



Leveraging Prosecutorial Power to Safely Reduce Jail Populations: A SWOT Analysis

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The appropriate use of prosecutorial power can positively impact the entire criminal justice system and the community, enhancing public safety and upholding the rights of the accused.

Executive Summary

Prosecutors hold tremendous power to fill and empty jail cells. As administrators of justice, they have a duty to use this power effectively to uphold justice for victims, the community and the accused.¹ In other words, they must balance their commitment to support public safety with their duty to protect the rights of the accused. Importantly, research has shown that limiting individuals' exposure to jail can improve public safety and effective alternatives to incarceration can ensure that those who have committed a crime are still held accountable.² Thus, to strike a balance between upholding public safety and implementing effective alternatives that can reduce jail populations, prosecutorial power and discretion must be used strategically. To help prosecutors' offices achieve this balance, we have created a SWOT analysis to explore the strengths, weaknesses, opportunities and threats of taking action and leveraging prosecutorial power to safely lower jail populations.

1. "Standard 3-1.2," in *Criminal Justice Standards for the Prosecution Function*, fourth edition, (American Bar Association, 2017). https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/#:~:text=The%20prosecutor%20should%20seek%20to,persons%2C%20including%20suspects%20and%20defendants.

2. Lisa Braude et al., "No Entry: Improving Public Safety through Cost-Effective Alternatives to Incarceration in Illinois," Center for Health & Justice, May 2007, p. 20. https://www.centerforhealthandjustice.org/tascblog/images/documents/Publications/IllinoisNoEntry_Final.pdf.

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Introduction

Prosecutors are servants of the law, and the prosecution’s goal “is not that it shall win a case, but that justice shall be done ... that guilt shall not escape or innocence suffer.”³ They have often been called “administrators of justice.”⁴ In this vein, prosecutors are tasked with serving the public interest and increasing public safety by balancing the use and severity of criminal charges when appropriate with not pursuing criminal charges when they are not appropriate.⁵ While these duties may seem well defined, the elected district attorney is the one who interprets them, which can lead to a range of policy approaches from “tough-on-crime” to “liberal reforms.” Consequently, particularly in areas where “tough-on-crime” rhetoric dominates, the charges many prosecutors’ offices have been pursuing are contributing to growing jail populations that include individuals awaiting trial in addition to those who have been convicted.

The United States incarcerates more individuals than any other country in the world, spending approximately \$80.7 billion on public prisons and jails annually and an additional \$3.9 billion on private prisons.⁶ Of the almost 2 million individuals behind bars, 445,000 are awaiting trial, 103,000 are in jail post-conviction, 1,042,000 are in state prison post-conviction and the remainder are in federal prison, territorial prison, immigration detention or juvenile detention—or being held on involuntary commitment.⁷ Prosecutors’ offices have the power to lower jail populations while upholding public safety and improving fiscal responsibility. Prosecutors decide whether a case is charged, whether an individual remains incarcerated pending trial, what plea deal to offer, what recommendations to make at a sentencing hearing post-trial and what action to take on probation violations. All of these prosecutorial actions can be direct factors in either increasing or decreasing jail populations.

In this paper, we use a SWOT analysis model to explore the strengths, weaknesses, opportunities and threats of leveraging prosecutorial power to safely reduce jail populations. As an associate justice of the U.S. Supreme Court once said, “the prosecutor has more control over life, liberty and reputation than any other person in America.”⁸ It is time for prosecutors to use that power to uphold their duties of justice; this analysis aims to identify how that can be done safely and in the best interests of our communities.

SWOT Analysis

SWOT analyses are frequently used in the corporate setting.⁹ This type of tool helps with strategic planning by identifying an organization’s strengths, weaknesses, opportunities and threats. At an institutional level, these elements can be defined as illustrated in the image below:¹⁰



The United States incarcerates more individuals than any other country in the world.

3. *Berger v. United States*, 295 U.S. 78 (1935). <https://supreme.justia.com/cases/federal/us/295/78/case.htm>.

4. “Standard 3-1.2.” https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/#:~:text=The%20prosecutor%20should%20seek%20to,persons%2C%20including%20suspects%20and%20defendants.

5. Ibid.

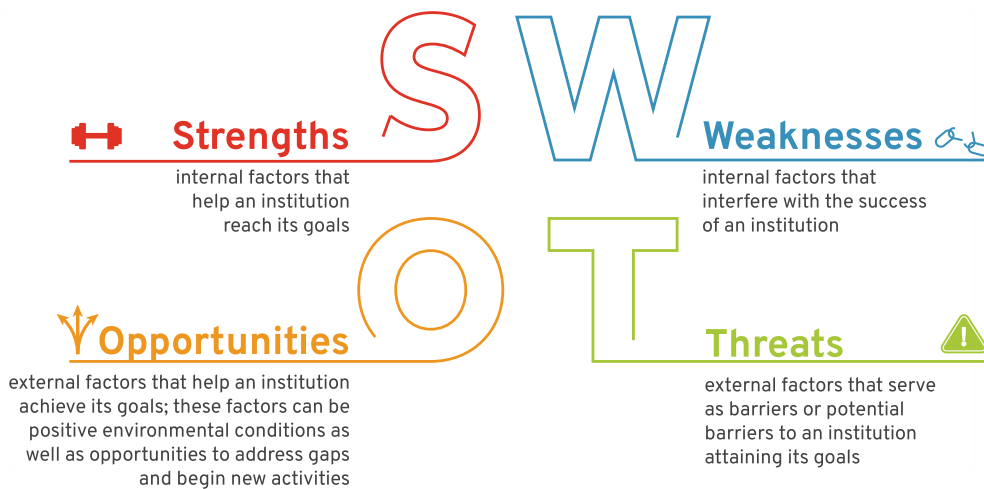
6. “Economics of Incarceration,” Prison Policy Initiative, Aug. 19, 2022. https://www.prisonpolicy.org/research/economics_of_incarceration.

7. Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2022,” Prison Policy Initiative, March 14, 2022. <https://www.prisonpolicy.org/reports/pie2022.html>.

8. Robert H. Jackson, “The Federal Prosecutor,” Robert H. Jackson Center, Dec. 1, 1940. <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor>.

9. Mostafa Ali Benzaghta et al., “SWOT analysis applications: An integrative literature review,” *Journal of Global Business Insights* 6:1 (March 2021), pp. 55-73. <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1148&context=globe>.

10. Ibid.



This paper will apply this SWOT framework—which offers significant value as an effective and efficient planning strategy—to analyze the strengths and weaknesses of the prosecution’s role in safely reducing jail populations and to identify opportunities and threats that may impact the effective application of prosecutorial power.¹¹

Strengths

Prosecutors are the gatekeepers of the criminal justice system. They decide whether to approve a case for prosecution, offer a plea deal or take a case to trial, as well as what sentence to recommend post-conviction. Here, we discuss three key prosecutorial authorities that, when used effectively, serve as strengths in safely reducing jail populations: declination of charges, pretrial release and plea bargaining.

• Declination of Charges

One of the most important aspects of the prosecutorial function is the prosecutor’s discretion not to pursue criminal charges, referred to as a “declination of charges.”¹² This is truly a discretionary decision, as there are no clear ground rules set by law, policies or professional standards for a prosecutor to refer to in determining whether a case should be declined.¹³ This expansive discretion in deciding what cases to prosecute can be a valuable tool to reduce jail populations.

A prosecutor may decline to pursue criminal charges for several reasons. Considerations include a lack of evidence that a crime was committed or that a particular person committed a crime, violations of a defendant’s constitutional rights or the desire to signal to other government officials the prosecutor’s belief that more widespread criminal justice reforms would enhance public safety.¹⁴ The typical number of cases declined varies from jurisdiction to jurisdiction as a result of these considerations. In places like San Francisco County and Milwaukee County, declination rates are as high as 60 percent, whereas in other locations, such as Philadelphia County and the 1st Judicial District in Colorado, declination rates are less than 10 percent.¹⁵



Prosecutors’ expansive discretion in deciding which cases to prosecute can be a valuable tool to reduce jail populations.

11. Ibid.

12. Jessica A. Roth, “Prosecutorial Declination Statements,” *Journal of Criminal Law and Criminology* 110:3 (Summer 2020), pp. 487-488. https://www.jstor.org/stable/48573789?read-now=1&refreqid=excelsior%3A9b3bb4b0b3fc705f3741b41954664ffe&seq=12#page_scan_tab_contents.

13. Ronald F. Wright, “Prosecutors and Their State and Local Politics,” *Journal of Criminal Law and Criminology* 110:4 (Fall 2020), p. 825. <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7683&context=jclc>.

14. Ibid., p. 824.

15. Besiki Luka Kutateladze et al., “Reject or Dismiss? A Prosecutor’s Dilemma,” Florida International University and Loyola University Chicago, Safety and Justice Challenge, July 2022, pp. 5-6. <https://safetyandjusticechallenge.org/wp-content/uploads/2022/07/RejectOrDismissAProsecutorsDilemma.pdf>.

As administrators of justice, prosecutors' ability to decline cases for prosecution is essential. Prosecutors are in the best position to ensure that innocent individuals are not wrongfully convicted, as they can immediately decline a case if law enforcement fails to present evidence beyond a reasonable doubt that the crime was committed or that the suspect committed the crime.¹⁶ The prosecution can also serve as a check and balance to ensure that an individual's constitutional rights were not infringed upon. That is, if the police violated a defendant's constitutional rights with an unreasonable search or seizure, prosecutors can decline the case.¹⁷

However, prosecutors can decline charges even when there are no evidentiary or constitutional flaws in the case.¹⁸ This use of a declination of charges has become a prominent tool for prosecutors to prioritize cases and reduce the number of individuals exposed to jail and the criminal justice system. Examples of using a declination of charges in this manner can be seen in New York City, where the district attorney declared that the office will not prosecute most petty offenses; in Boston, where the district attorney decided to not prosecute low-level cases like disorderly conduct and shoplifting; and in Los Angeles, where the district attorney instructed the office to decline cases such as trespass and low-level drug charges.¹⁹

Prosecutors may also decline cases if they believe the criminality is due to poverty or behavioral health issues and want to avoid exacerbating those issues.²⁰ A declination of charges can be helpful in such cases, as it reduces an individual's exposure to pretrial detention, thereby mitigating the negative impacts to the accused, such as loss of employment or housing.²¹ Promising research also shows that declining low-level offenses can reduce recidivism, thereby increasing public safety.²² Furthermore, by declining these cases, prosecutors, public defenders and courts can save valuable time and resources for more serious cases.²³



Check and Balance

The prosecution can serve as a check and balance to ensure that an individual's constitutional rights were not infringed upon.



Prosecutors should be encouraged and empowered to use their discretion strategically to decline cases of the innocent, the constitutionally violated and the low-level offender, as doing so is a strength of leveraging their power to safely lower jail populations.

• Pretrial Release

Bail is the amount of money defendants must post to be released from custody until their trial.²⁴ Generally, bail exists for two reasons: supporting public safety and ensuring that the accused returns to court for criminal proceedings.²⁵ The court—

16. Wright, p. 829. <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7683&context=jclc>.

17. Roth, pp. 493-494. https://www.jstor.org/stable/48573789?read-now=1&refreqid=excelsior%3A9b3bb4b0b3fc705f3741b41954664ffe&seq=12#page_scan_tab_contents.

18. "Standard 3-4.4," in *Criminal Justice Standards for the Prosecution Function*, fourth edition, (American Bar Association, 2017). https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/#:~:text=The%20prosecutor%20should%20seek%20to,persons%2C%20including%20suspects%20and%20defendants.

19. Sonia Moghe, "Manhattan district attorney announces he won't prosecute certain crimes," CNN, Jan. 6, 2022. <https://www.cnn.com/2022/01/06/us/alvin-bragg-manhattan-district-attorney-crimes-prosecution/index.html>; Jamila Hodge and Seleeke Flingai, "What Happened When Boston Stopped Prosecuting Nonviolent Crimes," Vera Institute of Justice, April 2, 2021. <https://www.vera.org/news/what-happened-when-boston-stopped-prosecuting-nonviolent-crimes>; George Gascón, "Special Directive 20-07," Los Angeles County District Attorney's Office, Dec. 7, 2020. <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf>.

20. "Welfarist Prosecution," *Harvard Law Review* 135 (June 10, 2022). <https://harvardlawreview.org/2022/06/welfarist-prosecution>.

21. Léon Digard and Elizabeth Swavola, "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention," Vera Institute of Justice, April 2019. <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

22. Amanda Y. Agan et al., "Misdemeanor Prosecution," National Bureau Economic Research, August 2022. https://www.nber.org/system/files/working_papers/w28600/w28600.pdf.

23. Wright, p. 827. <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7683&context=jclc>.

24. "How Courts Work: Bail," American Bar Association, Sept. 9, 2019. https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail.

25. *United States v. Salerno*, 481 U.S. 739 (1987). <https://supreme.justia.com/cases/federal/us/481/739>.

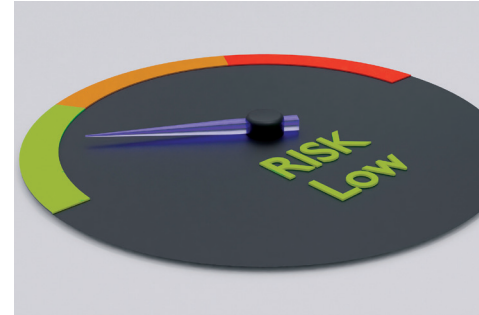
often with guardrails established in statute—sets bail in criminal cases.²⁶ However, prosecutors play a significant role in this determination. The prosecution can determine whether a summons should be used instead of arrest (unless otherwise dictated by statute), whether to recommend that an accused be released on their own recognizance and whether to recommend monetary or nonmonetary conditions for the accused's release on bail.²⁷

Indeed, although a reduction in the use of pretrial detention can be made at the state level—such as in Nevada where criminal citations are mandatory for certain offenses or in New Jersey where cash bail essentially has been eliminated—often, it is left to prosecutors' offices to make such policy decisions.²⁸ Examples of prosecutor policies that have reduced the reliance on arrest and pretrial detention include Philadelphia's policy to no longer request cash bail for 25 different misdemeanor and felony offenses, Durham's prosecutorial policy that discourages the use of cash bail and pretrial detention in cases that do not involve violence and New Orleans' mandate for a court summons in lieu of arrest for certain low-level offenses.²⁹

These discretionary decisions by prosecutors' offices make sense. Pretrial release can help ensure that low-level offenders who show no signs of risk remain an active part of society while pending trial. This, in return, can help accused individuals avoid the negative impacts and collateral consequences of incarceration and ultimately reduces the chance of recidivism.³⁰

The use of summons or citation in lieu of arrest or restricting the use of monetary bail can also better protect individuals' presumption of innocence—allowing them to remain free while pending trial—as well as increase law enforcement efficiency and reduce unnecessary stress on jail resources.³¹ This saves taxpayer dollars and frees up limited law enforcement time, which is currently a scarcity for many agencies.³²

To ensure that safety is not compromised with a greater use of pretrial release, many prosecutors' offices have access to tools and resources to use between pretrial detention and unsupervised release. Pretrial service programs, for example, can provide check-ins with defendants and monitor whether an individual is following release conditions, such as drug testing or treatment.³³ Electronic home monitors can track an individual's whereabouts.³⁴ Although research findings on the effectiveness of certain pretrial conditions have been inconsistent, studies assessing supervision and electronic monitoring have yielded promising results.³⁵



Pretrial release can help ensure that low-level offenders who show no signs of risk remain an active part of society while pending trial.

26. "How Courts Work: Bail." https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail.

27. "21 Principles for the 21st Century Prosecutor," Fair and Just Prosecution, 2018, p. 6. https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf.

28. AB 440, 81st Session, 2021 Regular Session (November 2021). <https://www.leg.state.nv.us/App/NELIS/REL/81st2021/Bill/8108/Overview>; Diana Dabruzzo, "New Jersey Set Out to Reform its Cash Bail System. Now, the Results Are In," Arnold Ventures, Nov. 14, 2019. <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in>.

29. Jessica Smith, "What Happens When Prosecutors Stop Asking for Cash Bail?," NC Criminal Law, April 3, 2019. <https://www.sog.unc.edu/blogs/nc-criminal-law/what-happens-when-prosecutors-stop-asking-cash-bail>; Satana Deberry, "Stop Blaming Crime Increase on Bail Reform: NC Prosecutor," *The Crime Report*, Dec. 22, 2021. <https://thecrimereport.org/2021/12/22/stop-blaming-crime-increase-on-bail-reform-nc-prosecutor>; Wes Muller, "New law requires summons instead of arrest for low-level crimes in New Orleans," *News From the States*, Oct. 17, 2021. <https://www.newsfromthestates.com/article/new-law-requires-summons-instead-arrest-low-level-crimes-new-orleans>.

30. Diana D'Abruzzo, "The Harmful Ripples of Pretrial Detention," Arnold Ventures, March 24, 2022. <https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention>; Digard and Swavola. <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

31. "Citation in Lieu of Arrest," International Association of Chiefs of Police, April 2016. <https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf>.

32. Ibid.

33. "Pretrial Services & Supervision," Pretrial Justice Center for Courts, last accessed Aug. 30, 2022. <https://www.ncsc.org/pjcc/topics/pretrial-services>.

34. "Electronic Monitoring," Electronic Frontier Foundation, last accessed Aug. 30, 2022. <https://www.eff.org/pages/electronic-monitoring#:~:text=How%20Electronic%20Monitoring%20Works&text=Electronic%20monitoring%20devices%20typically%20use,location%20information%20at%20set%20intervals>.

35. Ross Hatton and Jessica Smith, "Research on the Effectiveness of Pretrial Support and Supervision Services: A Guide for Pretrial Services Programs," UNC School of Government Criminal Justice Innovation Lab, July 2021. <https://cjl.sog.unc.edu/wp-content/uploads/sites/19452/2020/05/Research-on-the-Effectiveness-of-Pretrial-Support-Supervision-Services-5.28.2020.pdf>.



**Pretrial
Release**

Prosecutorial power should be used to make policy decisions that encourage alternatives to incarceration and reduce the use of cash bail, as the effective use of this power is a strength of the prosecution's role in safely reducing jail populations.

• Plea Bargaining

Plea bargaining is an important function of the criminal justice system. A plea deal allows accused individuals to take accountability immediately—often pleading guilty to lesser charges—and helps lessen or alleviate the clogging of courts and jails.³⁶ More than 90 percent of criminal cases result in a plea deal rather than a trial, and this approach can save money for both accused individuals and taxpayers.³⁷

Often, when a defendant takes a plea, they are agreeing to a specific amount of time or a range of sentencing.³⁸ The defendant's attorney and the prosecution negotiate this sentencing recommendation.³⁹ Factors used to determine a plea agreement are the defendant's criminal history, the severity of the offense and—potentially—the circumstances surrounding the offense.⁴⁰ The strength of the case, the court trial calendars and the availability of prosecutorial resources also are considered.

Many plea deals result in a probationary sentence. Prosecutors can couple a probationary sentence with a reduction in charges or agree to dismiss charges entirely if the defendant completes probation successfully—often called a deferred sentence.⁴¹ Prosecutors can also offer diversion—a probation-like program in which charges are dismissed upfront but can be refiled if the participant does not successfully complete the program.⁴²

Probation and diversion are often coupled with supervision, community service, substance abuse or mental health treatment, and the requirement to pay any necessary restitution. This approach can help reduce the probability of future arrests while still holding the accused accountable for their actions.

A growing body of evidence shows that these alternatives to incarceration, if used correctly, can reduce recidivism and alleviate the pressure on resource-strapped courts, jails and prosecutor's offices.⁴³ Yet, although prosecutors already often use probation as a tool in plea bargaining—some 3 million individuals are on probation at any point in time—prosecutorial diversion is not used as often.⁴⁴ In one study from 2019, only 55

>90%
of criminal cases

result in a plea deal rather than a trial, and this approach can save money for both accused individuals and taxpayers.

36. Michael Conklin, "In Defense of Plea Bargaining: Answering Critics' Objections," *Washington Law Review* 47:1 (June 18, 2020). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3609076#:~:text=The%20conclusion%20that%20plea%20bargaining,being%20charged%20with%20a%20crime.

37. Ram Subramanian et al., "In the Shadows: A Review of the Research on Plea Bargaining," The Vera Institute of Justice, September 2020. <https://www.vera.org/publications/in-the-shadows-plea-bargaining>; "How Courts Work: Plea Bargaining," American Bar Association, Nov. 28, 2021. https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining.

38. Ibid.

39. Ibid.

40. Ashley M. Votruba and Casey Tisdale, "Examining prosecutorial decision-making in plea bargaining: An experimental paradigm in a community sample," *Analyses of Social Issues and Public Policy*, January 2021. https://www.researchgate.net/publication/348932123_Examining_prosecutorial_decision-making_in_plea_bargaining_An_experimental_paradigm_in_a_community_sample.

41. "Deferred Sentence Law and Legal Definition," USLegal, last accessed Aug. 30, 2022. <https://definitions.uslegal.com/d/deferred-sentence>.

42. David Noble, "Mapping the Landscape of Prosecutor-Lead Pretrial Diversion," *The Criminal Law Practitioner* 11:1 (Aug. 7, 2020), pp. 8-32. https://e1e6cfc6-b1d4-4e45-b03c-22d8c290e050.filesusr.com/ugd/e009e5_b2b1f668d03449dbada3b1a0538b5a35.pdf.

43. "Promising Practices in Prosecutor-Led Diversion," Fair and Just Prosecution, September 2017. <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf>.

44. Danielle Kaebler, "Probation and Parole in the United States, 2020," Bureau of Justice Statistics, December 2021, p. 1. <https://bjs.ojp.gov/content/pub/pdf/ppus20.pdf>.

percent of 220 prosecutor offices surveyed offered diversion.⁴⁵ Therefore, this opportunity is ripe for prosecutors to use in addition to, or in replace of, traditional probation.



When appropriate, prosecutors should offer alternatives to incarceration during plea bargaining, such as probation, diversion and treatment programs, as the prudent use of this power is a strength of the role they serve in safely reducing jail populations.

Weaknesses

Although prosecutors' offices are well positioned to help reduce jail populations, there are potential weaknesses and drawbacks in using prosecutorial power and discretion to do so—namely the risk that prosecutors' choices could compromise public safety or the rights of the accused. That is, the very abilities identified as strengths when used properly can also be weaknesses when used improperly. In this section, we look at how declination of charges, pretrial detention and plea bargaining—the same factors identified as strengths in this SWOT analysis—must also be acknowledged as potential weaknesses when applied improperly to reduce jail populations. It is critical that prosecutors be cognizant of these potential issues to ensure that they optimally apply their power and discretion.

• Declination of Charges

High declination rates can assist in lowering jail populations, but they can also cause unintended consequences. As noted previously, prosecutor-office declination rates can be over 50 percent, meaning that more than 50 percent of the cases law enforcement present to the prosecution are declined, with the individual receiving no further court intervention or referrals for resources or support.⁴⁶

High rates of declined charges could indicate a variety of issues, such as misalignment between police and prosecutors' offices regarding what crimes should be prosecuted, poor training within the local law enforcement agency that results in continual constitutional violations or a lack of resources to prosecute the number of crimes committed within the community.⁴⁷ Regardless of the reason, high rates of declined charges can have negative consequences.

For example, law enforcement may be arresting individuals for crimes that the prosecutor's office has declared they will decline. When this happens, the arrested individual may experience negative repercussions from the arrest and detention, even with just one night spent in jail.⁴⁸ Individuals can lose employment, housing or even custody of children due to pretrial detention.⁴⁹ While a prosecutor may ultimately decline a charge, the damage from the arrest may have already been done. In fact, some studies have shown that pretrial detention can increase the likelihood of future arrest, meaning that the arrest without prosecution has, in and of itself, compromised public safety.⁵⁰

In some jurisdictions:

>50%
of the cases

law enforcement present to the prosecution are declined, with the individual receiving no further court intervention or referrals for resources or support.

45. Michela Lowry and Ashmini Kerodal, "Prosecutor-Led Diversion: A National Survey," Center for Court Innovation, March 2019, p. 11. https://www.courtinnovation.org/sites/default/files/media/document/2019/prosecutor-led_diversion.pdf.

46. Kutateladze et al., pp. 5-6. <https://safetyandjusticechallenge.org/wp-content/uploads/2022/07/RejectOrDismissAProsecutorsDilemma.pdf>.

47. Akhi Johnson and Stephen Roberts, "Reshaping Prosecution in St. Louis: Lessons from the Field," The Vera Institute of Justice, October 2020, p. 6. <https://www.vera.org/downloads/publications/reshaping-prosecution-in-st-louis.pdf>.

48. D'Abruzzo. <https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention>.

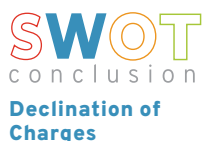
49. Digard and Swavola. <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

50. D'Abruzzo. <https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention>.

To avoid these issues, prosecutors' offices should work with local law enforcement agencies. Law enforcement should know and understand the prosecution's policies regarding declinations and be able to voice any concerns. If prosecutors' offices and police work together as partners, any misalignment of what cases are appropriate for prosecution can be mitigated or even avoided.

Another negative consequence of a declination of charges is the lack of support and resources offered to the accused. Prosecutors may decline cases because of staff shortages and overwhelmed dockets rather than a concern of innocence or evidentiary challenges.⁵¹ In such situations, no one is held accountable for the crime, and the accused does not receive support or referrals to help reduce the chance of recidivism.

Certainly, prosecutors' offices should prioritize serious offenses and violent offenders. However, diversion programs—rather than declinations—can be much more effective in ensuring that an individual has some accountability for their crime and receives the support and resources necessary to avoid reoffending. Likewise, police can offer law-enforcement-led diversion that could help alleviate docket and staffing restraints while still upholding public safety.⁵²



The power to decline charges can be a weakness of the prosecution's role in reducing jail populations when it is overused, as it can strain prosecutor-police relationships and result in missed opportunities to reduce recidivism and provide resources to accused individuals.



Diversion programs—rather than declinations—can be much more effective in ensuring that an individual has some accountability for their crime and receives the support and resources necessary to avoid reoffending.

• Pretrial Detention

Experts have repeatedly identified flaws in the current cash bail system, which often results in the pretrial detention of individuals based on their ability to pay rather than their risk to the community or their potential to fail to show up for court.⁵³ As noted previously, prosecutors play a significant role in this system, as they help determine whether to recommend monetary or nonmonetary conditions for an accused's release on bail.⁵⁴ However, this power to recommend cash bail can be a weakness in the prosecution's role in safely reducing jail populations, particularly when there is a lack of adequate time to prepare for bail hearings or a lack of tools to effectively assess an individual's flight and safety risk.⁵⁵

Many jurisdictions are turning to pretrial risk assessments to more effectively and fairly help determine who should be subject to pretrial detention.⁵⁶ But some prosecutor offices may not have access to these research-based tools that help determine risk.⁵⁷ Instead, prosecutors may have only a police report and criminal history to review—often obtained mere minutes before a bail hearing—before making a recommendation to the court on an accused's bail conditions. With limited

51. Johnson and Roberts, p. 6. <https://www.vera.org/downloads/publications/reshaping-prosecution-in-st-louis.pdf>.

52. Susan E. Collins et al., "Seattle's Law Enforcement Assisted Diversion (LEAD): Program effects on recidivism outcomes," *Evaluation and Program Planning* 64 (2017), pp. 49-56. https://www.leadbureau.org/_files/ugd/6f124f_f4eed992eaff402f88ddb4a649a9f5e6.pdf.

53. "The Civil Rights Implications of Cash Bail," U.S. Commission on Civil Rights, January 2022. <https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf>.

54. "21 Principles for the 21st Century Prosecutor," Fair and Just Prosecution, 2018, p. 6. https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf.

55. "Risk Assessment," Pretrial Justice Center for Courts, last accessed Aug. 30, 2022. <https://www.ncsc.org/pjcc/topics/risk-assessment>.

56. "Pretrial Release: Risk Assessment Tools," National Conference of State Legislatures, June 30, 2022. <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-risk-assessment-tools.aspx>.

57. "Risk Assessment." <https://www.ncsc.org/pjcc/topics/risk-assessment>.

time and tools to determine risk, it is not surprising that prosecutors may err on the side of caution by asking for high cash bail when making recommendations, especially given that the consequences of not asking for a high bail for a potentially high-risk individual may include that individual committing a violent offense.⁵⁸

Unfortunately, when high cash bail is set for those who cannot afford to pay it, it can result in prolonged detention, even in cases in which public safety and flight risk are low. This is a critical issue, as research has shown that pretrial detention increases rates of recidivism upon release, regardless of guilt or innocence.⁵⁹ Therefore, prosecutors should look to limit an accused's freedom only when it is necessary to maintain community safety or guarantee an individual's presence in court. Prosecutors have the unique opportunity to ensure that people do not remain in jail for no reason other than their inability to pay for their release pending trial and instead align the system with "dangerousness" and flight risk, as intended. Further, prosecutors should continue to keep in mind the accused's presumption of innocence—especially considering that research shows that nearly one-third of felony cases are dismissed or result in acquittal.

One effective working model of bail reform can be seen in New Jersey.⁶⁰ The state established a risk-based—rather than cash-based—system that uses pretrial risk assessments to help determine bail conditions. This has resulted in most defendants being released on nonmonetary bail; only those who are deemed a serious risk to public safety remain detained.⁶¹ Since the implementation of this bail reform, the jail population held on less than \$2,500 bail fell from 1,547 individuals in 2012 to 14 in 2020.⁶² Of those who were released, rates of committing a crime while on release dropped from 24.2 percent in 2014 to 13.8 percent in 2020.⁶³ Court appearance rates also remained fairly steady, at 92.7 percent in 2014 and 90.0 percent in 2020.⁶⁴

In 2019, a report revealed that an estimated 500,000 individuals are detained in jail across the country—mostly for low-level offenses—because of their inability to pay bail.⁶⁵ Seventy-five percent are being detained before trial for nonviolent offenses.⁶⁶ Thus, the use of pretrial detention and bail is ripe for prosecutorial intervention.

500,000 individuals are detained in jail across the country due to inability to pay bail.

75%
are detained

before trial for nonviolent offenses. Thus, the use of pretrial detention and bail is ripe for prosecutorial intervention.



When prosecutors' offices lack the resources or programs to optimally support decision-making in recommending bail conditions, the power to make such recommendations can be a weakness of the role they serve in reducing jail populations, as prosecutors may default to requesting a high bail, which could infringe on an accused's presumption of innocence and increase jail populations.

58. Marisa Iati and Mark Berman, "The Wisconsin parade suspect was accused of a car attack weeks ago. Here's why he was out on bail," *The Washington Post*, Nov. 24, 2021. <https://www.washingtonpost.com/nation/2021/11/24/wisconsin-parade-darrell-brooks-bail/>.

59. D'Abruzzo. <https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention>.

60. Stuart Rabner, "Chief justice: Bail reform puts N.J. at the forefront of fairness," *Star-Ledger*, Jan. 9, 2017. <https://www.njcourts.gov/courts/assets/criminal/starledgercolumn.pdf?c=0el>.

61. Ibid.

62. "Judiciary Releases 2020 Annual Criminal Justice Reform Report," New Jersey Courts, Oct. 8, 2021. <https://www.njcourts.gov/pressrel/2021/pr100821a.pdf?c=wbp>.

63. Ibid.; D'Abruzzo. <https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in>.

64. Ibid.

65. John Mathews II and Felipe Curiel, "Criminal Justice Debt Problems," American Bar Association, Nov. 30, 2019. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems.

66. Ibid.

• Plea Bargaining and Probation

Although prosecutors' use of probation instead of incarceration has the potential to drastically reduce jail populations, this alternative to incarceration is also one of the most significant drivers of higher jail populations.⁶⁷ In particular, technical violations—rather than new criminal offenses—often result in the revocation of a probationary sentence, which can result in jail or prison.⁶⁸

Approximately 3.6 million individuals are on probation.⁶⁹ Research shows that community supervision and treatment conditions can be effective, but if the system is too overwhelmed to adequately provide these conditions, it can result in unsuccessful probation terms and the potential for subsequent incarcerations.⁷⁰ One study found that approximately 29 percent of nearly 2 million probation completions were unsuccessful.⁷¹ Furthermore, 12 percent (nearly 250,000 people) resulted in incarceration, often for technical violations rather than new crimes.⁷²

The length and conditions of probation have grown over the years.⁷³ Probation was originally created as an alternative to incarceration, promoting rehabilitation and sparing promising individuals from the negative impacts of jail or prison.⁷⁴ Now, some experts have found that probation has “widened the criminal justice net,” expanding community supervision to low-level cases that may not have previously been considered for jail time.⁷⁵ Probation often includes conditions of fines and fees, frequent reporting to a probation officer, drug testing and other onerous rules that are not typically individualized in ways that make sense for the probationer.⁷⁶ These challenging, overly generalized conditions are often combined with a lack of adequate supervision—caused by overloaded probation officers—and frequently result in probationers failing to successfully adhere to their conditions and being resentenced to jail or prison.⁷⁷ In fact, some experts have asserted that probation is a “delayed path” to incarceration, rather than an alternative thereto.⁷⁸

Research shows that lengthy probation sentences are ineffective and rarely help reduce recidivism.⁷⁹ That is, prosecutors should not use extended periods of probation as a means of deterring criminality, as probation rarely does so. Rather, the length of probation should be only as long as needed for the individual to be connected to and complete treatment, therapy and programs that research shows reduces recidivism. Prosecutors should understand that exposing individuals to lengthy probation sentences or onerous, generalized conditions (such as no drinking

29% of nearly
2 Million
probation completions
were unsuccessful.

67. Michael P. Jacobson et al., “Less Is More: How Reducing Probation Populations Can Improve Outcomes,” Harvard Kennedy School, August 2017. https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/less_is_more_final.pdf.

68. Ibid.

69. See, e.g., “Probation and Parole Systems Marked by High Stakes, Missed Opportunities,” The Pew Charitable Trusts, Sept. 25, 2018. <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

70. Ibid.

71. Ibid.

72. Ibid.

73. Peggy McGarry, “Probation and Parole as Punishment,” Brennan Center for Justice, June 28, 2021. <https://www.brennancenter.org/our-work/analysis-opinion/probation-and-parole-punishment>.

74. Arthur L. Rizer, III, et al., “Realigning Probation with Our Values,” *National Affairs* 53 (Spring 2020). <https://nationalaffairs.com/publications/detail/realigning-probation-with-our-values>.

75. Michelle Phelps, “Mass Probation and Inequality,” in *Handbook on Punishment Decisions: Locations of Disparity* (Taylor and Francis 2018), pp. 43-44. https://www.prisonpolicy.org/scans/phelps/mass_probation_and_inequality.pdf.

76. Ibid.

77. “Policy Reforms Can Strengthen Community Supervision,” The Pew Charitable Trusts, April 23, 2020. <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision>.

78. Phelps, p. 43. https://www.prisonpolicy.org/scans/phelps/mass_probation_and_inequality.pdf.

79. “States Can Shorten Probation and Protect Public Safety,” The Pew Charitable Trusts, April 15, 2021. <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety#:~:text=A%20growing%20list%20of%20high,testing%20positive%20for%20drug%20use>.

alcohol when alcohol was not a part of the offense) merely leads to higher jail populations, not a safer community. Ultimately, keeping people on probation longer than necessary results in a waste of taxpayer dollars and resources.⁸⁰

SWOT
conclusion
**Plea Bargaining
and Probation**

Prosecutors' use of probation can be a weakness of the role they serve in reducing jail populations if it is offered unnecessarily, is lengthy or imposes unwarranted conditions that are difficult to adhere to; the suboptimal use of this approach can result in delayed incarceration, rather than deflection, which only serves to increase jail populations.

Opportunities

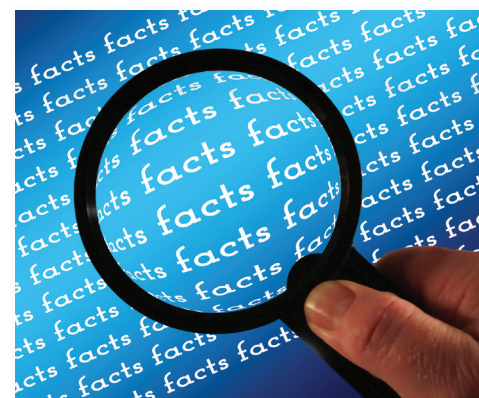
Prosecutors' offices are ripe for innovative thinking and research-based solutions to better support justice and public safety in their communities. In fact, some offices have implemented innovative approaches to safely lower jail populations that other offices could look to adopt. In this section of the SWOT analysis, we explore three of these unique opportunities: prosecutor-initiated resentencing, victim-offender mediation and specialized training.

• Prosecutor-Initiated Resentencing

Second-look laws have been growing in popularity, allowing more individuals to have an opportunity for a "second-look" at their case for a potentially reduced sentence.⁸¹ This helps curb long-term prison sentences, which a growing body of research has found to be ineffective.⁸² Generally, second-look laws have only allowed the court—not the prosecution—to look at reduced sentencing.⁸³ Prosecutors, however, are in the best position to evaluate such situations.

A "second-look" may be warranted if new or additional information in a case becomes available that would support a more lenient sentence than what the court ordered upon conviction.⁸⁴ In other cases, a "second look" may be appropriate after evaluating a convicted individual's personal circumstances—such as their age, length of time served and character improvement—to determine whether the remainder of the sentence is still within the interests of justice.⁸⁵

In California, 2018 legislation coupled with more recent state funding has given nine counties the resources to pilot a prosecutor-initiated resentencing initiative.⁸⁶ This law empowers prosecutors to ask the court to reopen a case for resentencing when the interests of justice are no longer being served.⁸⁷ From September to November 2021, prosecutors released more than 100 individuals through this initiative and were reviewing hundreds of additional cases.⁸⁸ Since the implementation of this prosecutor-



"Second-look" cases help curb long-term prison sentences, which a growing body of research has found to be ineffective.

80. Ibid.

81. Debra Cassens Weiss, "Momentum builds for 'second look' legislation that allows inmates to get their sentences cut," *ABA Journal*, May 19, 2021. <https://www.abajournal.com/news/article/momentum-builds-for-second-look-legislation-that-allows-inmates-to-get-their-sentences-cut#:~:text=%22Second%20look%22%20legislation%20has%20been,week%20by%20the%20Sentencing%20Project>.

82. Andrea Cipriano, "Second Look, Second Chance: Reevaluating Lengthy Sentences," *The Crime Report*, May 12, 2021. <https://thecrimereport.org/2021/05/12/second-look-second-chance-reevaluating-lengthy-sentences>.

83. Sarah Martinson, "New Wave Of Prosecutors Push For Resentencing Laws," *Law360*, July 11, 2021. https://www.law360.com/access-to-justice/articles/1394847/new-wave-of-prosecutors-push-for-resentencing-laws-?nl_pk=2861dc5f-72df-43c1-aa90-ef6c72c1278a&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice&read_more=1.

84. Ibid.

85. Cipriano. <https://thecrimereport.org/2021/05/12/second-look-second-chance-reevaluating-lengthy-sentences>.

86. California A.B. 2942, 2017-2018 Regular Session (Sept. 30, 2018).

87. "Prosecutor-Initiated Resentencing: California's Opportunity to Expand Justice and Repair Harm," *For The People*, December 2021. https://static1.squarespace.com/static/5d44c376e48120001a8b1d3/t/62d20a1f45137d2c597ad2f0/1657932343419/ForThePeople_Report_7.5.22.pdf.

88. Ibid.

initiated resentencing pilot program in California, Washington, Oregon and Illinois have also passed similar legislation.⁸⁹

These types of programs are huge opportunities, as research has shown that long sentences can be ineffective and costly.⁹⁰ In fact, some studies report that long sentences can be counterproductive to public safety.⁹¹ Second-look laws can help safely reduce jail populations and redirect cost savings to enhance public safety.⁹² Prosecutors are in an ideal position to evaluate cases and individuals to see whether justice is still being served by their incarceration.



Prosecutor-initiated resentencing offers an opportunity for prosecutors' offices to safely reduce unjust or ineffective long-term jail sentences, as this tool can allow new information to be considered in convicted individuals' unique situations to ensure that existing sentences remain in the interests of justice and public safety.

• Victim-Offender Mediation

At times, options outside of the criminal justice system seem to better uphold justice for both the victim and the accused. One such opportunity is victim-offender mediation (also referred to as restorative justice). Victim-offender mediation is not a new practice, but widespread use has not yet caught on and is therefore an area of opportunity for many prosecution agencies.

Victim-offender mediation moves away from an offender-centered system to a victim-driven approach.⁹³ It provides victims—generally of property crimes or minor assaults—the opportunity to address the offender directly in a safe setting, asking them questions, describing how they were negatively impacted and explaining how the offender could repair any harm done. Victims are also provided support and resources for further assistance with their healing or monetary damages. With this model, offenders are held accountable and directly responsible for their crime by learning the full impact of their actions on the victim and helping to develop a plan to make amends. If an offender fails to successfully complete the plan, they can be subjected to criminal proceedings.⁹⁴

The prosecutor's office in Polk County, Iowa, has been running a victim-offender mediation program since 1984 with great success.⁹⁵ The county's model uses face-to-face mediation with a trained volunteer mediator to help offenders understand the impact of their actions and to address the harm a victim endured. The result of this meeting is a "contract of restitution." The county reports that 94 percent of these contracts are successfully completed.⁹⁶

Victim-offender mediation in Polk County, Iowa, proves successful, resulting in "contracts of restitution."

94%
of the contracts
were successfully completed.

89. "National Work," For The People, last accessed Aug. 30, 2022. <https://www.fortheppl.org/national-work>.

90. Marc Mauer, "Long-Term Sentences: Time to Reconsider the Scale of Punishment," The Sentencing Project, Nov. 5, 2018. <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment>.

91. Ibid.

92. "Prosecutor-Initiated Resentencing: California's Opportunity to Expand Justice and Repair Harm." https://static1.squarespace.com/static/5d44c4376e48120001a8b1d3/t/62d20a1f45137d2c597ad2f0/1657932343419/ForThePeople_Report_7.5.22.pdf.

93. "Victim-Offender Mediation: A National Perspective," Office for Victims of Crime Archive, April 2000. https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

94. Ibid.

95. "Mediators help people have difficult conversations," Victim Offender Reconciliation Program, last accessed Aug. 30, 2022. <http://www.vorpcms.org/history.html#:~:text=94%25%20of%20these%20VORP%20contracts,directly%20accountable%20to%20their%20victim>.

96. Ibid.

This approach not only elevates a victim's voice and better supports their healing process, but also—according to promising evidence—reduces recidivism.⁹⁷ Furthermore, victims and offenders who have participated in this type of mediation have reported the process to be more just.⁹⁸ One study also found that offenders who participate in victim-offender mediation may take more responsibility and feel more guilt and shame about their actions.⁹⁹ Ultimately, victim-offender mediation can reduce the potential for reoffending.¹⁰⁰

Additionally, by addressing the crime outside of the criminal justice system, prosecutorial time, court time and resources can be saved. This allows prosecutors to spend additional resources on more complex cases.



The wider application of victim-offender mediation serves as an opportunity for prosecutors' offices to safely reduce jail populations, as it can benefit victims, generate a greater sense of culpability in offenders and save criminal justice resources.

• Training

Unfortunately, many prosecutors' offices have equated high bonds, high rates of convictions and lengthy sentences with success.¹⁰¹ While most offices are well intentioned and doing what they think is necessary to protect public safety, the "tough-on-crime" strategies that many prosecutors' offices adopt are counterproductive.

Prosecutors receive ample training on how to successfully prosecute a case, but they are rarely trained on the research related to the effectiveness and consequential impacts of various types and lengths of sentencing and incarceration. Without this specialized training, prosecutors' offices may default to "tough-on-crime" policies with longer and harsher sentences, believing them to be more effective, even though research suggests otherwise.¹⁰²

In reality, research shows that policies that are more proactive and community focused are more effective in reducing recidivism and improving public safety. Prosecutors' offices should offer additional education on the negative impacts of arrests and detention, effective rehabilitative options outside normal prosecution and the ineffectiveness of lengthy jail and probation sentences. Unfortunately, this information is rarely provided to frontline prosecutors who are handling cases every day. In addition, a lack of full agency understanding and buy-in regarding these smart reforms threatens the changes that could create safer and fairer outcomes within the criminal justice system.



While most prosecutors' offices are well intentioned in their efforts to protect the public, the "tough-on-crime" strategies that many offices adopt are counterproductive.

97. Jiska Jonas-van Dijk et al., "Victim-Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias," *Crime & Delinquency* 66:6-7 (June 1, 2020). <https://journals.sagepub.com/doi/full/10.1177/0011128719854348>.

98. Ibid.

99. Jonas-van Dijk et al. https://www.ncjrs.gov/ovc_archives/reports/96517-gdlines_victims-sens/guide4.html.

100. Ibid.

101. Dylan Hayre, "How To Reform Criminal Justice, When Prosecutors Hold The Power," *Cognoscenti*, July 19, 2017. <https://www.wbur.org/cognoscenti/2017/07/19/prosecutors-reform-criminal-justice-dylan-hayre>.

102. Alexi Jones, "Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms," *Prison Policy Initiative*, April 2020. <https://www.prisonpolicy.org/reports/violence.html>.



Prosecutors' offices have the opportunity to offer specialized training to prosecutors on the impacts that various prosecutorial tools have on recidivism and public safety; such training could result in the adoption of more strategic approaches to sentencing and incarceration that can help safely lower jail populations.

Threats

Prosecutors' offices may want to implement innovative policies or use prosecutorial discretion to safely and fairly reduce jail populations, but external factors may impede their ability to do so. These external factors threaten prosecutors' ability to help curb mass incarceration and to fulfill their duties as administrators of justice. Key threats, which include a scarcity of local resources, state laws that limit prosecutorial discretion and the public's response to rising crime rates, are discussed below.

• Lack of Resources

Many alternatives that prosecutors rely on to divert offenders away from jail, such as mental health services, pretrial detention alternatives and electronic monitoring, are resource-heavy options. Thus, staffing shortages, lack of funding and limited capacity are all threats that limit the availability of these options for prosecutors who wish to use them to safely reduce jail populations. When these resources are scarce, it weakens prosecutors' ability to address the root causes of crime and effectively balance fairness for defendants with community safety.

Prosecutors' access to behavioral health treatment for defendants is a critical resource to support safe pretrial release of an accused as well as provide rehabilitation through sentencing.¹⁰³ Approximately 44 percent of incarcerated individuals suffer from a mental illness, and 63 percent have a substance use disorder.¹⁰⁴ Rates of substance use among those on community supervision—such as probation or parole—are estimated to be two to three times higher than rates seen the general population.¹⁰⁵ Furthermore, studies show that individuals with behavioral health issues who are in the criminal justice system experience more days in jail and often receive more punitive sanctions for infractions than those without behavioral health issues.¹⁰⁶

Although research shows that access to behavioral health treatment can reduce crime, substance abuse and mental health treatment can be difficult to access in many communities because of staffing and funding limitations.¹⁰⁷ In fact, many probationers and parolees do not have any access to this kind of treatment.¹⁰⁸ When prosecutors know that these types of treatments and services are inaccessible, they may be hesitant to support probation or diversion sentences, especially for defendants whose behavioral health issues contributed their criminal activity.

Prosecutors' access to behavioral health treatment for defendants is a critical resource.

Of incarcerated individuals, approximately



103. "Improving Justice System Responses to individuals with Mental Illness," Fair and Just Prosecution, July 2018. https://fairandjustprosecution.org/wp-content/uploads/2018/07/FJP.Brief_.MentalHealth.pdf.

104. "About Criminal and Juvenile Justice," Substance Abuse and Mental Health Services Administration, March 2, 2022. <https://www.samhsa.gov/criminal-juvenile-justice/about>.

105. "Probation and Parole Systems Marked by High Stakes, Missed Opportunities." <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

106. Substance Abuse and Mental Health Services Administration, "Principles of Community-based Behavioral Health Services for Justice-involved Individuals: A Research-based Guide," U.S. Department of Health & Human Services, 2019. <https://store.samhsa.gov/sites/default/files/d7/priv/sma19-5097.pdf>.

107. Jennifer L. Doleac, "New evidence that access to health care reduces crime," Brookings, Jan. 3, 2018. <https://www.brookings.edu/blog/up-front/2018/01/03/new-evidence-that-access-to-health-care-reduces-crime>.

108. "Probation and Parole Systems Marked by High Stakes, Missed Opportunities." <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

However, incarceration may provide a worse outcome, as many individuals also do not get treatment while incarcerated and instead experience a worsening of their conditions.¹⁰⁹

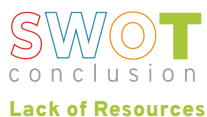
To help fill this gap, some communities have turned to initiatives such as law-enforcement-assisted diversion, co-responder programs and community-responder programs.¹¹⁰ These types of programs work alongside or in partnership with law enforcement and offer resources and support—in lieu of arrest and outside of the criminal justice system—to individuals suffering from behavioral health issues. Although staffing and funding issues can also threaten these types of efforts, the use of immediate response and ongoing case management associated with these programs has had great success in many jurisdictions. By providing this immediate support to individuals struggling with mental health illness or substance abuse, many jurisdictions have seen a reduction in calls for service, freeing up law enforcements' valuable time and resources.¹¹¹

Alternatives to pretrial detention can also be scarce in some areas, which threatens prosecutors' ability to recommend other possible approaches while maintaining public safety. For example, statewide pretrial service programs are rare, which means that many jurisdictions—usually smaller or more rural ones—are left without any supervision options if an accused individual is released on bail.¹¹² And without pretrial services, these communities lack access to the pretrial risk assessments that such services often provide.¹¹³ These assessments help prosecutors identify the accused individuals who are most at risk of reoffending and who require preventive detention to ensure community safety.¹¹⁴

Similarly, jurisdictions may not have access to electronic monitoring, which is a pretrial option that can be used between incarceration and unmonitored release.¹¹⁵ This option is more cost-effective than jail and has been shown to be successful in deterring future arrests.¹¹⁶ If these options do not exist in a community, prosecutors are left with limited alternatives when addressing pretrial detention or release. It is therefore not surprising that, when public safety is at risk, prosecutors may err on the side of caution and request high bonds and continued detention at the expense of an individual's presumption of innocence.



By providing diversion support to individuals struggling with mental health illness or substance abuse, many jurisdictions have seen a reduction in calls for service, freeing up valuable time and resources of law enforcement.



A lack of resources is a threat to prosecutors' ability to safely reduce jail populations through effective alternative options such as mental health services, pretrial detention alternatives and electronic monitoring.

109. Substance Abuse and Mental Health Services Administration. <https://store.samhsa.gov/sites/default/files/d7/priv/sma19-5097.pdf>.

110. Lisel Petis, "Conservative Jurisdictions Champion Diversion Efforts," *R Street Policy Study* No. 252, March 30, 2022. <https://www.rstreet.org/2022/03/30/conservative-jurisdictions-champion-diversion-efforts>.

111. Ibid.

112. "Bringing Pretrial Assessments to Rural Areas," *Advancing Pretrial Policy & Research*, February 2022. <https://advancingpretrial.org/story/bringing-pretrial-assessment-to-rural-areas>.

113. Ibid.

114. "Pretrial Assessment Tools," *Advancing Pretrial Policy & Research*, April 2021. https://www.ncsc.org/__data/assets/pdf_file/0028/68077/Pretrial_Assessment_Research_Summary_2021April.pdf.

115. Robert Kanallakan, "Best practices for electronic monitoring post-incarceration," *Corrections1*, April 19, 2019. <https://www.corrections1.com/re-entry-and-recidivism/articles/best-practices-for-electronic-monitoring-post-incarceration-jEPLp0E1ArBdbhr0>.

116. Ibid.

• State Laws Limiting Prosecutorial Discretion

Prosecutors generally do not have to fight for the freedom of the innocent or those whose constitutional rights have been violated. They can merely dismiss a case to right such wrongs. In fact, a prosecutor not only has the ability to dismiss such cases—they have a duty to do so.¹¹⁷ After conviction, however, prosecutors may face challenges in upholding this duty. For example, in Florida, state law provides no avenue for prosecutors to vacate wrongful convictions.¹¹⁸

Since 1989, over 3,000 individuals have been exonerated in the United States.¹¹⁹ The Innocence Project reports that 353 of those individuals were exonerated by DNA evidence, and, of those, 152 actual perpetrators were later identified and found to have committed 150 additional violent crimes, including rape and murder, while the innocent individual languished in jail.¹²⁰

Clearing wrongful convictions is not only important for the wrongfully accused, but also for society as a whole. As a Founding Father once said:¹²¹

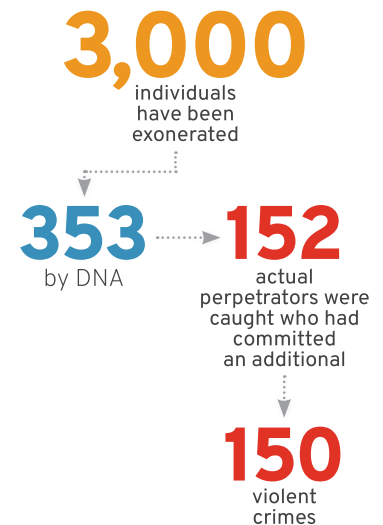
It is more important that innocence be protected than it is that guilt be punished, for guilt and crimes are so frequent in this world that they cannot all be punished. But if innocence itself is brought to the bar and condemned, perhaps to die, then the citizen will say, 'whether I do good or whether I do evil is immaterial, for innocence itself is no protection,' and if such an idea as that were to take hold in the mind of the citizen that would be the end of security whatsoever.

Wrongful convictions can also cost taxpayers millions of dollars while the real offender continues to be free with the ability to reoffend.¹²²

As with resentencing, prosecutors are generally in the best position to evaluate whether someone has been wrongfully convicted. They have direct access to all the evidence in the case and can best determine whether that evidence—and any new evidence—still warrants a conviction. But, in the state of Florida, for example, prosecutors cannot file a motion of wrongful conviction with the court.¹²³ Instead, the prosecution would have to find a defense attorney willing to take the case and file the motion.¹²⁴ This is an unnecessary and cumbersome step that impedes justice and delays the correction of wrongful convictions.

Recently, Missouri enacted new legislation to remove such an impediment and provide a new avenue for prosecutors to release innocent individuals.¹²⁵ Like Florida, Missouri did not previously have a legal mechanism for prosecutors to right wrongful convictions.¹²⁶ But now, if the prosecution believes that an individual was erroneously

Clearing wrongful convictions is not only important for the wrongfully accused, but also for society as a whole. Since 1989:



117. "Rule 3.8: Special Responsibilities of a Prosecutor," American Bar Association, last accessed Aug. 30, 2022. https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor.

118. Jim Ash, "Measure Would Allow State Attorneys to Bring Motions to Vacate Based on Evidence of Innocence," *Florida Bar News*, Dec. 16, 2021. <https://www.floridabar.org/the-florida-bar-news/measure-would-allow-state-attorneys-to-bring-motions-to-vacate-based-on-evidence-of-innocence>.

119. "Exonerations by State," The National Registry of Exonerations, last accessed Aug. 30, 2022. <https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

120. "DNA Exonerations in the United States," The Innocence Project, last accessed Aug. 30, 2022. <https://www.innocenceproject.org/dna-exonerations-in-the-united-states>.

121. John Adams, "Argument for the Defense," National Archives, Dec. 3-4, 1770. <https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016>.

122. Scott Rodd, "Do States Owe People Who Are Wrongfully Convicted?" The Pew Charitable Trusts, March 14, 2017. <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/14/what-do-states-owe-people-who-are-wrongfully-convicted>.

123. Ash. <https://www.floridabar.org/the-florida-bar-news/measure-would-allow-state-attorneys-to-bring-motions-to-vacate-based-on-evidence-of-innocence>.

124. Ibid.

125. S.B. 53 & 60, First Session, 2021 Regular Session (Aug. 28, 2021).

126. "Missouri Enacts New Mechanism for Prosecutors to Address Wrongful Convictions," Equal Justice Initiative, Nov. 23, 2021. <https://eji.org/news/missouri-enacts-new-mechanism-for-prosecutors-to-address-wrongful-convictions>.

convicted, they can file a motion at any time, and the court must grant the motion if the prosecution shows clear and convincing evidence of actual innocence or a constitutional error.¹²⁷

Other state statutes—such as mandatory minimum sentences or required, nonindividualized probation conditions—can also impede the prosecution’s ability to appropriately address cases and safely reduce jail populations. But for the prosecution to most effectively uphold their duty of justice, they must have the ability to properly evaluate and dispose of cases based on the appropriate circumstances. State laws should not unnecessarily limit the prosecution’s discretion and ability to fulfill this duty. Prosecutors’ offices should identify these state-level threats and work with elected officials to ensure that they are remedied so justice can be applied to every case.



Current laws may be a threat to prosecutors’ ability to uphold justice and use their prosecutorial discretion to safely reduce jail populations; prosecutors’ offices should evaluate whether such laws exist in their jurisdictions and work with elected officials to remedy identified issues.

• Public Response to the Rise in Crime

With the recent national increase in gun violence and homicides, prosecutors have been publicly called on to be tougher on crime.¹²⁸ Research does not support public-safety benefits to tough-on-crime policies, but public perception is perpetuating the narrative, which is threatening the offices’ ability to implement effective reforms.¹²⁹

Tough-on-crime policies—emphasizing incarceration for longer periods of time—became popular in the 1980s in an attempt to counter rising rates of violent crime.¹³⁰ But instead of deterring crime, these policies led to mass incarceration and high recidivism rates. In fact, the United States has seen a 500 percent increase in incarceration over the last four decades.¹³¹ Likewise, recidivism rates—based on rearrest within three years of release—have drastically increased over the decades, from approximately 40 percent at the beginning of the 1980s to 68 percent in the 2000s.¹³²

Regardless, “liberal reforms” that generally limit the use of pre- and post-trial incarceration have been frequently blamed for the rise in violent crime.¹³³ Yet one study found that murder rates have been rising consistently among cities regardless of whether the city is run by Republicans or Democrats.¹³⁴ But, as the saying goes, “perception is reality,” and prosecutors continue to be called on to reduce crime by ineffective, stricter and harsher criminal justice policies.

Tough-on-Crime Policies Not a Deterrent for Violent Crimes

The United States has seen a

500%

*increase in incarceration
over the last four decades.*

127. Ibid.

128. Josiah Bates, “U.S. Crime Is Still Dramatically Higher Than Before the Pandemic,” *Time*, July 29, 2022. <https://time.com/6201797/crime-murder-rate-us-high-2022>; Ames Grawert and Noah Kim, “Myths and Realities: Understanding Recent Trends in Violent Crime,” Brennan Center for Justice, July 12, 2022. <https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime>.

129. Maurer. <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment>.

130. E.R. Jones, “Failure of the ‘Get Tough’ Crime Policy,” *University of Dayton Law Review* 20:2 (Winter 1995), pp. 803-808. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/failure-get-tough-crime-policy>.

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132. G.G. Gaes et al., “Recidivism Among Federal Offenders,” Office of Justice Programs, 1986. <https://www.ojp.gov/ncjrs/virtual-library/abstracts/recidivism-among-federal-offenders#:~:text=The%20followup%20was%203%20years,43.9%20percent%2C%20and%2038%20percent>; Mariel Alper et al., “2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014),” Bureau of Justice Statistics, May 2018. <https://bjs.ojp.gov/content/pub/pdf/18upr9yfup0514.pdf>.

133. Post Editorial Board, “Progressive policy experiments hurt the people they claim to help,” *New York Post*, May 28, 2022. <https://nypost.com/2022/05/28/progressive-policy-experiments-hurt-the-people-they-claim-to-help>.

134. Grawert and Kim. <https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime>.

Prosecutors' offices have a key role to play in sharing information about research-backed reform efforts to lower jail populations in their communities.¹³⁵ They should be transparent with their data (both pre- and post-implementation of a reform initiative) and proactive in communicating this data and their efforts to key stakeholders and the community at large. They must also be willing to continually evaluate reforms to make sure they are not negatively impacting public safety or having other unintended consequences.



The idea that reforms used to reduce jail populations are causing the rise in violent crime is a threat to prosecutors' ability to safely lower jail populations; prosecutors' offices can counteract this threat by transparently sharing data and continuing to communicate the value of reforms and alternative efforts.

Conclusion

Prosecutors—by nature of their position as gatekeepers of the criminal justice system and their defined duties to uphold justice and support public safety—are best positioned to take action against mass incarceration.

There are many strengths of using prosecutorial power to help safely reduce jail populations. Prosecutors' offices can offer alternatives to incarceration at almost every step in the process of a criminal case. These research-backed alternatives are fiscally responsible, increase public safety and ensure fairness and justice. For these reasons, these options should become common practice in prosecutors' offices across the country.

Prosecutors' offices also need to be aware of the weaknesses inherent in using prosecutorial power and discretion for reform. Although the power prosecutors wield at each stage of the criminal justice process positions them perfectly to implement reform, inappropriate use of this power can negatively impact the entire criminal justice system and the community, compromising public safety or the rights of the accused.

Additionally, prosecutors' offices can take advantage of innovative opportunities to safely reduce jail populations. Prosecutor-initiated resentencing and victim-offender mediation are some of the already-modeled opportunities that offices could adopt. Prosecutors' offices should also broaden the scope of training for frontline prosecutors to incorporate the impacts of prosecution and explain why alternatives to incarceration are a better option.

Finally, when threats to prosecutorial power are not addressed, the power that prosecutors' offices hold becomes less effective. Challenges such as scarce social resources, overreaching government regulations and fear-based rhetoric can threaten offices' role in curbing mass incarceration.

In summary, prosecutors have a responsibility to use their power to uphold justice and increase public safety. As this SWOT analysis has shown, this can best be accomplished when prosecutors' offices prioritize alternatives that move away from mass incarceration.



Research-backed alternatives to incarceration are fiscally responsible, increase public safety and ensure fairness and justice.

135. Lisel Petis, "Criminal Justice Reform Efforts and Rise in Crime: Conclusion," R Street Institute, Aug. 8, 2022. <https://www.rstreet.org/2022/08/08/criminal-justice-reform-efforts-and-rise-in-crime-conclusion>.

About the Author

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