11, 1982). <https://www.reaganlibrary.gov/research/speeches/91182a> (“Study after study shows that most serious crimes are the work of a relatively small group of hardened criminals.”)

³¹Stephen Lurie, *There’s No Such Thing as a Dangerous Neighborhood*, CityLab (Feb. 25, 2019), <https://www.citylab.com/perspective/2019/02/broken-windows-theory-policing-urban-violence-crime-data/583030/>; Stephen Lurie et al., *The Less Than 1%: Extreme Concentration of Violence in American Cities*, Nat’l Network for Safe Communities (forthcoming 2018).

³²Anthony A. Braga, Andrew V. Papachristos, & David M. Hureau, *The Concentration and Stability of Gun Violence at Micro Places in Boston, 1980–2008*, 26 J. OF QUANTITATIVE CRIMINOLOGY 33, 33-53 (Mar. 2010). ; Anthony A. Braga, *Gun Violence Among Serious Young Offender*, . Problem-Oriented Guides for Police Series, Problem-Specific U.S. Dep’t of Just., COPS Office of Community Oriented Policing Services (2004); ANTHONY A. BRAGA, DANIEL W. WEBSTER, MICHAEL D. WHITE, & HILLY SAIZOW, SMART APPROACHES TO REDUCING GUN VIOLENCE, Dep’t of Justice (March 2014).

³³JAMES AUSTIN ET AL., THE SQUARE ONE PROJECT, RECONSIDERING THE ‘VIOLENT OFFENDER’ 10 (2019).

during this period occurred at fewer than 5% of the street segments and intersections.³⁴

Additional research has extended the findings in Boston to other cities and other types of crime. In a landmark 16-year study in Seattle, Washington, researchers found that half of all Seattle crime each year occurred on only 5-6% of the city's street segments.³⁵ Studies in Minneapolis, Cincinnati, Sacramento, and New York, as well as several smaller cities, all reveal the same pattern: In every city and over the course of many years, the great majority of places are entirely crime-free. Year after year, roughly half the crime in a city takes place at only 4% of the street segments; a quarter occurs at about 1.5% of the segments. A street segment is the area on either side of a street between two street corners, but sometimes the troublesome spot is just a single address, a dot on a map. This micro-analysis of crime, known as the "criminology of place," has moved scholars to abandon long-held notions of "dangerous neighborhoods" and "violent communities."³⁶ The conventional narrative, which depicts violent crime as a universal experience within and throughout certain neighborhoods, is simply false.

Yet recognizing that violence tends to be confined to a few people at a few spots is only the first step in understanding the hyper-concentration of violent crime. The people involved in violence are part of overlapping social networks that exist in small parts of a city, and rely over and over again upon the same locations for most of their criminal activity, including violence. Researchers have consistently shown violent crime to be heavily concentrated within these networks,

particularly in cities.³⁷ This holds true across a number of studies, spanning an array of different cities, even within traditionally "dangerous" or "violent" areas, like parts of East Baltimore. There, 0.75% of the population was a member of a violent social network; the same share of individuals was connected to 58.43% of homicides. In Minneapolis, 0.15% of the population was in a violent network; they were connected to 53.96% of shootings.³⁸ The individuals within the networks are embedded in a web of personal relationships so saturated with violence that they too become a part of it. It is these networks, therefore, that ultimately control who is exposed to and involved in violent crime.

But beyond shaping which people become involved in violent crime, networks also help determine where that crime will occur. Network ties are most able to exert control over members' behavior only within small geographic areas, roughly on the order of a city block.³⁹ And within those blocks, some micro-locations—like an abandoned house, an unlit alley, a poorly managed bar, or an overgrown lot—provide ideal criminogenic opportunities.⁴⁰ This results in the hyper-concentration of violent crime, not in a few neighborhoods, but in a few specific locations at a few specific blocks within a neighborhood.

c. Violence is Preventable

The fact that violence is hyper-concentrated among people, places, and networks is not simply an interesting sociological phenomenon. Instead, it is vital to our effort to address violent crime. For the very conditions that

³⁴Braga, Papachristos & Hureau, *The Concentration and Stability of Gun Violence at Micro-Places*, 26 J. OF QUANTITATIVE CRIMINOLOGY 33-53 (2010).

³⁵DAVID WEISBURD ET AL., *THE CRIMINOLOGY OF PLACE: STREET SEGMENTS AND OUR UNDERSTANDING OF THE CRIME PROBLEM* (2012)

³⁶*Id.*

³⁷On social networks and the concentration of violent crime, See Yanick Charette & Andrew V. Papachristos, *The network dynamics of co-offending careers*, 51 SOCIAL NETWORKS 3-13 (2017).; Sara Bastomski, et al., *Neighborhood co-offending networks, structural embeddedness, and violent crime in Chicago*, 51 SOCIAL NETWORKS 23-39 (2017). ; Andrew Papachristos, et al., *Tragic, but not random: The social contagion of nonfatal gunshot injuries*, 125 SOCIAL SCIENCE & MEDICINE 139-150 (2015). ; Andrew Papachristos et al., *Social Networks and the Risk of Gunshot Injury*, 89 J URB. HEALTH 992-1003 (2012).

³⁸*Id.*

³⁹John Hipp et al. *Explorative Simulation of Neighborhood Networks based on Population Spatial Distribution: Do they Predict Crime?* 34 SOCIAL NETWORKS 614-625 (2013). ; See John Hipp *Block, Tract, and Levels of Aggregation: Neighborhood Structure and Crime and Disorder as a Case in Point*, 72 AMERICAN SOCIOLOGICAL REVIEW 659-680 (2007). ; RICK GRANNIS, *FROM THE GROUND UP: TRANSLATING GEOGRAPHY INTO COMMUNITY THROUGH NEIGHBORHOOD NETWORKS* (2009).

⁴⁰David Weisburd, *The Law of Crime Concentration and The Criminology of Place*, 53 CRIMINOLOGY 133-157 (2015).

confine violence also yield the most promising strategies to prevent it. The risk of violence is highest among particular populations operating under very particular conditions, and violence can be prevented if we alter those conditions.

Scholars and practitioners have developed two principal approaches to violence prevention. The first conceives violence as a public health crisis. This approach dates back at least to 1979, when the Surgeon General released a report entitled, “Healthy People,” which identified violent behavior as one of the most urgent threats to public health in this country. Four years later, the Center for Disease Control (CDC) established the Violence Epidemiology Branch to include the prevention of violence as part of its public health mission.

Since then, the public health community has consistently recognized violence in general and violent crime in particular as a public health matter.⁴¹ The number of violence-prevention programs built around this recognition has proliferated, and public health officials have come to accept two propositions as axiomatic: violence spreads, clusters, and transmits through exposure, much like a contagious disease; and like a contagious disease, the spread and transmission of violence can be stopped.⁴²

Successful public health strategies vary widely. The Cure Violence model, for instance, has been established in more than forty communities in nine different countries. The model uses a variety of tools to detect and interrupt the spread of violence, change the behavior of those most likely to act violently, and shift the community’s norms. An evaluation of the program from 2012–2013 in Chicago found a 31 percent reduction in killings in the

two target districts. Similar evaluations of three different communities in New York found that program areas had an 18% reduction in killings, compared to a nearly 70% increase in comparison areas.⁴³ Additional studies have documented the model’s success in Baltimore and Richmond, California.

Hospital-based violence intervention programs are another successful public health approach to reducing violence. Focused on identifying victims of violence in hospitals, these programs assess the type, severity, and amount of violence to which a person has been exposed. Based on this information, these programs provide additional resources, including counseling, treatment for mental or physical trauma, mediation strategies, and domestic violence services.⁴⁴ By blanketing the victims of violence with services, these programs have dramatically reduced the incidence of retaliatory violence.

A study of a hospital-based violence intervention program (HVIP) in Oakland by the American Public Health Association, for instance, found 98% of program clients had not been reinjured and 70% had not been arrested.⁴⁵ Other hospital-based violence intervention programs have achieved comparable outcomes. For example, a program in Baltimore found an injury recidivism rate of 5% among participating patients, as compared to 36% among nonparticipants. In addition, patients participating in the program were only half as likely to be convicted of a crime as those who did not participate, “and four times less likely to be convicted of a violent crime.”⁴⁶

Other programs involve collaboration across city sectors, all of which join together in a public health approach to violence. This cooperation can bring together a wide variety of community members and institutions,

⁴¹THE CENTER FOR DISEASE CONTROL, THE HISTORY OF VIOLENCE AS A PUBLIC HEALTH ISSUE, 2 (2009)

⁴²AMERICAN PUBLIC HEALTH ASSOCIATION, VIOLENCE IS A PUBLIC HEALTH ISSUE: PUBLIC HEALTH IS ESSENTIAL TO UNDERSTANDING AND TREATING VIOLENCE IN THE U.S., 2 (2018). ; (For a general discussion of the public health approach to gun violence) See David Hemenway & Matthew Miller, *Public health approach to the prevention of gun violence*, 368 NEW ENG. J. MED. 2033–2035 (2013).

⁴³CHARLES RANSFORD & GARY SLUTKIN, ENDING VIOLENCE IN CHILDHOOD, SEEING AND TREATING VIOLENCE AS A HEALTH ISSUE, 12 (2017).

⁴⁴Rochelle Dicker MD. et al., *Violence intervention programs: A primer for developing a comprehensive program for trauma centers*, 102 BULLETIN OF THE AMERICAN COLLEGE OF SURGEONS (2017). <http://bulletin.facs.org/2017/10/violence-intervention-programs-a-primer-for-developing-a-comprehensive-program-for-trauma-centers/>.

⁴⁵Ransford et al. *supra* note 43 at 3.

⁴⁶*Id.*

including civic and business groups, churches, hospitals, community centers, city agencies, public schools, and individual community members. These approaches, no less than the Cure Health and hospital-based initiatives, have proven successful.

Initial findings from a comprehensive collaborative strategy enacted in Minneapolis, for instance, “suggest that adoption of the model in the 20 neighborhoods with the highest rates of violence correlated with a decrease of 57% in the number of individuals younger than 18 years (i.e., those involved in the intervention) arrested or suspected in violent crimes, while killings of people younger than 24 years fell by 76%.”⁴⁷ Other programs using a collaborative strategy have had success in Philadelphia and Los Angeles.⁴⁸

Yet as promising as the public health models might be, the second approach to the prevention of violence has been the subject of the most rigorous empirical testing, and therefore shows the greatest promise as a generalizable strategy. This approach, known as focused deterrence, bears some similarities to certain public health strategies. It targets the very small number of young men most likely to engage in violence, and offers them a comprehensive, wrap-around set of alternatives to criminality, including job training, educational support, and much-needed social services. But unlike the pure public health model, focused deterrence combines the “carrot” with a “stick.” Representatives of local law enforcement and prosecution present the members of the target audience with the evidence of their involvement in violence and give them a choice: either put down the guns, or face certain—and severe—sanctions.

Finally, and perhaps most importantly, focused deterrence pairs the carrot and stick with the moral urgency of trusted messengers. Respected members of the community,

including religious leaders, mothers who have lost children to violence or others whose voices resonate within the neighborhood are essential to the strategy, and not merely window dressing to create the appearance of racial diversity and sensitivity. They deliver the message that outsiders simply cannot credibly convey: the lives of the young men at risk of violence matter to the neighborhood, and that punishment is no longer the first impulse but the last recourse of a community desperate to end the bloodshed.⁴⁹

Focused deterrence strategies require close, sustained collaboration among a wide array of public and private actors. They demand the creation of strong relationships among diverse actors who often have no history of working together, or who mistrust each other’s motives. For that reason, these strategies are not easy to implement. Faced with these challenges, some municipalities abandon focused deterrence too quickly if it does not yield immediate results. Other prematurely declare the problem solved and discontinue the strategy if it produces immediate success, which can lead to backsliding and a resurgence in violence.

But when focused deterrence is done right, there is no doubting the results. In Boston, where the approach was first implemented in the late 1990s, the strategy produced a 63% reduction in the average monthly number of youth homicide victims, a 44% reduction in the number of youth gun assaults, and a 32% reduction in the monthly number of citywide shots-fired calls for service.⁵⁰ Oakland’s experience with focused deterrence is more recent, but equally impressive. Between 2012 and 2018, homicides and shootings in the city fell by nearly 50%. But these results merely bookend a long series of successful focused deterrence programs across the country. As the authors of an exhaustive survey of violence prevention strategies found, focused

⁴⁷*Id.* at 4.

⁴⁸*Id.*

⁴⁹See Anthony Braga & David Weisburd, *The Effects of “Pulling Levers” Focused Deterrence Strategies on Crime*, 6 CAMPBELL SYSTEMATIC REVIEWS (2012). (For a description of focused deterrence); THOMAS ABT, BLEEDING OUT: THE DEVASTATING CONSEQUENCES OF URBAN GUN VIOLENCE AND A BOLD NEW PLAN FOR PEACE IN THE STREETS (2019).

⁵⁰Anthony Braga et al., *Problem-Oriented Policing, Deterrence, and Youth Violence: An Evaluation of Boston’s Operation Ceasefire*, 36 J. OF RES. IN CRIME AND DELINQUENCY 195–225 (2001).

deterrence “has the largest direct impact on crime and violence, by far, of any intervention” they reviewed.⁵¹

In sum, we can—and have—prevented violence by recognizing it is hyper-concentrated among a small group of offenders operating within a tiny number of social networks at a comparably small number of places. The behavior of these few people and networks can be altered by changing the conditions under which violence appears. The second pillar supporting the current approach to violence also collapses.

d. Violence is Transient, and Those Convicted of Violence are the Least Likely to Reoffend

Even if communities adopt a robust preventive approach to the small number of people involved in violence, we accept that some violent crime will remain. At least for the foreseeable future, incarceration will remain in a prosecutor’s arsenal. But here too, prosecutors should attend to the evidence: involvement in violence is transient, and for the great majority of people, lengthy incarceration is unnecessary.

To begin with, we dispense with the enduring fantasy that excessively long sentences discourage others from committing the same offense. Research consistently shows that longer prison terms do not act as a general deterrent. It is not the length of a sentence that deters, but the certainty of punishment.⁵² If lengthy prison terms can be justified, therefore, it is not because they deter others, but because they incapacitate a dangerous offender.

On that score, the evidence is equally plain: For more than a century, criminologists have known that involvement in crime peaks in early

adulthood and decreases with age. Violence in particular is a young man’s activity. In the modern era, the likelihood of criminal involvement of any sort is at its highest around age 25. For violence, however, the age of peak involvement is typically even earlier. The likelihood of involvement in a homicide, for instance, peaks in the early to mid-20s and then declines dramatically. As of 2010, about 90% of participants in a homicide were under 35, and 95% were under 45. Other violent crime, like aggravated assault, follows a comparable pattern. For crimes like burglary and robbery, the age of greatest involvement is even earlier, peaking in mid- to late-adolescence and then declining very rapidly.⁵³

Older offenders are also much less likely to recidivate. A study of federal offenders conducted by the United States Sentencing Commission, for instance, found that among offenders who were 21 or younger at the time of release, more than two in three were rearrested within eight years. The odds of re-arrest declined steadily, however, as the age of release increased, falling below 50% for offenders released at age 40, and below 40% at age 45. As with likelihood of re-arrest, the likelihood of re-conviction and re-incarceration similarly decreases with age.⁵⁴

But even more important than the likelihood that an offender will commit any new offense is the likelihood that he will commit a new crime of violence. Here, the odds are striking indeed. Those who commit a violent crime recidivate at far lower rates than do those who commit non-violent crimes.⁵⁵ Indeed, of all crimes analyzed by the Bureau of Justice, those people who committed murder and sexual assault were the least likely to return to prison (for any violation).

⁵¹Thomas Abt & Christopher Winship, *What Works in Reducing Community Violence: A Meta-Review and Field Study for the Northern Triangle*, 6 U.S. AGENCY FOR INT’L DEV. (2016). <https://www.usaid.gov/sites/default/files/USAID-2016-What-Works-in-ReducingCommunity-Violence-Final-Report.pdf>.

⁵²On the improbability of decreasing crime rates by increasing sentences, *SEE* NATIONAL RESEARCH COUNCIL, *DETERRENCE AND THE DEATH PENALTY* (2012). ; NATIONAL RESEARCH COUNCIL, *UNDERSTANDING AND PREVENTING VIOLENCE: VOLUME 1*, (1993).

⁵³JEFFERY T. ULMER & DARRELL STEFFENSMEIER, *THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY: THE AGE AND CRIME RELATIONSHIP: SOCIAL VARIATION, SOCIAL EXPLANATIONS*, (Kevin M. Beaver et al., ed., 2014).

⁵⁴U.S SENTENCING COMMISSION, *THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS*, (2017).

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf.

⁵⁵MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUST. *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, (2014).

And when those convicted of violence do re-offend, the odds are overwhelming that they will not commit a violent crime. The Square One Project calculated that only one in twenty people convicted of an act of violence was re-arrested for a violent crime, and only one in a hundred people convicted of sexual assault or homicide was re-arrested for those offenses. BJS statistics show that out of 20,195 people released after serving time for rape or sexual assault, only 7.7% were re-arrested for similar crimes.⁵⁶

In sum, far from being irredeemable, those convicted of violent crimes quickly age out of violence and are the least likely to recidivate. So collapses the third and final pillar sustaining the argument in favor of the current approach to violence.

e. Prison Inflicts Enormous and Unjustifiable Costs

Though none of the arguments withstand close examination, we still maintain the *status quo*, at enormous financial and personal cost. The Prison Policy Initiative estimated that the mass incarceration nationwide costs \$182 billion every year, or roughly \$500 million dollars every day. According to the Bureau of Justice Statistics, prisons cost nearly \$81 billion per year. Commissary and phone calls alone cost the men and women behind bars and their families on the outside nearly three billion dollars a year.⁵⁷ Since mass incarceration is driven largely by prolonged

incarceration for crimes of violence, blame for much of this cost must be placed at our misguided approach to violence.

But the costs we cannot measure ought to trouble prosecutors at least as much as those we can. What is a prosecutor's obligation if she knows to a moral certainty that a defendant will be brutalized in prison? The question is not merely hypothetical. As recent reporting by *The Guardian* described, people are dying in U.S. prisons and jails at unprecedented rates.⁵⁸ The mortality rate in state prisons in this country is the highest it has been since data collection began in 2001.⁵⁹ Last year, Texas had the highest number of in-custody prison deaths since at least 2005 and saw a 20-year high in prison suicides.⁶⁰ There were more deaths in Michigan prisons last year than in any year since at least 1994.⁶¹ More prisoners committed suicide in South Carolina prisons last year than ever before.⁶²

Jails are similarly lethal. There were 16 deaths in Mississippi jails in a single month last year, which led the FBI to open an inquiry.⁶³ In Utah, at least 71 people have died in jail since 2013. Half of those deaths were suicides, and most were within a week of the person entering jail.⁶⁴ Jails in Utah have the highest per capita death rate in the country.⁶⁵ (To be sure, most people in prison or jail die of natural causes, but given conditions in some facilities, and the known relationship between length of time in prison and reduced life expectancy⁶⁶, it is at least fair to ask what "natural" means under such circumstances.)

⁵⁶Austin, *supra* note 33 at 25.

⁵⁷PETER WAGNER & BERNADETTE RABUY, PRISON POLICY INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION, (2017). <https://www.prisonpolicy.org/reports/money.html>.

⁵⁸Michael Sainato, *Why are so many people dying in US prisons and jails?* *The Guardian*, (May 26, 2019), <https://www.theguardian.com/us-news/2019/may/26/us-prisons-jails-inmate-deaths>

⁵⁹JOE RUSSO ET AL., RAND COOPERATION, CARING FOR THOSE IN CUSTODY: IDENTIFYING HIGH-PRIORITY NEEDS TO REDUCE MORTALITY IN CORRECTIONAL FACILITIES, (2017). https://www.rand.org/pubs/research_reports/RR1967.html.

⁶⁰Keri Blakinger, *'I just kept thinking he was coming home': Suicides in Texas prisons hit 20-year high*, HOUS. CHRON., (April 5, 2019), www.houstonchronicle.com/news/houston-texas/houston/article/I-just-kept-thinking-he-was-coming-home-13746039.php

⁶¹Paul Egan, *Michigan prisoners dying behind bars at highest rate in decades*, DETROIT FREE PRESS, (May 2, 2019), <https://www.freep.com/story/news/local/michigan/2019/05/02/michigan-prison-deaths-surged-2018/3344232002/>

⁶²Mary Katherine Wildeman, *Suicide rate in SC prisons hits record high as mental health problems grow*, THE POST AND COURIER, (May 3, 2019), https://www.postandcourier.com/news/suicide-rate-in-sc-prisons-hits-record-high-as-mental/article_e3f070b8-6ab6-11e9-8e88-0b119ed5f1bd.html

⁶³Jon Schuppe & Teresa Frenzel, *16 prisoners died in one month in Mississippi. Their families want to know why*, U.S. NEWS, (Sept. 1, 2018), <https://www.nbcnews.com/news/us-news/15-prisoners-died-one-month-mississippi-their-families-want-know-n905611>

⁶⁴Jessica Miller, *71 people died in Utah jails in the past five years, most within a week of when they got locked up*, THE SALT LAKE TRIBUNE, (Nov. 15, 2018), <https://www.sltrib.com/news/politics/2018/11/14/people-died-utah-jails/>

⁶⁵Whitney Evans, *Investigating The Many Deaths in Utah's Jails*, NATIONAL PUBLIC RADIO, (Dec. 17, 2017), <https://www.npr.org/2017/12/17/571443634/investigating-the-many-deaths-in-utahs-jails>

⁶⁶EMILY WIDRA, PRISON POLICY INITIATIVE, INCARCERATION SHORTENS LIFE EXPECTANCY, (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/

And this of course says nothing about the non-lethal violence and abuse to which men and women in prison or jail are frequently subjected, at the hands of both other prisoners and correctional staff.⁶⁷ In 2016, for example, 19% of all men incarcerated in U.S. prisons reported having been physically assaulted by other incarcerated men; 21% said they had been assaulted by a member of the prison staff.⁶⁸

Yet these figures almost certainly *understate* the amount and severity of violence within our prisons. In a great number of facilities, prison deaths and other violent incidents are chronically misclassified and under-reported. In one Alabama prison, for instance, at least three homicide victims—one of whom was stabbed, and another who was beaten to death—were classified as having died from natural causes.⁶⁹ At a correctional center in Louisiana, an investigator recorded 12 stabbings over 2 months, but records from Louisiana's Department of Corrections showed the same facility reporting just 5 stabbings over the course of 10 months that same year.⁷⁰ At the national level, officials reported fewer than 8,800 incidents of rape and sexual assault in all U.S. prisons and jails in 2011.⁷¹ The same year, between 3 and 9 percent of all incarcerated men said they had been sexually assaulted behind bars—that works out to more than 180,000 prisoners who allege they were sexually victimized that year.⁷²

In some facilities, conditions are particularly inhumane. In a recent report on the Alabama prison system, the Department of Justice found a level of violence that is “common, cruel, of an unusual nature, and pervasive.” They also found that prison officials exhibited a “flagrant disregard” for incarcerated peoples’ rights to be free from cruel and excessive punishment.⁷³ During a single week at one Alabama prison, investigators noted 4 stabbings, 4 beatings, and 3 sexual assaults.⁷⁴ Some days featured multiple violent incidents, including a sleeping man attacked with socks filled with metal locks and another man forced to perform oral sex on two men at knife point.⁷⁵

Violence alone, however, is not the only hazard we knowingly inflict upon the incarcerated. The majority of prisons and many jails detain far more people than they can safely and humanely hold.⁷⁶ Not only does this encourage violence, it creates conditions that can become unendurable. Overcrowding often prevents incarcerated people from gaining access to necessary medical care and other essential services, and routinely leads to exposure to dangerous environmental conditions.⁷⁷

Alabama is again instructive. The Department of Justice recently found that major prisons throughout the state are at 182 percent of capacity.⁷⁸ As a result, prison officials are systematically incapable of managing the conditions and cannot maintain even a

⁶⁷The Marshall Project, *Prison Violence*, (Updated Oct. 29, 2019).

⁶⁸Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. OF CORRECTIONAL HEALTH CARE 58-82. (2009).

⁶⁹Katie Benner & Shaila Dewan, *Alabama’s Gruesome Prisons: Report Finds Rape and Murder at All Hours*, The New York Times, (April 3, 2019), <https://www.nytimes.com/2019/04/03/us/alabama-prisons-doj-investigation.html>

⁷⁰LOUISIANA DEPARTMENT OF CORRECTIONS, (2015). <https://www.documentcloud.org/documents/2866450-Mother-Jones-Stat-Request-October-2015.html>; Shane Bauer, “My four months as a private prison guard,” Mother Jones, July/August 2016.

<https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/>.

⁷¹“Sexual Victimization Reported by Adult Correctional Authorities, 2009-11.” U.S. Department of Justice. January 2014.

⁷²David Gilson, *What we Know About Violence in America’s Prisons*, MOTHER JONES, (July/August 2016), <https://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons/>.

⁷³U.S. DEP’T OF JUST. CIVIL RIGHTS DIVISION, INVESTIGATION OF ALABAMA’S STATE PRISONS FOR MEN, 2 (2019).

⁷⁴*Id.*

⁷⁵*Id.* at 2.

⁷⁶Am. Civil Liberties Union, *Overcrowding and Other Threats to Health and Safety*, ACLU (2019), <https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions/overcrowding-and-other-threats-health>

⁷⁷*Id.*

⁷⁸*Id.* at 8.

⁷⁹Campbell Robertson, *An Alabama Prison’s Unrelenting Descent into Violence*, NEW YORK TIMES, (March 28, 2017), <https://www.nytimes.com/2017/03/28/us/alabama-prison-violence.html?module=inline>

rudimentary degree of safety and order. Drugs and other contraband are abundant and readily available; incarcerated people sleep in cells to which they have not been assigned simply in order to escape violence.⁷⁹ In one facility, investigators found open sewage running by an entry pathway. (This item was repaired by the state soon after the investigators' visit). Another investigator became sick from inhaling toxic fumes while inspecting the kitchen.⁸⁰

Incarcerated people themselves are far from the only people who suffer during their imprisonment. The men and women in America's prisons often leave behind children, a partner, and a community. In calculating the moral and financial cost of incarceration as a tool for responding to violence, prosecutors must reckon with the costs to these people as well.

For example, research has repeatedly established the negative association between parental incarceration and child health.⁸¹ The child with a parent in prison is more apt to perform poorly in school, endure lasting economic hardship, participate in antisocial behavior, and engage in criminal activity. One study, for instance, found that children of incarcerated parents are six times more likely to one day find themselves behind bars.⁸² Incarceration also inflicts a toll on fragile families, imposing financial and emotional burdens that many relationships cannot withstand.⁸³

Some might accept the pain we inflict on an offender and his family as the price we pay for

safer, healthier communities. Yet the evidence suggests that communities can be crushed by this approach. As incarceration rates increase, for instance, so do rates of sexually transmitted infections and teenage pregnancies.⁸⁴ Communities with high rates of reentry also have higher rates of HIV.⁸⁵ And some of the most important research in criminology over the past fifteen years has shown that the endless churning of the incarceration cycle—the thousands of young men and women repeatedly removed from their neighborhoods, returned, and removed again—systematically destabilizes communities by disrupting the intricate but fragile webs of connection that hold them together.⁸⁶

In fact, a study of the incarceration cycles in Boston and Trenton has shown that a high incarceration rate not only destabilizes disadvantaged communities, it actually *increases* the incidence of crime. While small levels of incarceration can reduce the overall level of crime, the effect reverses as incarceration approaches the rates of the last few decades. After a certain threshold, the overall level of crime goes up. Researchers have also found that in some locations, so many have been incarcerated that additional imprisonment is having essentially no effect on crime rates, meaning the collateral effects on children, partners, and communities are simply gratuitous injury.⁸⁷

Prison as a response to violence has profound ripple effects that prosecutors cannot ignore. The harms inflicted in and by prison demand a different approach to violent crime.

⁸⁰*Id.* at 5.

⁸¹Christopher Wildeman et al., *Parental Incarceration and Child Health in the United States*, 40 EPIDEMIOLOGIC REVIEWS 146–56 (2018).

⁸²Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. OF JUST. 2 (May 2017). <https://www.nij.gov/journals/278/pages/impact-of-incarceration-on-dependent-children.aspx#noteReference12>; Megan Cox, *The Relationships Between Episodes of Parental Incarceration and Students' Psycho-Social and Educational Outcomes: An Analysis of Risk Factors* (2009) (unpublished Ph.D dissertation, Temple University); Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41; ANN. REV. SOC. 291-310 (2015).

⁸³Christopher Wildeman & Bruce Western *Incarceration in fragile families*, 20 THE FUTURE OF CHILDREN 157-77 (Sept. 2010). ; Massoglia et al. *supra* note 82

⁸⁴James C. Thomas & Elizabeth Torrone E., *Incarceration as Forced Migration: Effects on Selected Community Health Outcomes*, 96 Am. J. of Public Health S181-S184 (2008).

⁸⁵Loren Henderson, *Mass Incarceration, Residential Segregation and Racial Disparities in HIV*, 8 J. OF AIDS AND HIV RES. 150-62 (2016).

⁸⁶Todd Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME AND JUSTICE 97-132 (2008).

⁸⁷TODD CLEAR ET AL., *PREDICTING CRIME THROUGH INCARCERATION: THE IMPACT OF RATES OF PRISON CYCLING ON RATES OF CRIME IN COMMUNITIES* (2014). <https://www.ncjrs.gov/pdffiles1/nij/grants/247318.pdf>.

III. IMPLICATIONS FOR PROSECUTORS

In light of the evidence, prosecutors have an affirmative obligation to change course. They must:

- i. **Seek substantially shorter sentences for crimes of violence.** As Marc Mauer and Ashley Nellis of The Sentencing Project recently argued, sentences meted out to people convicted of violent crimes have crept steadily upward over the last several decades and are now far beyond historic or international norms. We agree with them that in all but the most unusual cases, the maximum penalty available in the United States should be 20 years in prison, and this ceiling should be continually reexamined. Prosecutors should not seek a longer sentence absent compelling proof that it is strictly necessary to provide for the public welfare—a showing that is all but impossible to make for any first offender.⁸⁸
- ii. **Support reform of probation and parole,** so that no offender spends a day in prison unless their conduct convincingly demonstrates a threat to public welfare that cannot be met by any other means. At a minimum, no one should be sent to prison for a technical (i.e., non-criminal) violation of a condition of supervised release.
- iii. **Create, staff, and fund an independent conviction integrity unit.** Implicit in the recognition that our approach to violence has been flawed for many years is a complementary acceptance that some people are in prison based on evidence that cannot be trusted. And it does not matter *why* the evidence cannot be trusted; to the innocent man in prison, it matters little if the wrong in his case was excusable or venal. In either case, he languishes behind bars for a crime he did not commit. Identifying those injustices and correcting the error is critical both to rectify past harms, and to

restore the legitimacy of the system in the eyes of the community. For this reform to succeed the prosecutor must do more than create a CIU; the prosecutor must provide it with adequate staffing, funding, administrative support, and institutional independence.⁸⁹ And the work of a CIU should be both backward-looking—to provide complete review and remedy of past cases where appropriate—and forward-looking—to create and implement policies and practices that will protect against similar miscarriages in the future. And the work of a CIU should be both backward-looking—to provide complete review and remedy of past cases where appropriate—and forward-looking—including sentinel event reviews that analyze the causes of wrongful convictions and enable the creation and implementation of policies to protect against similar miscarriages in the future.

But prosecutors must do more than change their own behavior. Prosecutors have unique power and authority within the system, and must use that moral and institutional capital to champion reform. Prosecutors must:

- i. **Seek the repeal of mandatory minimum sentences** and other statutory provisions that deprive judges of the power to act on the unique circumstances of every offender and offense. These provisions produce sentences that are often grossly disproportionate to the offender's culpability.
- ii. **Support the repeal of automatic sentence enhancements,** which have the same practical effect as mandatory minima. In short, the bare fact that a person has been convicted of a given offense should never be sufficient to compel a particular sentence.
- iii. **Play their part to prevent violence.** Prosecutors have a duty to educate themselves about violence prevention

⁸⁸MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* (2018); Marc Mauer, *A 20-Year Maximum for Prison Sentences*, 39 *DEMOCRACY* (2016), <https://democracyjournal.org/magazine/39/a-20-year-maximum-for-prison-sentences/>.

⁸⁹See JOHN HOLLWAY, *CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE* (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2615&context=faculty_scholarship. Some scholars have advocated for the creation of truly independent entities that can review closed cases for error with no institutional connection to the prosecutor. See Barry Scheck, *Conviction Integrity Units Revisited*, 14 *OHIO STATE JOURNAL OF CRIMINAL LAW* 705, 710-12 (2017). https://kb.osu.edu/bitstream/handle/1811/80789/OSJCL_V14N2_705.pdf.

programs that have been effective, and must support the creation and funding of such programs in their jurisdictions. Likewise, they must support and scale alternatives to incarceration, including restorative justice programs.

iv. Support prison reform. As long as prosecutors encourage judges to sentence at least some offenders to prison, they have a moral obligation to advocate for prison reform. At a minimum, they must educate themselves about prison conditions in their jurisdiction. Part of this education must include visits to the facilities in their state where offenders serve their time, including Special Housing Units, where prosecutors should listen respectfully to the men and women held there. Having educated themselves about prison conditions, prosecutors must advocate for change. Fortunately, this does not require that they start from scratch; a number of organizations have published exhaustively researched white papers describing the many commonsense reforms needed to bring dignity to America's prisons, from ending the misuse of solitary confinement to curbing private and public sexual and physical violence.⁹⁰ Prosecutors must become part of this campaign.

v. Shrink the carceral footprint. Prison reform is not simply a matter of better conditions. Prosecutors must join in the call to shrink the carceral footprint. A number of evidence-based reforms are in wide circulation. At a minimum, prosecutors must lend their support for a wholesale shift in prison philosophy from incarceration to rehabilitation. They must support the early release of elderly and

infirm men and women behind bars, and of people who have served sentences beyond the bounds of moral reason, or who have provided satisfactory evidence of rehabilitation.

vi. Advocate eliminating collateral consequences.

In the same spirit, prosecutors should campaign vigorously to reduce barriers to the successful re-entry of returning citizens. The collateral consequences of a prison sentence impose nearly impossible burdens on men and women trying to reintegrate into society and all but guarantee not only that a certain fraction will reoffend, but that an even larger fraction will be unable to contribute to their communities in a fashion commensurate with their potential. The interest in community well-being commands that prosecutors become part of the solution by advocating that these barriers be torn down. Here again, the path is well charted, and no prosecutor has to reinvent the wheel.⁹¹

CONCLUSION

From the first day on the job, prosecutors learn that they betray their oath when they ignore the evidence. Today, the evidence—gathered from many quarters and assembled over the course of many years—points unmistakably down a new path. The current approach to violent crime contributes nothing to falling crime rates, imprisons people far longer than necessary, diverts resources from more productive strategies, and subjects people to a brutality that should make any prosecutor shudder. The status quo is not merely pointless. It is affirmatively destructive and gratuitously cruel. The time to change has come. Prosecutors can and must reject the existing approach to violent crime.

⁹⁰See RUTH DELANEY ET AL., VERA INST. OF JUSTICE, REIMAGINING PRISON, (2018) https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf.

⁹¹See MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION* (2003).

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