BEYOND REFORM: FOUR VIRTUES OF A TRANSFORMATIONAL PROSECUTOR

Taylor Pendergrass* and Somil Trivedi**

*Deputy Director of Campaigns, American Civil Liberties Union; A.B., Duke University; J.D., University of Colorado Law School.

**Senior Staff Attorney, American Civil Liberties Union; B.A., Georgetown University; J.D., Boston University School of Law. The authors—both members of the ACLU's multi-year campaign to redefine the role of the prosecutor—would like to thank the colleagues and coalition partners who have done the transformational groundwork that informs this piece. They also thank their families for their virtues of love, patience, and support.

INTRODUCTION

The second wave of prosecutor reform has arrived. While the number of prosecutors pursuing significant changes to the criminal legal system is still a small fraction of those defending and sustaining mass incarceration, it's also true that a dividing line has been passed. There have been exponential leaps in awareness regarding the tragic and avoidable consequences of prosecutors' policies. That awareness has spread within impacted communities and among advocates, candidates, and—in steadily increasing numbers—voters.[1] It has broken open and penetrated a once monolithic prosecutorial culture. Compared to ten or even five years ago, we live in a vastly different landscape.

This changing landscape presents new opportunities and new challenges. As the reform movement builds power and continues to open up political space for change and accountability, the demands made on prosecutors must evolve to ensure the long-term trajectory stays fixed on ending mass incarceration and systemic racism, not just tinkering at the edges. As reform rhetoric becomes normalized and rewarded, voters must be increasingly wary of candidates and elected prosecutors merely paying lip service to change.

As the second wave gathers momentum, this Article argues that an effective way for communities and advocates to address these challenges is to (1) reject the oft-cited "progressive prosecutor" or "reform-oriented prosecutor" in favor of a truly "transformational prosecutor," and (2) measure progress using a guiding set of *virtues*, as opposed to the hodge-podge of discrete policy reforms that have often served as inexact and misleading proxies for a prosecutor's genuine commitment to decarceration.

In this Article, we propose four such virtues as a framework to evaluate whether someone in this second wave of reform can truly be considered a "transformational prosecutor." By "transformational," we mean an elected prosecutor who is not just curbing the most egregious and obvious prosecutorial abuses, nor even someone who is a benign dictator. We mean a prosecutor who demonstrates genuine commitment to creating the conditions under which incarceration—and the criminal legal system as a whole—can be dramatically *and permanently* reduced, including by proactively ceding their own prosecutorial power.

To be sure, a "transformational prosecutor" may be described in any number of ways. But we propose four easy measures—virtues—that, if present, are strong if not failsafe indicators of a prosecutors' *bona fides* as transformational: (1) making and being held accountable to specific decarceration commitments; (2) implementing radical transparency; (3) championing decarceral legislative reforms, especially those that reduce prosecutorial power; and (4) redirecting prosecutorial resources outside of the criminal legal system.

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1. *See, e.g.*, ACLU, *Americans Overwhelmingly Support Prosecutorial Reform, Poll Finds* (Dec. 12, 2017), https://perma.cc/ZE47-XMSC.

Part I of this Article describes four challenges on the horizon that the prosecutor reform movement should anticipate and prepare to address as the movement continues to shift the landscape. Part II describes how the conceptualization of a "transformational prosecutor" and the four virtues underpinning that framework help to address those challenges. Part III discusses each of the four virtues in concept and in practice, and how they will further the goal of evolving the prosecutor reform movement.

I. NEW CHALLENGES IN THE SECOND WAVE OF PROSECUTOR REFORM

A tough-on-crime, pro-punishment, and pro-incarceration mentality has been the dominant culture of prosecutors, if not all of American criminal justice politics, for decades. While a small number of elected prosecutors have resisted these approaches, something far more significant was revealed in 2016, when a cohort of candidates running on explicitly pro-reform agendas were elected across the country. This group has grown every year since then, and is likely to continue on that trajectory.

This success, however, has also created looming challenges that, if left unresolved, imperil the long-term transformation of the criminal legal system, a central part of which is the prosecutor reform movement. As described below, these challenges include pursuing only incremental reforms, being misled by reform-oriented rhetoric, letting prosecutor reform become an entirely partisan enterprise, and failing to anticipate and neutralize blowback to prosecutors who help shrink the criminal legal system.

A. Thinking Too Small

Five years ago, a prosecutor candidate merely running on a pro-reform platform was something of an earth-shattering moment. The implementation of small policy reforms was extraordinary against the backdrop of a prosecutorial culture that celebrated punishment as a first, last, and only resort.[2] Prosecutors who were just slightly more humane than their predecessors were hailed as change agents.

That approach and analysis was right at the time, and undoubtedly will continue to be appropriate in geographies where even the "first wave" of reform will still take years of additional work to realize. In those geographies, the movement must still rely on the courts and other mechanisms to achieve prosecutorial accountability while electoral change catches up. But from the perspective of a long-term national movement, it is imperative to now set bolder goals that will actually get to the heart of dismantling mass incarceration.

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2. *See, e.g.*, Eli Hager, *Against the Trump Tide: Away from Washington, a New Breed of Prosecutors Takes First Steps*, MARSHALL PROJECT (Jan. 25, 2017), https://perma.cc/CP4W-78BR (describing policy reforms implemented by prosecutors newly elected in 2016).

The evolution of "conviction integrity units" is a good example. For decades, it was near heresy for prosecutors to concede that wrongful convictions occurred, let alone that they were a systemic problem.[3] The first prosecutors who publicly admitted the obvious—human systems have human errors—played a critical role in helping tear down that façade. Then some prosecutors stopped fighting efforts to overturn wrongful convictions. The next evolution was for prosecutors to take proactive efforts—conviction integrity units—to affirmatively uncover and remedy these injustices.[4] Now, prosecutors are recognizing they must expand the mandate of those units to review cases beyond innocence to unfairly punitive sentences.[5]

From one perspective, the pace of these developments has been immorally and tragically slow for the people whose families and lives were destroyed by wrongful convictions and harsh punishments. From another perspective, however, once impacted families and advocates finally broke the dam open, change has been rapid. And yet, going forward, an elected prosecutor who merely seeks to reverse wrongful convictions and harmful sentences after the fact hardly deserves any credit; the true measure is what that prosecutor is doing proactively to prevent harm and shrink their own footprint, thereby eliminating the risks from the outset.

As the above example illustrates, it cannot be emphasized enough that the bar started incredibly low for prosecutor reform. What constitutes meaningful prosecutor reform, and which prosecutors are considered to be on the cutting edge of that reform, should be continuously evaluated and reinvented. A healthy trajectory for a movement as nascent as this one should mean that the successes and the heroes of a few years ago will quickly become outdated. The heroes may even live long enough to become the villains.

Therefore, the second wave of prosecutor reform is an opportunity to name and embrace this dynamic. Rather than endeavoring to set a static, policy-based definition of what constitutes a "transformational prosecutor," advocates and prosecutors themselves should pursue that project iteratively, in alignment with the steady gains of the broader reform movement. The failure to evolve expectations for prosecutor reform will all but ensure the momentum dies long before we truly begin the deep work needed to end mass incarceration. It also makes the movement more vulnerable to the blowback now underway. It is far easier to roll back policy reforms than to reverse real cultural change and political power.

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3. Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://perma.cc/P76V-ET85.

4. *See generally* John Hollway, *Conviction Review Units: A National Perspective*, Faculty Scholarship at Penn. Law No. 1614 (Apr. 2016), https://perma.cc/B8EP-B83A.

5. Eli Hager, *The DAs Who Want to Set the Guilty Free*, MARSHALL PROJECT (Mar. 20, 2018), https://perma.cc/7LDJ-F3XN.

B. Cutting Through the Rhetoric

There is an urgent need for voters, advocates, candidates, and elected prosecutors to understand what constitutes a meaningful commitment to transformation. As the first wave of reform made winners out of candidates embracing reform, and as polling continues to show robust support for pro-reform prosecutors across geographic and ideological divides,[6] both incumbents and new candidates increasingly have incentives to embrace pro-reform rhetoric.

While this dynamic marks an extraordinary accomplishment, it also presents a new challenge. It's no longer shocking to hear a prosecutor or candidate embrace anything other than maximum convictions and incarceration as a goal. The more relevant question has now become whether they actually mean what they say, and whether they have the vision and ability to follow through in a way that provides relief to communities suffering under decades of racist and punitive prosecutor practices.

Prior efforts have often holistically and expertly outlined policy guidelines across specific issue areas, prescribed high-level decision-making frameworks for prosecutors, or tried to split the difference between these two.[7] These contributions, while invaluable, were likely not intended for an audience of voters and community members, nor were they always easily translatable by organizers and advocates with a clear metric of accountability. A common, easy-to-understand, and measurable accountability framework should exist that allows everyone and anyone to determine whether their local prosecutor is working to transform the criminal legal system.

C. Prosecutor Reform as a Partisan Project

Though negative partisanship and political polarization are the defining features of recent American politics, the road to mass incarceration was a truly bipartisan enterprise.[8] Despite the vast majority of first-wave reform prosecutors running as Democrats,[9] the road out of mass incarceration must be bipartisan as well. There is no path to ending mass incarceration that does not involve transformational change in red, blue, and purple geographies. That is true in three respects.

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6. ACLU, *supra* note 1.

7. *See, e.g.*, Brian Elderbroom & Lauren-Brooke Eisen, *The Gatekeepers: Four Ways Prosecutors Can Improve Their Decision-Making,* MARSHALL PROJECT (Mar. 16, 2015), https://perma.cc/LPE2-QKTB*;* FAIR AND JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), https://perma.cc/2Z8Q-F5EG.

8. Zak Cheney-Rice, *Trump Is Not the 'Uniter-in-Chief.' Locking Up Black People Has Always Been Bipartisan*, NEW YORK MAG. (Nov. 16, 2018), https://perma.cc/C44S-8PFR.

9. *See, e.g.*, Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 16, 2019), https://perma.cc/YGP3-674B.

One, it is true in terms of the basic math of decarceration. A substantial degree of incarceration is occurring in counties that will not be controlled by "progressives" within any current lifetimes, and the relative concentration of incarceration in counties with similar conservative profiles is getting even worse.[10]

Two, the success of decarceration legislation and ballot initiatives has depended on bipartisan coalitions in many states, including states that include powerful conservative constituencies. For example, a major ballot initiative reducing sentences for drug and property crimes passed in Oklahoma in 2016—a state with (at the time) the highest incarceration rate in the country, where decarceration was absolutely imperative, and a state that went sixty-five percent for Donald Trump.[11]

Three, as a matter of principle, any "end" to mass incarceration will be incomplete and fragile so long as racist, tough-on-crime, pro-carceral regimes still dominate the lives of Americans anywhere—regardless of the size of the city or county where they live.

As noted, the first wave of reform has been carried out largely, although not exclusively, by elected prosecutors who identify as Democrats. Perhaps that could be considered a necessary corrective, given Democrats' role in creating the architecture of mass incarceration.[12] But to the extent that prosecutorial reform becomes increasingly aligned with the word "progressive," or with any single party or ideology, that presents a threat to the long-term viability of the movement by increasing the chances for pro-incarceration forces to leverage partisanship in the war to defend and expand the carceral state. Consequently, the next wave of prosecutors must be identified and defined in a way that transcends partisan ideology or affiliation.

D. Neutralizing Blowback

Finally, the backlash to first-wave policy reforms, and to the first-wave elected officials themselves, is perhaps the most obvious and exigent challenge threatening to slow or even reverse the momentum of the reform movement.[13] Even a sitting U.S. Attorney General recently got in on the game:

> Another similar problem is the increasing number of district attorneys who have fashioned for themselves a new role of judge-legislator-prosecutor. These self-styled "social justice" reformers are refusing to enforce entire categories of law,

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10. *See generally* Jacob Kang-Brown & Ram Subramanian, VERA INST. OF JUST., OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA 2 (2017), https://perma.cc/C96S-AZA8.

11. BALLOTPEDIA, *Presidential Election in Oklahoma, 2016*, https://perma.cc/J5BP-4V88.

12. Marie Gottschalk, *The Democrats' Shameful Legacy on Crime*, NEW REPUBLIC (Sept. 11, 2019), https://perma.cc/7MDR-D57P.

13. CTR. ON MEDIA, CRIME & JUST. AT JOHN JAY COLL., *Prosecutors on the Firing Line: Backlash Against 'Progressives' Grows* (June 24, 2019), https://perma.cc/3YZY-S8L3.

> including law against resisting police officers. In so doing, these DAs are putting everyone in danger. Their policies are pushing a number of America's cities back toward a more dangerous past.[14]

While immediate efforts to neutralize this opposition involve many strategies outside the scope of this Article, the lack of a unified working measure for a transformational prosecutor hinders the ability to counter this backlash. In other words, the best defense is a good offense.

Over the long-term, the most reliable way to neutralize and overcome backlash is to build power and change culture in a manner that ensures that prosecutors who prioritize decarceration are elected and re-elected. That project requires electing and supporting prosecutors who are not merely working for *policy* change, but who are deeply invested in *systemic* change. Knowing what that means, having a way to speak about and measure those core values, and holding elected prosecutors accountable to those values helps to create an environment in which rolling back reforms will become more difficult for anti-reform forces.

With these and other challenges looming, we turn to defining the transformational prosecutors who, standing alongside their communities, will hopefully beat them back.

II. FOUR VIRTUES OF A TRANSFORMATIONAL PROSECUTOR

As we enter the second wave of change to the prosecutorial system, it is time to retire, or at least put in their appropriate places, terms like "reform-oriented prosecutor" or "progressive prosecutor." Instead, we should be looking for "transformational prosecutors" and creating a broadly applicable framework that separates the former—prosecutors engaged in discrete, sometimes piecemeal, policy reforms—from the latter—those who are fundamentally altering the role itself and therefore more immediately ending the era of mass, racist incarceration.

A. The Criteria

In our formulation, a "transformational prosecutor" embodies the four "virtues" described below. In crafting these virtues, we are drawing upon the thinking of numerous non-ACLU colleagues and academics, plus the ACLU's own experience in the prosecutor reform movement. Over the course of thousands of legislative fights, dozens of prosecutor elections, and numerous litigations against prosecutors, we have seen what has and has not been a reliable indicator of a transformational commitment. We have endeavored to distill that experience

14. Press Release, U.S. Dep't. of Just., *Attorney General William P. Barr Delivers Remarks at the Major County Sheriffs of America Winter Conference* (Feb. 11, 2020), https://perma.cc/A3KP-9V85.

into virtues—in other words, broadly applicable qualities or behaviors that inform policy yet transcend it. In arriving at those virtues, we have decided they had to satisfy the following criteria:

First, they have to be easy for anyone to understand—especially and including voters and others with no deep experience in the criminal justice system. That means they must also be measurable or verifiable (even if not quantifiable). While we want to move away from a world of discrete reforms ("did prosecutor X implement policy Y?"), we also do not want virtues that are so amorphous ("treat people fairly," "do justice") that they are incapable of accountability. We want virtues where one could look at any given prosecutor and arrive at a clear yes or no answer on whether they fulfill it.

Second, for the purpose of creating a tool that gives an apples-to-apples comparison, the selected virtues have to be generally applicable across the country regardless of the county, city, or state. In part this means they have to be capable of being exhibited by any prosecutor in any jurisdiction, and not dependent on legal or policy quirks particular to that place. In part, it means they have to be scalable, such that a prosecutor in a small conservative county could be expected to exhibit the same core virtue as a prosecutor in a large liberal county, simply adjusted for the political and operational realities. And finally, in part, it means the virtue can be embraced and exhibited regardless of party affiliation.

Third, the virtues have to be bold. They have to push the envelope in a substantial way, such that commitment to them would necessarily advance the movement to end mass incarceration and address systemic racism. They have to be so significant that a commitment to all four would be a very reliable indicator of that prosecutor's long-term vision and values.

These criteria are, of course, subject to debate. There are also likely many different virtues other than the ones we have identified below, that would meet these (or other) criteria. Our goal is not to exhaustively catalogue all the possible virtues, but rather somewhat the opposite: to identify a bare minimum number of characteristics that advocates across the country can use during this second wave of prosecutor reform, as a common yardstick.

With that foundation laid, we turn to the four virtues themselves.

B. The Decarceration Pledge

The first virtue of a transformational prosecutor is embracing an easy-to-understand, easy-to-measure, numeric commitment to reduce the jail and prison population. In 2018, then-candidate John Cruezot, now District Attorney in Dallas, made a first-of-its-kind pledge to reduce incarceration fifteen to twenty percent by the end of his first term.[15] Since that time, candidates and incumbents have made similar pledges in prosecutor races around the country, including in

15. Shawn Shinneman, *The Era of Dallas County District Attorney John Creuzot Is Almost Here*, D MAG. (Nov. 26, 2018), https://perma.cc/E3GD-FW3Q.

California, Arizona, New York, and Virginia.[16] Voters and advocates are now busy holding those candidates and electeds accountable to their stated goals. The decarceration pledge, like the other virtues below, is *not* a commitment to any specific policy or collection of policies. Rather, it is a commitment by a prosecutor to ensure fewer people are locked up in cages and to implement a plan to get there.

1. Why the Decarceration Pledge is Transformational

How does the decarceration pledge meet the three criteria above?

First, it is hard to imagine a virtue that is easier to understand and verify. As compared to the wide array of policy changes that are central to effectuating decarceration—pretrial reform, increased diversion, sentencing reductions—the pledge requires a lay person to understand nothing about the minutiae of policy detail, and the pledge communicates as directly as possible how many fewer people will be locked up in cages. A decarceration pledge is empowering and democratizing for communities and voters. At the end of an elected's term, they have either reduced the incarceration population by the stated percentage, or they have not.

By the same token, a decarceration pledge reduces the risk that an elected can check a box and call it a day after implementing a requested, issue-specific policy. For example, if an elected prosecutor does everything asked on bail, but that effort drops the jail population much less than hoped, then the pressure is still on to keep working at that reform and other levers until it actually reduces the number of human beings being held pretrial unnecessarily.

Second, the decarceration commitment can be applied anywhere. Whether a prosecutor is in a large, liberal, Democratic county committing to eighty percent decarceration, or a smaller, conservative, Republican one committing to fifteen percent, the pledge is the pledge and must be met. Certainly, the emergency jail reductions occurring during the COVID pandemic—reductions of thirty to fifty percent in red and blue counties alike—show that such reductions are eminently

16. Some of these pledges have been made in response to candidate questionnaires from the ACLU. *See, e.g.*, Pamela Price, *Responses to California District Attorney Candidate Questionnaire* (Apr. 1, 2018), https://perma.cc/EB64-PEUQ (candidate for district attorney in Alameda County, Cal., set an "aspirational goal . . . to reduce prison commitments from Alameda County by 25% in the next four years" in response to questionnaire from ACLU of Northern California and other organizations); ACLU of Va., *Ray Morrogh and Steve Descano's Responses to ACLU-VA's Questionnaire on Criminal Justice Reform*, https://perma.cc/53Q4-Q79U (candidate in Fairfax County, Va., committed to a "minimum of 5%" decarceration). *See also* Meg O'Connor, *How One Election Might Strike a Blow to Mass Incarceration in Arizona*, APPEAL (Sept. 22, 2020), https://perma.cc/6V4U-E777 (candidate in Maricopa County, Ariz., pledged to lower the incarceration rate by twenty-five percent); Sam Mellins, *Jason Marton: The Criminal Justice System in New York City is Rotten*, JACOBIN (Dec. 7, 2020), https://perma.cc/A43N-FZ9E (candidate for Manhattan district attorney proposed to decarcerate Manhattan by eighty percent).

achievable anywhere in the U.S., and prosecutors have more power than any other law enforcement leader to set and achieve those goals.[17]

Third, the decarceration pledge is bold because it does *not* allow the prosecutor to duck the question of whether they are actually committed to, and willing to be held accountable to, a significant amount of decarceration. Relatedly, this virtue confronts head-on the prevailing myth that there is a "natural" or "organic" or "steady state" level of incarceration. In fact, how many people we incarcerate is a direct result of policy choices made, to a large extent, by prosecutors. A prosecutor's unwillingness to make this commitment based on the rationale that they don't "control the crime rate," or that they do not "make the law, only enforce it," is revealing. Indeed, the ACLU has encountered many prosecutors for whom a decarceration pledge induces significant heartburn and balking, and that's a good thing.

Further, this virtue is bold because it shifts the burden to the elected to come up with a decarceration goal and a workable plan to get there. In the first wave of reform, community members and advocates played an outsized role in proposing very specific policy platforms for candidates and then working day in and day out to ensure compliance. This strategy was an essential part of forcing prosecutors to be responsive to communities, and reflected the reality that communities and those closest to the system often knew solutions far better than existing prosecutors did.

But it is also a fundamentally unfair approach that re-victimizes communities still suffering under the previous regime. And, practically speaking, it is an approach with real limits—limits that are now being tested in some jurisdictions. Even sophisticated activists with perfect data would have a hard time projecting whether a policy will have the intended decarceral impact, which often depends heavily on the policy detail and how it is operationalized. Spending resources and political capital on essentially crafting prosecutor's policies for or alongside them may not be a sustainable political strategy,[18] nor even the best way to ensure impact.

In the second wave of reform, transformational prosecutors should be setting a specific decarceration goal, and then putting forward their own policy agenda to get to that goal that voters and advocates can review, critique, and hold them accountable to achieving.

C. Radical Transparency

The second virtue of the transformational prosecutor is radical transparency: ensuring every policy and decision can be evaluated by the public, by advocates,

17. Jasmine Heiss et al., VERA INST. OF JUST., *The Scale of the COVID-19-Related Jail Population Decline* (Aug. 2020), https://perma.cc/7NJ3-ZNU9.

18. *See generally* COMMUNITY JUST. EXCH. ET AL., *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing* (Jan. 2020), https://perma.cc/8BAB-BAFF.

and by the prosecutors themselves. While transparency may seem the most basic of pledges, it is, in truth, not at all common. The inaccessibility of even the most basic information about prosecutors' practices has shielded prosecutors' contributions to mass incarceration and prevented accountability.

First, some context. Prosecutors' offices are decidedly ineffective at collecting and publicizing data. In 2018, the Urban Institute published a national survey finding that: (1) less than half of offices surveyed collected basic case information, including the volume of cases coming into an office, the number of charges, and what happens within a case; and (2) a quarter admitted they spent no staff time on data collection or analysis at all.[19] Further, of the already small number of offices that collect and analyze data, only twenty-four percent of those make the analyses public.[20] Offices that do release data often do so in varying formats, making comparative analysis across offices or states virtually impossible.[21] And this is to say nothing of non-data documents that are easy to collect and post, such as policies, training materials, organizational charts, and paper case files.

Prosecutors might respond that these documents are subject to public records law and that our courts are open, so they are not hiding the ball. This belies reality on several fronts. First, prosecutors often reflexively ignore or fight public records requests, even though virtually every piece of data in their offices—save some investigative, sensitive, and personal identifying information—is presumptively disclosable under every state's and the federal government's open records laws.[22] In a 2019 ACLU report on prosecutorial transparency, an investigative journalist explained how difficult prying records from prosecutors in particular can be:

> Whether I can get any information from a prosecutor's office with an open records request varies widely. For example, I've filed identical requests to prosecutors in adjoining counties, and one will provide information while the other does not. Even when I can get a response, it often takes months for the request to be processed. In addition, prosecutors may refuse to provide information even when they have it, claiming that it is protected by the attorney-client privilege or other exemptions in open records laws. Trying to get information from prosecutors' offices using open records requests takes a long time, and often you

19. Robin Olsen et al., URBAN INST., *Collecting and Using Data for Prosecutorial Decisionmaking* 6, 10 (Sept. 2018), https://perma.cc/GFB4-FHYT.

20. *Id.* at 9.

21. Nicole Zayas Fortier, ACLU, *Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration* 9 (Feb. 2019), https://perma.cc/8AU9-PUC3.

22. *See, e.g.*, Alexis Krell, *Hit With $311,150 Public Records Fine, Pierce County Prosecutor's Office Files Appeal*, TACOMA NEWS TRIB. (Aug. 27, 2019), https://perma.cc/842J-HMPY; *Prosecutor Owes $12,100 for Sunshine Law Violations*, ST. LOUIS NEWS TRIB. (Oct. 18, 2017), https://perma.cc/JGS9-ZSC8; Brad Petrishen, *Worcester DA, Two Others Lose Records Request Lawsuit Brought by AG*, WORCESTER TELEGRAM (Nov. 30, 2018), https://perma.cc/DX59-XFRN.

end up empty-handed.[23]

In 2019, the ACLU of Arizona and an investigative reporter were forced to sue the Maricopa County Attorney's Office after a request for case-level data and office policies was ignored for over seven months.[24] Production only started after the lawsuit was filed,[25] but not every citizen has the luxury of litigating these requests.

Further, our courts are only "open" in the most legalistic of senses (and sometimes not even that). No ordinary citizen can attend all the hearings and trials necessary to gain a global sense of how their prosecutors' office is administering justice.[26] Even if they could, less than three percent of all federal criminal cases actually go to a public trial.[27] The vast majority of convictions occur via plea deal, with many ending well before pretrial hearings or discovery can create a record from which to piece together the appropriateness of the ultimate result.[28] Further, virtually nothing about the plea "negotiation" process—the back and forth between prosecution and defense—is done in public or even written down for later scrutiny.[29]

Lastly, complying with legal obligations to make information public when asked is the floor, not the ceiling. It is not even commendable, much less transformational.

1. Commitment to Radical Transparency Benefits Defendants, the Public, and Prosecutors Themselves.

Defendants—and their counsel and advocates—will benefit because they will be able to better spot trends and potential biases, and therefore better negotiate deals and argue at suppression hearings, trial, and sentencing.[30]

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23. Zayas Fortier, *supra* note 21, at 10.

24. Steven Hsieh, *Lawsuit: Montgomery Won't Provide Public Records Requested More Than 200 Days Ago*, PHX. NEW TIMES (May 22, 2019), https://perma.cc/AC4D-5RV8.

25. Lauren Castle, *Fight with ACLU Over Public Records Will Cost Maricopa County $24,000*, ARIZ. REPUBLIC (Aug. 27, 2020), https://perma.cc/G92R-VZUS.

26. Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://perma.cc/J4YQ-K5HU (estimating that one defense attorney for indigent clients "needed to do the work of five full-time lawyers to serve all of his clients").

27. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR.: FACT TANK (June 11, 2019), https://perma.cc/BFN7-CQYB.

28. *See* Somil Trivedi, ACLU, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out* (Jan. 13, 2020), https://perma.cc/Q5KE-G3D2.

29. *Id.*

30. For an example from the policing context, in *Commonwealth v. Warren*, 58 N.E.3d 333 (Mass. 2016), a Black defendant in Boston fled from police, and police used the fact of flight to establish reasonable suspicion for the subsequent stop and search that yielded

Transparency also benefits the public, particularly in their capacity as voters. We take for granted that the basic information required to make voting decisions about other elected officials is readily available. Legislators have voting records; governors have employment rates; presidents have GDP. Yet, when it comes to prosecutors, we only have what they tell us about a tiny sliver of metrics—typically vaguely defined "conviction rates."[31] But now that voters have become more sophisticated and are starting to judge prosecutors by more than simply how many people they cage and for how long, these voters deserve information on par with that sophistication. Even in geographies where prosecutors are appointed, transparency will allow voters to better elect and lobby governors and attorneys general who will appoint and influence those prosecutors.[32]

Finally, transparency benefits the very prosecutors who have traditionally resisted it. First and foremost, as mentioned above, transparency builds community trust by demonstrating that prosecutors have nothing to hide. As a recent report by the International Association of Police Chiefs explained:

> One [community listening session] group described how the local district attorney (DA), in addition to opting not to prosecute an officer-involved shooting case, erected a chain-link fence around the DA's office building. Community members expressed how they felt shut out, literally and figuratively, by their public officials. In other jurisdictions, law enforcement had done a good job of sharing information and being open with the community. In these places, community members wanted that transparency to continue. They expressed gratitude to the police department for being open and honest with them and emphasized that continued transparency was something they would need to continue building trust.[33]

Collecting the data in the first place also improves office functioning and efficiency. For example, recently the District Attorney's Office in Travis County,

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a firearm. Mr. Warren moved to suppress the gun, citing to Boston Police Department data showing that "black men in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations." *Id.* at 342 (citing a report from the ACLU of Massachusetts based on data from the Boston Police Department). Accordingly, the flight could not necessarily be probative of consciousness of guilt, which undermined the police's case for reasonable suspicion. Despite this happy ending, Mr. Warren could only use that data after a painstaking investigation and report by the ACLU of Massachusetts. *Id.* Most defendants will not be so lucky, nor should they have to be. Prosecutors (and police) should disclose this information voluntarily so that every defendant can make their best possible case.

31. *See generally* Eric Rasmusen, Manu Raghav & Mark Ramseyer, *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. & ECON. REV. 47 (2009); Katherine K. Moy, Dennis M. Martin & David Alan Sklansky, STAN. CRIM. JUST. CTR., *Rate My District Attorney: Toward a Scorecard for Prosecutors' Offices* (Jan. 2018), https://perma.cc/84YK-ELEG.

32. *See, e.g.*, Mark Pazniokas, *A unanimous vote for prosecutorial transparency*, CONN. MIRROR (June 4, 2019), https://perma.cc/3CWU-WQSN.

33. INT'L ASS'N OF CHIEFS OF POLICE, *T.R.U.S.T. Initiative Report* 5 (Oct. 2018), https://perma.cc/BKJ5-J7PL.

Texas, knew it had a high rate of cases dismissed pre-indictment.[34] However, it had no analysis to explain why. The office assumed this was the result of line prosecutors charging people and then discovering they did not have sufficient evidence to bring the case to trial.[35] But after collecting and analyzing the data, the analysis revealed that this pattern was the result of successful diversions.[36] In response, the office invested further in its diversion programs.[37]

And now that we have experienced the first wave of prosecutorial reform and know that running on a reform ticket is a winning strategy, radical transparency can be an increasingly successful electoral strategy. In a 2017 nationwide poll, seventy-nine percent of voters said they were much more likely to support a candidate for prosecutor who will work to increase overall transparency in the criminal justice system.[38] And for incumbents, when their policies do achieve their transformational goals, they can verifiably take credit for it on the re-election trail.[39]

2. Why Radical Transparency is Transformational.

As with the decarceration pledge, the particular methods by which an office achieves radical transparency is not the focus of this paper.[40] The point is that the commitment to radical transparency itself is a reliable signal of a transformational prosecutor: it is easy to understand and verify; it is generalizable, scalable, and measurable; and, given the traditional prosecutorial reluctance outlined above, it is bold.

First, transparency is easy for the lay observer to understand and verify, particularly because it is such a recognizable component of good governance outside the prosecutorial sphere. Average citizens understand that government offices should make their operations public and open for scrutiny—and when they do not, they must have something to hide.

Second, transparency is generally applicable and fairly scalable, and often the least partisan issue within a given policy space. Of course, this effort will cost some money and likely require tangible investments like data management

34. Olsen et al., *supra* note 19, at 12-13.

35. *Id.*

36. *Id.*

37. *Id.*

38. ACLU, *supra* note 1.

39. Kumar Ramanathan & Tom Ogorzalek, *Breaking Down Kim Foxx's Win in the 2020 Primary*, CHI. DEMOCRACY PROJECT, NW. UNIV. POL. SCI. (Apr. 10, 2020), https://perma.cc/X3R9-LZL2.

40. The ACLU's experience suggests these steps are critical to radical transparency: (1) investing in data collection tools, processes, and training; (2) investing in data analysis; and (3) regularly posting the data and other relevant documents (policies, trainings, etc.) online in a user-friendly way allowing for easy manipulation and sorting, and (4) continuous and open engagement with the community discussing and being held accountable for policy decisions and outcomes using these data.

tools. Smaller offices may struggle to find funding and larger offices with high caseloads may struggle to capture all the relevant data about every case. However, successful examples across the spectrum abound.

In Milwaukee County, Wisconsin, analytics provided by the Vera Institute brought to light racial disparities in how District Attorney John Chisholm's office was responding to black and white defendants arrested for low-level drug offenses.[41] In fact, analysts were able to show the disparity closely tracked varying levels of prosecutorial experience; junior prosecutors primarily pursued charges for paraphernalia associated with crack cocaine, while senior prosecutors declined paraphernalia charges across the board.[42] In response to this revelation, the District Attorney adopted a new policy to decline drug paraphernalia charges whenever reasonable—and pursued only with approval of a supervisor to offer defendants referrals for treatment.[43] The racial disparity diminished as a result.[44]

And in smaller, nearby Winnebago County, Wisconsin, analytics provided by Measures for Justice exposed a racial disparity between the number of black and white defendants who were diverted from traditional prosecution. District Attorney Christian Gossett acknowledged that data cannot answer all of his questions, but can help him to start asking them.[45]

There is also a credible argument that transparency saves money over time by automating previously manual processes and avoiding needless public records litigation.[46] And there is low-hanging fruit like posting online office policies and reports that the office creates anyway (often for funding purposes). In the end, this virtue, like the others, can manifest and scale in myriad ways if prosecutors are committed.

Transparency is also readily measurable: either the prosecutor made their operations public, or they did not. And if they made certain things public and others not, the gaps will be readily apparent.

Third, radical transparency is bold. For most jurisdictions around the country, it would be the first time that citizens have the opportunity to meaningfully scrutinize their criminal justice system—not just prosecutors, but also police, sheriffs, judges, public defenders, and other players whose performance can be

41. Wayne McKenzie, Don Stemen, Derek Coursen & Elizabeth Farid, VERA INST. OF JUSTICE, *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution* 6 (Mar. 2009), https://perma.cc/87B9-RSZ2 (finding Milwaukee County prosecutors declined to prosecute 41% of white defendants initially charged with possession of drug paraphernalia, while they chose not to prosecute only 27% of non-white defendants charged with the same offense).

42. *Id.* at 6–7.

43. *Id.* at 7.

44. *Id.*

45. John Chisholm & Christian Gossett, *Chisholm, Gossett: Law Enforcement Needs Better Data*, MILWAUKEE J. SENTINEL (May 30, 2017), https://perma.cc/C9NN-V9JP.

46. *See, e.g.*, Krell, *supra* note 22.

judged, at least indirectly, by how criminal cases are ultimately resolved by prosecutors. It would help cut through the often unchallenged rhetoric that tough-on-crime forces have been peddling for centuries and empower voters to choose a new direction.

Radical transparency, in short, is the one virtue that allows for the other three; without radical transparency, prosecutors cannot be held accountable for their failure to meet the others, nor given credit for their success.

D. Championing Legislative Reform

The third transformational virtue is ensuring that prosecutors are vocal champions of legislative reforms that will reduce the jail and prison population, especially and including reforms that reduce their own prosecutorial power. In the wake of the first wave of reform, it is sadly common for a prosecutor to pretend they are committed to transformational change by adopting some reforms in-house, while lobbying aggressively behind the scenes to maintain the status quo at the legislative level. Any voter anywhere can understand this hypocrisy, and there is not a state in the country where local prosecutors' vocal championing of decarceration would not be a game changer for the mass incarceration movement. On the flip side, a prosecutor who is staying quiet on statewide reform should send up an immediate red flag.

Prosecutors are all too fond of saying, "We don't make the law, we just enforce it," but that is a false narrative. Whether individually[47] or more commonly as part of local district attorneys' associations, prosecutors are often the most powerful voice on criminal justice-related legislation in states and municipalities. Unsurprisingly, they often support tough-on-crime measures like new categories of crimes and mandatory minimum sentences, which arrogate power to themselves.[48] And they routinely oppose or stay silent on reform measures that strip that power away, such as ending plea-inducing mandatory minimums and equalizing pay between prosecutors and public defenders.[49]

1. Why Championing Legislative Change is Transformational.

Championing legislative change meets the three criteria for transformational prosecution.

First, it is both measurable and easy to understand because lobbying is a public and knowable act—or at least it should be. If a legislative reform bill or

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47. *See, e.g.*, Maria Polletta, *Reformers Seeking Changes in Arizona's Justice System See Roadblock in Bill Montgomery*, ARIZ. REPUBLIC (Mar. 25, 2019), https://perma.cc/7NCT-X92E.

48. *See, e.g.*, Daniel Nichanian, *Larry Krasner Quit Pennsylvania's DA Association. What Does Group Stand For?*, APPEAL (Dec. 20, 2018), https://perma.cc/3JQQ-MQXT.

49. Casey Tolan, *Mandatory Minimums Don't Make Us Safer*, SLATE (May 1, 2017), https://perma.cc/6ZT4-RR6E.

package is up for debate, a transformational prosecutor will publicly and vocally support it. Abstention and/or backroom dealing will not suffice. Therefore, voters will be able to easily see the stance and assess it for themselves. In upcoming elections, elected prosecutors can expect to be held accountable for their lobbying at the capitol in addition to the more direct local impacts of their decisions.

Second, this virtue can be demonstrated by any prosecutor, in any county. In many cases, counterintuitively so: prosecutors from smaller or rural counties often have tremendous lobbying influence, and their active support for reform could be a game-changer for permanent legislative reform. Indeed, change is already occurring on this front in differently situated jurisdictions. Prosecutors from both sides of the aisle have committed to leave their local district attorneys' associations and make legislative decisions for themselves.[50] Some are publicly committing to lobby for legislative changes that would shrink their own power and extend beyond their own offices.

In San Francisco, for example, then-candidate Chesa Boudin committed to lobby to eliminate gang enhancements; not only is this transformative with respect to sentencing policy, but it would also reduce his own power by greatly reducing plea bargaining leverage.[51] Boudin won on that platform. In Connecticut, prosecuting attorneys were part of the lobbying coalition pushing for mandatory prosecutorial transparency—an excellent example of prosecutors exhibiting two transformational virtues at once![52]

Third, publicly lobbying for decarceration is bold and can produce immediate impact. The disappointing history of prosecutors lobbying for punitive tools like mandatory minimums and fighting reforms like expanded pretrial discovery has catalyzed mass incarceration for decades. Moreover, more than eighty percent of those behind bars are in state or local systems[53] that are particularly sensitive to fearmongering by powerful local prosecutors.[54] Reversing these trends will be a sea change, especially where prosecutors openly support changes to reduce their own power, and is therefore a necessary virtue of a transformational prosecutor.

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50. Nichanian, *supra* note 48 (Democrat Larry Krasner); Evan Sernoffsky, *Central California DA Quits State Association Over Its Opposition to Criminal Justice Reforms*, S.F. CHRON. (Jan. 16, 2020), https://perma.cc/VB59-SEGY (Republican District Attorney Tori Salazar of San Joaquin Cty., Cal.).

51. Elizabeth Weill-Greenberg, *San Francisco D.A. to Announce Sweeping Changes on Sentencing Policy and Police Stops*, APPEAL (Feb. 28, 2020), https://perma.cc/TD3J-3KMR.

52. Pazniokas, *supra* note 32.

53. Wendy Sawyer & Peter Wagner, PRISON POL'Y INITIATIVE, *Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), https://perma.cc/KU6W-6VUM.

54. *See, e.g.*, Erin George, *Opinion: DAs Must Stop Fearmongering About Criminal-Justice Reforms*, CITY LIMITS (May 8, 2019), https://perma.cc/8CPF-WWDT.

E. Shrinking the Criminal Legal System

The fourth and final virtue of a transformational prosecutor is a demonstrated commitment to shrinking the criminal legal system, including the role of the prosecutor itself. This is closely related to championing legislative change, in that shrinking the system as a whole will almost certainly involve pushing for legislative change that reduces prosecutors' power. However, this virtue is more expansive and potentially the most transformational, because it also contemplates prosecutors taking immediately and severely self-limiting acts like cutting their own headcounts and budgets, in order to seek—and potentially even transfer resources to—harm reduction solutions outside the criminal justice system. In light of the national conversation around police divestment in the wake of George Floyd's murder in Minneapolis, this virtue becomes even more timely and necessary.

In other words, a transformational prosecutor can and must shrink the entire system with every act they take. By the same token, a prosecutor—even a "reform-minded" one who espouses decarceral values and takes certain steps in that direction—cannot be considered transformational if they express those values and take those steps via the criminal system as it exists today, because that system is far too large, intrusive, punitive, and racist.

Crime of all types has decreased dramatically over the last quarter century,[55] yet mass incarceration continues virtually unabated.[56] Despite modest decreases since the mid-2000s, the arrest rate nationwide for non-serious offenses (e.g., drug abuse violations) is still higher than it was in 1980.[57] State and federal legislators, often bowing to pro-carceral prosecutor lobbying, have passed more and more—and ever more punitive—criminal laws, sentencing enhancements, and investigatory tools.[58]

This means that criminal dockets are still overflowing and prosecutors' caseloads—to say nothing of public defenders'—are still overwhelming,[59] even

55. John Gramlich, *5 Facts About Crime in The U.S.*, PEW RSCH. CTR.: FACT TANK (Oct. 17, 2019), https://perma.cc/LDY6-PJF7.

56. *See, e.g.*, Campbell Robertson, *Crime Is Down, Yet U.S. Incarceration Rates Are Still Among the Highest in the World*, N.Y. TIMES (Apr. 25, 2019), https://perma.cc/DS6G-8JBC.

57. Rebecca Nuesteter & Megan O'Toole, VERA INST. OF JUSTICE, *Every Three Seconds: Unlocking Police Data on Arrests* (Jan. 2019), https://perma.cc/KR2M-6W9C.

58. *See generally* Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared*, WALL ST. J. (July 23, 2011), https://perma.cc/99AL-3QQ3; Eli Lehrer, *Opinion: America Has Too Many Criminal Laws*, HILL (Dec. 9, 2019), https://perma.cc/PBF5-QQ3B; James R. Copland & Rafael A. Mangual, MANHATTAN INST., *Overcriminalizing America: An Overview and Model Legislation for the States* (Aug. 2018), https://perma.cc/8KTD-JG8A.

59. Nuesteter & O'Toole, *supra* note 57 (over 10 million arrests made in America each year); *see also* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 266-79 (2011) (prosecutor and investigator caseloads in major cities far exceed recommended

though more and more of those cases are unnecessary for public safety. This in turn has created the conveyor-belt system of criminal justice we currently practice in America, in which the goal is to process as many people as quickly as possible without much if any consideration for innocence, fairness, or actual harm reduction.[60]

Hence, a second-wave, transformational prosecutor cannot be satisfied by merely regulating the process or addressing individual policy tools like pretrial detention or mandatory minimums; that approach is in itself a mandatory minimum. Instead, a truly transformative prosecutor must shrink the system that created this state of affairs in the first place.

1. Why Shrinking the Criminal Legal System is Transformational

First, "shrinking the criminal legal system" may not be an easy concept for average individuals to understand. Indeed, the terms "criminal legal system" and "criminal justice system" are already misnomers; those who work in the field know that our country has thousands of individual systems across counties, cities, and the federal government. However, most Americans understand the concept of shrinking, and particularly shrinking government. Hence, without having to dig into the weeds of what it would take to shrink this particular part of government, one can imagine cross-ideological support for the notion in general.

And, of course, decarceration—including a numeric pledge—and other quantifiable metrics like reducing charges, reducing jail intakes, eliminating wealth-based detention, slashing headcount, slashing budget, increasing community-based diversions, and the like, are all measurable indicators of a shrinking system.

While there are myriad avenues a prosecutor could take to shrink the system, we offer a few suggestions:

Simply saying it out loud. Even among the current wave of reform-minded prosecutors, we have not seen an example of this virtue being expressed on a consistent basis. Indeed, many who claim to be progressive are actively seeking to expand the system, asking us to trust them to operate it better.[61] We will not.

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standards).

60. The conveyor belt is powered, of course, by plea "bargaining," which accounts for over ninety-five percent of all convictions, both state and federal. Clark Neily, *Prisons Are Packed Because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal.*, NBC NEWS (Aug. 8, 2019), https://perma.cc/LSA3-VF5C. While plea bargaining was always a feature of the system, the explosion of criminal dockets, even when crime rates are falling, has made it a necessary one. To facilitate this churn, prosecutors have been handed—and in many instances lobbied for—increasingly punitive tools to increase their leverage, including ubiquitous pretrial detention. Not only has this diluted if not eliminated hallowed protections like due process, the presumption of innocence, and the right to a fair jury trial; it has supercharged mass incarceration by making convictions as quick and painless for prosecutors as possible.

61. *See, e.g.*, Keri Blakinger, *Harris County DA Again Asks for More Prosecutors*

Others ask us to accept a tit-for-tat trade of mass incarceration for an expanded surveillance state. We will not.[62] A transformational prosecutor must recognize that they are likely the most powerful player in their criminal justice system and must deploy that bully pulpit accordingly, forcing adjacent players like police, sheriffs, corrections officials, and judges to scramble and catch up.

Reinvest in the community. The most concrete way prosecutors can shrink the criminal system is by starving it of funding and giving those freed-up dollars to public defenders and eventually to non-criminal systems. For example, rather than using prosecutors to charge those with mental health, substance abuse, or housing challenges—often just to divert them back out, but under pain of state supervision and potential jail time—a transformational prosecutor will build up those non-criminal systems from the start and refuse to charge those individuals at all.

Establish a presumption against prosecution. Declining to prosecute certain categories of crimes is a hallmark of the current crop of reform prosecutors, and it has been game changing. However, a transformational prosecutor will go further and establish a rebuttable presumption against all prosecutions, looking first to the non-carceral, community-based harm reduction solutions mentioned above. Hence, rather than categorically refusing to prosecute a small number of crimes, transformational prosecutors will not refuse any prosecutions outright, but will be forced to formally justify and overcome this presumption in each one.

While transformational, this proposition is not radical or unsupported; it is a logical outgrowth of the Framers' intent to make deprivation of liberty an extraordinary and extraordinarily difficult thing to do. We now have data showing that, in the vast majority of cases, incarceration is also an extraordinarily counterproductive and harmful thing to do.[63] So prosecutors should make it the last resort, and establish a policy that makes that commitment real.

Second, shrinking the system is certainly generalizable and scalable. No matter the size or makeup of the jurisdiction, its criminal legal system can *always* get smaller, less punitive, and less racist. Smaller geographies may not have preexisting non-criminal support systems to fill in the gaps, but the savings from shrinking the criminal system could provide the seed capital.

Third and most importantly, shrinking the system is the most bold and far-

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to Deal With Fallout From Botched Drug Raid, HOUSTON CHRON. (July 26, 2019), https://perma.cc/87ZP-MZMP; Michael Hardy, *Criminal Justice Reform Moves Pretty Fast. Just Ask Harris County DA Kim Ogg.*, TEX. MONTHLY MAG. (Feb. 19, 2020), https://perma.cc/Z7R3-LBC5.

62. Stephanie Wykstra, *A Solution to the Cash Bail Crisis Might Be Almost as Bad*, PROGRESSIVE (Aug. 8, 2018), https://perma.cc/4H66-BQ8E.

63. Maya Schenwar, *Prisons Are Destroying Communities and Making All of Us Less Safe*, ATLANTIC (Nov. 11, 2014), https://perma.cc/FDU6-SME6; Inimai M. Chettiar, *The Many Causes of America's Decline in Crime,* ATLANTIC (Feb. 11, 2015), https://perma.cc/QZ6U-JRN7. *See* PRISON POL'Y INITIATIVE, *Community Impact*, https://perma.cc/2UZM-B76D (collecting research resources).

reaching virtue a transformational prosecutor can exhibit, and one likely to remain essential in the third, fourth, and fifth waves of prosecutor reform. It is, indeed, the transformation itself. It is indisputable that the criminal legal system is far too large and fundamentally broken to justify a prosecutor's attempt to fix it by addition. What and how much prosecution is left after transformational shrinking can vary based on jurisdiction and local considerations—but shrinking is unquestionably necessary.

CONCLUSION

Hundreds of prosecutors across the country will be up for election this year, and the year after that, and the year after that. What constituted progress in 2016 should not be the measure of what we expect from prosecutors in 2021. As the movement to end mass incarceration continues to build momentum and power, it is imperative that the goalposts for prosecutors are reevaluated and redefined. Particularly because "reform" is now a successful, mainstream approach to running and winning elections, the movement must be on the lookout for wolves in sheep's clothing.

In particular, with the first wave of reform in the rearview mirror, we are no longer content with mere reform; the second wave should be defined by transformational change. As argued in this Article, we will know a transformational prosecutor when they commit to (1) setting specific decarceration goals; (2) enacting radical transparency; (3) championing transformational legislation; and (4) shrinking the footprint of the criminal legal system, starting with the role of the prosecutor itself.

And our final hope is that these virtues are themselves outdated by the time wave three arrives.