

## *ARTICLE: The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*

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### **Reporter**

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### **Highlight**

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[W]e do not expect people to be deeply moved by what is not unusual. That element of tragedy which lies in the very fact of frequency, has not yet wrought itself into the coarse emotion of mankind; and perhaps our frames could hardly bear much of it. If we had a keen vision and feeling of all ordinary human life, it would be like hearing the grass grow and the squirrel's heart beat, and we should die of that roar which lies on the other side of silence.

--Mary Ann Evans, *Middlemarch* <sup>2</sup>

### **Text**

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[\*848] i

On January 26, 2014, Sharnalle Mitchell was sitting on her couch with her one-year-old daughter on her lap and her four-year-old son to her side. Armed government agents entered her home, put her in metal restraints, took her from her children, and brought her to the Montgomery City Jail. Jail staff told Sharnalle that she owed the city money for old traffic tickets. The City had privatized the collection of her debts to a for-profit "probation company," which had sought a warrant for her arrest. I happened to be sitting in the courtroom on the morning that Sharnalle was brought to court, along with dozens of other people who had been jailed because they owed the city money. The judge demanded that [\*849] Sharnalle pay or stay in jail. If she could not pay, she would be kept in a cage until she "sat out" her debts at fifty dollars per day, or at seventy dollars per day if she agreed to clean the courthouse bathrooms and the feces, blood, and mucus from the jail walls. An hour later, in a windowless cell, Sharnalle told me that a jail guard had given her a pencil, and she showed me the crumpled court document on the back of which

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<sup>1</sup> The views expressed are my own and do not necessarily represent the views of anyone else, including Civil Rights Corps.

<sup>2</sup> GEORGE ELIOT, *MIDDLEMARCH* 194 (Rosemary Ashton ed., Penguin Books 1994) (1872).

she had calculated how many more weeks of forced labor separated her from her children. That day, she became my first client as a civil rights lawyer.

## ii

Prisons do not disappear social problems, they disappear human beings.

--Angela Davis <sup>3</sup>

There are 2.2 million human beings confined in prison and jail cells in the United States tonight. <sup>4</sup> About 500,000 of those people are presumptively innocent people awaiting trial, <sup>5</sup> the vast majority of whom are confined by the government solely because they cannot pay enough money to buy their release. <sup>6</sup> This country has five percent of the world's population, but twenty-five percent of the world's prisoners--the highest rate of human caging of any society in the [\*850] recorded history of the modern world. <sup>7</sup> At least another 4.5 million people are under government control through probation and parole "supervision."<sup>8</sup>

Between eighty and ninety percent of the people charged with crimes are so poor that they cannot afford a lawyer. <sup>9</sup> Twenty-five years into America's incarceration boom, black people were incarcerated at a rate six times that of South Africa during apartheid. <sup>10</sup> The incarceration rate for black people in the nation's capital, where I live, is nineteen times that of white people. <sup>11</sup>

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<sup>3</sup> Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLOR LINES (Sept. 10, 1998), <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> [<https://perma.cc/7GCH-GMKZ>].

<sup>4</sup> Danielle Kaeble & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. DEPT JUST. (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/RA2A-VPMC>].

<sup>5</sup> See Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/7S96-3AAS>] (noting that 465,000 pretrial defendants are in the custody of local jails alone).

<sup>6</sup> Thomas H. Cohen & Brian A. Reaves, *Pretrial Release of Felony Defendants in State Courts*, U.S. DEPT JUST. 1 (Nov. 2007), <https://www.bjs.gov/content/pub/pdf/prfdsc.pdf> [<https://perma.cc/UL7X-VXKN>] (reporting that of all state-court felony defendants who are detained until the end of their cases, five out of every six are confined because of money bail).

<sup>7</sup> Michelle Ye He Lee, *Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/> [<https://perma.cc/Z546-DH5T>].

<sup>8</sup> Wagner & Sawyer, *supra* note 5. No one reliably keeps track of how many millions of additional people are on some form of pretrial supervised release or in deferred prosecution programs.

<sup>9</sup> *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act*, JUD. CONF. xiv (Apr. 2018), <https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf> [<https://perma.cc/98NB-NORT>] ("Fully 90 percent of defendants in federal court cannot afford to hire their own attorney."); John Pfaff, *Opinion, A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), <https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html> [<https://perma.cc/Y5CR-9AHP>] ("Approximately 80 percent of all state criminal defendants in the United States qualify for a government-provided lawyer.").

<sup>10</sup> LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 263 (2002).

<sup>11</sup> Marc Mauer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, SENT'G PROJECT 11 (July 2007), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Uneven-Justice-State-Rates-of-Incarceration-by-Race-and-Ethnicity.pdf>

I have traveled the country and seen nearly identical practices in every courtroom and every jail that I have visited. We have a legal system in which things like what happened to Sharnalle are simultaneously illegal and the norm.

**[\*851] iii**

[T]he movement for reforming the prisons, for controlling their functioning is not a recent phenomenon. It does not even seem to have originated in a recognition of failure. Prison 'reform' is virtually contemporary with the prison itself: it constitutes, as it were, its programme.

--Michel Foucault <sup>12</sup>

A lot of people are talking about "criminal justice reform." Much of that talk is dangerous. The conventional wisdom is that there is an emerging consensus that the criminal legal system is "broken." But the system is "broken" only to the extent that one believes its purpose is to promote the well-being of all members of our society. If the function of the modern punishment system is to preserve racial and economic hierarchy through brutality and control, then its bureaucracy is performing well.

**iv**

Official language smitheryed to sanction ignorance and preserve privilege is a suit of armor polished to shocking glitter . . . . It is the language that drinks blood . . . .

--Toni Morrison <sup>13</sup>

The emerging "criminal justice reform" consensus is superficial and deceptive. It is superficial because most proposed "reforms" would still leave the United States as the greatest incarcerator in the world. It is deceptive because those who want largely to preserve the current punishment bureaucracy--by making just enough tweaks to protect its perceived legitimacy--must obfuscate the difference between changes that will transform the system and tweaks that will curb only its most grotesque flourishes.

Nearly every prominent national politician and the vast majority of state and local officials talking and tweeting about "criminal justice reform" are, with varying levels of awareness and sophistication, furthering this deception. These "reform"-advancing punishment bureaucrats are co-opting a movement toward profound change by convincing the public that the "law enforcement" system as we know it can operate in an objective, effective, and fair way based on "the rule [\*852] of law." These punishment bureaucrats are dangerous because, in order to preserve the human caging apparatus that they control, they must disguise at the deepest level its core functions. As a result, they focus public conversation on the margins of the problem without confronting the structural issues at its heart. Theirs is the language that drinks blood.

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[<https://perma.cc/9Y9J-E4PT>]. The disparity appears to have worsened since the Sentencing Project's analysis a decade ago. Comparing the D.C. Department of Corrections' data against Census data suggests that the incarceration rate for black people is now twenty-four times worse than it is for white people in Washington, D.C. *Compare Facts and Figures*, D.C. DEP'T CORRECTIONS (Sept. 2018), <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DCDepartmentofCorrectionsFactsandFiguresSeptember2018.pdf> [<https://perma.cc/B92B-VA2P>], with *Washington, DC*, CENSUS REPORTER (2017), <https://censusreporter.org/profiles/16000US1150000-washington-dc> [<https://perma.cc/755D-RRYG>].

<sup>12</sup> MICHEL FOUCAULT, *DISCIPLINE & PUNISH* 234 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

<sup>13</sup> Toni Morrison, *Nobel Lecture* (Dec. 7, 1993), <https://www.nobelprize.org/prizes/literature/1993/morrison/lecture> [<https://perma.cc/ZHR4-YWEF>].

In this Essay, I examine "criminal justice reform" by focusing on the concepts of "law enforcement" and the "rule of law." Both are invoked as central features of the American criminal system. For many prominent people advocating "reform," the punishment bureaucracy as we know it is the inevitable result of "law enforcement" responding to people "breaking the law." To them, the human caging bureaucracy is consistent with, and even required by, the "rule of law." This world view--that the punishment bureaucracy is an attempt to promote social well-being and human flourishing under a dispassionate system of laws--shapes their ideas about how to "fix" the system.

But few ideas have caused more harm in our criminal system than the belief that America is governed by a neutral "rule of law." The content of our criminal laws--discussed in Part V--and how those laws are carried out--addressed in Part VI--are *choices* that reflect power. The common understanding of the "rule of law" and the widely accepted use of the term "law enforcement" to describe the process by which those in power accomplish unprecedented human caging are both delusions critical to justifying the punishment bureaucracy. This is why it is important to understand how they distort the truth.

I apply these arguments in Part VII, explaining why the current "criminal justice reform" discourse is so dangerous. I focus on several prominent national punishment bureaucrats and a new local wave of supposedly "progressive prosecutors."

Finally, in Part VIII, I discuss the new generation of directly impacted people, organizers, lawyers, faith leaders, and academics on the libertarian left and right who understand the punishment bureaucracy as a tool of power in service of white supremacy and profit. I explain why this growing movement must reject the "criminal justice reform" discourse of punishment bureaucrats and speak clearly about why the legal system looks the way that it does. I urge those interested in changing the punishment bureaucracy to ground every discussion that they have and every proposed reform that they evaluate in a set of guiding principles rooted in this movement's vision. I sketch some of those principles for their consideration below. the punishment bureaucracy

[\*853] v.

We are living in the era of premeditation and the perfect crime. Our criminals . . . have a perfect alibi: philosophy, which can be used for any purpose--even for transforming murderers into judges.

--Albert Camus <sup>14</sup>

What is a crime? The first step to understanding how we accomplish the imprisonment of millions of people's bodies is understanding what laws authorize government agents to take away a person's liberty.

A society makes choices about what acts or omissions to render worthy of different kinds of punishment. The decision to make something punishable by human caging authorizes the government to treat people in ways that otherwise would be abhorrent. For example, a person walking down the street smoking a cigarette cannot be searched by police. Even a police demand to stop walking or the probe of an officer's hand along the person's outer clothing would violate our Constitution's Bill of Rights. <sup>15</sup> But, in most of the country for the past fifty years, if that same person were smoking a cigarette containing a dried marijuana plant in addition to a dried tobacco plant, the person may be bound in metal chains, removed

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<sup>14</sup> ALBERT CAMUS, THE REBEL 3 (Anthony Bower trans., 1961).

<sup>15</sup> See [Minnesota v. Dickerson, 508 U.S. 366, 372, 378 \(1993\)](#).

from the street, strip-searched, placed in a cage, and held in solitary confinement with no human contact or natural light. <sup>16</sup> The person can be kept in that cage for decades. <sup>17</sup> The person can lose her right to vote, be removed from public housing and have her family removed from public housing, be kicked out [\*854] of school, and be barred from employment. <sup>18</sup> She can also be deprived of basic human needs, such as hugging her child or having a sexual relationship with her spouse. <sup>19</sup> All of this treatment is allowed only because the person is a "criminal."

#### A. Criminal Laws Reflect and Legitimate the Environment in Which They Are Made

Choices about what is a crime and what is not are made by politicians and within the economic, social, and racial systems in which politicians exist. As a result, for better or worse, these choices reflect the logic of, promote the legitimacy of, and protect distributions of power within those systems.

Consider, for example, that it is a "crime" in most of America for the poor to wager in the streets over dice. Wagering over international currencies, entire cities' worth of mortgages, the global supply of wheat needed to avoid mass starvation, <sup>20</sup> or ownership of public corporations is accepted behavior. <sup>21</sup> Dice-wagerers become bodies to seize, search, confine, and shun. <sup>22</sup> Their private cash is [\*855] "forfeited" to government ownership. <sup>23</sup> Wheat-wagerers become names on the wings of hospitals and museum galleries. Their cash makes them heroes, and charitable organizations providing legal services to low-income dice-wagerers in criminal prosecutions give them philanthropic awards at banquets.

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<sup>16</sup> See Tana Ganeva, *Pot Prisoners: Meet Five Victims of the War on Drugs*, ROLLING STONE (Sept. 13, 2017, 7:32 PM), <https://www.rollingstone.com/culture/culture-lists/pot-prisoners-meet-five-victims-of-the-war-on-drugs-200055/fate-vincent-winslow-200103> [<https://perma.cc/J8DH-ZSBW>] (telling the story of Fate Winslow, who is serving a sentence of life without parole for selling an undercover police officer two bags of marijuana worth \$ 10 each while he was homeless); Brooke Staggs, *This California Man Will Spend Life in Prison for a Marijuana Conviction Unless Trump or the Supreme Court Helps Him*, MERCURY NEWS (Sept. 10, 2018, 8:06 AM), <https://www.mercurynews.com/2018/09/10/this-man-will-spend-life-in-prison-for-a-marijuana-conviction-unless-donald-trump-or-the-supreme-court-helps-him> [<https://perma.cc/96CQ-TH6Z>] (discussing the case of Corvain Cooper).

<sup>17</sup> See *Hutto v. Davis*, 454 U.S. 370, 384 (1982) (Brennan, J., dissenting); Laura-Ashley Overdyke, *Life Sentence for a Bag of Marijuana?: Examples of Louisiana's Habitual Offender Law*, KTBS (Apr. 8, 2015), [https://www.ktbs.com/news/life-sentence-for-a-bag-of-marijuana-examples-of-louisiana/article\\_efbef5e8-85ff-536b-9f6d-b79702e207df.html](https://www.ktbs.com/news/life-sentence-for-a-bag-of-marijuana-examples-of-louisiana/article_efbef5e8-85ff-536b-9f6d-b79702e207df.html) [<https://perma.cc/6FVL-J9ER>].

<sup>18</sup> See generally About, NAT'L INVENTORY COLLATERAL CONSEQUENCES FOR CONVICTIONS (2019), <https://niccc.csgjusticecenter.org/about> [<https://perma.cc/QAR7-RP4D>] (describing the possible collateral consequences for people convicted of crimes).

<sup>19</sup> See Jack Smith IV, *The End of Prison Visitation*, MIC (Sept. 6, 2016), <https://mic.com/articles/142779/the-end-of-prison-visitation> [<https://perma.cc/4XQP-AETH>].

<sup>20</sup> Frederick Kaufman, *The Food Bubble: How Wall Street Starved Millions and Got Away with It*, HARPER'S MAG., July 2010, at 27 (describing how highly profitable speculation on wheat futures led to "hundreds of millions" of people starving and enormous profits for American bankers).

<sup>21</sup> So too may be dice-wagering, so long as it is done in a large casino facility that has obtained special exemptions through the political process. See, e.g., Jon Delano, *As Communities Opt Out, Process Begins to Award New Pa. Casino Licenses*, CBS PITTSBURGH (Jan. 10, 2018, 2:58 AM), <https://pittsburgh.cbslocal.com/2018/01/10/process-begins-award-new-pa-casino-licenses> [<https://perma.cc/CLL8-PPNM>]. Dice-wagering in a private house, in many places, can result in forfeiture of your house. See, e.g., *United States v. Real Prop., Titled in the Names of Godfrey Soon Bong Kang & Darrell Lee*, 120 F.3d 947, 948-49 (9th Cir. 1997) (affirming forfeiture of house used for cockfights and dice games). Large corporate wagering houses dominate the skyline of those cities.

This example is not a quirky outlier. Furthering and legitimating particular distributions of wealth and power are pervasive, defining functions of our criminal legal system--not minor, unintended byproducts.

These choices play out over the criminal law, from foundational laws criminalizing a physical breach of another person's private property to definitions of affirmative defenses like duress or necessity. (Poverty, for example, is not commonly accepted by American courts as a sufficient excuse for theft of subsistence goods.)<sup>24</sup> Our political choices answer important questions: Should it be a crime to beg for money? To charge high interest rates? To hoard wealth? To decide not to vote? To abuse a family dog? To abuse thousands of pigs to make higher profits from their flesh? To belong to a union? To decline to belong to a union? To refuse to grant mortgages to people of a certain race? To drill for oil? To seize land from indigenous people? To participate in a lynch mob? To enslave people? To refuse to pay reparations to people formerly enslaved on one's land? To spray carcinogenic chemicals into the ground to release natural gas? To hit one's child? To design political boundaries based on race? To run a bank for profit? To refuse to identify oneself to a police officer? To force sex upon a spouse? To search a person without probable cause? To beg for money? To grow tobacco? To have oral sex with another consenting adult? To hold profits offshore? To expose secret government misdeeds in the media? To dress a certain way? To possess a gun? To possess a hunting rifle ten years after a marijuana conviction? To donate to a foreign charity? To boycott apartheid? To terminate a pregnancy? To cross an imaginary boundary between two political jurisdictions to be reunited with one's child?

The standard narrative portrays "criminals" as a vast collection of individuals who have each made a choice to "break the law." Convictions and punishments [\*856] are consequences that flow naturally from that bad choice: we must enforce the "rule of law." But these crimes are not chosen because of some assessment of the amount of harm prevented, and punishments are not selected because of demonstrated penological success. The difference in the way the bureaucracy treats someone using cocaine and someone using vodka has no empirical connection to the respective harm caused by those substances or to any analysis of how to prevent addiction to them. Instead, forces external to well-reasoned policy contribute to definitions of criminality and to decisions about appropriate punishment. The criminal law is not an inviolate repository of right and wrong, but--just like any other policy fashioned in a country as unequal as ours--a tool related to cultural, racial, and economic features of our society.<sup>25</sup>

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<sup>22</sup> Compare Max Ehrenfreund, *Baltimore Police Once Used a Helicopter to Break Up a Dice Game*, WASH. POST (Aug. 12, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/08/12/baltimore-police-once-used-a-helicopter-to-break-up-a-dice-game/?utm\\_term=.e65ecb069505](https://www.washingtonpost.com/news/wonk/wp/2016/08/12/baltimore-police-once-used-a-helicopter-to-break-up-a-dice-game/?utm_term=.e65ecb069505) [<https://perma.cc/Q78F-7CHZ>], with Dan Roberts, *Wall Street Deregulation Pushed by Clinton Advisers, Documents Reveal*, GUARDIAN (Apr. 19, 2014), <https://www.theguardian.com/world/2014/apr/19/wall-street-deregulation-clinton-advisers-obama> [<https://perma.cc/N7CP-AD5N>] (describing lack of opposition to financial deregulation among top policymakers).

<sup>23</sup> [Kang, 120 F.3d at 950.](#)

<sup>24</sup> Compare Jeremy Waldron, *Why Indigence Is Not a Justification*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 98 (William C. Heffernan & John Kleinig eds., 2000) (explaining that recognizing poverty as a defense to theft would threaten the legitimacy of property ownership in a capitalist society), with Stephanie Kirchgaessner, *Theft of Sausage and Cheese by Hungry Homeless Man 'Not a Crime,'* GUARDIAN (May 3, 2016), <https://www.theguardian.com/world/2016/may/03/theft-sausage-cheese-hungry-homeless-man-not-crime-italy> [<https://perma.cc/3AAR-558K>] ("Italy's highest court has ruled that the theft of a sausage and piece of cheese by a homeless man in 2011 did not constitute a crime because he was in desperate need of nourishment.").

<sup>25</sup> See generally ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1975); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006);

Making it a crime to possess certain substances is a good example. The expansion and increase in severity of drug laws in the last forty years, as well as the lack of outrage over that punishment for many decades, has been shown to stem from a combination of conscious and subconscious biases and incentives.<sup>26</sup> It is now a federal and state crime in every American jurisdiction for any person to ingest a wide variety of substances into their own bodies.<sup>27</sup> And politicians have simultaneously decided that other harmful substances are *legal* to consume and to distribute for profit.<sup>28</sup> It was not always so. The history of drug prohibition [\*857] was influenced by the desire to criminalize conduct associated with particular groups at specific historical moments.<sup>29</sup> And now, during what punishment bureaucrats call the "war on drugs," punishment bureaucrats make a choice to "fight" drug use (when it comes to *some* drugs when used in *some* neighborhoods) not as a public health issue but through armed agents and cages. No matter what one's views on drugs, there is one thing that all agree on: these laws were *never* based on empirical evidence about the best way to create a society with less use of harmful substances.<sup>30</sup>

Why does the evidence matter so little to the punishment bureaucracy? The punishment system would change overnight if the vast numbers of young, wealthy, and white drug criminals at private schools and famous universities were harassed and beaten by police in the streets, had their family homes raided at night, were sexually and physically assaulted in prisons, and were confined to live and die in cages. The human costs of the bureaucracy would be evaluated differently if drug searches by undercover police and SWAT teams were as common at Yale University as they are down the street in the low-income neighborhoods of New Haven. The brutality of separating tens of millions of families from their loved ones--with no empirical evidence of a benefit--would not be tolerated if it were happening to different people. Our culture would see it as widespread violence in need of serious justification, if not a human

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RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY MORE EQUAL SOCIETIES ALMOST ALWAYS DO BETTER* (2009).

<sup>26</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); see also, e.g., *Top Adviser to Richard Nixon Admitted 'War on Drugs' Was Policy Tool to Go After Anti-War Activists and 'Black People,'* DRUG POL'Y ALLIANCE (Mar. 22, 2016), <http://www.drugpolicy.org/press-release/2016/03/top-adviser-richard-nixon-admitted-war-drugs-was-policy-tool-go-after-anti> [<https://perma.cc/J3NL-SYU5>].

<sup>27</sup> See Jeffrey Miron, *Why All Drugs Should Be Legal. (Yes, Even Heroin.)*, WEEK (July 28, 2014), <https://theweek.com/articles/445005/why-all-drugs-should-legal-yes-even-heroin> [<https://perma.cc/5NPG-83TU>]; cf. Zeeshan Aleem, *14 Years After Decriminalizing All Drugs, Here's What Portugal Looks Like*, MIC (Feb. 11, 2015), <https://mic.com/articles/110344/14-years-after-portugal-decriminalized-all-drugs-here-s-what-s-happening> [<https://perma.cc/DMX9-94XY>]; Ioan Grillo, *Mexico's Marijuana Ruling Shakes Up Drug Policy*, TIME (Nov. 5, 2015), <http://time.com/4100747/mexicos-marijuana-ruling-shakes-up-drug-policy> [<https://perma.cc/223V-C4HU>] (reporting that marijuana consumption was legalized "to respect personal liberties").

<sup>28</sup> See Maria Cheng, *Alcohol More Dangerous Than Heroin, Cocaine, Study Finds*, NBC NEWS (Nov. 1, 2010, 2:46 AM ET), <http://www.nbcnews.com/id/39938704/ns/health-addictions/t/alcohol-more-dangerous-heroin-cocaine-study-finds> [<https://perma.cc/8DQV-HTZQ>]; Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238, 1241-42 (2004) (estimating that, in 2000, 17,000 people died from the use or the indirect effects of the use of illicit drugs in the United States, and that 16,653 people were killed in alcohol-related car crashes); *Smoking & Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 6, 2019), [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm) [<https://perma.cc/7LWZ-QUJY>] ("Smoking is the leading cause of preventable death.").

<sup>29</sup> See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, [20 STAN. L. & POL'Y REV. 257, 263 \(2009\)](https://www.stanford.edu/publications/policyreview/article/race-drugs-law-enforcement).

<sup>30</sup> See Martha Mendoza, *Associated Press, U.S. Drug War Has Met None of Its Goals*, NBC NEWS (May 13, 2010), [http://www.nbcnews.com/id/37134751/ns/us\\_news-security/t/us-drug-war-has-met-none-its-goals](http://www.nbcnews.com/id/37134751/ns/us_news-security/t/us-drug-war-has-met-none-its-goals) [<https://perma.cc/9H7M-VDD3>]; cf. Cheng, *supra* note 28.

rights crisis demanding urgent and immediate action, rather than as a vague and impersonal aspect of the need for "law enforcement."

And so the knowledge that laws will be enforced in particular ways against particular people changes what laws powerful people create. Elites need not worry about creating crimes with harsh punishments if they know that the laws will not be enforced against them.

While many of these choices reflect background social, racial, and economic forces, other choices in the criminal law are more obvious political calculations. For example, while politicians decided to make insider trading a crime for ordinary people and private investors, they had also decided, until recently, that insider [\*858] trading should be *legal* for members of Congress. This meant that elite politicians could make millions of dollars based on inside information that they learned through lawmaking or use their control over lawmaking and regulation for personal profit. <sup>31</sup>

More broadly, much of what are now celebrated as instruments of wealth creation for investors used to be called "crimes." During the Clinton presidency, for example, bankers hoping to engage in then-illegal types of derivatives trading paid lobbyists and politicians a lot of money to change words in a federal statute that transformed, overnight, those doing certain investment banking activities from criminals into philanthropists. <sup>32</sup>

Overt political calculations similarly determine the punishment system's understanding of "terrorism." The federal government has passed a law to make it a felony to provide "material support" for "terrorist" groups. <sup>33</sup> This crime includes providing non-violent conflict resolution and peaceful advice to any group a government bureaucrat chooses to put on a list of "terrorists." <sup>34</sup> And politicians and bureaucrats are constantly revising who goes on "terrorist" lists and which people are instead "allies" to whom the United States government and private corporations sell weapons. <sup>35</sup> Often, these are the same groups at different times. To take one example, one of those "terrorist" groups, the People's [\*859] Mujahedin of Iran, recently hired dozens of the most famous retired American politicians to work on its behalf to remove it from the list of "terrorist" groups, transforming those politicians from felony terrorism offenders to

<sup>31</sup> Tamara Keith, *How Congress Quietly Overhauled Its Insider-Trading Law*, NPR (Apr. 15, 2013), <https://www.npr.org/sections/itsallpolitics/2013/04/16/177496734/how-congress-quietly-overhauled-its-insider-trading-law> [<https://perma.cc/A2U2-EVAQ>] (explaining that insider trading was legal for Congress until recently); see also David Dayen, *Sen. Jeff Merkley Wants to Stop Congress Members from Insider Trading by Banning Them from Owning Stocks*, INTERCEPT (Dec. 17, 2018, 2:03 PM), <https://theintercept.com/2018/12/17/jeff-merkley-james-inhofe-ban-stock-trading> [<https://perma.cc/MHG9-CFCH>] (discussing the failure of a new insider trading law to stop profiteering based on insider information by politicians in Congress).

<sup>32</sup> They became wealthy even as the newly legal derivatives products contributed to a worldwide financial collapse and massive global suffering. See Lynn A. Stout, *Derivatives and the Legal Origins of the 2008 Financial Crisis*, *1 HARV. BUS. L. REV. 1, 29-30 (2011)*; see also Nomi Prins, *Inside the Clintons' Cozy Relationship with the Big Banks*, ALTERNET (May 7, 2015), <https://www.alternet.org/news-amp-politics/inside-clintons-cozy-relationship-big-banks> [<https://perma.cc/4T4P-5GC9>]. The same political dynamics drive much of the tax code. See generally DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH--AND CHEAT EVERYBODY ELSE* (2003).

<sup>33</sup> 18 U.S.C. § 2399B (2018).

<sup>34</sup> David Cole, *The Roberts Court's Free Speech Problem*, N.Y. REV. BOOKS (June 28, 2010), <http://www.nybooks.com/blogs/nyrblog/2010/jun/28/roberts-courts-free-speech-problem> [<https://perma.cc/MU4P-X3HM>].

<sup>35</sup> Jennifer Williams, *Are the Austin Bombings Terrorism? It Depends Who You Ask*, VOX (Mar. 21, 2018, 12:20 PM EDT), <https://www.vox.com/2017/10/2/9868048/austin-bombings-terrorism-definition> [<https://perma.cc/672B-HNZX>].



successful lobbyists. <sup>36</sup> And during America's support for South African Apartheid, the government not only helped to capture and imprison Nelson Mandela, but it officially categorized him as a "terrorist" until 2008. <sup>37</sup>

In the same way, the federal government makes it a felony to disclose "classified" information, <sup>38</sup> and officials secretly decide what information to deem "classified." There are between two and three million bureaucrats with the ability to classify (and therefore criminalize) information, and they did so for nearly 50 [\*860] million documents in 2017. <sup>39</sup> At the same time, the federal government does not make it a crime for bureaucrats to violate Freedom of Information Act requirements, meaning that officials can fail to document their activities, refuse to disclose records when they exist, or destroy records without committing a crime. <sup>40</sup> Such violations of the law, even brazen ones, are addressed through *civil* lawsuits. <sup>41</sup> But when a military intelligence officer publicized a video of a mass murder by U.S. troops (including the murder of children arriving at the scene of the massacre to treat the wounded), she became a "criminal" sentenced to 35 years in prison because an unknown bureaucrat decided that disclosing the video to the public should be a crime. <sup>42</sup> The soldiers who murdered people on videotape were not prosecuted for their violations of the "rule of law." <sup>43</sup> Similarly, the person who disclosed lies used to justify American involvement in millions of deaths in Vietnam, Cambodia, and Laos was prosecuted in the 1970s for felonies because bureaucrats had decided to make publication of their lies a crime. <sup>44</sup>

This political process is also influenced by multibillion-dollar industries with sophisticated marketing and lobbying strategies because many corporations depend on increasing punishment. These interests include pharmaceutical companies [\*861] lobbying to block marijuana legalization and large meat corporations

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<sup>36</sup> Chris McGreal, *MEK Decision: Multimillion-Dollar Campaign Led to Removal from Terror List*, GUARDIAN (Sept. 21, 2012, 3:20 PM EDT), <https://www.theguardian.com/world/2012/sep/21/iran-mek-group-removed-us-terrorism-list> [<https://perma.cc/A63K-2L6T>]; see also *United States v. Hayat*, 710 F.3d 875, 904 (9th Cir. 2013) (Tashima, J., dissenting) (criticizing "unsettling and untoward consequences of the government's use of [a "material support"] anticipatory prosecution as a weapon in the 'War on Terror'"); Amna Akbar, *How Tarek Mehanna Went to Prison for a Thought Crime*, NATION (Dec. 31, 2013), <https://www.thenation.com/article/how-tarek-mehanna-went-prison-thought-crime> [<https://perma.cc/M8D6-6YHZ>]. People would feel differently if Saudi Arabia invaded Minnesota and local residents fought back—it would be seen as patriotic self-defense. Low-income Muslim Americans are prosecuted on charges of "material support of terrorism" for making contributions to political causes in their home countries that the United States deems inappropriate while high-ranking Congresspersons and officials aided the "terrorist" group MeK. Compare McGreal, *supra*, with Akbar, *supra*. Many of the people in the former category had the misfortune of supporting whichever political group the United States happened not to be working with at the time. This can be a difficult thing to predict in advance; after all, active U.S. support for brutal regimes or "terrorist" groups included working with Saddam Hussein to provide chemical weapons to Iraq, General Augustus Pinochet of Chile, Islamic militants in Afghanistan and Syria, and paramilitary death squads and dictators across South America, Africa, the Middle East, and Asia. See, e.g., Shane Harris & Matthew M. Aid, *Exclusive: CIA Files Prove America Helped Saddam as He Gassed Iran*, FOREIGN POLY (Aug. 26, 2013, 2:40 AM), [http://www.foreignpolicy.com/articles/2013/08/25/secret\\_cia\\_files\\_prove\\_america\\_helped\\_saddam\\_as\\_he\\_gassed\\_iran](http://www.foreignpolicy.com/articles/2013/08/25/secret_cia_files_prove_america_helped_saddam_as_he_gassed_iran) [<https://perma.cc/N36F-5V4W>]; see also, e.g., William D. Hartung, *Weapons for Anyone: Donald Trump and the Art of the Arms Deal*, TOM DISPATCH (Apr. 1, 2018, 4:33 PM), [http://www.tomdispatch.com/blog/176405/tomgram%3A\\_william\\_hartung%2C\\_selling\\_arms\\_as\\_if\\_there\\_were\\_no\\_tomorrow](http://www.tomdispatch.com/blog/176405/tomgram%3A_william_hartung%2C_selling_arms_as_if_there_were_no_tomorrow) [<https://perma.cc/Y88X-YV7N>].

<sup>37</sup> David Johnston, *C.I.A. Tie Reported in Mandela Arrest*, N.Y. TIMES (June 10, 1990), <https://www.nytimes.com/1990/06/10/world/cia-tie-reported-in-mandela-arrest.html> [<https://perma.cc/KAF6-FF6R>]; Robert Windrem, *U.S. Government Considered Nelson Mandela a Terrorist Until 2008*, NBC NEWS (Nov. 2, 2015, 7:22 PM EST), <https://www.nbcnews.com/news/world/us-government-considered-nelson-mandela-terrorist-until-2008-flna2D11708787> [<https://perma.cc/E7JN-BREU>].

lobbying to create new felony offenses for videotaping animal abuse at their factories.<sup>45</sup> They also include private prison corporations and the much larger industry of private contractors in public prisons and jails, who profit from the labor, phone calls, emails, family visits, mail, food, supplies, and medical care of prisoners.<sup>46</sup> The more people in jail or prison and the longer they remain confined to a cage, the more profit the companies make.

Simply put, political power influences what we decide to criminalize. And because political contributions effect voting behavior, groups pay political campaigns and associated entities so that politicians will create laws that benefit those groups. Laws are often passed not because they increase overall well-being, but because politicians need money to stay in power. If a would-be criminal, therefore, has a large amount of money, she can purchase the ability to be viewed as a non-criminal by changing laws. If a group of people wants other people to be called "criminals" and imprisoned, the group can pay for that as well. We could call this behavior "bribery," but instead we have decided to call it "free speech."<sup>47</sup>

To be clear, it is appropriate for a political process to make decisions about what a society should punish and what a society should celebrate. The point here is that our criminal laws are not an objective mechanism for increasing overall well-being by efficiently reducing harmful behavior. Our criminal laws are based [\*862] on some of the most arbitrary aspects of human existence, like power, racial bias, and economic self-interest--they reflect our demons, past and present.<sup>48</sup>

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<sup>38</sup> [18 U.S.C. § 798\(a\)](#) (2018).

<sup>39</sup> Alice Speri, *As FBI Whistleblower Terry Albury Faces Sentencing, His Lawyers Say He Was Motivated by Racism and Abuses at the Bureau*, INTERCEPT (Oct. 18, 2018, 7:00 AM), <https://theintercept.com/2018/10/18/terry-albury-sentencing-fbi/> [<https://perma.cc/E3A8-JE5L>]; see also Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 892-93 & n.68 (2008) (estimating that there were about three million such bureaucrats in 1999, and even more in 2008).

<sup>40</sup> See Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 148 (2006).

<sup>41</sup> See, e.g., Norman L. Eisen & Noah Bookbinder, Opinion, *Pruitt's Resignation Is Just the Beginning*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/opinion/scott-pruitt-resignation-wheeler.html> [<https://perma.cc/U7XB-PSHX>].

<sup>42</sup> Chris McGreal, *US Private Bradley Manning Charged with Leaking Iraq Killings Video*, GUARDIAN (July 6, 2010, 2:14 EDT), <https://www.theguardian.com/world/2010/jul/06/bradley-manning-charged-iraq-killings-video> [<https://perma.cc/CU3F-2D73>]; *Shooters Walk Free, Whistleblower Jailed*, DAS ERSTE (Aug. 11, 2018), <https://daserste.ndr.de/panorama/media/panor165.html> [<https://perma.cc/8L9M-L42X>]; Peter Van Buren, *Tomgram: Peter Van Buren, In Washington, Fear the Silence, Not the Noise*, TOM DISPATCH (Feb. 9, 2012, 9:31 AM), [http://www.tomdispatch.com/post/175500/tomgram%3A\\_peter\\_van\\_buren%2C\\_in\\_washington%2C\\_fear\\_the\\_silence%2C\\_not\\_the\\_noise](http://www.tomdispatch.com/post/175500/tomgram%3A_peter_van_buren%2C_in_washington%2C_fear_the_silence%2C_not_the_noise) [<https://perma.cc/EB6X-R3XT>].

### B. *The Same Processes Determine How Harshly We Punish*

Having made certain activity a "crime," society must decide how to punish it. How does the legal system choose how harshly to punish speeding, selling various derivatives of the coca plant, domestic assault, sleeping under a bridge, illegally searching someone, downloading music, committing murder, or tax evasion? Why are penalties for texting or drinking while driving more lenient than for cocaine possession even though impaired driving is more dangerous? And why are the penalties for the same crimes dramatically lower in other countries?

The same forces that determine which conduct is criminal also determine how severely different conduct is punished. To take one example, federal law famously treats crack cocaine offenses more harshly than powder cocaine offenses, even though the two substances are pharmacologically identical. For the first seven years that the disparity existed, not a single white person was prosecuted for a crack cocaine offense in seven of the largest American cities.<sup>49</sup> For decades, even the cautious U.S. Sentencing Commission wanted to remove this disparity because there is no legal or scientific basis for it.<sup>50</sup> And when Congress did reduce the disparity after a unanimous Senate vote in 2010--and millions of years in prison later--no one offered a justification for why it had existed.<sup>51</sup> But for reasons that were never articulated, the government did not remove the disparity; it chose to lower the disparity from 100:1 to 18:1.<sup>52</sup> And for more than eight years after that "Fair Sentencing Act" passed, the government chose not to make even these limited "fair" changes retroactive to help the thousands of human [\*863] beings already in prison because of a law that everyone agreed had no basis.<sup>53</sup> Close to ten years *after* the celebrated reform

<sup>43</sup> See U.S. 'Reviewing' Iraq Killing Video Posted on WikiLeaks, BBC NEWS (Apr. 8, 2010, 10:20 AM GMT) <http://news.bbc.co.uk/2/hi/americas/8608972.stm> [<https://perma.cc/7MRS-C2J8>] (stating that there were "no plans" to reinvestigate the case).

<sup>44</sup> Martin Arnold, *Ellsberg Trial: Now the Focus Is on Secrecy*, N.Y. TIMES (Mar. 5, 1973), <https://www.nytimes.com/1973/03/05/archives/ellsberg-trial-now-the-focus-is-on-secrecy.html> [<https://perma.cc/34KW-JT7Q>].

<sup>45</sup> See Alfonso Serrano, *Inside Big Pharma's Fight to Block Recreational Marijuana*, GUARDIAN (Oct. 22, 2016, 8:00 AM EDT), <https://www.theguardian.com/sustainable-business/2016/oct/22/recreational-marijuana-legalization-big-business> [<https://perma.cc/Z5PF-PJBR>]; Leighton Akio Woodhouse et al., *They Rescued Pigs and Turkeys from Factory Farms--and Now Face Decades in Prison*, INTERCEPT (Dec. 23, 2018), <https://theintercept.com/2018/12/23/dxe-animal-rights-factory-farms> [<https://perma.cc/75GD-LZTD>] (noting that legislators created an exception to the felony dollar-value threshold for misdemeanor theft to enable felony prosecution of those who rescue factory-farmed animals).

<sup>46</sup> Corrections Accountability Project, *The Prison Industrial Complex: Mapping Private Sector Players*, URBAN JUST. CTR. (2018), <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/5ade0281f950b7ab293c86a6/1524499083424/The+Prison+Industrial+Complex+-+Mapping+Private+Sector+Players+%28April+2018%29.pdf> [<https://perma.cc/5BU3-S3PY>].

<sup>47</sup> *Citizens United v. FEC*, 558 U.S. 310, 365 (2010); see also, e.g., Gary Rivlin, *A Giant Pile of Money*, INTERCEPT (Oct. 20, 2018), <https://theintercept.com/2018/10/20/public-pensions-crisis-wall-street-fees> [<https://perma.cc/G6BU-XU8L>] (noting one example in which newly unregulated political donations by hedge funds led to different investment decisions by public pension managers and billions of dollars in public pension losses); see also, e.g., Tom Angell (@tomangell), TWITTER (Nov. 26, 2018), <https://twitter.com/tomangell/status/1067071136964448257> [<https://perma.cc/K524-VDOQ>].

under the Obama Administration, the 18:1 punishment disparity is still law, and thousands sentenced to decades in prison under the policy continue to languish.

Besides determining the severity of punishment, these forces influence the way people are punished. For many decades, white elites in the South used the punishment system to transfer wealth, confiscate land, and preserve racial hierarchy through convict leasing--that is, criminalizing people so that their bodies could be forced to work for profit.<sup>54</sup> In contemporary prisons throughout the United States, 800,000 people work long hours every day in often dangerous conditions with miniscule wages to produce products for private corporations and government entities so that prisoners can afford to purchase basic necessities sold by other private corporations inside prison walls.<sup>55</sup> In this way, prisoners work to afford phone calls to their families or toilet paper, soap, and nutritious food--needs that the prisons create in order to coerce this labor.<sup>56</sup> This ubiquitous overcharging of prisoners and their families for basic necessities and the monetizing of human contact with one's family are not based on what would help improve health, wellness, and community safety during or after release from prison, but on what maximizes profit.

Our society has created other punishments to promote different political interests. For example, in the early twentieth century, Alabama passed a law that took away a person's ability to vote if the person was caught possessing cocaine. That law was first passed for the purpose of reducing the number of black people [\*864] voting.<sup>57</sup> In the most recent national election, there were nearly 6 million Americans who could not vote the because of the decision to prosecute them in the punishment system, and nearly forty percent of those who could not vote were black.<sup>58</sup> Until recently, Florida alone chose to disenfranchise so many people that 1.5 million people and forty percent of all black males in Florida could not vote in the 2018 election.<sup>59</sup> These Florida laws also had the purpose of limiting the political power

<sup>48</sup> See, e.g., DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 53-54 (2008) (explaining that, for the purpose of "reintroducing the forced labor of blacks" through convict leasing, "[b]eginning in the late 1860s . . . every southern state enacted an array of interlocking laws essentially intended to criminalize black life"); Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 980-81 (1968) (discussing the "vigorously enforced" espionage acts passed during the First World War).

<sup>49</sup> [United States v. Blewett](#), 719 F.3d 482, 487 (6th Cir. 2013), rev'd en banc, 746 F.3d 647 (6th Cir. 2013).

<sup>50</sup> COCAINE AND FEDERAL SENTENCING POLICY, U.S. SENTENCING COMM'N iii (Feb. 1995).

<sup>51</sup> See Julie Stewart, *Well Done Congress, Now Make Fair Sentencing Act Retroactive*, HUFFPOST (Aug. 4, 2010), [https://www.huffingtonpost.com/julie-stewart/well-done-congress-now-ma\\_b\\_671008.html](https://www.huffingtonpost.com/julie-stewart/well-done-congress-now-ma_b_671008.html) [<https://perma.cc/3LYK-MQMP>].

<sup>52</sup> *Id.*

<sup>53</sup> See First Step Act of 2018, Pub. L. No. 115-391, § 404, [132 Stat. 5194](#); [United States v. Blewett](#), 746 F.3d 647, 660 (6th Cir. 2013).

<sup>54</sup> BLACKMON, *supra* note 48.

<sup>55</sup> Whitney Bennis, *American Slavery, Reinvented*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/prison-labor-in-america/406177/> [<https://perma.cc/QTT7-R78P>]; see also Luis Gomez, *For \$ 1 an Hour, Inmates Fight California Fires. 'Slave Labor' or Self-Improvement?*, SAN DIEGO UNION TRIB. (Oct. 20, 2017), <http://www.sandiegouniontribune.com/opinion/the-conversation/sd-how-much-are-california-inmate-firefighters-paid-to-fight-wildfires-20171020-htmlstory.html> [<https://perma.cc/Y7OZ-KNOB>].

<sup>56</sup> Timothy Williams, *The High Cost of Calling the Imprisoned*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html> [<https://perma.cc/HO8J-XDLP>].

of black people.<sup>60</sup> When it became unlawful to deny the right to vote to people based on the color of their skin, a similar result could be accomplished by denying the right to vote if a person committed certain crimes, knowing that "law enforcement" would disproportionately arrest and prosecute people with black skin for those crimes. It is remarkable that many "rule of law" proponents treat these elections as democratic and the laws produced after them as valid even while accepting that large percentages of people are prohibited from casting a ballot because of political decisions made based on their skin color.

In addition to being caged and stripped of the right to vote, people are punished in other ways. One component of contemporary "law enforcement" for drug crimes, for example, is that an entire family can be removed from their home for one person's drug crime, even a grandmother who had no knowledge that her grandson possessed a substance that the government put on a list of substances for which a family could lose a home.<sup>61</sup>

**[\*865]** *C. We Have Different Rules of Law, and They Are Inconsistent*

How we punish is complicated in another important respect: our laws conflict in ways that make it impossible to apply the "rule of law" without choosing between competing rules. But which laws prevail when rules of law conflict and, thus, which laws come to define the "rule of law" in mainstream consciousness?

One of the bedrock principles of American constitutional law is that when a person has a constitutional right, the government may not deprive a person of that right without sufficient justification.<sup>62</sup> For example, under the First and Second Amendments, I have a right to publish an essay about the dangers of "criminal justice reform" discourse, and to possess a firearm in my home. If the government wants to take away either of these rights, it has to demonstrate that it has good reasons. In the same way, a long line of Supreme Court cases has established that the right to physical bodily liberty is "fundamental" and lies at the "core" of the liberty that the Due Process Clause protects.<sup>63</sup>

<sup>57</sup> Mark Joseph Stern, *Alabama's Failure of Moral Turpitude*, SLATE (Oct. 6, 2016), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/10/alabama\\_s\\_grossly\\_unconstitutional\\_felony\\_disenfranchisement\\_scheme.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/10/alabama_s_grossly_unconstitutional_felony_disenfranchisement_scheme.html) [<https://perma.cc/CCG8-H32L>].

<sup>58</sup> Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT 1 (July 17, 2018), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer> [<https://perma.cc/6KS2-7AUL>].

<sup>59</sup> See Steve Bousquet, *Florida's Felon Disenfranchisement System Under Intense National Glare*, TAMPA BAY TIMES (Sept. 11, 2018), <https://www.tampabay.com/florida-politics/buzz/2018/09/11/pleading-for-the-right-to-vote-in-florida-one-case-at-a-time> [<https://perma.cc/J2NK-X72L>]. A ballot measure passed in 2018 that was designed to restore the right to vote for most people with felony convictions in Florida. Tim Mak, *Over 1 Million Florida Felons Win Right to Vote with Amendment 4*, NPR (Nov. 7, 2018, 2:46 AM ET), <https://www.npr.org/2018/11/07/665031366/over-a-million-florida-ex-felons-win-right-to-vote-with-amendment-4> [<https://perma.cc/5BF2-T5LZ>].

<sup>60</sup> See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 8-10 (2006); Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 454 (1982).

<sup>61</sup> See *Dep't of Hous. v. Rucker*, 535 U.S. 125, 136 (2002).

<sup>62</sup> See, e.g., *Washington v. Harper*, 494 U.S. 210, 220 (1990).

<sup>63</sup> *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)).

The value of bodily liberty has been a central theme of law for centuries. For example, American courts have long required a high constitutional burden of proof in criminal cases: no person can be imprisoned unless the government proves *beyond a reasonable doubt* that she is guilty.<sup>64</sup> This reflects a paramount libertarian concern with agents of the state doing violence to a person's body by confining a person to a cage against her will. But while the legal system thinks of itself as applying extreme rigor to decisions about when a person can be caged, it does not apply any rigor to an antecedent question: Is this conduct something for which we should cage a human being?

Consider an example: your friend is stopped by police on the street and searched. The search reveals a small capsule of cocaine powder in her pocket. Your friend is charged with possession of cocaine, which is subject in her state to a penalty of five years in prison. Your other friend, who was also searched, had only a pack of cigarettes in her bag--she was not arrested. A third friend had a bottle of whiskey in his backpack that the three had just purchased from the nearby alcohol distribution trafficking enterprise--he too was allowed to leave. The cocaine possessor was eventually taken to trial. Because of the foundational importance of human liberty to the constitutional Framers, she was cloaked in [\*866] innocence and would be caged for five years only if the government proved beyond a reasonable doubt that she knowingly possessed the cocaine powder. But the "reasonable doubt" rule did little for her. It was easy for the government to prove that she knowingly possessed the cocaine found in her own pocket.

However, it would be *very* difficult for the government to prove that putting your friend in a cage for that cocaine possession served a compelling interest, let alone that it served that compelling interest in a *better* way than other alternative responses to cocaine possession--the standard we would apply if the government attempted to forbid the publication of this essay or seize my guns. Indeed, at least with respect to drug laws, it may be an insurmountable burden, given the existing empirical and scientific evidence. One of the remarkable features of the contemporary criminal system is that most punishment bureaucrats are aware of how ineffective caging people who use certain drugs is at addressing any social ill whatsoever, but they continue to enforce that punishment.

To accomplish this result, an entire strand of constitutional law--due process jurisprudence requiring the government to demonstrate a good reason to deprive a person of her bodily liberty--is ignored to enforce drug laws. I have struggled to find a single judicial opinion acknowledging, let alone confronting, this legal problem. The reason for this silence is that the principle of the "rule of law" cannot be applied at the same time to the law requiring a mandatory ten-year prison sentence for a crack cocaine offense and to the law that the government must prove that depriving a person of a fundamental liberty interest such as physical freedom is necessary to serve an identifiable public good.

In contrast, look at how our society has chosen to deal with a variety of other evils. One can be sued for racial discrimination or sexual harassment at work, for instance, but one cannot typically be prosecuted for that conduct, even though it might cause a lot of harm. The political system has chosen to pursue these other important goals without resort to the criminal system. Even assuming that preventing private individuals from choosing to ingest certain non-alcohol and non-tobacco drugs can create a compelling state interest--a proposition that would take its own justification--a variety of other alternatives to human caging exist to reduce drug use: education, employment, companionship, after-school art and theater

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<sup>64</sup> *In re Winship*, 397 U.S. 358, 362 (1970). American criminal law recognizes the importance of human liberty in a wide variety of other doctrines--such as the rule of lenity, which requires courts to interpret ambiguity in any criminal law in favor of liberty and against punishment. See, e.g., *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

programs, medical and mental health care, addiction treatment, and stable housing, to name a few. No government in any jurisdiction in the United States has proven that human caging is a way to reduce drug use at all, let alone the least intrusive way. Instead, a mountain of evidence suggests that the punishment approach to drugs has actually *increased* drug use and the harms the punishment bureaucracy [\*867] associated with it, including by diverting funds from evidence-based alternatives. <sup>65</sup>

The pathology through which people who call themselves "law enforcement" officials have come to acquiesce in this punishment is revealing. It would be intolerable to our legal system for a person to spend a moment in a cage for cocaine possession if the person did not possess cocaine. But many "rule of law" proponents care nothing for the question: why is it tolerable for a person to spend a moment in a cage when they *have* possessed cocaine? To answer that question, we would need to ask a further question: is human caging the best way, or even a reasonable way, to minimize the harms that cocaine possession causes?

Thus we have a central paradox of American criminal law: in order to put a person in prison, we have to prove by overwhelming evidence that she merits punishment in a narrow factual sense; but in order to put millions of people in prison, we do not need show that doing so would do any good. Under the unspoken consensus of the "rule of law," a law authorizing millions of people to be caged for certain conduct will be enforced so long as there is a "rational basis" for it--and the courts define "rational basis" to mean any potential reason, no matter how unpersuasive, and even if it was not the actual reason for the law. <sup>66</sup> This is almost the *exact opposite* of the "beyond a reasonable doubt" approach that we are told the Constitution requires for taking away bodily liberty. In the latter, a person must not be caged so long as there could be a single reason to doubt her factual eligibility for incarceration.

In this way, courts have chosen to enforce certain rules of criminal law over rules of constitutional law that constrain government violence to individual liberty, even though this order of priority defies the most basic "rule of law" in the legal system: that the Constitution trumps other laws. Thus, if a legislature created mandatory 10-year prison punishments for buying products derived from animals or for drinking red wine, it might be difficult for the government to prove that the prison terms were the least restrictive way of promoting a compelling interest in environmental or public health. This scenario is unlikely to [\*868] happen, but not because the courts would scrutinize whether the law violates a higher rule of constitutional law. It would not happen because such policies would be politically unpopular among groups with power.

Such flouting of foundational rules of law would be unthinkable in noncriminal areas. Consider an example: Suppose that a state passes a law establishing that parents lose custody of their children if they endanger their child's health, and that allowing a child to drink sugary sodas is a danger to child health. A

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<sup>65</sup> See Nicholas Kristof, Opinion, *How to Win a War on Drugs*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/opinion/sunday/portugal-drug-decriminalization.html> [<https://perma.cc/C2AZ-8UMJ>]; More Imprisonment Does Not Reduce State Drug Problems, PEW CHARITABLE TR. 11 (Mar. 2018), [https://www.pewtrusts.org/-/media/assets/2018/03/pspp\\_more\\_imprisonment\\_does\\_not\\_reduce\\_state\\_drug\\_problems.pdf](https://www.pewtrusts.org/-/media/assets/2018/03/pspp_more_imprisonment_does_not_reduce_state_drug_problems.pdf) [<https://perma.cc/DQ4X-S8OK>]; Susan Scutti, *Worldwide Drug Use Steady, but Heroin on Rise in U.S., U.N. Report Says*, CNN (June 23, 2016), <https://www.cnn.com/2016/06/23/health/un-world-drug-report/index.html> [<https://perma.cc/6C6U-7TYR>]; see also Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html> [<https://perma.cc/H2ZM-HCUW>].

<sup>66</sup> See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993).

federal judge hands her youngest daughter a Coca-Cola drink at a family party. A police officer standing on the street witnesses the incident through the window. Several days later, the judge's house is raided, the child and several cans of soda are removed from the home, and the state petitions to terminate parental rights. If the judge challenged the law that parents could lose their parental rights if they let their children drink soda, the law would be subject to heightened scrutiny because raising one's child is a "fundamental" right under the constitutional "rule of law."<sup>67</sup> Courts would ask whether the law served a compelling government interest (say, for example, child health) and then whether the law's termination of parental rights was the most narrowly tailored way to achieve that health-related goal.<sup>68</sup> The judge would likely win because it would be difficult for the government to prove the necessity of the drastic step of terminating parental rights to promote a Coca-Cola-free life for children.

But what if the law has a companion provision? What if it also *criminalizes* the distribution of sugary sodas to minors, punishing that behavior with a mandatory sentence of ten years to life in prison? When the federal judge challenges *that* law in court, the courts would, under their current abdication of these principles, refuse to review the criminal law for anything other than a "rational basis." The judge could be sentenced to twelve years of physical confinement. The judge can secure parental rights because the law lacks rigorous justification, but she will lose her bodily liberty and, incidentally, the ability to raise her daughter.

The whole criminal system is pervaded by similar inconsistencies in the "rule of law." To take one ubiquitous example, the Constitution requires that every guilty plea waiving the constitutional right to trial by a jury of one's peers be knowing, intelligent, and voluntary.<sup>69</sup> But no one who works in the criminal system thinks that contemporary plea bargaining produces voluntary agreements. [\*869] The vast majority of plea bargains are accepted by people who are told that they will be imprisoned for longer if they do not give up their right to a jury trial. Many of these people are in jail and are told that pleading guilty is the only immediate way out of jail.<sup>70</sup> In no other cultural context would the word "voluntary" describe this arrangement. Should my coworker ask a person out on a dinner date but tell the person that, if he does not accept, he will be placed in a cage, no one would view the person's agreement to dine with my coworker as voluntary. That's not how we understand "voluntary" actions. And yet, because we are attempting to arrest and process historically unprecedented numbers of people in the punishment bureaucracy, the system would collapse if people exercised the jury right envisioned by those who wrote the Constitution.<sup>71</sup> For that reason, the most important "rule of law" in our legal system--the Bill of

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<sup>67</sup> *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). Thus, a law stripping felons of the right to parent would be struck down instantly. But we effect the same result when we put someone in prison for a drug offense.

<sup>68</sup> See *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

<sup>69</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts . . .").

<sup>70</sup> See *Odonnell v. Harris Cty.*, 251 F. Supp. 3d 1052, 1105 (S.D. Tex. 2017); see also, e.g., Lise Olsen & Anita Hassan, 298 *Wrongful Drug Convictions Identified in Ongoing Audit*, HOUST. CHRON. (July 16, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/298-wrongful-drug-convictions-identified-in-8382474.php> [<https://perma.cc/9775-K2PL>].

<sup>71</sup> See *Lafler v. Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (lamenting the elevation of plea bargaining from a "necessary evil" to a "constitutional entitlement").



Rights--is ignored as a matter of practice in millions of cases every year.<sup>72</sup> The U.S. Supreme Court itself has acknowledged that it will not deem threats-based plea bargains involuntary in part *in order to* facilitate the mass caging of human beings.<sup>73</sup> In this respect, the post-arrest criminal system is not "law enforcement," but a bureaucracy designed and permitted to circumvent the "rule of law" when necessary to pursue the aims that political elites have assigned to it.

Similar problems exist throughout the application of the "rule of law" in the punishment bureaucracy. In the case of Ezell Gilbert, the federal courts acknowledged that Mr. Gilbert (like tens of thousands like him) was imprisoned under an illegal sentence that was more than ten years longer than allowed by federal law.<sup>74</sup> He was released after many years in federal prison after a federal appeals court finally granted his second petition for release.<sup>75</sup> But lawyers working for the executive branch run by President Obama and Attorney General Eric Holder urged the court to reconsider.<sup>76</sup> A larger group of judges chose to prioritize a [\*870] legal rule that a prisoner cannot file *two* petitions for release, even if the first one was wrongly denied and even if the person is wrongfully in prison.<sup>77</sup> Despite federal prosecutors and judges admitting that Mr. Gilbert was improperly sentenced, the federal court decided that the legal rule of "finality" was more important than the conflicting legal rule that people should not be in prison because of illegal convictions or sentences.<sup>78</sup> This, it was said, was the result that the "rule of law" required.<sup>79</sup> Despite having been freed from illegal confinement for months, Mr. Gilbert was arrested by U.S. Marshals and sent back to prison to finish his illegal sentence. Take a moment to think about how you might explain that collective social choice to your family over dinner.

The choice by "law enforcement" to prioritize some criminal laws over more fundamental rules of constitutional law that are inconsistent with those criminal laws results in far less actual liberty from imprisonment in the United States than in any other country in the world, even those countries that do not have the procedural protections afforded by the libertarians who wrote the Bill of Rights. If offered a choice between criminal systems, those with brown skin or those living in poverty might rationally choose *any* other country, given that their absolute chances of being imprisoned would be lower.

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<sup>72</sup> See Robert Schehr, *The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea Bargaining*, 2 TEX. A&M L. REV. 385, 389 (2015).

<sup>73</sup> *Brady*, 397 U.S. at 752-53 (1970) (holding that plea bargains induced by the threat of a higher penalty--in that case, the death penalty--are not involuntary in part because a contrary holding would strain "scarce judicial and prosecutorial resources").

<sup>74</sup> *Gilbert v. United States*, 640 F.3d 1293, 1301 (11th Cir. 2011).

<sup>75</sup> *Id.* at 1302.

<sup>76</sup> *See id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Alec Karakatsanis, Opinion, *President Obama's Department of Injustice*, N.Y. TIMES (Aug. 18, 2015), <https://www.nytimes.com/2015/08/18/opinion/president-obamas-department-of-injustice.html> [<https://perma.cc/MAR6-APT8>].

<sup>79</sup> *Gilbert*, 640 F.3d at 1327 (Pryor, J., concurring); see also *Blewitt v. United States*, 746 F.3d 647 (6th Cir. 2013) (en banc) (reversing, at the Obama Justice Department's urging, a Sixth Circuit panel's holding that the Fair Sentencing Act's reduction of the 100-to-1 crack-to-power cocaine sentencing disparity applied retroactively).

Modern courts have not reckoned with these issues because the consequences of adhering to the Framers' liberty-advancing principles is the specter that haunts the mass incarceration system built in the last forty years. When the needs of power and bureaucracy conflict with "the rule of law," our punishment system ignores the "rule of law." As Justice Brennan observed, the courts have been afraid that the assembly-line punishment bureaucracy could not withstand "too much justice."<sup>80</sup>

**[\*871] vi**

[I]t is forbidden to kill; therefore all murderers are punished, unless they kill in large numbers, and to the sound of trumpets . . . .

--Voltaire<sup>81</sup>

Criminal laws are an important way in which the punishment bureaucracy accomplishes mass human caging. But the choices that most define our criminal system today relate to how those laws are *enforced*.

Nearly everyone commits a crime on a regular basis: "disorderly conduct" by shouting too loud in the street at night, downloading a song without paying for it, pushing someone after a heated moment in the schoolyard or the company softball league, failing to declare cash income at a summer job, giving a prescription pill to a friend with back pain, using marijuana to treat a child's seizures, fishing in an undesignated spot, failing to fully stop at a stop sign, walking a dog without a leash, hiding money in an offshore bank account, withholding exculpatory evidence in a criminal prosecution, making misleading statements in a business transaction, stumbling down the street drunk after a party, hiring a worker who was born in another country but does not have work authorization, stopping and frisking someone without basis, systemically fabricating mortgage documents, giving a teenager a sip of wine, ordering drone assassinations, and more. We commit an incalculable number of legal violations every day. Only a tiny fraction of those violations, however, are ever targeted for punishment.

When almost all of us are criminals, the choice of which violations to "enforce" determines what the legal system looks like in the real world.<sup>82</sup> I have explained how we choose to make laws authorizing and calibrating punishment for certain conduct. Here, I explore how those laws are *enforced*. Of all the people who violate laws, how does society decide who will be punished and who will not?

**[\*872]** Consider a few snapshots of the decisions that "law enforcement" officials are making: in 2015, more people were handcuffed and caged for marijuana offenses than for all violent crimes combined.<sup>83</sup> In many jurisdictions, the single most common criminal prosecution is for driving with a suspended

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<sup>80</sup> *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

<sup>81</sup> Voltaire, *Droit [Rights]*, in 4 QUESTIONS SUR L'ENCYCLOPÉDIE [QUESTIONS ON THE ENCYCLOPEDIA] 364, 367 (1771) ("[I] est défendu de tuer. Tout meurtrier est puni, à moins qu'il n'ait tué en grande compagnie, & au fon des trompettes . . . .") (translated by the author).

<sup>82</sup> Cf. Radley Balko, *You're Probably a Federal Criminal, Too*, REASON (July 25, 2009), <https://reason.com/blog/2009/07/25/youre-probably-a-federal-crimi> [<https://perma.cc/5BQQ-5UN7>]; L. Gordon Crovitz, Opinion, *You Commit Three Felonies a Day*, WALL ST. J. (Sept. 27, 2009), <https://www.wsj.com/articles/SB10001424052748704471504574438900830760842> [<https://perma.cc/JSU3-VT9L>]; *Luxury to Forget*, WE ARE ALL CRIMINALS (2019), <https://www.weareallcriminals.org/category/luxury-to-forget/> [<https://perma.cc/UCD7-SM97>].

<sup>83</sup> Timothy Williams, *Marijuana Arrests Outnumber Those for Violent Crimes, Study Finds*, N.Y. TIMES (Oct. 12, 2016), <https://www.nytimes.com/2016/10/13/us/marijuana-arrests.html> [<https://perma.cc/CT23-HCW6>].

license,<sup>84</sup> and about forty percent of suspended American drivers' licenses were taken away not for any reason related to driving, but because a person was too poor to pay court debts.<sup>85</sup>

I make three points in this Part: first, discretionary authority to decide who is punished is vested almost entirely in a group of prosecutors and armed agents. Bureaucrats *decide* which offenses to punish and which to ignore.<sup>86</sup> The people making these choices call themselves "law enforcement."

Second, like society's choices about what conduct is criminalized and how severely that conduct is punished, decisions about who to target (and how and when to target them), are also driven by political, cultural, social, and economic forces. They are also made by particular cohorts of people who bring their life experiences and perspectives to their decisions. For example, American prosecutors are mostly men, almost all white, and share a number of other similarities across religious, class, and educational backgrounds.<sup>87</sup>

[\*873] Third, the "rule of law" is an important story that the punishment system uses to make its decisions appear to be the natural, inevitable consequences of individual law-breaking rather than distributive choices. Laws are broken. Laws are enforced. It must be so. One is punished because one breaks the law. "Law enforcement" officials exist not to pursue political, racial, and economic goals through strategic choices, but neutrally to administer mutually agreed-upon rules for everyone's benefit. This conventional story is wrong.

#### A. "Law Enforcement" Is About Making Choices

Our apologies good friends for the fracture of good order the burning of paper instead of children . . . .

--Father Daniel Berrigan<sup>88</sup>

#### 1. Prosecutorial Discretion

<sup>84</sup> See, e.g., Natalie Johnson, *State Senators Propose Reform for Driving with Suspended License Law*, CHRON. (Jan. 12, 2018), [http://www.chronline.com/crime/state-senators-propose-reform-for-driving-with-suspended-license-law/article\\_2996cdf8-f824-11e7-bd9e-ff4084d58384.html](http://www.chronline.com/crime/state-senators-propose-reform-for-driving-with-suspended-license-law/article_2996cdf8-f824-11e7-bd9e-ff4084d58384.html) [<https://perma.cc/6RL6-YG52>]; Farida Jhabvala Romero, *Driving with Suspended License Top Crime in Menlo Park, Many Lose Licenses*, PENINSULA PRESS (June 17, 2015), <http://peninsulapress.com/2015/06/17/driving-suspended-license-top-crime-in-menlo-park-california> [<https://perma.cc/56FX-BG89>].

<sup>85</sup> Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015, 3:30 AM ET), <https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor> [<https://perma.cc/VL8Z-HFP5>]; see also Denise Lavoie, *Drivers Challenge License Suspensions for Unpaid Court Debt*, ASSOCIATED PRESS (July 4, 2018), <https://apnews.com/3f83b360a1f141f4a794f4203c7eab2f> [<https://perma.cc/8UVV-6297>] (reporting that there are 4.2 million people with licenses suspended or revoked due to unpaid court debt in Virginia, Tennessee, Michigan, North Carolina, and Texas alone).

<sup>86</sup> See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 3-4 (2011) (observing that prosecutors have wide latitude in deciding whom to target for prosecution).

<sup>87</sup> See, e.g., Nicholas Fandos, *A Study Documents the Paucity of Black Elected Prosecutors: Zero in Most States*, N.Y. TIMES (July 7, 2015), <https://www.nytimes.com/2015/07/07/us/a-study-documents-the-paucity-of-black-elected-prosecutors-zero-in-most-states.html> [<https://perma.cc/L9RG-MWSY>]; Justice for All\*?, WHO LEADS, <https://wholeads.us/justice> [<https://perma.cc/KJZ2-SX7R>].

<sup>88</sup> DANIEL BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* 93 (2004).

Government employees called "prosecutors" decide the people against whom to initiate the state's machinery of physical force. Prosecutors have nearly unlimited authority to decide whom to charge with a crime and how harsh a punishment to pursue for it.<sup>89</sup>

Prosecutors make decisions about what crimes to investigate,<sup>90</sup> what crimes to ignore, whether to file charges in any particular case of lawbreaking, whether to seek pretrial detention, whether to seek mandatory minimum prison sentences, whether to permit a plea bargain, and how severe a punishment to seek, including whether to seek the death penalty, life in prison, decades in prison, probation, or diversion from punishment entirely. Because courts have removed themselves from this process and because there is typically no independent oversight of prosecutors, there is effectively no check on the exercise of American prosecutorial power.<sup>91</sup> And in most jurisdictions, there is no mechanism for the public to initiate an independent prosecution.

[\*874] This power is executed with little fanfare thousands of times every day as prosecutors decide which arrests to convert into prosecutions. In many jurisdictions, large percentages of arrests never end up in prosecution.<sup>92</sup>

Prosecutorial discretion exists all around us. It floats in the ether, largely unnoticed, because the vast majority of its exercise lies in the body of human behavior that prosecutors choose to ignore. Examining virtually any set of prosecutorial actions illustrates that they are political *choices*. Here, I'll look at a few examples that were extensively reported.

It is now known that U.S. government employees committed the crime of torture during what they called the "war on terror."<sup>93</sup> That widespread torture occurred and that it constituted a federal crime is not in dispute. The torture of human beings included, at least as far as we know: physical beatings,<sup>94</sup> anal rape,<sup>95</sup> mutilation of genitals,<sup>96</sup> electric shocks to the body,<sup>97</sup> waterboarding<sup>98</sup> (a crime for which the

<sup>89</sup> See, e.g., *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979).

<sup>90</sup> As discussed below, police also have investigative discretion. See *infra* Section VI.A.2.

<sup>91</sup> See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J.F. 203, 213 (2011).

<sup>92</sup> See Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 3, 36-49 (2000).

<sup>93</sup> Indeed, as discussed later, some Americans were even convicted in foreign courts of those crimes. See *3 Americans Convicted of Torture in Afghanistan*, CBC NEWS (Sept. 15, 2004), <https://www.cbc.ca/news/world/3-americans-convicted-of-torture-in-afghanistan-1.4980> 47 [<https://perma.cc/G5P3-PFNU>]; see also Lindsay Goldwert, *Iraq: 2 U.S. Soldiers Charged with Murder*, CBS NEWS (July 1, 2007), <https://www.cbsnews.com/news/iraq-2-us-soldiers-charged-with-murder/> [<https://perma.cc/B5EF-P62C>]; Rebecca Hersher, *Ex-CIA Officer in Rendition Case Is Released After Italy Grants Partial Clemency*, NPR (Mar. 1, 2017), <https://www.npr.org/sections/two-way/2017/03/01/517916196/italy-grants-partial-clemency-to-ex-cia-officer-over-extraordinary-rendition> [<https://perma.cc/COQ8-KETD>].

<sup>94</sup> Oliver Laughland, *How the CIA tortured its Detainees*, GUARDIAN (May 20, 2015), <https://www.theguardian.com/us-news/2014/dec/09/cia-torture-methods-waterboarding-sleep-deprivation> [<https://perma.cc/2QAT-8GVL>].

<sup>95</sup> Spencer Ackerman et al., *Senate Report on CIA Torture Claims Spy Agency Lied About 'Ineffective' Program*, GUARDIAN (Dec. 9, 2014), <https://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-released> [<https://perma.cc/4BD7-L268>].

<sup>96</sup> Reuters, *CIA Sex Abuse and Torture Went Beyond Senate Report Disclosures, Detainee Says*, GUARDIAN (June 2, 2015), <https://www.theguardian.com/us-news/2015/jun/02/cia-sexual-abuse-torture-majid-khan-guantanamo-bay> [<https://perma.cc/T4C5-NE76>].

United States previously prosecuted foreign soldiers<sup>99</sup>), [\*875] chaining people naked to walls in freezing temperatures until they died,<sup>100</sup> hanging people by their arms until it appeared that their shoulders would break,<sup>101</sup> locking a person in a box with insects,<sup>102</sup> forcing people to remain awake for eleven straight days,<sup>103</sup> and other physical and psychological tactics designed to inflict pain so severe that the inability to bear that pain would lead to people providing information.<sup>104</sup> Many people were killed by government employees during these torture sessions--federal prosecutors knew of at least 100 such deaths.<sup>105</sup> The details of these crimes and the surrounding criminal conspiracy are set forth in the findings of every public military, civilian, and international investigation conducted, and they are found in the admissions of the torturers themselves.<sup>106</sup> Moreover, no one disputes that further crimes were committed when the CIA destroyed videotapes documenting its employees torturing people.<sup>107</sup>

No person was prosecuted for torture, murder, or for destroying the videos of government employees committing these crimes.<sup>108</sup> Prosecutors chose instead [\*876] to ignore these violations of federal criminal law.<sup>109</sup> The official prosecutorial reason for the decision not to prosecute these crimes was that we must "look forward, not backward."<sup>110</sup> This is a philosophy of prosecution that every convicted person confined in jails and prisons would love to embrace: every person prosecuted in an American courtroom is charged with committing a crime in the past.

The only person who federal prosecutors used their discretion to prosecute for his role in the torture program was John Kiriakou, a high-level CIA official formerly in charge of the CIA's covert operations.<sup>111</sup> Kiriakou was not prosecuted for torture or for destroying the videos of torture. Instead, Kiriakou's crime was revealing details about the torture to the public, a violation of the rules against disclosure of information that bureaucrats choose to make secret.<sup>112</sup>

<sup>97</sup> Eric Schmitt & Carolyn Marshall, *In Secret Unit's 'Black Room,' a Grim Portrait of U.S. Abuse*, N.Y. TIMES (Mar. 19, 2006), <https://www.nytimes.com/2006/03/19/world/middleeast/in-secret-units-black-room-a-grim-portrait-of-us-abuse.html> [<https://perma.cc/AQ6Q-6JU6>].

<sup>98</sup> See Ackerman et al., *supra* note 95.

<sup>99</sup> Evan Wallach, *Waterboarding Used to Be a Crime*, WASH. POST (Nov. 4, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201170.html> [<https://perma.cc/POB8-3GLA>].

<sup>100</sup> See Larry Siems, *Inside the CIA's Black Site Torture Room*, GUARDIAN (Oct. 9, 2017), <https://www.theguardian.com/us-news/ng-interactive/2017/oct/09/cia-torture-black-site-enhanced-interrogation> [<https://perma.cc/2XF5-QYUS>].

<sup>101</sup> Jeremy Scahill, *U.S. Navy Reserve Doctor on Gina Haspel Torture Victim: "One of the Most Severely Traumatized Individuals I Have Ever Seen"*, INTERCEPT (May 17, 2018), <https://theintercept.com/2018/05/17/gina-haspel-cia-director-torture/> [<https://perma.cc/H2DM-4LZ5>].

<sup>102</sup> Michael Scherer, *Bush Torture Memo Approved Use of Insects*, TIME (Apr. 16, 2009), <http://content.time.com/time/nation/article/0,8599,1891812,00.html> [<https://perma.cc/ZZ2V-EGPQ>].

<sup>103</sup> *CIA Was Authorized to Keep Prisoners Awake for 11 Days*, ALTERNET (May 11, 2009), [https://www.alternet.org/story/139953/cia\\_was\\_authorized\\_to\\_keep\\_prisoners\\_away\\_for\\_11\\_days](https://www.alternet.org/story/139953/cia_was_authorized_to_keep_prisoners_away_for_11_days) [<https://perma.cc/SPZ9-K7LP>].

<sup>104</sup> Scahill, *supra* note 101.

<sup>105</sup> Glenn Greenwald, *The Suppressed Fact: Deaths by U.S. Torture*, SALON (June 30, 2009), [https://www.salon.com/2009/06/30/accountability\\_7/](https://www.salon.com/2009/06/30/accountability_7/) [<https://perma.cc/8ULM-3VZT>].

[\*877] Consider an example closer to home: On May 13, 1985, Philadelphia police officers boarded a helicopter and flew over a de-facto segregated black neighborhood.<sup>113</sup> On the orders of the Police Commissioner, when hovering over the home of a group of black liberation activists and their children, the officers dropped a bomb.<sup>114</sup> City officials initially ordered the fire department to "let the fire burn," and police shot at survivors as they ran from the home.<sup>115</sup> Sixty-one houses in the black neighborhood were destroyed by the bombing.<sup>116</sup> Eleven people were killed, including five children between the ages of seven and thirteen who police knew were in the home when they bombed it.<sup>117</sup> Exercising their discretion, local and federal prosecutors chose not to prosecute any of the people who carried out or ordered the bombing.<sup>118</sup> But they did exercise their discretion to prosecute the only adult black liberation activist who survived.<sup>119</sup>

Another high-profile exercise of discretion was the prosecutorial response to the "financial crisis" of 2008 and related subsequent scandals. Employees at banks committed crimes including lying to investors and regulators,<sup>120</sup> fraudulently portraying junk assets as valuable assets,<sup>121</sup> rate-rigging,<sup>122</sup> bribing foreign [\*878] officials,<sup>123</sup> submitting false documents,<sup>124</sup> mortgage fraud,<sup>125</sup> fraudulent home foreclosures,<sup>126</sup> financing drug cartels,<sup>127</sup> orchestrating and enabling widespread tax evasion,<sup>128</sup> and violating international sanctions.<sup>129</sup>

The massive criminality of financial sector employees caused enormous harm. Leaving aside the millions of home foreclosures<sup>130</sup> and the international effects of the crisis, consider just the lost wealth: in 2000, over 30 million people were living in poverty in the United States,<sup>131</sup> and poverty is estimated to have [\*879] caused over one hundred thousand deaths in the year 2000 alone (about 4.5 percent of U.S. deaths).<sup>132</sup> By the end of the financial crisis in 2009, median household wealth in the United States had declined by \$ 27,000,<sup>133</sup> leaving almost 44 million people in poverty<sup>134</sup> and therefore leading to many

<sup>106</sup> See, e.g., GLENN GREENWALD, *WITH LIBERTY AND JUSTICE FOR SOME* (2011); JANE MAYER, *THE DARK SIDE* 165-75, 252-55 (2009); SENATE SELECT COMMITTEE ON INTELLIGENCE, *COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM* 3-4 (2014).

<sup>107</sup> See Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES (Mar. 2, 2009), <https://www.nytimes.com/2009/03/03/washington/03web-intel.html> [<https://perma.cc/ROX7-CROJ>].

<sup>108</sup> See Brian Ross, *Ex-CIA Operative Says Prison Was Punishment for Whistleblowing on Torture*, ABC NEWS (Dec. 9, 2014), <https://abcnews.go.com/International/cia-operative-prison-punishment-whistleblowing-torture/story?id=27474359> [<https://perma.cc/UW9H-XXDU>]. At least one American was prosecuted and convicted for kidnaping and rendition, but he was prosecuted and convicted by Italy. However, when he was arrested in Panama and Italy requested rendition, the United States intervened and brought him back to the United States to shield him from serving his sentence in Italy. See Glenn Greenwald, *This Week in Press Freedoms and Privacy Rights*, GUARDIAN (July 20, 2013), <https://www.theguardian.com/commentisfree/2013/jul/20/press-freedoms-manning-risen> [<https://perma.cc/2XNZ-W2Q8>].

<sup>109</sup> Julian Borger, *Senate Report on CIA Torture Could Lead to Prosecution of Americans Abroad*, GUARDIAN (Dec. 10, 2014), <https://www.theguardian.com/us-news/2014/dec/10/cia-report-prosecutions-international-law-icc> [<https://perma.cc/B8KT-MAVX>].

<sup>110</sup> See Glenn Greenwald, *Obama Justice Department Grants Final Immunity to Bush's CIA Torturers*, GUARDIAN (Aug. 31, 2012), <http://www.guardian.co.uk/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer> [<https://perma.cc/T8L5-P3Z4>]; Adam Serwer, *Obama's Legacy of Impunity for Torture*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/> [<https://perma.cc/F6Q2-STUE>]; Sam Stein, *Obama On Spanish Torture Investigation: I Prefer to Look Forward*, HUFFPOST (May 5, 2009), [https://www.huffingtonpost.com/2009/04/16/obama-on-spanish-torture\\_n\\_187710.html](https://www.huffingtonpost.com/2009/04/16/obama-on-spanish-torture_n_187710.html) [<https://perma.cc/7PR3-EHT3>].

<sup>111</sup> Ross, *supra* note 108.

additional deaths. During the first full year of the crisis, the wealthiest four hundred Americans increased their wealth by \$ 30 billion. <sup>135</sup>

As of 2013, not a single high-ranking banker had been prosecuted by federal prosecutors for actions that led to the 2008 world economic collapse. <sup>136</sup> As one prominent executive famously wrote in an email: "Let's hope we are all wealthy and retired by the time this house of card[s] falters." <sup>137</sup> Again in 2012, the less [\*880] publicized "Libor scandal" involving many of the same large banks "dwarf[ed] by orders of magnitude any financial scam in the history of markets." <sup>138</sup> That scandal was followed by a new interest-rate swap conspiracy among largely the same banks that former federal regulators called "the height of criminality." <sup>139</sup> Dozens other bank scandals have each involved the loss of enough money to prevent tens of thousands of deaths.

The highest-ranking federal official overseeing criminal prosecution in the Obama Administration explained that banks, despite having committed federal felony crimes, would generally not be prosecuted because they were too big, and the effects of prosecution could hurt the economy. <sup>140</sup> There are numerous problems with this speculation, including that there is no evidence to support it. The largest U.S. banks are actually *not* profitable without taxpayer money; as *Bloomberg* explained in a seminal editorial, "the profits they report are essentially transfers from taxpayers to their shareholders." <sup>141</sup> And at the same time that large banks escaped prosecution, they retained an estimated \$ 83 billion in yearly taxpayer subsidies--essentially exactly equal to their profits. (They spend hundreds of millions of dollars each election cycle to convince politicians to preserve this taxpayer subsidy.) <sup>142</sup> Thus, entities that are not independently profitable without government welfare, that drain taxpayer money, and that caused massive suffering through flagrant crimes were protected by federal prosecutors on the unexplained theory that they are essential to social well-being. <sup>143</sup>

<sup>112</sup> *Id.*; see also Kevin Gozstola, *Imprisoned CIA Torture Whistleblower John Kiriakou "Pens Letter from Loretto,"* SHADOW PROOF (May 29, 2013), <http://dissenter.firedoglake.com/2013/05/29/imprisoned-cia-torture-whistleblower-john-kiriakou-pens-letter-from-loretto/> [<https://perma.cc/TZ8S-MXA2>]; John Kiriakou, *I Went to Prison for Disclosing the CIA's Torture. Gina Haspel Helped Cover It Up.*, WASH. POST (Mar. 16, 2018), [https://www.washingtonpost.com/outlook/i-went-to-prison-for-disclosing-the-cias-torture-gina-haspel-helped-cover-it-up/2018/03/15/9507884e-27f8-11e8-874b-d517e912f125\\_story.html?utm\\_term=.09352112fe2e](https://www.washingtonpost.com/outlook/i-went-to-prison-for-disclosing-the-cias-torture-gina-haspel-helped-cover-it-up/2018/03/15/9507884e-27f8-11e8-874b-d517e912f125_story.html?utm_term=.09352112fe2e) [<https://perma.cc/MV9J-XUUX>]. During the Obama Administration, many news articles on foreign policy contained leaked information that served the goals of politically powerful people, yet they were not prosecuted; on the other hand, the low-level leakers who disclosed information that exposed misconduct in the Administration were prosecuted with vigor. The Administration chose to prosecute twice as many leak cases as all previous administrations combined. See Conor Friedersdorf, *Behold the Selective Outrage over National Security Leakers*, ATLANTIC (Feb. 13, 2014), <http://www.theatlantic.com/politics/archive/2014/02/behold-the-selective-outrage-over-national-security-leaks/283799> [<https://perma.cc/TVN3-D5V9>].

<sup>113</sup> See Gene Demby, *I'm from Philly. 30 Years Later, I'm Still Trying to Make Sense of the MOVE Bombing*, NPR (May 13, 2015), <https://www.npr.org/sections/codeswitch/2015/05/13/406243272/im-from-philly-30-years-later-im-still-trying-to-make-sense-of-the-move-bombing> [<https://perma.cc/XAL8-CNS7>].

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Alex Q. Arbuckle, *May 13, 1985: The Bombing of MOVE*, MASHABLE (Jan. 10, 2016), <https://mashable.com/2016/01/10/1985-move-bombing/#iIbNLWxOmqG> [<https://perma.cc/N976-CPNQ>].

In the years that followed, repeated crimes by bankers eventually led to some criminal charges, but prosecutors permitted banks to plead guilty and to pay [\*881] fines that represented a small percentage of their annual profits.<sup>144</sup> And in these few prosecutions of large banks, *individuals* were typically not prosecuted,<sup>145</sup> even though it was individuals who committed each of the crimes. Individual prosecutions, as opposed to prosecutions of corporate entities, are more likely to achieve the stated goals of punishment given that it is the individual who makes the decision to break a law.<sup>146</sup> Moreover, as a prominent federal judge pointed out,<sup>147</sup> individual prosecutions do not trigger the concern that federal prosecutors used to justify their lack of prosecutions: they do not result in the collapse of the corporation that employed the individual, even if one believes that the collapse of criminal banking corporations would be the result of a prosecution or, beyond that, that such an occurrence would be bad.<sup>148</sup>

To take another prominent example, it came out in June 2013 that James Clapper, the Director of National Intelligence, had lied to Congress--a felony offense<sup>149</sup>--about the scope of federal government surveillance of private electronic communications in March 2013.<sup>150</sup> When his lie was discovered, Clapper sent an apology letter to Congress and offered a series of explanations for his dishonesty.<sup>151</sup> Those explanations ranged from (1) he intentionally gave "the least untruthful answer" possible to (2) the question was unfair to (3) he did not understand the question.<sup>152</sup> Of course, Clapper could have refused to answer the [\*882] question in public and answered only in classified communications to the senators.<sup>153</sup> Instead, he chose to give false information, precisely because it would mislead the public about the scope of the NSA's surveillance of ordinary people. Clapper was not prosecuted for this felony.<sup>154</sup> Nor was any NSA official prosecuted for any of the violations of secret FISA court orders in the surveillance programs that related to Clapper's lie.<sup>155</sup> Yet Clapper himself subsequently advocated that prosecutors pursue charges against Edward Snowden, the person who exposed Clapper.<sup>156</sup>

<sup>119</sup> Connie Langland, *Ramona Africa Still Carrying the MOVE Message*, PHILA. INQUIRER (May 12, 2010), [http://www.philly.com/philly/news/special\\_packages/20100512\\_Ramona\\_Africa\\_still\\_carrying\\_the\\_MOVE\\_message.html](http://www.philly.com/philly/news/special_packages/20100512_Ramona_Africa_still_carrying_the_MOVE_message.html) [<https://perma.cc/7YZB-UXPT>].

<sup>120</sup> *SEC Enforcement Actions: Addressing Misconduct That Led to or Arose from the Financial Crisis*, U.S. SEC. & EXCHANGE COMM'N (Oct. 7, 2016), <https://www.sec.gov/spotlight/enf-actions-fc.shtml> [<https://perma.cc/4B6K-DD4W>].

<sup>121</sup> *Id.*

<sup>122</sup> Reuters, *UBS Libor Rigging May Cost Bank \$ 1.63 Billion Fine*, HUFFPOST (Dec. 15, 2012, 7:33 AM EST), [https://www.huffingtonpost.com/2012/12/15/ubs-libor-rigging\\_n\\_2306432.html](https://www.huffingtonpost.com/2012/12/15/ubs-libor-rigging_n_2306432.html) [<https://perma.cc/M67N-8H4D>].

<sup>123</sup> Ben Protess & Alexandra Stevenson, *JPMorgan Chase to Pay \$ 264 Million to Settle Foreign Bribery Case*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/business/dealbook/jpmorgan-chase-to-pay-264-million-to-settle-foreign-bribery-charges.html> [<https://perma.cc/2BK9-HSLJ>].

<sup>124</sup> Catherine Curan, *Wells Fargo Made Up On-Demand Foreclosure Papers Plan: Court Filing Charges*, N.Y. POST (Mar. 12, 2014, 2:06 PM), <https://nypost.com/2014/03/12/wells-fargo-made-up-on-demand-foreclosure-papers-plan-court-filing-charges> [<https://perma.cc/4MB5-9FUB>].

<sup>125</sup> Binyamin Appelbaum, *How Mortgage Fraud Made the Financial Crisis Worse*, N.Y. TIMES (Feb. 12, 2015), <https://www.nytimes.com/2015/02/13/upshot/how-mortgage-fraud-made-the-financial-crisis-worse.html> [<https://perma.cc/4HTJ-SFEM>].

<sup>126</sup> David Dayen, *The Great Foreclosure Fraud*, AM. PROSPECT (May 16, 2016), <https://prospect.org/article/great-foreclosure-fraud> [<https://perma.cc/D4YK-UPCV>]; Yves Smith, *Kamala Harris Tells Big Lie: That 2012 Mortgage Settlement Was a Good Deal for*



This incident echoes the COINTELPRO scandal, in which the FBI committed felony crimes for years against people who were opposed to racial injustice, poverty, killing millions of human beings in Vietnam, Cambodia, and Laos and other causes associated with the political left.<sup>157</sup> The FBI's pervasive operation against American leftists and black activists, ordered at the highest levels, included blackmail, burglary, threats, kidnaping, infiltration of groups based on their political beliefs, murder, incitement to criminal activity, illegal wiretapping, intercepting letters and replacing them with changed content, and numerous other tactics (some of the most heinous of which the FBI has not publicly admitted, including the assassination of Fred Hampton and the involvement of an FBI informant in the infamous bombing of children in a Birmingham, Alabama [\*883] church).<sup>158</sup> These "law enforcement" officials also targeted black-led organizations on the basis of their race at the behest of J. Edgar Hoover,<sup>159</sup> for whom the organization's headquarters on Pennsylvania Avenue is still named.<sup>160</sup> (Years later, the FBI would provide the explosives that the Philadelphia police dropped from the helicopter.)<sup>161</sup> The FBI even undertook an operation to get Martin Luther King Jr. to commit suicide.<sup>162</sup>

This lawlessness was one of the most significant episodes in modern American history: it was a largely successful effort by elites to derail a growing social movement that sought to help marginalized people and that could have transformed American society. It is now viewed by consensus as one of the darkest periods in the history of modern American "law enforcement." The FBI's crimes even spurred rare congressional reforms establishing new oversight of "law enforcement" agencies.<sup>163</sup>

But the many FBI employees who committed crimes across the country were not outliers or bad apples; they were government bureaucrats following a "national security" program designed and orchestrated at the highest levels. Indeed, when COINTELPRO was uncovered, a team of over eighty federal "law

Homeowners, NAKED CAPITALISM, (Jan. 10, 2019), <https://www.nakedcapitalism.com/2019/01/kamala-harris-tells-big-lie-2012-mortgage-settlement-good-deal-homeowners.html> [<https://perma.cc/8TYV-A6KD>].

<sup>127</sup> Rajeev Syal, *Drug Money Saved Banks in Global Crisis, Claims UN Advisor*, GUARDIAN (Dec. 12, 2009, 7:05 PM EST), <https://www.theguardian.com/global/2009/dec/13/drug-money-banks-saved-un-cfief-claims> [<https://perma.cc/A6CE-A5T2>].

<sup>128</sup> See Ben Protesch & Jessica Silver-Greenberg, *Big Swiss Bank Pleads Guilty in Felony Case*, N.Y. TIMES (May 19, 2014, 4:50 PM), <https://dealbook.nytimes.com/2014/05/19/credit-suisse-set-to-plead-guilty-in-tax-evasion-case/> [<https://perma.cc/WNY3-Y2UF>].

<sup>129</sup> Kevin Johnson & Kevin McCoy, *BNP to Pay Almost \$ 9B for Sanctions Violations*, USA TODAY (June 30, 2014, 5:28 PM EST) <https://www.usatoday.com/story/money/business/2014/06/30/bnp-paribas-sanctions-announcement/11775681/> [<https://perma.cc/3CC2-EEH4>].

<sup>130</sup> FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT xv (2011); see also Janet Currie & Erdal Tekin, *Is There a Link Between Foreclosure and Health?* (Nat'l Bureau of Econ. Research, Working Paper No. 729, 1981), <https://www.nber.org/papers/w17310.pdf> [<https://perma.cc/82FM-9LR8>] (finding that foreclosures lead to an increase in urgent, preventable hospital admissions).

<sup>131</sup> Bureau of Labor Statistics, *A Profile of the Working Poor, 2000*, U.S. DEPT' LAB. (Mar. 2002), <https://www.bls.gov/cps/cpswp2000.htm> [<https://perma.cc/232R-ZGW8>].

<sup>132</sup> See *How Many U.S. Deaths Are Caused by Poverty, Lack of Education, and Other Social Factors?*, COLUM. MAILMAN SCH. PUB. HEALTH (July 5, 2011), <https://www.mailman.columbia.edu/public-health-now/news/how-many-us-deaths-are-caused-poverty-lack-education-and-other-social-factors> [<https://perma.cc/52SG-W3HK>].

<sup>133</sup> Leah Hendey et al., *Weathering the Recession: The Financial Crisis and Family Wealth Changes in Low-Income Neighborhoods*, URBAN INST. 6 (March 2012), <https://www.urban.org/sites/default/files/publication/25686/412626-weathering-the-recession-the-financial-crisis-and-family-wealth-changes-in-low-income-neighborhoods.pdf> [<https://perma.cc/J9HE-U84X>].

enforcement" agents was dispatched--not to investigate those responsible for committing the crimes identified in the FBI's files, but instead to search for those who anonymously sent to newspapers and members of Congress the internal documents describing the FBI's crimes.<sup>164</sup> Although numerous people were prosecuted during this period for acts of civil disobedience in protest of government policies now viewed as racist and profoundly harmful, federal prosecutors decided that not a single FBI employee should be prosecuted for their crimes.

Strategic prosecution in order to chill political activism has been, and remains, a through-line in American history. Marcus Mitchell, an engineering student and indigenous activist, is awaiting trial for charges of trespassing and interfering with police after police shot him in the face with a bean bag pellet while [\*884] he was protesting the Dakota Access oil pipeline.<sup>165</sup> Mitchell was allegedly hidden from his family and interrogated while heavily medicated in a hospital bed, guarded by a for-profit security company. He faces up to two years in jail. In 2016, California police and the FBI decided to work with neo-Nazi groups to surveil and then vigorously pursue charges against civil rights groups and activists, including attempting to prosecute a black anti-fascist protestor who was the victim of a neo-Nazi stabbing attack.<sup>166</sup> Tim DeChristopher went to a federal land auction in 2008 to protest the legality of the sale of federal land in Utah to corporate mining interests.<sup>167</sup> DeChristopher believed that the land auction was not authorized by federal law.<sup>168</sup> Once there, he was offered a bidding number and decided to go into the auction, eventually bidding on a parcel.<sup>169</sup> He was prosecuted for bidding on the land without having the intent to buy it.<sup>170</sup> (DeChristopher later raised enough money to cover his bid,<sup>171</sup> and a federal judge ruled in a civil case that the land sale was indeed unlawful.)<sup>172</sup> During his trial, at the request of prosecutors, DeChristopher was prohibited from telling the jury about his motives or the illegality of the land sale, and he was convicted.<sup>173</sup> Prosecutors sought a lengthy prison sentence, and the judge

<sup>134</sup> *I in 7 Americans Lived in Poverty in 2009, New Census Data Show*, PBS NEWS HOUR (Sept. 16, 2010, 3:48 PM EST), <https://www.pbs.org/newshour/economy/poverty-uninsured-rates-rise-as-recession-continues> [<https://perma.cc/HK2G-UBKQ>].

<sup>135</sup> Les Leopold, *The Forbes 400 Shows Why Our Nation Is Falling Apart*, HUFFPOST, (Dec. 1, 2009), [https://www.huffingtonpost.com/les-leopold/the-forbes-400-shows-why\\_b\\_306228.html](https://www.huffingtonpost.com/les-leopold/the-forbes-400-shows-why_b_306228.html) [<https://perma.cc/E9KE-BHYO>]; see also Steven Bertoni, *The Rich Are Now Richer Than Before the 2008 Credit Meltdown*, FORBES, (Jul. 12, 2011, 1:49 PM), <https://www.forbes.com/sites/stevenbertoni/2011/07/12/the-rich-are-now-richer-than-before-the-2008-credit-meltdown/#157a59f74fe9> [<https://perma.cc/DS5A-5E2M>].

<sup>136</sup> See Glenn Greenwald, *The Untouchables: How the Obama Administration Protected Wall Street from Prosecutions*, GUARDIAN (Jan. 23, 2013, 7:27 AM EST), <https://www.theguardian.com/commentisfree/2013/jan/23/untouchables-wall-street-prosecutions-obama> [<https://perma.cc/VLT8-UZM2>]; Glenn Greenwald, *Wall Street's Immunity*, SALON (May 10, 2012, 2:09 PM UTC), [http://www.salon.com/2012/05/10/wall\\_streets\\_immunity](http://www.salon.com/2012/05/10/wall_streets_immunity) [<https://perma.cc/KT5Q-A6TR>]; Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES (Apr. 14, 2011), <https://www.nytimes.com/2011/04/14/business/14prosecute.html> [<https://perma.cc/JYP4-G5B5>]; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/> [<https://perma.cc/2SAN-PC6L>]; Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011, 2:00 PM EST), <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216> [<https://perma.cc/V8L8-WAPZ>].

<sup>137</sup> See Matt Taibbi, *The Last Mystery of the Financial Crisis*, ROLLING STONE (June 19, 2013, 1:00 PM EST), <https://www.rollingstone.com/politics/politics-news/the-last-mystery-of-the-financial-crisis-200751/> [<https://perma.cc/VBB9-PU2D>].

<sup>138</sup> Matt Taibbi, *Everything Is Rigged: The Biggest Price-Fixing Scandal Ever*, ROLLING STONE (Apr. 25, 2013, 5:00 PM EST), <https://www.rollingstone.com/politics/politics-news/everything-is-rigged-the-biggest-price-fixing-scandal-ever-82255/> [<https://perma.cc/5AV7-7EBP>] (quoting MIT professor Andrew Lo).

<sup>139</sup> *Id.* (quoting Michael Greenberger, a former official at the Commodity Futures Trading Commission).

sentenced him to two years in federal prison.<sup>174</sup> The police officer who choked Eric Garner [\*885] to death was not indicted,<sup>175</sup> but the man who filmed the murder on his cell phone, Ramsey Orta, was harassed, later arrested, prosecuted, and sent to prison for ostensibly unrelated crimes.<sup>176</sup>

It is possible that Mitchell trespassed on someone else's land, that DeChristopher broke a federal law, and that Orta committed another crime, like those officials in the other examples discussed here. But who a government goes after and who it ignores affects what conduct people feel encouraged to engage in, whether that be political dissent, war crimes, financial fraud, or anything else. The aggregate of these decisions sends messages to the population about what kind of society those in charge want to see, what kind of conduct they will not abide, and what kind of conduct they will tolerate from certain people.

Consider just a few examples from different contexts:

. Fate Vincent Winslow was sentenced to life in prison without the possibility of parole for acting as a go-between in the sale of marijuana, worth \$ 10 in total, to an undercover police officer when he was homeless.<sup>177</sup> Clarence Aaron introduced two of his friends who he knew were engaged in selling drugs. Although Aaron had no criminal record, he was prosecuted for introducing the drug sellers to each other.<sup>178</sup> Aaron, a twenty-four-year-old college student, was sentenced to life in prison without parole, meaning that prosecutors used their discretion to ensure that he would die in prison. Stephanie George, who had no criminal record, was also sentenced to die in prison for allowing her boyfriend, the father of her child, to store [\*886] drugs in her home.<sup>179</sup> George was taken from her child and her family forever. At the request of federal prosecutors, she was given a longer sentence than anyone else involved in the drug conspiracy in which she was prosecuted.<sup>180</sup> There are hundreds of thousands of stories of long prison sentences for similar drug crimes.<sup>181</sup>

<sup>140</sup> See Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big to Jail*, FORBES (July 29, 2013, 9:30 AM), <https://www.forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/#3eefde093703> [<https://perma.cc/QCD2-UTFA>].

<sup>141</sup> Editorial Board, *Why Should Taxpayers Give Big Banks \$ 83 Billion a Year?*, BLOOMBERG (Feb. 20, 2013, 6:30 PM EST), <https://www.bloomberg.com/opinion/articles/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year->.

<sup>142</sup> *Id.*

<sup>143</sup> For incisive reporting on the non-prosecution of those responsible for the financial crisis and how it compares to our government's treatment of the poor, see MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (2014).

<sup>144</sup> See, e.g., Ben Protess & Mark Scott, *Guilty Plea and Big Fine for Bank in Rate Case*, N.Y. TIMES (Feb. 6, 2013, 8:10 AM), <https://dealbook.nytimes.com/2013/02/06/as-unit-pleads-guilty-r-b-s-pays-612-million-over-rate-rigging/> [<https://perma.cc/TPO2-MSK6>]; Protess & Silver-Greenberg, *supra* note 128.

<sup>145</sup> See Kaufman, *supra* note 140.

<sup>146</sup> See Danielle Kurtzleben, *Too Big to Jail: Why the Government Is Quick to Fine but Slow to Prosecute Big Corporations*, VOX (July 13, 2015, 10:52 AM EDT), <https://www.vox.com/2014/11/16/7223367/corporate-prosecution-wall-street> [<https://perma.cc/53L5-3K33>].

<sup>147</sup> Rakoff, *supra* note 136.

<sup>148</sup> See Kaufman, *supra* note 140.

<sup>149</sup> See 18 U.S.C. § 1001 (2018).

. Wage theft by employers costs workers an estimated \$ 50 billion per year.<sup>182</sup> All robberies, burglaries, larcenies, and motor vehicle thefts combined cost \$ 14 billion per year. Prosecutors almost never enforce criminal wage theft laws. Due to policy choices, federal authorities chronically underfund the number of employees assigned to investigate wage theft. As a result, corporations engage in wage theft and view the occasional civil lawsuit forcing compensation for these crimes as a cost of doing business.

[\*887] . Federal bureaucrats and private corporations working for profit were caught conducting illegal warrantless surveillance of American telecommunications in 2005.<sup>183</sup> At the time, such surveillance was a federal felony punishable by five years in prison.<sup>184</sup> Despite the acknowledged commission of felonies by high-ranking federal government officials and business executives, prosecutors chose not to charge them. And after paying money to lobbyists, telecommunications officials were later given civil immunity from the damages caused by their unprosecuted crimes.<sup>185</sup>

. Children have been physically abused and forced to take psychotropic medication without consent in for-profit immigrant detention jails. Prosecutors have chosen not to file criminal charges.<sup>186</sup> (Federal prosecutors recently chose to pursue charges, sometimes felony charges, against volunteers near the southern border who leave food and water for migrants in commonly lethal parts of the desert.)<sup>187</sup>

. Barack Obama ordered killings when he was President. These killings were often of people whose identities were not known and frequently of medics and children who came to treat the wounded at the scenes of American drone killings.<sup>188</sup> Many of the assassinations [\*888] went wrong according to their own stated justifications, including the bombings of weddings, funerals, hospitals, journalists, and other civilian targets.<sup>189</sup> American prosecutors decided that Obama should not be charged for these offenses, even after he and other officials were caught lying repeatedly about the murders.<sup>190</sup>

<sup>150</sup> Jeremy Herb, *Intelligence Chief Clapper Apologizes for 'Erroneous' Statement to Congress*, HILL (July 2, 2013), <https://thehill.com/policy/defense/308979-clapper-apologies-for-erroneous-statement-to-congress-on-us-data-collection> [<https://perma.cc/FW5Z-7EVJ>].

<sup>151</sup> *Id.*

<sup>152</sup> Dan Roberts & Spencer Ackerman, *Clapper Under Pressure Despite Apology for 'Erroneous' Statements to Congress*, GUARDIAN (July 1, 2013, 4:16 PM), <https://www.theguardian.com/world/2013/jul/01/james-clapper-apology-congress-erroneous-response> [<https://perma.cc/6SER-MGGK>].

<sup>153</sup> See Derek Khanna, *Should the Director of National Intelligence Be Impeached for Lying to Congress About PRISM?*, MEDIUM (Sept. 17, 2013), <https://medium.com/politics-and-policy/should-the-director-of-national-intelligence-be-impeached-for-lying-to-congress-about-prism-b09b968c01fd> [<https://perma.cc/TR59-V8PJ>].

<sup>154</sup> Steven Nelson, *James Clapper Avoids Charges for 'Clearly Erroneous' Surveillance Testimony*, WASH. EXAMINER (Mar. 10, 2018, 11:10 PM), <https://www.washingtonexaminer.com/james-clapper-avoids-charges-for-clearly-erroneous-surveillance-testimony> [<https://perma.cc/F8U6-3XR6>].

<sup>155</sup> These violations led the Federal Intelligence Surveillance Act (FISA) court reviewing the NSA's actions to accuse federal officials of "an institutional 'lack of candor.'" See Tim Johnson, McClatchy, *Secret Court Rebukes NSA for 5-Year Illegal Surveillance of U.S. Citizens*, MIAMI HERALD (May 26, 2017, 5:37 PM), <https://www.miamiherald.com/news/nation-world/national/article152948259.html> [<https://perma.cc/LVF3-WP8T>].

<sup>156</sup> See Julian Borger & Spencer Ackerman, *Edward Snowden: Republicans Call for NSA Whistleblower to Be Extradited*, GUARDIAN (June 10, 2013, 3:14 AM), <https://www.theguardian.com/world/2013/jun/10/the-nsa-files-edward-snowden> [<https://perma.cc/B6QS-E2YT>].

Obama likely tells himself a justification about why murdering a 16-year-old American child was necessary for the greater good and legally excusable on defense grounds.<sup>191</sup> Should Russia, Iran, Israel, Laos, or Chile<sup>192</sup> determine that assassinations of targets in Chicago and Pittsburgh is necessary to further their interests, or to deter American interference in their elections, those officials would also tell themselves stories about why that preventive violence is necessary to save lives or to "promote democracy."<sup>193</sup>

[\*889] . As alleged in a lawsuit that my organization recently filed, prosecutors in Phoenix have been making false statements in letters to coerce people into paying the District Attorney's office to get them to drop marijuana possession charges in a scheme that has earned the District Attorney's office an average of \$ 1.6 million annually in recent years.<sup>194</sup> This is, paradoxically, both the federal felony of mail fraud and "law enforcement." These prosecutors have not been prosecuted.

. California took away 4.2 million drivers' licenses because people could not pay court debts.<sup>195</sup> In the past five years, Tennessee took away more than 250,000 licenses for inability to pay tickets and more than 140,000 licenses for inability to pay other court debts.<sup>196</sup> Because dozens of states have done the same thing, millions more people have lost the ability to do all of the things many of us take for granted in life--like go to the grocery store, attend church, commute to work, and visit family--as "driving on a suspended license" has become one of the most commonly charged crime by prosecutors in many jurisdictions.<sup>197</sup> In such circumstances, that crime serves no function other than to criminalize poverty.

. According to an investigation by the District Attorney and the Louisiana State Auditor, judges in New Orleans were extorting money [\*890] from people, wrongfully jailing people who could not

<sup>157</sup> Paul Wolf et al., *COINTELPRO: The Untold American Story*, C.L. DEF. CTR. 3-17 (Sept. 1, 2001), <https://cldc.org/wp-content/uploads/2011/12/COINTELPRO.pdf> [<https://perma.cc/3NVV-79JA>]; see generally NELSON BLACKSTOCK, *COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM* (1988).

<sup>158</sup> Wolf, *supra* note 157.

<sup>159</sup> *Id.*

<sup>160</sup> See *FBI Building History*, GEN. SERVS. ADMIN. (Feb. 15, 2018), <https://www.gsa.gov/real-estate/gsa-properties/visiting-public-buildings/j-edgar-hoover-fbi-building/whats-inside/fbi-building-history> [<https://perma.cc/E5F3-3EX2>].

<sup>161</sup> See Arbuckle, *supra* note 118.

<sup>162</sup> Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N.Y. TIMES MAG. (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html> [<https://perma.cc/7RCG-K6HG>].

<sup>163</sup> BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER'S SECRET FBI 489-90* (2014).

<sup>164</sup> *Id.* at 294.

<sup>165</sup> Will Parrish, *Standing Rock Activist Faces Prison After Officer Shot Him in the Face*, GUARDIAN (Oct. 4, 2018, 4:00 AM), <https://www.theguardian.com/us-news/2018/oct/04/standing-rock-marcus-mitchell-shooting-charges> [<https://perma.cc/8FXA-OC3H>].

<sup>166</sup> See Sam Levin, *California Police Worked with Neo-Nazis to Pursue 'Anti-Racist' Activists, Documents Show*, GUARDIAN (Feb. 9, 2018, 7:00 AM EST), <https://www.theguardian.com/world/2018/feb/09/california-police-white-supremacists-counter-protest> [<https://perma.cc/43BX-TCS7>]; Sam Levin, *Revealed: FBI Investigated Civil Rights Group as 'Terrorism' Threat and Viewed KKK as Victims*, GUARDIAN (Feb. 1, 2019, 3:01 AM EST), <https://www.theguardian.com/us-news/2019/feb/01/sacramento-rally-fbi-kkk-domestic-terrorism-california> [<https://perma.cc/N2JX-L4DD>].

pay, and then illegally using the money to fund their own benefits packages.<sup>198</sup> Despite these investigations and later admissions by judges, prosecutors used their discretion not to prosecute the judges.

. Jail guards in Florida locked a man with mental illness in a shower, turned on scalding hot water, laughed at him, and left him there until he died. Prosecutors chose not to prosecute the guards.<sup>199</sup>

. General David Petraeus was prosecuted for disclosing classified information to a journalist with whom he was having a sexual affair. Although the information Petraeus disclosed included some of what the U.S. government considers to be its most sensitive secrets--more sensitive than the information disclosed by Chelsea Manning,<sup>200</sup> for example--prosecutors permitted him to plead guilty to a misdemeanor and to avoid any time in jail.<sup>201</sup>

. Twelve police officers in Miami Beach shot over 100 bullets at a car, killing the man inside. The officers also pointed their guns at witnesses, demanding that they stop filming. Police then confiscated and smashed the cell phones of witnesses to the shooting. The officers then lied, claiming that they had not tried to destroy the witnesses' videos of the incident. However, one witness had removed and hidden his phone's memory card in his mouth, and the video given to CNN confirmed the officers' crimes and lies.<sup>202</sup> The officers were not prosecuted.

**[\*891]** . Sentencing children to die in prison is illegal in nearly every country in the world, but as of 2012, the United States had over 2,500 people serving sentences to die in prison for crimes committed as children because prosecutors chose to seek life sentences in adult prison.<sup>203</sup>

. Prosecutors have begun charging people for filming animal torture on factory farms and for rescuing animals from them. In one widely reported recent incident, federal bureaucrats raided properties in

<sup>167</sup> See *United States v. DeChristopher*, 695 F.3d 1082, 1087 (10th Cir. 2012).

<sup>168</sup> See *id.* at 1095.

<sup>169</sup> *Id.* at 1088.

<sup>170</sup> *Id.*

<sup>171</sup> See Travis Holtby, *Bidder 70 Out of Prison*, MOAB SUN NEWS (May 1, 2013, 8:00 AM), [http://www.moabsunnews.com/news/article\\_47888438-b1d3-11e2-b05b-0019bb30f31a.html](http://www.moabsunnews.com/news/article_47888438-b1d3-11e2-b05b-0019bb30f31a.html) [<https://perma.cc/BWR6-3655>].

<sup>172</sup> *Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1242-44 (10th Cir. 2012).

<sup>173</sup> See *DeChristopher*, 695 F.3d at 1088.

<sup>174</sup> Brian Maffly, *Activist Tim DeChristopher To Be Freed After 21 Months in Custody*, SALT LAKE TRIB. (Apr. 17, 2013), <https://archive.sltrib.com/article.php?id=56159854&itype=CMSID> [<https://perma.cc/32DX-7MCZ>].

<sup>175</sup> See Rocco Parascandola et al., *Daniel Pantaleo, the NYPD Officer Who Put Eric Garner in a Fatal Chokehold, Is Loathed, Threatened and an Outcast, but Still Can't Wait to Get Back on the Job*, N.Y. DAILY NEWS (July 11, 2015), <http://www.nydailynews.com/new-york/daniel-pantaleo-fatal-choke-ready-back-job-article-1.2289076> [<https://perma.cc/NX3D-Y98G>].

<sup>176</sup> Dale W. Eisinger & Stephen Rex Brown, *Ramsey Orta, Who Filmed Death of Eric Garner, Sentenced to Four Years in Prison for Drugs and Weapons Charges*, N.Y. DAILY NEWS (Oct. 3, 2016) <http://www.nydailynews.com/new-york/ramsey-orta-filmed-eric-garner-death-sentenced-4-years-article-1.2815791> [<https://perma.cc/U8JL-EXAU>].

<sup>177</sup> Abby Haglage, *Life in Prison for Selling \$ 20 of Weed*, DAILY BEAST (Feb. 27, 2015), <https://www.thedailybeast.com/life-in-prison-for-selling-dollar20-of-weed> [<https://perma.cc/G7PC-BFUM>].

multiple states searching for the person who rescued two piglets from a factory and ordered doctors to cut off part of a piglet's ear for DNA testing. <sup>204</sup>

. Christopher Drew was arrested for selling art on the street in Chicago without a permit, and prosecutors filed charges carrying a fifteen-year prison sentence for recording his own arrest. <sup>205</sup> Throughout my career, I have seen people routinely arrested and charged with crimes for filming police officers committing misconduct or refusing to give police officers their phones after recording police misconduct.

. There is no state, county, or city where a person can afford a two-bedroom home while working forty hours for the federal minimum wage, and it is only possible to afford a one-bedroom home in [\*892] twenty-two of over three thousand counties while making the federal minimum wage. <sup>206</sup> The majority of criminal cases in Portland, Oregon are against people who are homeless. The vast majority of those are for nonviolent crimes. <sup>207</sup>

. Prosecutors help for-profit companies collect money on their business contracts by using criminal prosecution when low-income people cannot pay for "rent-to-own" products. <sup>208</sup>

. Since Richard Nixon declared a "war on drugs," there have been twenty million arrests for possession of marijuana offenses, <sup>209</sup> including about 600,000 per year in recent years. <sup>210</sup>

. Each of the three presidents from 1992 to 2016, covering more than two decades of the American incarceration explosion, admitted to committing federal drug crimes when they were younger. <sup>211</sup> Most of society does not (at least for that reason) think of them as "felons" unworthy of basic civil and political rights. Had prosecutors chosen to prosecute them for that conduct, it is possible that we

<sup>178</sup> Adam Serwer, *Obama Commutes Clarence Aaron's Sentence*, MSNBC (Dec. 19, 2013), <http://www.msnbc.com/msnbc/obama-rights-decades-old-injustice> [<https://perma.cc/D9RU-745S>].

<sup>179</sup> Erin Fuchs, *How a Florida Beautician and 'Bag Holder' in a Drug Conspiracy Got Obama on Her Side After a Life Sentence*, BUS. INSIDER (Aug. 16, 2015), <https://www.businessinsider.com/stephanie-george-and-life-after-prison-2015-8> [<https://perma.cc/6FB2-MEJ2>].

<sup>180</sup> John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), <https://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html> [<https://perma.cc/52VZ-RYDK>].

<sup>181</sup> See, e.g., Sari Horwitz, *From a First Arrest to a Life Sentence*, WASH. POST (July 15, 2015), [https://www.washingtonpost.com/sf/national/2015/07/15/from-a-first-arrest-to-a-life-sentence/?utm\\_term=.7ec7bccad43f](https://www.washingtonpost.com/sf/national/2015/07/15/from-a-first-arrest-to-a-life-sentence/?utm_term=.7ec7bccad43f) [<https://perma.cc/N6H3-XLDF>]; Alysia Santo, *A Prosecutor's Regret: How I Got Someone Life in Prison for Drugs*, MARSHALL PROJECT (Apr. 7, 2016), <https://www.themarshallproject.org/2016/04/07/a-prosecutor-s-regret-how-i-got-someone-life-in-prison-for-drugs> [<https://perma.cc/VY8N-R3WK>]; Annie Sweeney, *Obama Orders Release of Man Jailed for Life for Non-Violent Crime at 17*, CHI. TRIB. (Dec. 19, 2013), <http://www.chicagotribune.com/news/ct-xpm-2013-12-19-chi-obama-orders-release-of-man-jailed-for-life-for-nonviolent-crime-at-17-20131219-story.html>; John Tierney, *Life Without Parole: Four Inmates' Stories*, N.Y. TIMES (Dec. 12, 2012), <https://www.nytimes.com/2012/12/12/science/life-without-parole-four-inmates-stories.html> [<https://perma.cc/G69X-FPE5>].

<sup>182</sup> See Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. (Sept. 11, 2014), <https://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds> [<https://perma.cc/88YU-PDN7>]; see also Terri Gerstein, *Stealing from Workers Is a Crime. Why Don't Prosecutors See It That Way?*, NATION (May 24, 2018), <https://www.thenation.com/article/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way> [<https://perma.cc/Q9YW-TAOD>]; Report: *Wage Theft Is Pervasive in Corporate America; Big Banks, Insurers Are Among Most-Penalized Firms*, GOOD JOBS FIRST (May 6, 2018), <https://www.goodjobsfirst.org/news/releases/report-wage-theft-pervasive-corporate-america> [<https://perma.cc/L2YW-X73Y>]; Amy Traub, *The Steal: The Urgent Need to Combat Wage Theft in Retail*, DEMOS (June 12, 2017), <https://www.demos.org/publication/steal-urgent-need-combat-wage-theft-retail> [<https://perma.cc/YK7F-ESYP>] (finding just one type of wage theft more prevalent than all shoplifting combined).

would never [\*893] have heard their names. It matters who gets investigated, caught, and prosecuted.

. President Clinton's perjury was not prosecuted. <sup>212</sup>

. Prosecutors charged an eleven-year-old child with a felony for pulling a school fire alarm. <sup>213</sup> After many prosecutors adopted "zero tolerance" policies for children committing misconduct in public schools, there was an explosion in the criminalization of child misbehavior. <sup>214</sup> "Law enforcement" employees are typically not involved in misbehavior at private schools, but "law enforcement" employees routinely arrest, jail, prosecute, convict, sentence, imprison, and supervise children after conviction for the same conduct in public schools serving low-income communities.

. Phillip Zimmermann created PGP, the world's first free encryption program that anyone could use to thwart surveillance. It is now ubiquitous and celebrated as a technical computing achievement. He was initially threatened with an indictment because prosecutors treated encryption software to protect individual privacy as a munition and placed it on the same prohibited export control list as guns and missiles. <sup>215</sup>

. Possession of small amounts of marijuana has been decriminalized for years in New York except if possessed "in public view." But police and prosecutors evaded the "public view" exception to create tens of thousands of arrests and prosecutions in New York City by stopping and searching people, ordering them to empty their pockets, and then arresting them because marijuana in their pockets was consequently open to public view. <sup>216</sup>

[\*894] . Texas officials falsified drug prescriptions that they sought to carry out executions, but they were not prosecuted for this crime. <sup>217</sup>

<sup>183</sup> James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005) <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html> [<https://perma.cc/NY53-YG5L>].

<sup>184</sup> See James Bamford, *Opinion, Bush Is Not Above the Law*, N.Y. TIMES (Jan. 31, 2007), <https://www.nytimes.com/2007/01/31/opinion/31bamford.html> [<https://perma.cc/ARW5-K2AW>].

<sup>185</sup> David Kravets, *Obama to Defend Telco Spy Immunity*, WIRED (Jan. 15, 2009), <https://www.wired.com/2009/01/obama-to-fight> [<https://perma.cc/8PVA-TSU9>].

<sup>186</sup> See *Lost in Detention*, FRONTLINE (Oct. 18, 2011), <https://www.pbs.org/wgbh/frontline/film/lost-in-detention> [<https://perma.cc/TK7N-CPTF>]; Caroline Chen & Jess Ramirez, *Immigrant Shelters Drug Traumatized Teenagers Without Consent*, PROPUBLICA (July 20, 2018), <https://www.propublica.org/article/immigrant-shelters-drug-traumatized-teenagers-without-consent> [<https://perma.cc/2TLZ-264M>].

<sup>187</sup> Editorial Board, *Convicted for Leaving Water for Migrants in the Desert: This Is Trump's Justice*, WASH. POST (Jan. 27, 2019), [https://www.washingtonpost.com/opinions/convicted-for-leaving-water-for-migrants-in-the-desert--this-is-trumps-justice/2019/01/27/9d4b3104-2013-11e9-8b59-0a28f2191131\\_story.html?noredirect=on&utm\\_term=.0e7ba23a8239](https://www.washingtonpost.com/opinions/convicted-for-leaving-water-for-migrants-in-the-desert--this-is-trumps-justice/2019/01/27/9d4b3104-2013-11e9-8b59-0a28f2191131_story.html?noredirect=on&utm_term=.0e7ba23a8239) [<https://perma.cc/4HTY-ZYUJ>]; Amy Goodman et al., *Arizona Activists Face Jail Time for Providing Life-Saving Aid to Migrants Crossing Sonoran Desert*, DEMOCRACY NOW! (Jan. 15, 2019), [https://www.democracynow.org/2019/1/15/arizona\\_activists\\_face\\_jail\\_time\\_for?](https://www.democracynow.org/2019/1/15/arizona_activists_face_jail_time_for?) [<https://perma.cc/Z2YW-PZNK>].

<sup>188</sup> See, e.g., Spencer Ackerman, *Obama Claims US Drone Strikes Have Killed up to 116 Civilians*, GUARDIAN (July 1, 2016), <https://www.theguardian.com/us-news/2016/jul/01/obama-drones-strikes-civilian-deaths> [<https://perma.cc/3TTA-KUE2>]; Conor Friedersdorf, *The Obama Administration's Drone-Strike Disassembling*, ATLANTIC (Mar. 14, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-obama-administrations-drone-strike-disassembling/473541> [<https://perma.cc/2K5F-XRQ2>].



. Henry Kissinger has never been charged for his war crimes by American prosecutors despite uncontroverted evidence of them. <sup>218</sup>

. Political appointees in the George W. Bush administration intervened to shut down a criminal investigation into environmental felonies being committed by British Petroleum and allowed the company to plead guilty to lesser offenses without the prosecution targeting senior executives. <sup>219</sup>

. Prosecutors have used criminal charges to chill voter turnout from certain groups. In Texas, prosecutors obtained a five-year prison sentence for a woman who cast an uncounted provisional ballot after she purportedly did not know that she could not vote due to her criminal record. <sup>220</sup> Georgia prosecutors attempted to prosecute a black woman city councilmember for showing a confused voter how to operate a voting machine. The woman was acquitted by a jury in twenty minutes. <sup>221</sup>

. From 2004 to 2009, there were over 500,000 violations of the Clean Water Act, resulting in rotting teeth, cancer, kidney failure, and [\*895] damage to the nervous system. About one in ten Americans was exposed to dangerous chemicals in drinking water. Prosecutors chose to ignore the "vast majority" of these crimes, admitting when confronted that their enforcement of these laws was "unacceptably low." <sup>222</sup>

The goal in offering these examples is not to provoke an argument about whether what prosecutors decided in any one of them is objectively correct. <sup>223</sup> I mean to give a sense of the kinds of choices that

<sup>189</sup> Tom Engelhardt, *The US Has Bombed at Least Eight Wedding Parties Since 2001*, NATION (Dec. 20, 2013), <https://www.thenation.com/article/us-has-bombed-least-eight-wedding-parties-2001> [<https://perma.cc/H3JB-BTMC>]; see also Glenn Greenwald, *U.S. Again Bombs Mourners*, SALON (June 4, 2012), [http://www.salon.com/2012/06/04/obama\\_again\\_bombs\\_mourners](http://www.salon.com/2012/06/04/obama_again_bombs_mourners) [<https://perma.cc/J3FD-PUQQ>]; Glenn Greenwald, *U.S. Drones Targeting Rescuers and Mourners*, SALON (Feb. 5, 2012), [http://www.salon.com/2012/02/05/u\\_s\\_drones\\_targeting\\_rescuers\\_and\\_mourners](http://www.salon.com/2012/02/05/u_s_drones_targeting_rescuers_and_mourners) [<https://perma.cc/3XZN-E8MM>].

<sup>190</sup> See, e.g., Friedersdorf, *supra* note 188. After the repeated, false claims that civilians were not being killed, it was revealed that the Obama Administration had internally defined "civilian" to exclude any male of "military age," meaning that any boy or man murdered was automatically reclassified as a combatant. See Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), <https://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html> [<https://perma.cc/RZJ3-N5HK>]. Even under this definition, the Administration's claims that it did not kill civilians were false by the thousands. See Rafiq ur Rehman, Opinion, *Please Tell Me, Mr. President, Why a U.S. Drone Strike Killed My Mother*, GUARDIAN (Oct. 25, 2013), <https://www.theguardian.com/commentisfree/2013/oct/25/president-us-assassinated-mother>; Jeremy Scahill, *The Assassination Complex*, INTERCEPT (Oct. 15, 2015), <https://theintercept.com/drone-papers/the-assassination-complex>. In most criminal prosecutions, prosecutors introduce evidence of postcrime lies as evidence of guilt.

<sup>191</sup> See Nasser Al-Alwaki, Opinion, *The Drone That Killed My Grandson*, N.Y. TIMES (July 17, 2013), <https://www.nytimes.com/2013/07/18/opinion/the-drone-that-killed-my-grandson.html> [<https://perma.cc/39AH-7RRD>].

<sup>192</sup> For a comprehensive accounting of illegal American interference in foreign democracies, see STEVEN KINZER, *OVERTHROW* (2007); and WILLIAM BLUM, *KILLING HOPE* (2003).

prosecutors make when confronted with alleged illegality and how those choices are tied not to a "rule of law," but rather to particular political preferences.

By choosing to look "backward" and not "forward" in the Winslow or DeChristopher cases, for example, prosecutors sent messages to those interested in possessing marijuana or in acts of civil disobedience in support of environmental causes, in the same way that they sent messages to those interested in covering up evidence of torture or lying to Congress about warrantless surveillance. As in South Africa during Apartheid or in the United States during the civil rights movement, or in any context where geographic distance or time has given us a different perspective, those who are prosecuted are often those who we later judge to be in better compliance with basic moral values. And in a society characterized by deep, systemic injustices, in time judgments about who is a criminal and who is a hero may be reversed entirely.

## 2. Investigative Discretion

A personal anecdote: my young client once wondered aloud, "*How can I tell you what it's like to leave the house every morning knowing that my body could be searched at any moment? That no one thinks it's wrong? That they call themselves 'law enforcement.'*"<sup>224</sup>

**[\*896]** Something important happens before a case gets to a prosecutor: bureaucrats decide where to look for crimes. They must decide: should we spend our resources looking for people who possess marijuana? If so, in which neighborhoods should we look for them? Should we stop and search people on the street in the Bronx, or should we use undercover informants to see if students possess marijuana in

<sup>193</sup> The child on the south side of Chicago caught in a shootout the previous week has a story that he tells himself about why he should carry a gun for self-defense. See Brian Freskos, *How and Why Chicago's At-Risk Youth Carry Guns*, TRACE (Oct. 5, 2018), <https://www.thetrace.org/2018/10/chicago-youth-gun-carry-habits-protection/> [<https://perma.cc/S67K-GBPH>]. My friends in Alabama who openly carried firearms to protect themselves when we went to lunch together while I lived there felt similarly. Culture, race, economics, and jingoism influence how we think about the validity of self-defense or the degree of criminality in each of these situations.

<sup>194</sup> Shailla Dewan, *Caught With Pot? Get-Out-Of-Jail Program Comes With \$ 950 Catch*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/us/marijuana-diversion-program-maricopa-arizona.html> [<https://perma.cc/UPL7-R6NW>].

<sup>195</sup> Alex Bender et al., *Not Just a Ferguson Problem: How Traffic Courts Drive Inequality*, LAW. COMMITTEE FOR C.R. 9 (2015), <https://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf> [<https://perma.cc/M55T-MBVZ>].

<sup>196</sup> Sam Stockard, *Court Orders State to Stop Suspending Licenses of People Too Poor to Pay Debt*, DAILY MEMPHIAN (Oct. 18, 2018, 10:39 AM CT), <https://dailyMemphian.com/article/740/Court-orders-state-to-stop-suspending-licenses-of-people-too-poor-to-pay-debt> [<https://perma.cc/XUD8-XJFA>].

<sup>197</sup> Justin Wm. Moyer, *More Than 7 Million People May Have Lost Driver's Licenses Because of Traffic Debt*, WASH. POST (May 19, 2018), [https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d\\_story.html](https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html) [<https://perma.cc/D3ZF-C3X4>].

<sup>198</sup> Matt Sledge, *New Orleans Judges to Appeal Decisions in Fines and Fees Lawsuits*, NEW ORLEANS ADVOC. (Aug. 21, 2018, 12:59 PM), [https://www.theadvocate.com/new-orleans/news/courts/article\\_fbd197d6-a56b-11e8-befe-abaf6281ca54.html](https://www.theadvocate.com/new-orleans/news/courts/article_fbd197d6-a56b-11e8-befe-abaf6281ca54.html) [<https://perma.cc/T8G7-Y7UQ>].

<sup>199</sup> Julie K. Brown, *An M.E. Casts Doubt on Rainey's 'Accidental' Death*, MIAMI HERALD (Feb. 4, 2016, 5:54 PM), <https://www.miamiherald.com/news/special-reports/florida-prisons/article57413813.html> [<https://perma.cc/X99C-B9XB>] (detailing facts); Laurel Wamsley, *After Inmate With Schizophrenia Dies in Shower, Fla. Prosecutor Finds No Wrongdoing*, NPR (Mar. 19, 2017, 5:11 PM),

Columbia University dorms? Or should we instead spend those public resources looking into tens of thousands of tax returns?

There is a massive tax-theft problem in the United States that dwarfs all other types of theft combined.<sup>225</sup> The money recovered from the "law enforcement" of tax crimes could be used to save lives. But every billion dollars spent on informants and surveillance to charge low-level drug cases is a billion dollars not spent on informants and surveillance to investigate tax evaders.<sup>226</sup> Through assignments given to hundreds of thousands of "law enforcement" agents, the government makes decisions about which criminals it will look for. Each police department, for example, decides whether to spend money testing a rape kit or a cocaine sample.<sup>227</sup> Every "law enforcement" agency makes further decisions about which neighborhoods to patrol, which crimes to prioritize, and how many [\*897] officers to assign to different units.<sup>228</sup> When my organization sued the town of Ferguson, Missouri, for example, the City averaged about "3.6 arrest warrants *per household*" arising out of low-level municipal ordinance violations and tickets,<sup>229</sup> almost exclusively, I uncovered in my investigation, against black people.

Resource-allocation choices determine the response to entire categories of socially harmful behavior. For example, President Ronald Reagan decided to transfer thousands of federal agents from investigating white-collar financial crimes to pursuing the "War on Drugs."<sup>230</sup> Similarly, the FBI under Presidents Bill Clinton and George W. Bush oversaw still-further declines in its white-collar crime-fighting investigations.<sup>231</sup> The results were stark: federal prosecutors were referred 10,000 white-collar criminal cases by FBI agents in 2000, but that number dropped to 3,500 in 2005,<sup>232</sup> shortly before the worldwide financial system collapsed due to massive fraud.<sup>233</sup> The same is true for the slow depletion of [\*898] the IRS, which is now unable meaningfully to enforce tax laws against wealthy tax evaders.<sup>234</sup> Indeed,

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<https://www.npr.org/sections/thetwo-way/2017/03/19/520743255/after-schizophrenic-inmate-dies-in-a-shower-florida-prosecutor-finds-no-wrongdoi> [<https://perma.cc/AT2A-PEH3>] (discussing decision not to prosecute).

<sup>200</sup> Alexa O'Brien & David Coombs, *WATCH: Full Extended Interview with Manning's Attorney After 35-Year Sentence*, DEMOCRACY NOW! (Aug. 22, 2013), [https://www.democracynow.org/2013/8/22/watch\\_full\\_extended\\_interview\\_with\\_mannings\\_attorney\\_after\\_35\\_year\\_sentence](https://www.democracynow.org/2013/8/22/watch_full_extended_interview_with_mannings_attorney_after_35_year_sentence) [<https://perma.cc/KHU7-5TKK>].

<sup>201</sup> See Pierre Thomas et al., *Former CIA Head David Petraeus to Plead Guilty*, ABC NEWS (March 23, 2015, 10:33 PM), <https://abcnews.go.com/Politics/cia-head-david-petraeus-plead-guilty/story?id=29340487> [<https://perma.cc/5779-FTWP>].

<sup>202</sup> Rania Khalek, *15 Years in Prison for Taping the Cops? How Eavesdropping Laws Are Taking Away Our Best Defense Against Police Brutality*, ALTERNET (July 28, 2011), [https://www.alternet.org/story/151806/15\\_years\\_in\\_prison\\_for\\_taping\\_the\\_cops\\_how\\_eavesdropping\\_laws\\_are\\_taking\\_away\\_our\\_best\\_defense\\_against\\_police\\_brutality?page=entire](https://www.alternet.org/story/151806/15_years_in_prison_for_taping_the_cops_how_eavesdropping_laws_are_taking_away_our_best_defense_against_police_brutality?page=entire) [<https://perma.cc/K9CT-H25L>].

<sup>203</sup> U.S.: *Harsh Conditions for Young Lifers*, HUMAN RTS. WATCH (Jan. 2, 2012, 11:45 PM), <http://www.hrw.org/news/2012/01/02/us-harsh-conditions-young-lifers> [<https://perma.cc/7FY8-XRCB>].

<sup>204</sup> The piglet's screeches of pain were so terrible that they did not subject the second piglet to the same mutilation. Glenn Greenwald, *The FBI's Hunt for Two Missing Piglets Reveals the Federal Cover-Up of Barbaric Factory Farms*, INTERCEPT (Oct. 5, 2017, 2:05 PM), <https://theintercept.com/2017/10/05/factory-farms-fbi-missing-piglets-animal-rights-glenn-greenwald> [<https://perma.cc/PDP3-ZH8E>] ("[A] six-car armada of FBI agents in bulletproof vests, armed with search warrants, descended upon two small shelters for abandoned farm animals . . . .").

as federal "law enforcement" failed to prevent the \$ 50 billion Bernie Madoff fraud, the FBI alone had at least 15,000 informants, many of whom, along with state-level police and private contractors, were monitoring left-leaning political activists across the country. <sup>235</sup>

The government controls a huge "law enforcement" budget. This money could pay for investigating every doctor who writes an improper prescription, chemical testing and surveillance to locate the sources of illegal pollution of local rivers and groundwater, wiretaps to investigate corruption in police departments, and audits to examine prosecutor offices for withholding favorable evidence. "Law enforcement" could infiltrate boarding-school campuses to bust underage drinking and tobacco use or set up sting operations to fight widespread wage theft by employers. The choices that the bureaucracy makes involve direct tradeoffs, for example, from black families to corporate executives or from drug sellers to sexual abusers.

Tradeoffs exist not only between broad categories of crime (e.g., should we focus our resources on uncovering drug crime or sex crime?), but also within each category. If the government decides that drug possession is a more important priority than is police corruption, water pollution, or rape, it must still decide whether to spend money on police patrols and prisons, or whether to spend money on treatment, medical care, and safe injection sites. <sup>236</sup> If "law enforcement" decides that reducing violent sexual assaults is important, bureaucrats still must decide how they will expend resources looking for criminals; how much they will pay to prosecute and to jail them; or whether they will create programs to reduce gender inequality, help survivors find employment and trauma support, and pay for domestic violence shelters.

<sup>205</sup> *Chicago Artist's Protest Backfires as He Faces 15 Years in Jail . . . Because He Recorded His Own Arrest on Video*, DAILY MAIL (Jan. 24, 2011, 4:46 EDT), <https://www.dailymail.co.uk/news/article-1349966/Chicago-artist-Chris-Drew-faces-15-years-jail-recorded-arrest.html> [<https://perma.cc/25H3-PRYP>]; Mike Masnick, *Police and Courts Regularly Abusing Wiretapping Laws to Arrest People for Filming Cops Misbehaving in Public Places*, TECHDIRT (June 4, 2010, 5:45 PM), <https://www.techdirt.com/articles/20100603/0859019675.shtml> [<https://perma.cc/6LE3-QCKJ>].

<sup>206</sup> *Out of Reach: The High Cost of Housing*, NAT'L LOW INCOME HOUS. COALITION 1 (2018), [https://nlihc.org/sites/default/files/oor/OOR\\_2018.pdf](https://nlihc.org/sites/default/files/oor/OOR_2018.pdf) [<https://perma.cc/ST97-DCLU>].

<sup>207</sup> Rebecca Woolington & Melissa Lewis, *Portland Homeless Accounted for Majority of Police Arrests in 2017, Analysis Finds*, OREGONIAN (June 27, 2018), [https://www.oregonlive.com/portland/index.ssf/2018/06/portland\\_homeless\\_accounted\\_fo.html](https://www.oregonlive.com/portland/index.ssf/2018/06/portland_homeless_accounted_fo.html) [<https://perma.cc/74JW-DYR3>] (finding the "vast majority of the arrests" to be for nonviolent crimes and fifty-two percent of all arrests to be of homeless people).

<sup>208</sup> Joshua Vaughn, *Pennsylvania Prosecutors Pursue Charges for People Who Fall Behind on Rent-to-Own Payments*, APPEAL (Sept. 5, 2018), <https://theappeal.org/rent-to-own-companies-are-turning-the-criminal-justice-system-into-their-debt-collector/> [<https://perma.cc/U6UH-3NN2>].

<sup>209</sup> *Marijuana Arrest Reports*, NORML, <https://norml.org/library/arrest-reports> [<https://perma.cc/Z7FT-H8DL>].

<sup>210</sup> Christal Hayes, *Marijuana Arrests Were Up Last Year--And You're Paying Billions for It*, NEWSWEEK (Sept. 26, 2017, 3:22 PM), <https://www.newsweek.com/pot-arrests-rising-and-youre-paying-millions-it-671478> [<https://perma.cc/6RAM-BTB6>]; see also *Marijuana Arrests by the Numbers*, ACLU (last visited Mar. 11, 2019), <https://www.aclu.org/gallery/marijuana-arrests-numbers> [<https://perma.cc/FSK9-BKX8>] (finding that "[o]f the 8.2 million marijuana arrests between 2001 and 2010, 88% were for simply having marijuana" and that the marijuana arrests displayed "significant racial bias"); *Nixon Tapes Show Roots of Marijuana Prohibition: Misinformation, Culture Wars and Prejudice*, COMMON SENSE FOR DRUG POL'Y 6 (Mar. 2002), <http://www.csdp.org/research/shafernixon.pdf> [<https://perma.cc/4JSA-EKK2>] (reporting the annual number of marijuana arrests from 1972 to 2000).

Resource choices can be seen not just within police investigation priorities, but also in the money budgeted for other programs, such as housing, drug treatment, mental health care, probation, prisons, and education. For example, under President Clinton, federal public housing expenditures were reduced by four hundred million dollars annually, nearly the same amount by which the federal [\*899] prison budget increased. <sup>237</sup> Today, as police departments turn to "predictive policing" to supposedly prevent *future* crime rather than merely investigating *past* crimes, <sup>238</sup> they are deciding to spend billions of dollars on surveillance instead of investing in lead abatement in poor neighborhoods, <sup>239</sup> mental and medical health care, afterschool arts programs, or affordable places for people to live.

It is important for people advocating changes to the criminal system to explore why elites are making these investment choices even though, based on all the available evidence, the things bureaucrats are *not* investing in are far more likely to reduce future crime.

### *B. Cultural, Political, and Economic Forces Influence Which Laws Are Enforced Against Which People*

The Panthers thus became the native Vietcong, the ghetto became the village in which the Vietcong were hidden, and in the ensuing search-and-destroy operations, everyone in the village became suspect.

--James Baldwin <sup>240</sup>

Police bureaucrats have the discretion to change a person's life at any moment, and they exercise this discretion tens of millions of times every year. A major problem with "criminal justice reform" discourse is that most privileged people have no idea what "law enforcement" looks like in practice. The vast bulk [\*900] of contemporary policing is discretionary surveillance of and ruthless intervention in the lives of low-income people and people of color. <sup>241</sup>

<sup>211</sup> Katharine Q. Seelye, *Barack Obama, Asked About Drug History, Admits He Inhaled*, N.Y. TIMES (Oct. 24, 2006), <https://www.nytimes.com/2006/10/24/world/americas/24iht-dems.3272493.html> [<https://perma.cc/Y6L8-8SMK>].

<sup>212</sup> Neil A. Lewis, *Special Counsel Puts Lewinsky Case to Rest*, N.Y. TIMES, Mar. 7, 2002, at A18; cf. Gwen Ifill, *Clinton Admits Experiment with Marijuana in the 1960's*, N.Y. TIMES, Mar. 30, 1992, at A15.

<sup>213</sup> Nancy Flake, *11-Year-Old Arrested, Faces Felony, for Tripping School Fire Alarm*, HOUS. CHRON. (Feb. 1, 2005, 6:00 PM), <https://www.chron.com/neighborhood/article/11-year-old-arrested-faces-felony-for-tripping-9767783.php> [<https://perma.cc/WZ9G-ZXJX>].

<sup>214</sup> *Id.*

<sup>215</sup> Juliette Garside, *Philip Zimmermann: King of Encryption Reveals His Fears for Privacy*, GUARDIAN (May 25, 2015, 12:02 PM), <https://www.theguardian.com/technology/2015/may/25/philip-zimmermann-king-encryption-reveals-fears-privacy> [<https://perma.cc/3ECW-NC2G>].

<sup>216</sup> Benjamin Mueller, *It Wasn't a Crime to Carry Marijuana. Until the Police Found a Loophole.*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/nyregion/marijuana-police-nyc.html> [<https://perma.cc/7GFL-7KBT>].

<sup>217</sup> Ross Levitt & Deborah Feyerick, *Death Penalty States Scramble for Lethal Injection Drugs*, CNN (Nov. 16, 2013, 1:44 PM), <http://www.cnn.com/2013/11/15/justice/states-lethal-injection-drugs/> [<https://perma.cc/ZG4X-F6MT>].

<sup>218</sup> See, e.g., CHRISTOPHER HITCHENS, *THE TRIAL OF HENRY KISSINGER* (2001); Zaid Jilani, *REPORT: Henry Kissinger's Long History of Complicity in Human Rights Abuses*, THINK PROGRESS (Dec. 29, 2010), <https://thinkprogress.org/report-henry-kissingers-long-history-of-complicity-in-human-rights-abuses-ffc00aafbee/> [<https://perma.cc/7UCY-Z7GJ>]; see generally KINZER, *supra* note 192 (describing Kissinger's role in multiple U.S. military interventions based on deception and false claims).

At any stage, from the street to the courtroom, a government employee has the power to immunize crime. How many of us have pleaded for a little bit of this discretion when caught breaking a rule? I have a friend who has never received a speeding ticket despite having been stopped by radar-wielding police at least five times. Police officers on city streets have discretion to stop, arrest, or ignore people engaged in a wide variety of conduct and misconduct. Higher-level officials, by deciding geographic placement of officers, drafting department budgets, and setting prosecution priorities, have the ability to ignore law-breaking in entire neighborhoods or economic sectors. For that reason, the "radical" future of prison and police abolition sought by some on the political left and right effectively already exists for wide swaths of our society: wealthy white people rarely interact with the police, except by choice.

The discretionary exercise of these powers means the opposite for the poor and people of color. What has emerged for them is a metastasized system guided [**\*901**] by forces we don't acknowledge as opposed to good policy made transparently to promote shared values.

<sup>219</sup> Jason Leopold, *How Bush's DOJ Killed a Criminal Probe into BP that Threatened to Net Top Officials*, TRUTHOUT (May 19, 2010), <https://truthout.org/articles/how-bushs-doj-killed-a-criminal-probe-into-bp-that-threatened-to-net-top-officials> [<https://perma.cc/LRZ8-6P4Q>].

<sup>220</sup> Sandra E. Garcia, *Texas Woman Sentenced to 5 Years in Prison for Voter Fraud Loses Bid for New Trial*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/2018/06/13/us/texas-woman-voter-fraud.html> [<https://perma.cc/PV6C-U5YZ>]; see also Jack Healy, *Arrested, Jailed and Charged with a Felony. For Voting.*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html> [<https://perma.cc/5YQ7-TVFS>] (reporting on twelve people on probation or parole who were prosecuted in Alamance County, North Carolina for voting illegally in the 2016 presidential election, nine of whom were black).

<sup>221</sup> Carrie Teegardin, *Jury Quickly Says 'Not Guilty' in Georgia Elections Case*, ATLANTA J. CONST. (Mar. 15, 2018), <https://www.ajc.com/blog/investigations/jury-quickly-says-not-guilty-georgia-elections-case/uxbnZO4AUxmBOfTmVGZjXK> [<https://perma.cc/A64V-7A5R>].

<sup>222</sup> Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES (Sept. 123, 2009), <https://www.nytimes.com/2009/09/13/us/13water.html> [<https://perma.cc/P2TW-8F89>].

<sup>223</sup> Interested readers may also find worthwhile the stories of Tarek Mehanna, Barrett Brown, Thomas Drake, Aaron Swartz, William Binney, Jeremy Hammond, Leonard Peltier, Albert Woodfox, and Lynne Stewart.

<sup>224</sup> For illustrations of what the experience of being stopped and frisked can be like, see Gabrielle Bluestone, *This Is What It's Like to Be in a Stop and Frisk*, GAWKER (Oct. 13, 2013, 11:03 AM), <http://gawker.com/this-is-what-its-like-to-be-in-a-stop-and-frisk-1444542777> [<https://perma.cc/B9LD-4EJJ>], and Ross Tuttle & Erin Schneider, *Stopped-and-Frisked: 'For Being a F\*\*king Mutt'* [VIDEO], NATION (Oct. 8, 2012), <https://www.thenation.com/article/stopped-and-frisked-being-fking-mutt-video> [<https://perma.cc/KD9J-2YVM>].

<sup>225</sup> Compare JANE GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 2 (2015), <https://fas.org/sgp/crs/misc/R40623.pdf> [<https://perma.cc/UN94-HVQH>] (estimating annual revenue loss on account of corporate tax evasion due to profit sharing at one hundred billion dollars), with Meixell & Eisenbrey, *supra* note 83 ("All of the robberies, burglaries, larcenies, and motor vehicle thefts in the nation cost their victims less than \$ 14 billion in 2012, according to the FBI's Uniform Crime Reports."). A problem on a far larger scale is the black hole of international finance that permits tax evasion in complex transactions that are arguably legal in jurisdictions that have changed their laws to permit private individual wealth to be essentially hidden from taxation by other countries. See Matthew C. Klein, *How Much Do Tax Havens Cost the Rest of Us?*, BARRON'S (June 19, 2018, 10:58 AM ET), <https://www.barrons.com/articles/how-much-do-tax-havens-cost-the-rest-of-us-1529420282> [<https://perma.cc/BM2D-N95X>].

<sup>226</sup> Cf. Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 385 n.72 (2009) (collecting works by William Black on regulatory capture in financial fraud enforcement).

<sup>227</sup> By 2010, major U.S. cities had backlogs of tens of thousands of untested rape kits. See Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1246 (2014). Police departments were thus forgoing or slowing rape

A major achievement of the punishment bureaucracy is that it has retained mainstream respect even though it crushes unprecedented numbers of people with no evidence of any unique social benefit while simultaneously allowing enormous amounts of lawlessness that cause massive harm. Why is it still viewed as legitimate?

First, the groups who wield power in our society benefit from the punishment bureaucracy. It privileges their private property, their racial supremacy, their jobs, their voting rights, and their segregated neighborhoods.

Second, the growth of the punishment bureaucracy itself changes our culture and economy. As the bureaucracy expands, it employs larger and larger numbers of police officers, prosecutors, probation officers, defense attorneys, prison guards, contractors, and equipment manufacturers. People working in the system become dependent on its perpetuation for their livelihoods and even their identities. The path of least resistance is to grow more. Jobs are created, local political power is consolidated, and "law enforcement" activities are normalized and then rendered economically essential--such as roadblocks, prison guards, home raids, drug interdiction teams, neighborhood patrols, armed police in schools, SWAT teams, stop-and-frisk practices, social media monitoring, video surveillance, probation drug testing, and "intelligence" divisions. An ever-expanding set of "criminal justice" products are designed and advertised with billions of dollars from investors and tens of thousands more people involved at every stage of their production and marketing, trade conventions displaying the latest products and lucrative bureaucrat training schools follow,<sup>242</sup> along with new protocols for using the new products and training methods on those new protocols, and so on.<sup>243</sup> Soon, an entire society is prepared psychologically and [\*902] institutionally to confront a public health issue like drug addiction with metal shackles, tasers, and cages.

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investigations while they spent money on low-level arrests. Separately, even though we know that rape occurs with frequency on college campuses, the police do not have armies of undercover officers or armies of informants infiltrating college fraternities. And, in my ten years of experience, "law enforcement" essentially ignores uncontroverted evidence of rampant sexual violence against prisoners.

<sup>228</sup> For example, police chose to set up a unit of officers to record conversations in religious houses of worship and investigate a community of low-income Muslim residents in their homes. See Adam Goldman & Matt Apuzzo, *With Cameras, Informants, NYPD Eyed Mosques*, ASSOCIATED PRESS (Feb. 23, 2012), <https://www.ap.org/ap-in-the-news/2012/with-cameras-informants-nypd-eyed-mosques> [<https://perma.cc/G2AA-TNGN>]. The same department presumably did not create a similar team of two hundred agents to infiltrate luxury condos to ferret out evidence of tax evasion and prescription-drug abuse.

<sup>229</sup> Class Action Complaint at P 5, *Fant v. City of Ferguson*, 107 F. Supp. 3d 1016 (E.D. Mo. 2015) (No. 4:15-CV-253) (drawing on data from 2014).

<sup>230</sup> See JOHN HAGAN, *WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN* 137-212 (2010).

<sup>231</sup> See John Hudson, *FBI Drops Law Enforcement as 'Primary' Mission*, FOREIGN POL'Y (Jan. 5, 2014, 11:57 PM), [http://thecable.foreignpolicy.com/posts/2014/01/05/fbi\\_drops\\_law\\_enforcement\\_as\\_primary\\_mission](http://thecable.foreignpolicy.com/posts/2014/01/05/fbi_drops_law_enforcement_as_primary_mission) [<https://perma.cc/79PP-FWKA>]; Catherine Rampell, *Opinion, How America Stopped Prosecuting White-Collar Crime and Public Corruption*, in *Charts*, WASH. POST (Aug. 7, 2018), <https://www.washingtonpost.com/news/rampage/wp/2018/08/07/how-america-stopped-prosecuting-white-collar-crime-and-public-corruption-in-charts> [<https://perma.cc/85CN-HAUB>]; David Sirota, *US Prosecution of White-Collar Crime Hits 20-Year Low: Report*, INT'L BUS. TIMES (Aug. 4, 2015, 7:50 AM), <https://www.ibtimes.com/us-prosecution-white-collar-crime-hits-20-year-low-report-2037160> [<https://perma.cc/BR6X-7JHL>].

<sup>232</sup> Hudson, *supra* note 231; see Eric Lichtblau et al., *F.B.I. Struggles to Handle Financial Fraud Cases*, N.Y. TIMES (Oct. 18, 2008), <https://www.nytimes.com/2008/10/19/washington/19fbi.html> [<https://perma.cc/YC8U-97SW>] ("Prosecutions of frauds against financial institutions dropped 48 percent from 2000 to 2007, insurance fraud cases plummeted 75 percent, and securities fraud cases dropped 17

The more police officers and defense lawyers and border agents and weapons makers and training consultants there are, the more people who internalize the norms of the "law enforcement" culture and who come to depend on it. More people's friends and family make their livings in these industries, and private family conversations, public discussions, and media coverage change to tolerate and normalize the jobs performed by all of the normal people we know. This process organically increases support for the "law enforcement" complex, extending its influence, both casually through social norms and directly by expanding its economic power through more profit.

The process of how norms evolve is critical to explaining why it seems reasonable to roll tanks through Ferguson, put handcuffs on twelve million people every year, and monitor the lives of tens of millions of people through electronic surveillance when our society, only a generation ago, would have perceived such government intrusions as an authoritarian revolution. The cultural norms and economic regime that these forces have nurtured have produced a "law enforcement" zeitgeist characterizing the past forty years of American life. So embedded is this spirit that the punishment bureaucracy has become the venue to manage social and public health problems such as poverty, deteriorating education, lack of housing, drug addiction, and mental illness.<sup>244</sup>

Third, it is easier to police and jail populations whose pain and inconvenience are not part of the social conscience and who lack economic capital.<sup>245</sup> A decision by police officers to stop, question, and search

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percent."); Paul Shukovsky et al., *The Terrorism Trade-Off: Focus on National Security After 9/11 Means that the FBI Has Turned Its Back on Thousands of White-Collar Crimes*, SEATTLE POST-INTELLIGENCER (Apr. 11, 2007), <https://www.lathropd.com/projects/terrorism-trade-off/pdfs/terrorism-trade-off-april-11.pdf> [<https://perma.cc/4KN8-HAK7>].

<sup>233</sup> See *supra* notes 120-129.

<sup>234</sup> Paul Kiel & Jesse Eisinger, *How the IRS Was Guttled*, PROPUBLICA (Dec. 11, 2018, 5:00 AM EST), <https://www.propublica.org/article/how-the-irs-was-guttled> [<https://perma.cc/CL3X-8V58>].

<sup>235</sup> See, e.g., Stephan Salisbury, *Tomgram: Stephan Salisbury, Keeping an Eye on Everyone*, TOMDISPATCH (Oct. 3, 2010, 6:03 PM), [http://www.tomdispatch.com/archive/175303/stephan\\_salisbury\\_keeping\\_an\\_eye\\_on\\_everyone](http://www.tomdispatch.com/archive/175303/stephan_salisbury_keeping_an_eye_on_everyone) [<https://perma.cc/VT55-ULX4>].

<sup>236</sup> See Katherine Beckett, *The Uses and Abuses of Police Discretion: Toward Harm Reduction Policing*, 10 HARV. L. & POL'Y REV. 77, 89-95 (2016).

<sup>237</sup> Michelle Alexander, *Why Hillary Clinton Doesn't Deserve the Black Vote*, NATION (Feb. 10, 2016), <https://www.thenation.com/article/hillary-clinton-does-not-deserve-black-peoples-votes/> [<https://perma.cc/96QV-E6VC>]; see also Jeff Stein, *The Clinton Dynasty's Horrific Legacy: How "Tough-on-Crime" Politics Built the World's Largest Prison System*, SALON (Apr. 13, 2015), [https://www.salon.com/2015/04/13/the\\_clinton\\_dynastys\\_horrific\\_legacy\\_how\\_tough\\_on\\_crime\\_politics\\_built\\_the\\_worlds\\_largest\\_prison/](https://www.salon.com/2015/04/13/the_clinton_dynastys_horrific_legacy_how_tough_on_crime_politics_built_the_worlds_largest_prison/) [<https://perma.cc/5R56-NNMV>].



people is hard to sustain in wealthy neighborhoods. It would *feel* more shocking, strange, and intrusive to those most able to affect policing decisions, and instances of brutality and humiliation would work their way through the web of social connections surrounding the lives of elites. Children of news anchors would be arrested, doctors and their husbands would have their homes raided and their children's faces put to the barrels of assault rifles, and bankers would have their anal cavities searched in their high-rise offices. If that happened, twenty-four-hour news pundits [\*903] would discuss the violent police behavior with large on-screen font, and reporters standing next to news vans would demand explanations.

Fourth, leading punishment bureaucrats exploit these background conditions to obfuscate the functions of the punishment system. Instead of acknowledging that enforcement decisions are made based on cultural norms, money, conscious and subconscious bias, and political connections between officials and the people that they regulate, the punishment bureaucracy masks these deeper forces under slogans like "tough on crime" or "the rule of law." This propaganda suggests an almost scientific connection between every instance of law-breaking and an efficient system of enforcement.

The situation is especially ripe for exploitation by punishment bureaucrats in periods when what are marketed as "crime rates" are claimed to be increasing. But the very instinct to respond to perceived increases in (certain types of) crime by more punishment is the response of a ruling class--by those who want to talk about "crime" without changing society.

The zeal for "law enforcement" as punishment means that the legal system does not consider potential causes of misbehavior or ways to reduce it that might have other social benefits--for example, addressing structural inequality,<sup>246</sup> child exposure to lead,<sup>247</sup> gender inequality, or lack of meaningful access to theater, art, music, poetry, and physical wellness activities.<sup>248</sup> The punishment bureaucracy does not ask

<sup>238</sup> See Mara Hvistendahl, *Can 'Predictive Policing' Prevent Crime Before It Happens?*, SCI. (Sept. 28, 2016), <http://www.sciencemag.org/news/2016/09/can-predictive-policing-prevent-crime-it-happens> [<https://perma.cc/SM5L-D8XK>] ("As to whether predictive policing models work as advertised . . . the evidence is scarce, and the few data points are not encouraging.")

<sup>239</sup> Kevin Drum, *Lead: America's Real Criminal Element*, MOTHER JONES (Feb. 11, 2016), <http://www.motherjones.com/environment/2013/01/lead-crime-link-gasoline> [<https://perma.cc/D23V-LRUK>].

<sup>240</sup> James Baldwin, *No Name in the Street*, in *THE PRICE OF THE TICKET* 449, 537 (1985).

<sup>241</sup> See generally ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND* (2018); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* (2018); Paul Butler, *The System Is Working the Way it is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1447-75 (2016); NAT'L ASSOC. OF CRIM. DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE* (2009). In New York City, for example, police recorded stopping and investigating 533,042 people in 2012. NEW YORK CITY BAR ASS'N, *REPORT ON THE NYPD'S STOP-AND-FRISK POLICY 5* (2013). Eighty-five percent were black and Latino and only six percent of the stops resulted in an arrest. *Id.* at 15; see also Vincent Warren, *The Case Against Stop and Frisk*, OPEN SOC'Y FOUND. (Sept. 30, 2016), <https://www.opensocietyfoundations.org/voices/case-against-stop-and-frisk> [<https://perma.cc/BY55-XZVM>]. Black people are significantly more likely than white people to be stopped by police and significantly more likely to be searched after being stopped. Black people are less likely to possess illegal contraband than white people when searched. Jeff Guo, *Police Are Searching Black Drivers More Often but Finding More Illegal Stuff with White Drivers* (Oct. 27, 2015), WASH. POST, [https://www.washingtonpost.com/news/wonk/wp/2015/10/27/police-are-searching-black-drivers-more-often-but-finding-more-illegal-stuff-with-white-drivers-2/?utm\\_term=.cbf216b3ce03](https://www.washingtonpost.com/news/wonk/wp/2015/10/27/police-are-searching-black-drivers-more-often-but-finding-more-illegal-stuff-with-white-drivers-2/?utm_term=.cbf216b3ce03) [<https://perma.cc/7PHJ-AUOE>]. In Washington, D.C., black people are less than half the population but are over 90 percent of those handcuffed and jailed for drug offenses, despite using drugs in the same rate as white people. WASHINGTON LAWYERS COMM. FOR CIVIL RIGHTS & URBAN AFFAIRS, *RACIAL DISPARITIES IN ARRESTS IN THE DISTRICT OF COLUMBIA, 2009-2011*, at 2 (2013). When I investigated drug search warrants in Washington, D.C., I uncovered that hundreds of them every year were illegal and contained false statements by police. I interviewed dozens of families, who described violent raids executing these illegal searches including strip searches, probing the anuses of innocent people, pointing guns at naked children in the shower, shooting pets, and handcuffing elderly

if these causes of "crime" might be ameliorated without the human cost of prosecution and mass human caging. <sup>249</sup> This lack of care also explains why, in virtually every jurisdiction in which I have worked, I have noticed that the bureaucracy collects virtually no data to rigorously measure its performance.

Consider the drug war--one of the greatest successes of "law enforcement" punishment propaganda. The drug war cost more than a trillion dollars, <sup>250</sup> tens [\*904] of millions of arrests, <sup>251</sup> hundreds of millions of police stops, <sup>252</sup> tens of millions of years in prison, <sup>253</sup> tens of millions of lost jobs and educations and homes, millions of square acres of spray-poisoned forests, <sup>254</sup> tens of millions of voting rights (including at least one presidential election), <sup>255</sup> tens of millions of children separated from a parent, <sup>256</sup> hundreds of thousands of deaths due to the resulting drug wars and American intervention in Latin America, <sup>257</sup> and massive militarization and surveillance by local police of every American city and town. <sup>258</sup> The vast bulk of these consequences were inflicted on people for personal use of certain substances, an exercise of bodily autonomy that other countries have protected and that this country protects for other harmful substances like alcohol and tobacco. All of this was done in ways that dramatically increased the racial [\*905] disparities in every stage of the criminal system. <sup>259</sup> For all of these social costs, drug use either did not go down or significantly increased, and teenagers are using dangerous drugs at twice the rate that they did in the 1980s. <sup>260</sup>

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and disabled people. Of these, at least ninety-nine percent were in the homes of black families. John Sullivan, et al., *Probable Cause*, WASH. POST (Mar. 5, 2016), <https://www.washingtonpost.com/sf/investigative/2016/03/05/probable-cause> [<https://perma.cc/DS5C-NDL8>].

<sup>242</sup> See, e.g., Shane Bauer, *The Making of the Warrior Cop*, MOTHER JONES (Oct. 23, 2014, 10:00 AM), <https://www.motherjones.com/politics/2014/10/swat-warrior-cops-police-militarization-urban-shield> [<https://perma.cc/L5U4-D3WB>].

<sup>243</sup> Other economic incentives also corrupt this process, including billions of dollars in federal grants for discriminatory and military-style policing, the pursuit of billions of dollars in cash and property through civil forfeiture, overtime pay policies, performance evaluation metrics, and billions of dollars in weapons transfers from the U.S. military. See, e.g., Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35 (1998) (discussing the incentives created by federal grants and civil forfeiture); Hanqing Chen, *The Best Reporting on Federal Push to Militarize Local Police*, PROPUBLICA (Aug. 19, 2014, 8:30 AM EDT), <https://www.propublica.org/article/the-best-reporting-on-the-federal-push-to-militarize-local-police> [<https://perma.cc/9FOA-EG2A>] (explaining a federal program that had provided at least \$ 4.3 billion in military equipment to local police); Mike Maciag, *The Alarming Consequences of Police Working Overtime*, GOVERNING (Oct. 2017), <http://www.governing.com/topics/public-justice-safety/gov-police-officers-overworked-cops.html> [<https://perma.cc/T4AA-YGTU>] (describing how police incentives to work overtime have negative consequences, including increased racial bias).

Only idiots would pursue strategies that are so counterproductive and destructive for so long--and our legal system's bureaucrats are sophisticated, not idiotic. The "war on drugs" is about something else.

Above all, one thing is true: The punishment bureaucrats who created the contemporary "criminal justice system" are broadly comfortable with the way that our society looks. They market a crime problem in need of "law enforcement" in order to keep our society looking the way that it does. They do not want to solve the "crime" problem if that means a society that looks much different--say, more equal and with less private profit. Hence they both construct and respond to "crime" with strategies that increase inequality and control, but do little to stop the same problems they purport to care about--and that often make those problems worse, thereby justifying a circular call for more (selective) punishment. And that is why courts do not enforce the rules of law that are intended to make our society more equal when those rules conflict with the goals of the punishment bureaucracy.

In sum, the "law enforcement" religion is hostile to the view that a society that is more equal would have less crime, not because that idea is untrue, but because the very *goal* of the criminal legal system is to preserve certain elements of an unequal social order even if that inequality *creates* "crime." <sup>261</sup>

### C. *The Myth of the Rule of Law*

[T]he alleged protection of our persons from violence is only an accidental result of the existence of a police force whose real business is to force the poor man to see his children starve whilst idle people overfeed pet dogs with the money that might feed and clothe them.

--George Bernard Shaw <sup>262</sup>

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<sup>244</sup> See generally LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (arguing that the complementary erosion of the social-welfare state and explosion of the penal state has resulted in the criminalization of social insecurity).

<sup>245</sup> See Nicholas K. Peart, Opinion, *Why Is the NYPD After Me?*, N.Y. TIMES (Dec. 17, 2011), <http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html> [<https://perma.cc/3TMU-XJJ3>].

<sup>246</sup> RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITIES MAKES SOCIETIES STRONGER (2011).

<sup>247</sup> See Michael Hawthorne, *Studies Link Lead Exposure, Violent Crime*, CHI. TRIB. (June 6, 2015), <http://www.chicagotribune.com/news/ct-lead-poisoning-science-met-20150605-story.html> [<https://perma.cc/7PZU-YXDF>].

<sup>248</sup> See *Invest-Divest*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/invest-divest> [<https://perma.cc/2B9H-PQGF>].

<sup>249</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

<sup>250</sup> Associated Press, *AP IMPACT: After 40 Years, \$ 1 Trillion, US War on Drugs Has Failed to Meet Any of Its Goals*, FOX NEWS (May 13, 2010), <https://www.foxnews.com/world/ap-impact-after-40-years-1-trillion-us-war-on-drugs-has-failed-to-meet-any-of-its-goals> [<https://perma.cc/9XPE-4NJE>].

<sup>251</sup> *Id.*

To accomplish the "rule of law" trickery, the punishment bureaucracy makes pronouncements about what "crime" is, why people commit crime, and how best [\*906] to reduce crime by "enforcing the law." The power of this worldview cannot be underestimated: it has won almost every relevant policy debate in the past forty years. It convinced a broad range of people that the solutions to their problems were not changes to the political system or the economic structure or discriminatory social norms, but rather, more police "on the streets" and more poor black people in prison cages.

The "law enforcement" myth is seductive. Many people, including lawyers and judges, want to believe that something like the neutral "rule of law" can exist, and for good reasons. But it is dangerous to do so without understanding that policing and prosecution are used as a tool of politics and power to benefit some and to hurt others.

One of the most insidious notions pervading standard discourse is that people are investigated and punished because they break laws and therefore that, if one breaks the law, one will be investigated and punished. This principle supports a larger idea: our legal system is objective, trying its best to promote

<sup>252</sup> See *Findings*, STAN. OPEN POLICING PROJECT (last visited Mar. 11, 2019), <https://openpolicing.stanford.edu/findings/> [<https://perma.cc/Z9KR-ZFLB>] (finding that more than 20 million motorists are stopped every year, and illustrating graphically that traffic stops in Colorado and Washington reduced by half after the legalization of marijuana in those states).

<sup>253</sup> See, e.g., Mark Motivans, Bureau of Justice Statistics, *Federal Justice Statistics, 2015-16*, U.S. DEPT JUST. 10 (Jan. 2019), <https://www.bjs.gov/content/pub/pdf/fjs1516.pdf> [<https://perma.cc/DBU4-K7E2>] (reporting in Table 7 that over 100,000 years of prison for drug offenses were imposed in fiscal year 2016 alone, assuming that the median drug sentence approximates the average drug sentence).

<sup>254</sup> *Colombia's Two Anti-Coca Strategies Are at War with Each Other*, ECONOMIST (Feb. 20, 2018), <https://www.economist.com/the-americas/2018/02/20/colombias-two-anti-coca-strategies-are-at-war-with-each-other> [<https://perma.cc/OO8J-Z6VL>]; Judith Walcott, *Spraying Crops, Eradicating People*, CULTURAL SURVIVAL Q. MAG. (Dec. 2002), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/spraying-crops-eradicating-people> [<https://perma.cc/KH4M-AHW2>].

<sup>255</sup> See Hannah Kozłowska, *What Would Happen if 6 Million Felons Could Vote?*, QUARTZ (Oct. 6, 2016), <https://qz.com/784503/what-would-happen-if-felons-could-vote/> [<https://perma.cc/4VW9-33T4>]; see also Heather Ann Thompson, *How Prisons Change the Balance of Power in America*, ATLANTIC (Oct. 7, 2013), <http://www.theatlantic.com/national/archive/2013/10/how-prisons-change-the-balance-of-power-in-america/280341/> [<https://perma.cc/8NMY-MX74>].

<sup>256</sup> Brian Elderbroom et. al., *Every Second: The Impact of the Incarceration Crisis on America's Families*, FWD.US (Dec. 2018), <https://everysecond.fwd.us/downloads/EverySecond.fwd.us.pdf> [<https://perma.cc/D7LZ-39UG>] (discussing the effect of incarceration on tens of millions of families).

<sup>257</sup> David Huey, *The US War on Drugs and Its Legacy in Latin America*, GUARDIAN (Feb. 3, 2014), <https://www.theguardian.com/global-development-professionals-network/2014/feb/03/us-war-on-drugs-impact-in-latin-american> [<https://perma.cc/7QMX-G645>] (reporting that approximately 100,000 Mexicans have disappeared and 15,000 Colombians have died during the war on drugs).

<sup>258</sup> See, e.g., Chen, *supra* note 243.

<sup>259</sup> Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/> [<https://perma.cc/EU44-SM8Q>].

<sup>260</sup> Associated Press, *supra* note 250.

<sup>261</sup> See ALEXANDER, *supra* note 26, at 173-208; THE DERRICK BELL READER 27-54 (Richard Delgado & Jean Stefancic eds., 2005).

<sup>262</sup> BERNARD SHAW, MAJOR BARBARA 7-8 (1941).

well-being, morality, and human flourishing. The myth that an objective "rule of law" determines the outcomes is important to the system's perceived legitimacy and to our acceptance of its authority over us.

A lot of assumptions are imbedded in the everyday assessment of the punishment bureaucracy's legitimacy and effectiveness: Poor people and black people fill jails because they do more bad things than wealthy people and white people. American officials are not arrested for war crimes because they slaughtered people and assassinated democratically elected leaders for good reasons. People are pulled over because they violated a traffic rule or frisked because they were suspicious. Teenagers are searched on their way to school because they live in a "high crime" area and their black and brown bodies are dangerous. A person obtained his wealth legitimately because his ancestors were never prosecuted for acquiring it. Prisoners cannot hug their children or see sunlight because jails are places where we could not safely have family visits or fresh air.

The standard "criminal justice" discourse lulls people into abandoning scrutiny of their assumptions. Government employees who arrest and prosecute people are called "law enforcement" agents; the entire enterprise is referred to in press conferences as an objective entity: "from a law enforcement perspective" or "law enforcement believes that." As we have seen, it would be more accurate to refer to them as "selective enforcement officers" or "white wealth preservation officers" because they usually enforce only *some* laws against *some* people. <sup>263</sup>

Many of the most prominent mass violations of American law were perpetrated or covered up by "law enforcement" officers acting pursuant to official [\*907] policies, including the Trail of Tears, the ethnic cleansing and forced deportation of more than a million Americans for suspected Mexican heritage, <sup>264</sup> the internment of Japanese Americans, and the arming of right-wing Nicaraguan death squads and the perjury surrounding it. <sup>265</sup> For much of this country's history, black people were lynched--one of the main features of that ritual being that the openness of the public murder communicated that the "law enforcement" apparatus would do nothing to "enforce" criminal laws to protect black bodies and embraced racial terror. <sup>266</sup> To take just one example, not a single white person was prosecuted after the Tulsa massacre, the most deadly terrorist event in an American city until September 11, 2001. <sup>267</sup> Hundreds of years of criminal acts against black people were unpunished such that the "rule of law" was formally converted into a tool to reproduce slavery by another name. <sup>268</sup>

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<sup>263</sup> See HAGAN, *supra* note 230.

<sup>264</sup> Diane Bernard, *The Time a President Deported 1 Million Mexican Americans for Supposedly Stealing U.S. Jobs*, WASH. POST (Aug. 13, 2018), [https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/?utm\\_term=.1c05936ac974](https://www.washingtonpost.com/news/retropolis/wp/2018/08/13/the-time-a-president-deported-1-million-mexican-americans-for-stealing-u-s-jobs/?utm_term=.1c05936ac974) [<https://perma.cc/P464-ASPG>].

<sup>265</sup> Noam Chomsky, Opinion, *From Central America to Iraq*, KHALEEJ TIMES (Aug. 6, 2004), <https://www.khaleejtimes.com/article/20040806/ARTICLE/308069989/1098> [<https://perma.cc/KL3K-JGVV>]; see also Tuttle & Schneider, *supra* note 224.

<sup>266</sup> See David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 797-99 (2005).

<sup>267</sup> OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT 11-15 (2001).

<sup>268</sup> See BLACKMON, *supra* note 48, at 99-100.

Given this history, one of the central tasks for punishment bureaucrats is to push the myth that the American legal system at some point became *different* and more objective than it has been throughout its entire history.

The way punishment bureaucrats talk is therefore like a newspaper assuring us that it contains "all the news that is fit to print." This marketing technique of feigned completeness and objectivity is a manipulation--its goal to have us ignore editorial decisions about which of the millions of potential news stories to cover. For example, despite its famous motto, the *New York Times* chooses to cover most plane crashes, but does not contain a front-page article every morning about the thousands of children who died of starvation the night before.<sup>269</sup> By presenting as objective decisions that are highly subjective, both journalists and punishment bureaucrats obscure from debate many of society's political choices.

The work of punishment bureaucrats to convince people to support selective "law enforcement" against certain populations has created a miscalibration of [\*908] our response to harmful conduct. Seen from the lens of actual social harm, American "law enforcement" priorities are ridiculous. For example, second-hand smoke alone kills 41,000 Americans every year.<sup>270</sup> That is twelve September 11 attacks on innocent people unlucky enough to have come into contact with other people who smoke products produced by corporate traffickers of tobacco. If one includes Americans addicted to tobacco, that drug kills 480,000 Americans<sup>271</sup> and almost 6 million human beings globally every year.<sup>272</sup> Tobacco use is legal, and the marketing and distribution of tobacco is lucrative.<sup>273</sup> Similar examples pervade every aspect of life: the insertion of food additives and cancer-causing agents into products causes enormous harm, but is not typically addressed through the criminal law; the massive financial fraud of *trillions* of dollars of taxpayer money over several decades to secretly inflate the military budget has never been treated as a crime;<sup>274</sup> the contamination of drinking water in major cities is rarely discussed as a criminal issue; the billions of dollars in health costs, deaths, and physical pain caused by sugary sodas are harms not addressed through the punishment system.<sup>275</sup> Mortgage fraud and other financial crimes that result in homelessness and an inability to meet basic needs of life kill, by conservative estimates, tens of thousands

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<sup>269</sup> Cf. Robert E. Black et al., *Maternal and Child Undernutrition and Overweight in Low-Income and Middle-Income Countries*, 382 LANCET 427 (2013).

<sup>270</sup> *Tobacco-Related Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 15, 2017), [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/health\\_effects/tobacco\\_related\\_mortality/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm) [<https://perma.cc/JRD5-FUMV>].

<sup>271</sup> *Id.*

<sup>272</sup> *Smoking and Tobacco Use: Fast Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 20, 2018), [https://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/fast\\_facts/index.htm](https://www.cdc.gov/tobacco/data_statistics/fact_sheets/fast_facts/index.htm) [<https://perma.cc/9XEZ-F9CF>].

<sup>273</sup> Cf. Anna Gilmore, *Big Tobacco Targets the Young in Poor Countries--with Deadly Consequences*, GUARDIAN (Dec. 1, 2015), <https://www.theguardian.com/global-development/2015/dec/01/big-tobacco-industry-targets-young-people-poor-countries-smoking> [<https://perma.cc/8WC4-953D>].

<sup>274</sup> Dave Lindorff, *The Pentagon's Massive Accounting Fraud Exposed*, NATION (Nov. 27, 2018), <https://www.thenation.com/article/pentagon-audit-budget-fraud/> [<https://perma.cc/FPW3-N4Z4>].

<sup>275</sup> See Gretchen Frazee, *How Taxing Sugary Drinks Affects a Community's Health and Economy*, PBS NEWSHOUR (Oct. 4, 2018, 5:57 PM), <https://www.pbs.org/newshour/economy/making-sense/how-taxing-sugary-drinks-affects-a-communitys-health-and-economy> [<https://perma.cc/DR8F-EEGL>].

of Americans every year, not to mention dramatically reducing the quality of life for millions more.<sup>276</sup> To the contrary, the threat of "terrorism" is almost nonexistent--about the same danger to Americans as [\*909] shark attacks, and orders of magnitude lower than texting while driving.<sup>277</sup> The vast bulk of "law enforcement" resources are thus spent protecting Americans from relatively miniscule risks. This bureaucracy is therefore pathetic as a means of saving lives, preventing harm, and helping humans flourish.

In societies that our culture portrays as primitive, force was thought to have prevailed in all disputes. Stronger people committed crimes at their pleasure. Cities were sacked, nations conquered, and lords were immune from punishment by the size of their armies. All of this has been replaced with "the rule of law" and institutions to "enforce the law." But, as Camus suggests, there has been something devious in the construction of this bureaucracy. That ingenious element is the illusion of rigorous objectivity, the façade of legitimacy. It's the ability to turn "murderers into judges."<sup>278</sup>

Now that this façade is unraveling amidst a new movement challenging the mass imprisonment of black and brown and poor people, many of the bureaucrats who built their careers on the myth of the "rule of law" are trying to rescue the legitimacy of the punishment bureaucracy.

## VII

The smart way to keep people passive and obedient is to strictly limit the spectrum of acceptable opinion, but allow very lively debate within that spectrum--even encourage the more critical and dissident views. That gives people the sense that there's free thinking going on, while all the time the presuppositions of the system are being reinforced by the limits put on the range of the debate.

--Noam Chomsky<sup>279</sup>

Powerful systems have a way of shapeshifting. By some measures, we have *more* segregation in schools since 1968 even though courts declared that de jure school segregation is illegal.<sup>280</sup> A push to "reform" federal sentencing laws in the [\*910] 1980s, ostensibly to reduce judicial bias, *increased* punishment severity across the board.<sup>281</sup> A "bail reform" campaign in the 1960s to eliminate the use of cash bail in federal courts to jail the poor resulted in a system in which the rate of pretrial detention of presumptively

<sup>276</sup> See *supra* notes 132-Error! Bookmark not defined. and accompanying text.

<sup>277</sup> See Andrew Shaver, *You're More Likely to be Fatally Crushed by Furniture than Killed by a Terrorist*, WASH. POST (Nov. 23, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/23/youre-more-likely-to-be-fatally-crushed-by-furniture-than-killed-by-a-terrorist> [<https://perma.cc/DX5N-NWSW>].

<sup>278</sup> ALBERT CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* 3 (1951).

<sup>279</sup> NOAM CHOMSKY, *THE COMMON GOOD* 43 (1998).

<sup>280</sup> See Beverly Daniel Tatum, Opinion, *Segregation Worse in Schools 60 Years After Brown v. Board of Education*, SEATTLE TIMES (Sept. 14, 2017, 3:06 PM), <https://www.seattletimes.com/opinion/segregation-worse-in-schools-60-years-after-brown-v-board-of-education> [<https://perma.cc/Y8U6-YRXS>]; see also, e.g., Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat, and an Uncertain Future*, C.R. PROJECT (2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf> [<https://perma.cc/YQQ9-DUVN>]; Fred Harris & Alan Curtis, Opinion, *The Unmet Promise of Equality*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/interactive/2018/02/28/opinion/the-unmet-promise-of-equality.html> [<https://perma.cc/LAC5-7CM4>].

<sup>281</sup> Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1134-36 (2018).

innocent people went *up*.<sup>282</sup> Although the Supreme Court has said that pretrial liberty must be the "norm" and pretrial detention the "carefully limited exception,"<sup>283</sup> over seventy-two percent of federal criminal defendants are now confined to jail cells for the entire duration of their prosecution.<sup>284</sup>

And so we find ourselves in a dangerous time. There is broad awareness of the senselessness of the punishment system and a movement of people organizing to dismantle it. But the forces that made the punishment bureaucracy are aligning to shape how it is "reformed." The recognition of the system's unfairness and ineffectiveness has reached such a tipping point that some kind of change must happen in order for the system to preserve its own legitimacy. Accordingly, mass incarceration bureaucrats are looking to become the face of what they call "criminal justice reform." Their success will depend on whether people can tell the difference.

#### A. *Punishment Bureaucrats and the Rule of Law*

On a national level, punishment bureaucrats like Preet Bharara, Kamala Harris, Eric Holder, and Sally Yates are feted as "criminal justice reform" leaders. They and many more punishment bureaucrats have adopted vaguely critical buzz words about mass incarceration that are trendy in liberal elite circles, and they are calling for "reforms," such as decreasing the use of cash bail in "low level" cases or shorter mandatory minimum prison sentences for some drug crimes. But make no mistake: these former prosecutors devoted a career to mass human caging. For years, each of them prospered professionally by transferring [\*911] unprecedented numbers of poor people and people of color away from their families and into government confinement. And remember what that means: each of them operated the machinery that abused the bodies and minds of people who lack power in our society without any evidence that the misery they were inflicting was necessary to make our society a better place.

On Twitter, Bharara has billed himself as a "defender of justice and fairness" and a new kind of "sheriff" who has shifted "law enforcement" focus to fighting "big banks, terrorists, hedge funds, and public corruption."<sup>285</sup> But impoverished people of color in New York City saw a different kind of "law enforcement." Bharara began his career as a prosecutor at the height of mass incarceration.<sup>286</sup> Although he had access to essentially any job in the legal profession, he chose to become a drug prosecutor, a job devoted to putting human beings in prison cells for possessing substances on a list of substances that the government has decided that people may not possess.<sup>287</sup> Even later in his career, as he trumpeted a small

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<sup>282</sup> Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 741 (2011).

<sup>283</sup> *United States v. Salerno*, 481 U.S. 739, 755 (1987).

<sup>284</sup> See *Table H-14--Federal Pretrial Services Judicial Business (September 30, 2017)*, U.S. COURTS (Sept. 30, 2017), <http://www.uscourts.gov/statistics/table/h-14/judicial-business/2017/09/30> [<https://perma.cc/3YRT-HMKK>].

<sup>285</sup> Preet Bharara (@PreetBharara), TWITTER (Oct. 9, 2018, 2:38 PM), <https://twitter.com/PreetBharara/status/1049776018943143936> [<https://perma.cc/CZ5C-KVJ2>].

<sup>286</sup> See Benjamin Weiser, *For Manhattan's Next U.S. Attorney, Politics and Prosecution Don't Mix*, N.Y. TIMES (Aug. 9, 2009), <https://www.nytimes.com/2009/08/10/nyregion/10bharara.html> [<https://perma.cc/2UWC-BU9R>].

<sup>287</sup> See *id.*; see also, e.g., Nicole Hong, *U.S. Attorney Preet Bharara Sets His Sights on Drug Dealers in Opioid Overdoses*, WALL ST. J. (Nov. 20, 2016, 8:30 AM), <https://www.wsj.com/articles/u-s-attorney-preet-bharara-sets-his-sights-on-drug-dealers-in-opioid-overdoses-1479643209> [<https://perma.cc/4HAN-JW6D>] (outlining Bharara's initiative to charge dealers for their buyers' deaths); David Patton, *Opinion, An Honest Assessment of Preet Bharara's Record: Harsh Prosecutions Put More African-Americans and Hispanics Behind Bars*,



number of highly marketed Wall Street prosecutions to build his public profile,<sup>288</sup> about eighty percent of the people prosecuted by his office in Manhattan were impoverished.<sup>289</sup> During his time in charge of the office, about *fifty* percent [\*912] of his cases were prosecutions for drug offenses and of undocumented immigrants accused of crossing a geographic political boundary.<sup>290</sup> In 2016, despite jurisdiction over the New York Police Department (NYPD), he chose not to prosecute a single civil rights case.<sup>291</sup> This is remarkable given that Bharara had jurisdiction to prosecute intentional violation of any person's rights by the NYPD, including any intentionally unlawful stop, search, or arrest. No officers were prosecuted for perjury, even when they were caught lying in Bharara's cases.<sup>292</sup>

[\*913] Bharara, like all of us, knew that the people he chose to cage were significantly likely to be physically and sexually assaulted,<sup>293</sup> receive inadequate medical care,<sup>294</sup> and be tortured in solitary confinement.<sup>295</sup> For years, he oversaw all of the things, large and small, that federal prosecution entails in our society: pursuing mandatory minimum sentencing to coerce guilty pleas, working with police with long histories of abuse and constitutional violations, covering up police lying, rejecting science in forensic evidence, placing metal restraints on criminal defendants and immigrants in court so that they cannot hug their families, threatening people with longer imprisonment unless they give up their right to a jury trial, imposing pretrial detention in dangerous and grotesque conditions, creating racial disparities, separating children from their parents without evidence that it benefits anyone, and displaying massive disregard for the crimes of elites.

[\*914] Similarly, Attorney General Holder ran the largest human caging apparatus in the history of western democracies. He was selected for that role in part because of the reputation he built as a tough prosecutor in D.C. during the 1990s, when he pioneered the now-ubiquitous strategy of police stopping

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N.Y. DAILY NEWS (Mar. 15, 2017) <http://www.nydailynews.com/opinion/honest-assessment-preet-bharara-record-article-1.2999367> [<https://perma.cc/9HTQ-LRKS>] (providing statistics on Bharara's tenure); Press Release, *Manhattan U.S. Attorney Charges 34 Members of Bronx Drug Trafficking Crews with Distributing Crack Cocaine*, DRUG ENFORCEMENT AGENCY (Dec. 15, 2011), <https://www.dea.gov/press-releases/2011/12/15/manhattan-us-attorney-charges-34-members-bronx-drug-trafficking-crews> [<https://perma.cc/Q5BU-H2VU>] (quoting Bharara as stating that "[d]rug dealers infect neighborhoods with their presence and poison a community's lifeblood" and that "[t]ogether with our law enforcement partners, our commitment to cleaning up the streets of New York for its citizens is a top priority").

<sup>288</sup> Keith J. Kelly & Kaja Whitehouse, *Preet Bharara Scores \$ 1M Book Deal for Debut*, N.Y. POST (June 22, 2017, 12:27 PM), <https://nypost.com/2017/06/22/preet-bhararas-debut-book-will-be-about-the-search-for-justice> [<https://perma.cc/2DLL-ETP5>].

<sup>289</sup> Patton, *supra* note 287.

<sup>290</sup> *Statistical Information Packet: Fiscal Year 2015: Southern District of New York*, U.S. SENT'G COMMISSION (2015), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/nys15.pdf> [<https://perma.cc/9WAG-CJ4C>].

<sup>291</sup> *Statistical Information Packet: Fiscal Year 2016: Southern District of New York*, U.S. SENT'G COMMISSION (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/nys16.pdf> [<https://perma.cc/WE8J-K8ZG>].

<sup>292</sup> See, e.g., David E. Patton, *Policing the Poor and the Two Faces of the Justice Department*, 44 FORDHAM URB. L.J. 1431 (2017).

<sup>293</sup> Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. DEP'T JUST. (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<https://perma.cc/9RQ8-SBBZ>].

<sup>294</sup> See generally *Medical Treatment in Prison: A Curated Collection of Links*, MARSHALL PROJECT (Mar. 10, 2019, 6:15 PM), <https://www.themarshallproject.org/records/868-medical-treatment-in-prison> [<https://perma.cc/6TFN-VFXD>]; see also, e.g., *Brown v. Plata*,

young black men based on pretextual reasons in order to search their bodies.<sup>296</sup> In his later role running the DOJ, among many other things, Holder transferred billions of dollars in cash and military equipment to local police with histories of rampant abuse;<sup>297</sup> managed the largest solitary confinement program in the public record, crushing people for years in isolation; refused to make meaningful changes after the National Academy of Sciences unmasked that federal prosecutors were using junk science for decades to pursue convictions based on testimony that had no scientific basis;<sup>298</sup> supervised an army of prosecutors who sought, virtually every single day, to defend and expand mandatory minimum sentences in federal appellate courts; and presided over a historic expansion of immigrant detention and deportation.<sup>299</sup> More brazenly, he kept thousands of men, mostly black, in prison by fighting against retroactive application of a new law that would reduce the disparity between the punishment of crack and powder cocaine.<sup>300</sup> And he quietly intervened to prevent the release of tens of thousands of black federal [\*915] prisoners detained illegally for drug offenses in one of the most callous acts that I have witnessed in my legal career.<sup>301</sup>

And Sally Yates, known in the field as a harsh advocate of imprisonment while a federal prosecutor in Georgia,<sup>302</sup> repeatedly undermined the possibility of meaningful changes during her time as Deputy Attorney General. To take just a few of many examples, she argued against application of small reductions in penalties for federal drug sentences to people already confined in prison under harsh sentences,<sup>303</sup> oversaw the DOJ's rejection of Inspector General reports recommending greater compassionate release of terminally ill and elderly prisoners,<sup>304</sup> sat on or rejected the clemency petitions of thousands of federal prisoners,<sup>305</sup> and secretly kept from the White House the contrary opinions of the DOJ Pardon Office in the many cases in which Yates overruled or refused to act on the Pardon Office's

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563 U.S. 493, 501 (2011) ("For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs. Needless suffering and death have been the well-documented result."); NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 222-226 (2014), <https://www.nap.edu/read/18613/chapter/9#222> [<https://perma.cc/M42L-T9DG>]; Amanda Aronczyk & Katie Rose Quandt, *Angola Prison Lawsuit Poses Question: What Kind of Medical Care Do Inmates Deserve?*, NPR (Mar. 10, 2018, 7:46 AM ET), <https://www.npr.org/sections/health-shots/2018/03/10/591624904/angola-prison-lawsuit-poses-question-what-kind-of-medical-care-do-inmates-deserv> [<https://perma.cc/C263-SFCE>]; Mike Cason, AL.COM (Feb. 11, 2019), *Judge Finds Alabama Prisons 'Deliberately Indifferent' to Isolated Inmates*, <https://www.al.com/news/2019/02/judge-finds-alabama-prisons-deliberately-indifferent-to-isolated-inmates.html> [<https://perma.cc/MA2J-R257>]; Greg Dober, *Corizon Needs a Checkup: Problems with Privatized Correctional Healthcare*, PRISON LEGAL NEWS (Mar. 15, 2014), <https://www.prisonlegalnews.org/news/2014/mar/15/corizon-needs-a-checkup-problems-with-privatized-correctional-healthcare/> [<https://perma.cc/SA4J-B24G>]; Bob Egelko, *Report Rips California Prison Psychiatric Care, Cites Case of Inmate Who Ate Her Eyeball*, SFGATE (Nov. 2, 2018, 4:34 PM PDT), <https://www.sfgate.com/bayarea/article/Report-rips-California-prison-psychiatric-care-13356438.php> [<https://perma.cc/39K7-KARQ>]; Jennifer Gonnerman, *Do Jails Kill People?*, NEW YORKER (Feb. 20, 2019), <https://www.newyorker.com/books/under-review/do-jails-kill-people> [<https://perma.cc/CE8R-5SRP>] (discussing HOMER VENTERS, *LIFE AND DEATH IN RIKERS ISLAND* (2019)); Jimmy Jenkins, *On the Inside: The Chaos of Arizona Prison Health Care*, PRISON LEGAL NEWS (Nov. 6, 2018) <https://www.prisonlegalnews.org/news/2018/nov/6/inside-chaos-arizona-prison-health-care> [<https://perma.cc/7GFW-5EN7>].

<sup>295</sup> Atul Gawande, *Hellhole*, NEW YORKER (Mar. 30, 2009), <https://www.newyorker.com/magazine/2009/03/30/hellhole> [<https://perma.cc/2GYA-6QWV>].

<sup>296</sup> See JAMES FORMAN JR., *LOCKING UP OUR OWN* 194-204 (2017).

<sup>297</sup> See *supra* note 241 and accompanying text; *infra* note 345 and accompanying text.

<sup>298</sup> Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 449 (2017); see also Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic*

recommendation for clemency.<sup>306</sup> Tens of thousands of federal prisoners, mostly poor and disproportionately black--including thousands who [\*916] were serving sentences that the DOJ itself had declared illegal--never got clemency.<sup>307</sup>

For her part, Harris now calls herself a "progressive prosecutor."<sup>308</sup> When I first encountered Harris, she had spent her prosecutorial career using the cashbail system in California to illegally jail thousands of impoverished people, to extract tens of millions of dollars every year from the poorest families in California for the for-profit bail industry, and to coerce guilty pleas through illegal pretrial detention.<sup>309</sup>

Harris's broader record shows her commitment to the punishment bureaucracy. As a longtime District Attorney, Harris increased felony convictions, largely on the strength of her zealous prosecution of drug offenses.<sup>310</sup> When she was a prosecutor in San Francisco, Harris chose to arrest impoverished black parents whose children were truant.<sup>311</sup> Harris can be seen on video bragging that, against the advice of her political aides, she pushed for punishment of those parents because it was the right thing to do, even if it meant using up her limited political capital.<sup>312</sup> Harris laughed about sending "gang" and "homicide" prosecutors to threaten poor mothers of truant children with prosecution. And she boastfully recalled charging a homeless mother of three with a crime for having truant children.<sup>313</sup> She also pushed legislation to expand such criminal punishment of parents across California.<sup>314</sup> Harris embarked on this crusade despite lacking any evidence that criminal punishment of impoverished parents is the best way to increase school attendance in poor communities of color. In 2010, [\*917] local prosecutors told the media that Harris "pressured them to take weak cases to trial in an attempt to look tough on crime" before her election.<sup>315</sup> In 2014, she tried to block the early release of people convicted of less serious crimes to reduce deadly prison overcrowding on the ground that "prisons would lose an important labor pool."<sup>316</sup> At the core of Harris' argument was that California needed cheap labor from prisoners, such as to fight

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*Flaws Found by Justice Department*, WASH. POST (Apr. 16, 2012), [http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT\\_story.html](http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_story.html) [<https://perma.cc/KRT2-PRFS>]; Spencer S. Hsu, *Forensic Techniques Are Subject to Human Bias, Lack Standards, Panel Found*, WASH. POST (Apr. 17, 2012), [http://www.washingtonpost.com/local/crime/forensic-techniques-are-subject-to-human-bias-lack-standards-panel-found/2012/04/17/gIQADCoMPT\\_story.html](http://www.washingtonpost.com/local/crime/forensic-techniques-are-subject-to-human-bias-lack-standards-panel-found/2012/04/17/gIQADCoMPT_story.html) [<https://perma.cc/B6BA-BDX3>] ("[N]ew DNA testing appeared to clear convicted defendants in 16 percent of Virginia criminal convictions between 1973 and 1988 in which evidence was available for retesting. A 2009 study of post-conviction DNA exonerations -- now up to 289 nationwide -- found invalid testimony in more than half the cases.").

<sup>299</sup> See, e.g., Serena Marshall, *Obama Has Deported More People Than Any Other President*, ABC NEWS (Aug. 29, 2016, 2:05 PM ET), <https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661> [<https://perma.cc/64RP-BZV2>]. The number of border patrol agents feeding this bureaucracy increased from 4,139 in 1992 to more than 20,000 in 2015. Daniel Denvir, *Opinion, Obama Created a Deportation Machine. Soon It Will Be Trump's*, GUARDIAN (Nov. 21, 2016, 7:30 AM ET), <https://www.theguardian.com/commentisfree/2016/nov/21/obama-deportation-mchahine-damage-trump> [<https://perma.cc/Q9BN-K9SZ>].

<sup>300</sup> See *United States v. Blewett*, 746 F.3d 647 (6th Cir. 2013).

<sup>301</sup> See Karakatsanis, *supra* note 78.

<sup>302</sup> See, e.g., Josh Gerstein, *Sally Yates Confirmed as No. 2 at Justice Department*, POLITICO (May 13, 2015, 2:35 PM ET), <https://www.politico.com/blogs/under-the-radar/2015/05/sally-yates-confirmed-as-no-2-at-justice-department-207069> [<https://perma.cc/87SS-EHB8>] (reporting that Senator Jeff Sessions had "no quibble with [Yates'] track record"). To take one of many examples from her career, Yates's office argued that a judge should disregard a jury's determination about how much cocaine was possessed by the defendants, arguing that the judge should sentence one defendant with no criminal record to ten years in prison and another man to twenty years in prison. Yates then chose to defend the mandatory minimum sentences on appeal. Yates eventually lost because the Supreme Court determined that judges cannot sentence people to mandatory minimum prison terms based on facts that were not found by a jury beyond a reasonable doubt. *United States v. Jordan*, 531 F. App'x 995, 996 (11th Cir. 2013) (vacating the sentences and remanding to the district court following review by the Supreme Court).

dangerous wildfires for \$ 1.45 per day. <sup>317</sup> Perhaps most widely known, she repeatedly fought against exonerations of wrongful convictions and worked to conceal or minimize evidence of false testimony and prosecutorial misconduct. <sup>318</sup>

Across a wide range of areas, each of these former prosecutors is unremarkable as a bureaucrat--their careers reflect a worldview indistinguishable from the consensus that gave rise to mass human caging.

In spite of this, Holder is routinely honored in Washington, D.C. society as a "criminal justice reform" leader. <sup>319</sup> After he left the government, he was given a standing ovation at major "criminal justice reform" events that I attended. (He had not renounced his career in human caging or sought accountability for it; instead, he had left the government to get paid large amounts of money to help aggregations of corporate wealth make more money.) Yates was honored by the Southern Center for Human Rights in Atlanta and was given a major award by the National Association of Criminal Defense Lawyers as a "Champion of Justice." <sup>320</sup> (Through her behind-the-scenes assault on the clemency process, Yates [\*918] may be responsible for the denial of more clemency petitions than any person in American history.)

It says a lot about the "criminal justice reform" culture that someone with the record of Yates or Holder is celebrated as a "reformer." And I predict that Harris and Bharara, despite not having sought accountability for their past actions, will seek higher public office on platforms of "criminal justice reform" with proposals that would do little to remake our punishment bureaucracy. Indeed, when Harris announced her candidacy for President a few days after I had drafted the above paragraphs about her record, the leader of a major national civil rights organization that works on "criminal justice reform" issues praised Harris'

<sup>303</sup> See *Public Hearing on Retroactivity of 2014 Drug Amendment*, U.S. SENT'G COMMISSION 110-11 (June 10, 2014), [https://www.uscc.gov/sites/default/files/transcript\\_1.pdf](https://www.uscc.gov/sites/default/files/transcript_1.pdf) [<https://perma.cc/D92V-DX9T>].

<sup>304</sup> Barkow, *supra* note 298, at 441-49.

<sup>305</sup> See Resignation Letter from Deborah Leff, Pardon Attorney, U.S. Dep't of Justice, to Sally Quillian Yates, Deputy Attorney General, U.S. Dep't of Justice (Jan. 15, 2016), <https://www.documentcloud.org/documents/2777898-Deborah-Leff-resignation-letter.html> [<https://perma.cc/Q78S-6HDB>] (citing as reasons for her resignation, Pardon Attorney Deborah Leff noted that she was "instructed to set aside thousands of [clemency] petitions," that Sally Yates reversed her staff's recommendations for clemency in an "increasing number of cases," and that she was denied access to the White House, preventing President Obama from learning of her disagreements with Ms. Yates); see also Mark Osler, Opinion, *Obama's Clemency Problem*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html> [<https://perma.cc/8FJH-QD7M>] (discussing the Administration's inadequate approach to clemency generally).

<sup>306</sup> *Id.*

<sup>307</sup> See Office of the Pardon Att'y, *Commutations Denied by Barack Obama*, U.S. DEP'T JUST. (Jan. 23, 2017), <https://www.justice.gov/pardon/obama-denials/commutations-denied-president-barack-obama> [<https://perma.cc/L96N-CRXW>].

<sup>308</sup> C.J. Ciaramella, *Kamala Harris' New Book Tries to Massage Her Record as a Prosecutor, but the Facts Aren't Pretty*, REASON: HIT & RUN BLOG (Jan. 9, 2019, 2:56 PM), <https://reason.com/blog/2019/01/09/kamala-harris-new-book-tries-to-massage?> [<https://perma.cc/HEK5-BJGM>].

<sup>309</sup> See Branko Marcetic, *The Two Faces of Kamala Harris*, JACOBIN (Aug. 10, 2017), <https://www.jacobinmag.com/2017/08/kamala-harris-trump-obama-california-attorney-general> [<https://perma.cc/D9SW-XFZF>].

<sup>310</sup> Hannah Giorgis, *Kamala Harris's Political Memoir Is an Uneasy Fit for the Digital Era*, ATLANTIC (Jan. 11, 2019), <https://www.theatlantic.com/entertainment/archive/2019/01/kamala-harris-truths-we-hold-review/579430> [<https://perma.cc/SGA7-77TR>].

prosecutorial record as striking the right "balance" between the "need for public safety and reckoning with civil rights ideals." <sup>321</sup>

My point is not to criticize these four people in particular. They are not unique in their commitment to the punishment bureaucracy. The salient fact about their careers is how ordinary they are--their willingness, along with most of us who have worked in the system, especially lawyers like myself and judges, to go along with unspeakable things, to become desensitized to the pain we cause, and to live our lives without the intellectual and moral rigor that should have prevented so much senseless suffering of powerless people in the name of "law enforcement."

And so these punishment bureaucrats are important because they are *not* outliers. They represent the vast majority of officials that I interact with in dozens of cities and states as I travel the country working on these issues. Mayors, district attorneys, city council members, state legislators, attorneys general, sheriffs, police chiefs, and judges are all adopting some of the language of "reform." To their credit, many with whom I have interacted genuinely believe that reforms need to be made. And like Bharara, Holder, Yates, and Harris, they may have spent their careers as punishment bureaucrats pursuing policies that they genuinely believe in. But almost uniformly, they lack what is necessary for big change: critical analysis of structural problems, genuine self-reflection, and organized political support from groups powerful enough to hold them accountable. <sup>322</sup>

**[\*919]** Most reforms being implemented or seriously contemplated suffer from the failure of these bureaucrats to address the nature of the problem. For example, when many "reformer" officials in California finally announced their opposition to cash bail in the summer of 2018, they passed a law ending cash bail. But the law was written in secret by punishment bureaucrats, <sup>323</sup> and the result was a system

<sup>311</sup> Marcetic, *supra* note 309.

<sup>312</sup> @WalkerBragman, TWITTER (Jan. 28, 2019, 2:24 AM), <https://twitter.com/walkerbragman/status/1089831581030797312?lang=en> [<https://perma.cc/2BE3-QJLL>].

<sup>313</sup> @WalkerBragman, TWITTER (Jan. 28, 2019, 11:51 AM), <https://twitter.com/WalkerBragman/status/1089974205284798464> [<https://perma.cc/BZL5-UKDN>].

<sup>314</sup> Marcetic, *supra* note 309.

<sup>315</sup> Kate Zernike, *'Progressive Prosecutor': Can Kamala Harris Square the Circle?*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/11/us/kamala-harris-progressive-prosecutor.html> [<https://perma.cc/WG5A-8Q8W>].

<sup>316</sup> Paige St. John, *Federal Judges Order California to Expand Prison Releases*, LA. TIMES (Nov. 14, 2014), <https://www.latimes.com/local/political/la-me-ff-federal-judges-order-state-to-release-more-prisoners-20141114-story.html> [<https://perma.cc/WM7J-JPGB>].

<sup>317</sup> David C. Fathi, Opinion, *It's Time to Give Prisoners a Big Raise*, WASH. POST (Sept. 3, 2018), [https://www.washingtonpost.com/opinions/its-time-to-give-prisoners-a-big-raise/2018/09/03/6be40364-ad5b-11e8-8a0c-70b618c98d3c\\_story.html](https://www.washingtonpost.com/opinions/its-time-to-give-prisoners-a-big-raise/2018/09/03/6be40364-ad5b-11e8-8a0c-70b618c98d3c_story.html) [<https://perma.cc/OER9-CUCC>].

<sup>318</sup> Lara Bazelon, Opinion, *Kamala Harris Was Not a 'Progressive Prosecutor,'* N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> [<https://perma.cc/A72X-C8F6>] (detailing Harris's record on wrongful convictions and prosecutorial misconduct).

that could replace cash bail with significantly *expanded* pretrial detention in local jails and that will likely lead to an explosion of for-profit e-carceration<sup>324</sup> through GPS monitoring for people who are released from jail.<sup>325</sup>

In New York, the death of teenager Kalief Browder outraged the public. Kalief committed suicide after he endured three years of pretrial detention on Rikers Island—including eighteen months in solitary confinement and brutal beatings captured on video.<sup>326</sup> Invoking Kalief and standing next to Kalief's brother as he announced "Kalief's Law," Governor Andrew Cuomo used lofty language to announce what punishment bureaucrats portrayed as major "reforms," including raising the age of criminal prosecution in some cases and barring children from being imprisoned with adults. But nearly two years after that [\*920] announcement, those "reforms" have reinforced the punishment bureaucracy. *More* money is being spent by New York to cage children in *separate* locations, leading to a boom in the construction of child-detention prisons and an *increase* in the number of prison guards; many thousands of children are excluded from the reforms altogether; and new forms of government control over children's bodies are expanding.<sup>327</sup> The public learned that even Kalief Browder would have been excluded from the law that bears his name because the crime for which he was wrongly accused—stealing a backpack from another child—was too serious to qualify for the reforms.<sup>328</sup> In an anecdote that captures "criminal justice reform" culture, Kalief's Law led the State of New York to spend \$ 12 million in 2017 to *re-open* the "Harriet Tubman Center"—a jail for children named after an abolitionist icon.<sup>329</sup> The facility created eighty-five new jobs and now cages disproportionately black children.

A former prosecutor and senior official at a major "criminal justice reform" organization recently wrote an op-ed in the *New York Times* arguing that a way to improve American prisons was to privatize them and to create incentives for the for-profit private prison companies who run them to reduce crime.<sup>330</sup> The

<sup>319</sup> See, e.g., Angela J. Davis, *Eric Holder Transformed the Attorney General into an Advocate for the Poor*, NEW REPUBLIC (Sept. 26, 2014), <https://newrepublic.com/article/119616/eric-holders-criminal-justice-legacy> [<https://perma.cc/99ZM-HLXF>] ("[T]his former prosecutor became a champion of liberty.").

<sup>320</sup> NACDL Presents Champion of Justice Restoration of Rights Award to Georgia Gov. Nathan Deal and Former U.S. Deputy Attorney Sally Q. Yates, NAT'L ASS'N CRIM. DEF. LAW. (Aug. 28, 2018), <https://www.nacdl.org/Deal-Yates-Rights-Restoration-Award> [<https://perma.cc/3CT2-6TMZ>].

<sup>321</sup> See Astead W. Herndon, *Kamala Harris Declares Candidacy, Evoking King and Joining Diverse Field*, N.Y. TIMES (Jan. 21, 2019), <https://www.nytimes.com/2019/01/21/us/politics/kamala-harris-2020-president.html> [<https://perma.cc/53W8-BCSA>] (quoting Kristen Clark, President and Executive Director of the Lawyers' Committee for Civil Rights Under Law).

<sup>322</sup> I have seen this in dozens of cities and counties in which I work. Sheriff Tom Dart in Chicago, for example, announced himself as a leader on bail reform, but I saw him work behind the scenes to undermine that reform; then to promote increased use of pretrial detention; and then to advocate for expansion of e-carceration. At one point, the sheriff simply refused to enforce court orders releasing pretrial detainees from his jail cells in flagrant violation of the "rule of law." See Rick Tulsy, *Lawsuit Contends Dart Illegally Holding Inmates Despite Judges' Bond Decisions*, INJUSTICE WATCH (Feb. 28, 2018), <https://www.injusticewatch.org/news/2018/developing-cook-county-jail-inmate-contends-dart-illegally-holding-inmates> [<https://perma.cc/F2ME-4L8Y>]. After pretrial reforms by the Chief Judge in response to a lawsuit in which I was involved led to a 44 percent decrease in the number of people physically confined in the Cook County jail, the sheriff's department bureaucracy expanded electronic custody to include thousands of people being monitored every day, and despite the dramatic decrease in jail population, the sheriff's bureaucracy actually *increased* its budget by 28 percent to reach \$ 588 million in 2018. *Money for Communities, Not Cages*, CHI. COMMUNITY BOND FUND 4 (Oct. 2018), <https://chicagobond.org/wp-content/uploads/2018/10/money-for-communities-not-cages-why-cook-county-should-reduce-the-sheriffs-bloated-jail-budget.pdf> [<https://perma.cc/4BUZ-J4RW>].

<sup>323</sup> See Dan Walters, *Bail Reform Bill Stretches the 72-Hour Notice Law*, CALMATTERS (Aug. 27, 2018), <https://calmatters.org/articles/commentary/bail-reform-bill-stretches-the-72-hour-notice-law> [<https://perma.cc/FUT8-28LQ>].

article made errors that undermine its conclusions even on their own terms,<sup>331</sup> but most dangerously, the editorial proceeded from a bewildering premise: [\*921] "Prisons exist to lower crime rates."<sup>332</sup> This factual claim, for which there is no good evidence in American history, is a frequent delusion of punishment bureaucrats. According to them, it is not about race or class or control; it is about good-faith, objective attempts to reduce "crime" for everyone's benefit. Assumptions like this, offered without support or analysis in the public discourse by "rule of law" proponents, are casually asserted as unquestioned wisdom in editorials reaching millions of people. They are a core malignancy that needs to be fought in order to dismantle mass incarceration. No reform, no matter how well intentioned, will be successful if its premise misunderstands why the criminal punishment bureaucracy exists.

Because punishment bureaucrats do not believe that the criminal punishment bureaucracy needs to be dismantled, a movement to dismantle the punishment bureaucracy must learn how to distinguish little tweaks from big changes.

Whatever judgments one makes about punishment bureaucrats as individuals, they serve three main functions in the current conversation. First, they set the outer bounds of acceptable discussion on what should be done to fix the system in order to ensure that more significant changes do not happen. If "reformers" talk about hiring more police officers and spending more money on training them; paying for police body cameras to observe the same officers as they continue to patrol the same poor neighborhoods;

<sup>324</sup> See Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> [<https://perma.cc/6T77-U2Q9>].

<sup>325</sup> I represent a habeas petitioner in the California Supreme Court in a pending case arguing that this expansion of pretrial detention would violate the California Constitution. See *In re Humphrey*, 228 Cal. Rptr. 3d 513 (Cal. Ct. App. 2018), *rev. granted*, 417 P.3d 769 (Cal. 2018).

<sup>326</sup> See Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/TVU3-7SUN>]; Jennifer Gonnerman, *Kalief Browder, 1993-2015*, NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/FRX9-VYPP>].

<sup>327</sup> See Zhandarka Kurti & William Martin, *Cuomo's "Carceral Humanism,"* JACOBIN (Nov. 2018), <https://www.jacobinmag.com/2018/11/andrew-cuomo-juvenile-justice-carceral-humanism-kalief-browder> [<https://perma.cc/7PCY-P9D3>].

<sup>328</sup> Akeem Browder, Kalief's brother, refused to endorse Cuomo in the 2018 primary. *Id.*

<sup>329</sup> See Samantha House, *After \$ 12 Million Update, Former Cayuga County Center Will Again House Youth Offenders*, SYRACUSE.COM (Sept. 22, 2017, 3:33 PM), [https://www.syracuse.com/crime/index.ssf/2017/09/state\\_plans\\_to\\_create\\_12\\_million\\_center\\_for\\_youth\\_offenders\\_in\\_cayuga\\_county.html](https://www.syracuse.com/crime/index.ssf/2017/09/state_plans_to_create_12_million_center_for_youth_offenders_in_cayuga_county.html) [<https://perma.cc/J4G5-V3T3>].

<sup>330</sup> See Lauren-Brooke Eisen, *Down Under, More Humane Private Prisons*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/opinion/private-prisons-australia-new-zealand.html> [<https://perma.cc/649A-JZ33>].

<sup>331</sup> The piece makes logical errors, has no analysis of or engagement with scholarship concerning the larger implications of increasing the economic and political power of private prison corporations, provides no empirical evidence to support its central claims, and ignores contrary evidence of the systemic mistreatment of detainees by private prisons in Australia and the United States. See, e.g., Nick Olle et al., *At Work Inside Our Detention Centres: A Guard's Story*, GLOBAL MAIL (last visited Mar. 11, 2019), <http://igm-serco.patarmstrong.net.au/> [<https://perma.cc/6TWG-MKUR>]; Mark Willacy & Alexandra Blucher, *Inside Australia's 'Powder Keg' Private Prison*, ABC (June 19, 2018, 9:45 PM), <https://www.abc.net.au/news/2018-06-20/inside-arthur-gorrie-correctional-centre/9837260> [<https://perma.cc/3V73-TQJD>]. Most brazenly, for example, although praising privatization of prisons in Australia was the supposed occasion for writing the op-ed, the author notes at the end of the op-ed that *there is no data available yet to evaluate private prisons in Australia*.

<sup>332</sup> *Id.*

creating profitable electronic incarceration instead of jail; using pre-trial probation instead of post-trial probation; establishing specialized "drug courts" with "graduated sanctions" instead of immediate punishment; privatizing prisons and immigrant detention jails; and instituting slightly shorter mandatory minimum sentences in cages, then the voices of other people calling for abolition of the police, closing jails and prisons, reparations, new paradigms of restorative justice, and broader economic divestment from punishment are kept outside mainstream discourse. In this way, punishment bureaucrats echo the modern role of the Democratic Party in normalizing American militarism, wealth inequality, neighborhood segregation, incarceration, environmental degradation, and jingoism by defining the boundaries of acceptable dissent from bipartisan policy orthodoxies that lead to these evils.

Second, punishment bureaucrats create confusion. By marketing minor tweaks as huge changes, they make it difficult for the public to figure out who or what promises significant change and who or what does not. If both Kamala Harris and civil rights organizations are calling for "bail reform," ordinary people may think that both groups are proposing the same ideas and that no more change is needed if Harris's version of "reform" passes.

[\*922] Third, by touting achievements of little significance, they quell popular energy for dramatically changing the punishment system. They burn the areas around the growing fire, ensuring that the fire for reform never threatens the most important punishment infrastructure.

Why are punishment bureaucrats doing this? The origin of these "reforms" is that most elites are happy with the legal system and want it to keep functioning largely as it does. It is not a coincidence that punishment bureaucrats devote their public platforms to promoting America's "rule of law" myth. Bharara is now the Co-Chair of a group that calls itself the National Task Force on Rule of Law and Democracy.<sup>333</sup> That group's mission statement portrays American history as democratic and guided by rules and norms that "ensure that officials act for the public good" and that prevent against "abuses of power." These rules and norms, Bharara's group claims, historically prevented government from becoming "a chaotic grab for power and self-interest."<sup>334</sup> Armed with this ridiculous picture of America's legal, social, and economic past, the group aims at "*repairing* the rule of law," as if that term had historical content other than to justify *undemocratic* exercise of power by elites.<sup>335</sup> Bharara is participating in the long American tradition of developing more and greater obfuscations of a basic truth: the powerful have used the law to dominate the powerless.

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<sup>333</sup> See Colleen O'Dea, *Former NJ Gov. Whitman to Chair National Task Force to Fix U.S. Democracy*, NJ SPOTLIGHT (Feb. 1, 2018), <https://www.njspotlight.com/stories/18/01/31/former-nj-gov-whitman-to-chair-national-task-force-to-fix-u-s-democracy> [<https://perma.cc/85YEA8F8G>].

<sup>334</sup> See Preet Bharara et al., *Proposals for Reform: National Task Force on Rule of Law & Democracy*, BRENNAN CTR. FOR JUST. (Oct. 2, 2018), <https://www.brennancenter.org/publication/proposals-reform-national-task-force-rule-law-democracy> [<https://perma.cc/F6X7-695Y>]; Preet Bharara & Christine Todd Whitman, *How to Prevent Corruption, Protect the Rule of Law and Protect Democracy*, USA TODAY (Oct. 2, 2018, 10:00 AM EST), <https://www.usatoday.com/story/opinion/2018/10/02/prevent-corruption-protect-rule-law-restore-faith-america-column/1491771002> [<https://perma.cc/B6Z8-GWMG>].

<sup>335</sup> Bharara et al, *Proposals for Reform*, *supra* note 334.



Similarly, Yates has been sounding the alarm that the "time-honored" reputation and "legitimacy" of federal "law enforcement" is in danger.<sup>336</sup> She recently explained: "at the Justice Department it is hammered into you that your sole [\*923] responsibility is to seek justice. It is deeply ingrained in the Department of Justice; that is the ethos."<sup>337</sup> In a characteristic speech to law students entitled "The Rule of Law Under Siege," Yates defended her career working for an organization that accomplished unprecedented mass caging of marginalized people: "When you are part of the Department of Justice . . . [y]our only responsibility is to seek justice. I know that sounds incredibly corny, but that's really what people at DOJ believe . . . . It doesn't get any better than that."<sup>338</sup>

One of Holder's public talking points is that America stands out because it is "a nation of laws" and that, "for the first time in the history of the world, a government was formed based first and foremost on the rule of law" rather than on "the application of force."<sup>339</sup>

In her first words on inauguration as California Attorney General, Harris explained that the elected prosecutor "is one of the most profound innovations in the entire history of the rule of law . . . . [A] crime against any one of us is a crime against all of us. Many times I have looked into the eyes of a crime victim and repeated this promise. It's not you alone versus the defendant. It's the people. The people of the State of California."<sup>340</sup> After fondly recounting her time as a 20-year line prosecutor in the age of mass human caging, Harris stressed the need to be "tough" on crime and announced that she had secured the help of former police chief Bill Bratton, an architect of "broken windows" policing in which the explicit strategy is to process large numbers of low-level cases, disproportionately poor people of color.<sup>341</sup> She promised the "law enforcement" community: [\*924] "you will have a forceful advocate for public safety funding at the federal, state and local levels--particularly when it comes to putting more cops on the street."<sup>342</sup>

These punishment bureaucrats thus personify the growing banality of "criminal justice reform": advocates of some of the harshest punishments in the world pushing minor changes in order to preserve faith in the architecture of a bureaucracy used for purposes that they do not acknowledge.

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<sup>336</sup> Jacqueline Thomsen, *Sally Yates: Trump Is 'Tearing Down the Legitimacy' of Justice Department*, HILL (May 15, 2018, 2:16 PM EST), <https://thehill.com/blogs/blog-briefing-room/news/387793-sally-yates-trump-is-tearing-down-the-legitimacy-of-justice> [<https://perma.cc/3229-SCWP>].

<sup>337</sup> Jennifer Rubin, *Sally Yates: Don't 'Normalize' Attacks on the Rule of Law*, WASH. POST (May 15, 2018), <https://www.washingtonpost.com/blogs/right-turn/wp/2018/05/15/sally-yates-dont-normalize-attacks-on-the-rule-of-law> [<https://perma.cc/VAY2-DKMC>].

<sup>338</sup> Sally Yates, *The Rule of Law Under Siege*, YOUTUBE (Nov. 22, 2017), [https://www.youtube.com/watch?v=VIoM8Xc\\_eDI](https://www.youtube.com/watch?v=VIoM8Xc_eDI); see also Sally Q. Yates, *Don't Let Trump's Use of Celebrities Distract You from His Criminal-Justice Failures*, WASH. POST (Oct. 16, 2018), <https://www.washingtonpost.com/opinions/dont-let-trumps-use-of-celebrities-distract-you-from-his-failures/2018/10/16/2bfd7b14-d096-11e8-a275-81c671a50422> [<https://perma.cc/DWZ4-U4RT>].

<sup>339</sup> See *Eric Holder on the Rule of Law--2008 ACS National Convention*, AM. CONST. SOC'Y (June 14, 2008), <https://www.acslaw.org/video/eric-holder-on-the-rule-of-law-2008-ac-s-national-convention>.

<sup>340</sup> *Attorney General Kamala D. Harris Inaugural Remarks 1* (2011), ST. CAL. DEPT JUST. [https://oag.ca.gov/system/files/attachments/press\\_releases/n2021\\_final\\_speech.pdf](https://oag.ca.gov/system/files/attachments/press_releases/n2021_final_speech.pdf) [<https://perma.cc/6ALD-B7XJ>].

<sup>341</sup> *Id.* at 2.

<sup>342</sup> *Id.* at 3.

### B. *How Can We Tell the Difference?*

We must remember that liberty becomes a false ensign--a "solemn complement" of violence--as soon as it becomes only an idea and we begin to defend liberty instead of free [people] . . . . It is the essence of liberty to exist only in the practice of liberty.

--Maurice Merleau Ponty <sup>343</sup>

A lot of attention is turning to local district attorneys. In some ways, the recent interest in "progressive prosecutors" and the growing sums spent on their election campaigns means that more people are acknowledging the myth of the "rule of law." People donating to prosecutorial elections understand that the same "rule of law" will be enforced differently based on the policy choices of the prosecutor.

Perhaps most prominently, there is a wave of "progressive prosecutors" at the local level. Kim Ogg in Houston, Larry Krasner in Philadelphia, Kim Foxx in Chicago, Eric Gonzalez in Brooklyn, Aramis Ayala in Orlando, Kim Gardner in St. Louis, Cyrus Vance in Manhattan, and George Gascón in San Francisco are a few of the dozens of prosecutors embracing a new image as leaders who will "reform" the punishment bureaucracy. While it is wrong to use the same labels to describe each of these actors--Krasner's rhetoric is different from the others, for example, and many would reject Vance's or Gardner's attempts to brand themselves "progressive"--I want to start with some general observations about the entire cohort. <sup>344</sup>

**[\*925]** It is remarkable how little these prosecutors have tried to do so far considering that we would need eighty percent reductions in human caging to return to historical United States levels and to those of other comparable countries. <sup>345</sup> None of them have reported reducing prosecutions by more than a few percentage points, and most of them have not reported any reductions at all. None of them are calling for smaller prosecutor offices or fewer police. None of them are seeking a massive shift in investigative resources away from investigating the crimes of the poor to investigating the crimes of the rich. None of them have prosecuted a single one of their own employees for withholding evidence or obstruction of justice. None of them have announced a policy of declining to prosecute all drug possession. None of them have stopped prosecuting children as adults. None of them has sought to eliminate fines and fees for the indigent. None of them have opened a systemic civil rights investigation into the brutality, neglect, and crimes against confined people that are rampant in their local jails. None of them has set up a truth and reconciliation commission to confront the past racism and barbarism of their offices and local police. None of them have taken serious steps to transition their approach to a restorative justice model.

All of them do essentially similar things as the offices of their predecessors and the offices of district attorneys around the country: they choose to prosecute a significant majority of low-level misdemeanors and drug crimes, they assume that the response to social problems like violence must be punishment, and they inflict brutal forms of punishment under torturous conditions on a cohort that is disproportionately

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<sup>343</sup> MAURICE MERLEAU-PONTY, *HUMANISM AND TERROR* xxiv (John O'Neill trans., Beacon Press 1969) (1947).

<sup>344</sup> A new prosecutor, Rachel Rollins, was recently elected in Boston, taking office in the weeks prior to publication of this piece. Her campaign rhetoric more closely mirrors, and in some way exceeds in ambition, the progressive discourse of Krasner, although it is too early to evaluate what policy changes she will oversee.

<sup>345</sup> See Bruce Western & Becky Pettit, *Mass Imprisonment*, in BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 11, 14-15 (2006).

poor, black, and brown. While a number of them have made initial attempts at less harsh policies in good faith, it is largely business as usual so far.

Krasner, by consensus the most committed to change among this new group, has not made public any data showing that he has reduced the number of people going to prison or the length of sentences relative to other Pennsylvania prosecutors since he took office.<sup>346</sup> In a misdiagnosis of the nature of the problem and [\*926] of how to make change endure after he leaves office, Krasner worked to *increase* the overall budget for prosecution in Philadelphia.<sup>347</sup>

Although Foxx replaced one of the most notoriously harsh prosecutors in any major American city, the total number of felony prosecutions under Foxx went *up* last year after years of decline, including before she took office.<sup>348</sup> Each year that Foxx has been in office, she has also *increased* the number of cases in which her office chose to prosecute a person for a drug felony.<sup>349</sup> Despite her rhetoric to the contrary, local court watchers have reported to me that Foxx's line prosecutors have taken no action to prevent the use of cash bail in the vast majority of felony cases.

Ogg is sometimes called the least harsh prosecutor in Texas<sup>350</sup>--but her incarceration statistics would be extreme outliers for nearly the entirety of American history. Ogg is a master of the "rule of law" deception. After winning her election on a platform of bail reform because of the supposed injustice of cash bail, Ogg instructed her attorneys to *ignore* the law and to use cash bail to intentionally accomplish pretrial detention of the indigent in cases in which Texas law [\*927] does not permit transparent pretrial detention.<sup>351</sup> Moreover, Ogg demanded a \$ 20 million budget increase, including for 102 new

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<sup>346</sup> Krasner recently unveiled what he called significant impacts of his signature bail-policy change, in which his office requests cash bail in fewer cases'. Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here's What Happened Next.*, PHILA. INQUIRER (Feb. 19, 2019), <https://www.philly.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html> [<https://perma.cc/89X2-YFXQ>] (quoting Krasner as declaring at a press conference, "[w]e do not, we should not, imprison people for poverty"). But even the study that Krasner cited found that his policy was having barely any effect on wealth-based detention in Philadelphia. It had only led to an eight percentage-point decrease in the use of secured cash bail--and even this reduction had almost no effect on pretrial detention, because those individuals were largely being bailed out on low money bonds prior to the policy changes. Aurelie Ouss & Megan T. Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail* 11 (George Mason Legal Studies Research Paper No. LS 19-08, 2019), <https://ssrn.com/abstract=3335138>; *see also id.* at 3 ("[T]he main policy impact of the No-Cash-Bail reform was to release more defendants without monetary conditions, *with modest effects on pretrial detention.*") (emphasis added).

<sup>347</sup> *See, e.g.,* Joe Trinacria, *Krasner Requests Budget Increase for DA's Office*, PHILA. MAG. (Apr. 25, 2018, 9:06 AM), <https://www.phillymag.com/news/2018/04/25/krasner-budget-increase-da-office> [<https://perma.cc/BS38-3RAQ>].

<sup>348</sup> Foxx has arguably been the best of the new prosecutors about sharing her data. In her first year, felony prosecutions decreased only 6.4 percent, which was not a significant decrease given the steady decline that started with her predecessor. And the trend reversed in her second year, with overall felony prosecutions going up 1.3 percent. Foxx's office also has a policy of allowing the police to file drug felonies in Chicago without exercising her own discretion. *A Step in the Right Direction: An Analysis of Felony Prosecution Data in Cook County*, RECLAIM CHI. ET AL. 3 (2018), [https://www.thepeopleslobbyusa.org/wp-content/uploads/2018/06/05-2018-Report-Kim-Foxx\\_FINAL\\_Print.pdf](https://www.thepeopleslobbyusa.org/wp-content/uploads/2018/06/05-2018-Report-Kim-Foxx_FINAL_Print.pdf) [<https://perma.cc/EW9C-VSLP>]; *Exercising Full Powers: Recommendations to Kim Foxx on Addressing Systemic Racism in the Cook County Criminal Justice System*, RECLAIM CHI. ET AL. 2 (Jan. 2019), [https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/01/2019-Report-Kim-Foxx\\_ForWeb.pdf](https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/01/2019-Report-Kim-Foxx_ForWeb.pdf) [<https://perma.cc/664T-QJRT>].

<sup>349</sup> *Exercising Full Powers*, *supra* note 348, at 2-3.

prosecutors. <sup>352</sup> At the same time, other local officials and lower level prosecutors have told me that they cannot even get her office to stop criminally prosecuting and jailing people for, among other things, driving with a license that was suspended solely because they were too poor to pay court debts. In my experience, over and over again, Ogg appears to want to prosecute more people and to expand her office's bureaucracy. I have watched as she has worked behind the scenes to thwart even modest reforms in Houston like reducing the harms of fines and fees on the indigent and not caging low-level drug possessors in jail cells solely because they cannot pay cash-bail amounts requested by her office. As far as I am aware, she has never explained what evidence she possesses that more punishment is the way to solve any of the social problems that she has identified.

Gascón is less harsh than his predecessor, Kamala Harris. But his record of human caging is still alarming by historical and international standards. For years, at the same time that Gascón touted himself as a progressive reformer, attorneys from his office crushed impoverished people and their families every day with relentless use of cash-bail amounts that were five times the national average. <sup>353</sup> Tellingly, after Gascón hyped for months his role in introducing an algorithmic "risk-assessment tool" to the bail process in San Francisco, <sup>354</sup> I asked him and his senior management staff during a meeting to answer the most basic questions about how the tool worked--for example, to explain what the different numerical scores meant in terms of empirical risk prediction. But none of them had even the rudimentary knowledge about the tool that one could get from reading its instructions, let alone knowledge that public officials implementing the tool should have learned from studying the research and talking to the experts who designed it. This makes sense, because punishment bureaucrats are mostly not interested in using new methods to dramatically reduce pretrial detention--that [\*928] would remove their ability to coerce guilty pleas through that detention. And Gascón is not alone: every judge and prosecutor who I have interviewed around the country has almost entirely misunderstood or otherwise improperly explained the science, empirical evidence, and function of the risk assessment algorithms that they have touted as their main "reform" of the cashbail system. As a result, Gascón's "progressive" office, like every other jurisdiction I have studied, was misusing the algorithm framework in ways that violated the principles set forth by the researchers who created the tool and that promoted rampant pretrial incarceration of poor people of color. They were also improperly describing the risk-assessment tool to judges in court, including (but not limited to) misstating the purported risk and conflating the algorithm's empirical predictions with their

<sup>350</sup> See Ronald Brownstein, *Will Texas Follow Houston's Lead on Drug-Policy Reform?*, ATLANTIC (May 24, 2018), <https://www.theatlantic.com/politics/archive/2018/05/will-texas-follow-houstons-lead-on-drug-policy-reform/561035/> [<https://perma.cc/FBR5-HC76>].

<sup>351</sup> Alex Hannaford, *Harris County DA Ran as a Reformer. So Why Is She Pushing High Bail for Minor Offenses?*, APPEAL (Aug. 9, 2018), <https://theappeal.org/harris-county-kim-ogg-bail-reform-jail/> [<https://perma.cc/KPA3-YR35>].

<sup>352</sup> Greg Groogan, *County Judge, District Attorney Clash Over Request for 102 New Prosecutors*, FOX 26 NEWS (Jan. 29, 2019), <http://www.fox26houston.com/news/county-judge-district-attorney-clash-over-request-for-102-new-prosecutors> [<https://perma.cc/8DMZ-SXYJ>].

<sup>353</sup> Maura Ewing, *Punished for Being Poor*, SLATE (Oct. 20, 2017), [http://www.slate.com/articles/news\\_and\\_politics/trials\\_and\\_error/2017/10/bail\\_reform\\_is\\_catching\\_on\\_in\\_san\\_francisco\\_but\\_not\\_fast\\_enough\\_for\\_some.html](http://www.slate.com/articles/news_and_politics/trials_and_error/2017/10/bail_reform_is_catching_on_in_san_francisco_but_not_fast_enough_for_some.html) [<https://perma.cc/U6KG-2H5L>].

<sup>354</sup> George Gascón, *Decision Points: Prosecutors Have Opportunities to Reduce Incarceration and Disparities Through Risk Assessment*, HUFFPOST: BLOG (Oct. 14, 2015, 11:23 AM ET), [https://www.huffingtonpost.com/george-gasc/decision-points-prosecuto\\_b\\_8288908.html](https://www.huffingtonpost.com/george-gasc/decision-points-prosecuto_b_8288908.html) [<https://perma.cc/7J5M-ETE3>].

own political choices, attempting to cloak the latter with a veneer of neutral science. And, again like many other local punishment bureaucracies, because they were not analyzing data and did not have the goal of serious reductions in detention, they neither knew nor cared that they were not using the algorithm properly or changing outcomes significantly. Since then, as we prevailed against Gascón's office in challenging the use of cash bail to detain the poor in San Francisco, Gascón (along with California Attorney General Xavier Becerra) began a campaign to get judges to change the law to expand the ability of the government to detain people without bail,<sup>355</sup> and lawyers at his office even argued in my cases that people should be presumed guilty at bail hearings.<sup>356</sup>

I have found Krasner and Gascón to be sincere and smart people. I have talked at length with numerous "progressive prosecutors," and many of them are genuinely attempting to do less harm than other prosecutors. It is prudent to support that harm reduction and to push for more, because "progressive prosecutors" and their rhetoric can play a role in highlighting deeper structural flaws and in energizing a political base to attack them. Importantly, the recent rise of "progressive prosecutors" has already helped to change overall narrative of punishment in many jurisdictions in which I work by making many more people aware of the injustice and senselessness of much of the punishment system. And I have seen a few of these prosecutors begin some incremental reforms, such as declining some prosecutions, reducing their requests for cash bail, and reducing [\*929] marijuana possession prosecutions. Perhaps most encouraging, many local organizers are using prosecutor-related issues to engage and mobilize a base who can eventually demand more significant changes.

But we must also guard against the tendency to inflate the importance of existing "progressive prosecutors." We must be clear about who they are; what they are proposing; the differences across the cohort and within each prosecutor office between genuinely transformative changes and minor tweaks; how a newer generation of "progressive prosecutors" can be even more bold than this current cohort; how specifically organizing around prosecutor issues can shift concentrations of local power, and what the theory is for how "progressive prosecutors" can be a stepping stone to much more significant structural change.

After all, as Paul Butler has extensively shown in his writings about a previous generation of what he called "progressive prosecutors" in 2009, these prosecutors are operating under enormous constraints: a powerful local "law enforcement" machine; multi-billion dollar punishment industries; an inherited culture and bureaucracy of line prosecutors and internal office supervisors who believe in mass incarceration; a lack of organized political power among and investment in directly impacted communities; and the broader cultural, racial, and economic forces that fostered our addiction to human caging.<sup>357</sup>

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<sup>355</sup> See, e.g., Amicus Curiae Brief of Attorney General Xavier Becerra, *In re* Kenneth Humphrey, No. S247278 (Cal. Oct. 9, 2018) (arguing for an expansive reinterpretation of the state's power to detain people without bail under the California Constitution); Notice of Motion and Motion to Detain Without Bail, *People v. Reynoso*, No. 18002330 (Cal. Sup. Ct. Feb. 14, 2018) (advancing the same argument on behalf of Gascón's office).

<sup>356</sup> See, e.g., People's Response and Opposition to Motion for Order Releasing Defendant on Own Recognizance or Bail Reduction at 4, *People v. Sanchez*, No. 17013355 (Cal. Sup. Ct. Oct. 3, 2017) (arguing, on behalf of Gascón's office, that "the court must presume guilt" at bail hearings).

<sup>357</sup> See generally, e.g., PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 101-21 (2009) (discussing the constraints facing progressive prosecutors).

Prosecutors are political actors responding to incentives and, like most of the country, they have been socialized in mass human caging. If left on their own, they will largely preserve mass human caging, if only because none of them has the power to dismantle such a mammoth system even if they wanted to without a social movement articulating it clearly and demanding it. So, although electing different prosecutors and then pushing them to be better can be important in itself and as an organizing tool, anyone interested in significantly dismantling the punishment bureaucracy must have a strategy for creating a reality in which organized political power demands big changes.

## VIII

We want land, bread, housing, education, clothing, justice, and peace.

--Black Panther Party, Ten-Point Program <sup>358</sup>

People interested in big change must be clear about what changes they want to see as they build the power in communities to force political actors to accept [\*930] them. Here, I offer some rules of thumb to differentiate between the "reforms" of punishment bureaucrats and the transformational interventions that would end mass incarceration. The standard "reforms" promoted by punishment bureaucrats typically have several characteristics.

### A. *The Silo Mistake*

First, at the highest level of generality, they portray the problems of the criminal system as existing in a silo: we can "fix" the criminal system, they say, without confronting deeper problems like white supremacy, lack of access to health care, economic deprivation, educational divestment, neighborhood segregation, gender inequality, banking, lack of access to the arts, unaffordable housing, and environmental destruction. <sup>359</sup> For them, the disproportionate use of the punishment bureaucracy in Boston against black people is not related to the fact that the median net worth of black households in Boston is \$ 8. <sup>360</sup> We must have better policies in this one domain, they concede, but we need not link addressing criminal system failures to remedying broader social inequities.

### B. *Misdiagnosing the Problem*

Second, they accept the assumptions of the system: we have to deal with social problems through punishment; the existing bureaucracy is trying its best to help people live safe, flourishing lives; "law enforcement" uses "the rule of law" to pursue "criminal justice" and not other objectives like protecting profit and racial hierarchy.

### C. *Hoarding Control*

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<sup>358</sup> Safiya Bukhari-Alston, *Notes on the Black Panther Party: Its Basic Working Papers and Policy Statements*, FREEDOM ARCHIVES (1971), <https://search.freedomarchives.org/search.php?s=%22notes+on+the+black+panther+party%22> [<https://perma.cc/H7RA-LAYQ>].

<sup>359</sup> See, e.g., Kim Foxx, Opinion, *Commentary: Kim Foxx: The Next Steps Toward Criminal Justice Reform After the Van Dyke Trial*, CHI. TRIB. (Oct. 5, 2018), <http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-kim-foxx-van-dyke-criminal-justice-1007-20181005-story.html> [<https://perma.cc/NGC2-7EN3>].

<sup>360</sup> Akilah Johnson, *That Was No Typo: The Median Net Worth of Black Bostonians Really Is \$ 8*, BOS. GLOBE (Dec. 11, 2017), <https://www.bostonglobe.com/metro/2017/12/11/that-was-typo-the-median-net-worth-black-bostonians-really/ze5KxC1jJelx24M3pugFFN/story.html> [<https://perma.cc/5YYZ-CVMF>].

Third, because punishment bureaucrats accept these assumptions and rely on the bureaucracy's good faith, their proposals retain power and control in the same actors and institutions that created and manage mass human caging. <sup>361</sup> [\*931] Reformers want to give control, resources, and discretion to prosecutors, judges, police, sheriffs, probation departments, parole boards, private corporations and consultants, and so on. Their reforms are defined by their lack of community self-determination and accountability. <sup>362</sup> They do not shift centers of power and control.

#### D. Lack of Reparations, Lack of Justice

Fourth, punishment bureaucrats' reforms are not backward looking. Standard "reforms" pay no attention to repairing the damage done by mass human caging, such as through monetary and property reparations for massive harms caused by the punishment bureaucracy in the past and for the lawlessness against marginalized people and communities that went unprosecuted and uncompensated. Making individual survivors whole is an uncontroversial goal of standard criminal prosecutions, but making whole the many survivors of systemic government atrocities is entirely absent from broader "criminal justice reform" discourse.

#### E. Shrinking the Bureaucracy

Fifth, they do not try to shrink the punishment system. They instead tout larger budgets, more police officers, better "predictive" policing and machine learning algorithms, more prosecutors, special "drug" courts with different jail [\*932] punishment structures, greater use of probation supervision, more parole, fee-based "diversion" programs, and electronic shackles to replace metal ones. In short, they seek expanded control over people's bodies and minds, but they argue that this control should be exercised in different ways. <sup>363</sup>

A good rule of thumb for identifying whether a proposal is meaningful or hollow is asking the question: would this reform result in greater or fewer resources going to the punishment bureaucracy? Virtually every major "reform" pushed by local, state, and federal punishment bureaucrats would result in either the same or more resources flowing into the punishment bureaucracy.

<sup>361</sup> See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 410-11 (2018).

<sup>362</sup> Ferguson, Missouri is one among many representative examples. Responding to the conversion of a municipal police force into a revenue-generating machine, self-styled reformers from the Obama Administration announced that one of the main priorities in resolving its investigation into Ferguson's systemic civil rights violations was, in practice, to require *more* resources for "law enforcement" through "community policing" and other increased expenditures for police training. Civil Rights Div., *Investigation of the Ferguson Police Department*, U.S. DEPT JUST. 93 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/K35Y-MFWL>]. The "community policing" mandate was interpreted by the City and federal court monitor as requiring the City to hire *more* police officers, which became a top priority for Ferguson in implementing the decree. Jim Salter & Eric Tucker, *Ferguson Officials Missed Deadlines in Deal with Justice Department*, ASSOCIATED PRESS (Jan. 27, 2017), <https://www.apnews.com/a288f62dbeda4a65bb2f35b35bb51aa1> [<https://perma.cc/2Q8N-P5U3>]. This was a pattern among Obama's police policies and settlements: to lavish money, weapons, and military equipment on police; to "train" police better; and to make sure that police officers have the funds to attach officer-controlled cameras to their militarized vehicles and vests to observe them as they policed impoverished communities. See, e.g., Glen Ford, *Obama Prepares to Reinforce the Militarized Police Occupation of Black America*, BLACK AGENDA REPORT (July 28, 2016), [https://www.blackagenda.com/obama\\_reinforces\\_militarized\\_police](https://www.blackagenda.com/obama_reinforces_militarized_police) [<https://perma.cc/2NS2-COK2>].

<sup>363</sup> See, e.g., Alexander, *supra* note 324; Dewan, *supra* note 194; Shaila Dewan & Andrew W. Lehren, *Alabama Prosecutor Sets the Penalty and Fills the Coffers*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/alabama-prosecutor-valeska-criminal-justice-reform.html> [<https://perma.cc/SPNY-GFCJ>].

## F. Reinvestment

Sixth, because they shift resources *within* the punishment system (e.g. from incarceration to surveillance and supervision) they lack a plan for creating cost savings. Even when there are promises of vague savings due to less incarceration, punishment bureaucrats typically do not propose to reinvest those savings in anti-carceral institutions. They do not attempt to build up institutions that would provide the sustainable infrastructure for dismantling incarceration and shifting toward alternative community-based wellness. The resource savings from reform proposals should be articulated, and every proposal should have a transparent vision for how those savings will be reinvested outside of the punishment bureaucracy.

\* \* \*

In contrast with the standard "criminal justice reform" pushed by punishment bureaucrats, people working in communities across the country are situating their work in a deeper politics and are therefore incubating a wide range of transformations. I include here just a small list of the broad range of work being done in communities across the United States:

- . Organizers in Cleveland, Detroit, the Bay Area, and elsewhere are cultivating economic models that change distributions of power, such as worker-owned cooperatives that can build the wealth, power, and political engagement of formerly incarcerated people. <sup>364</sup>

- [\*933] . Campaigns to close notorious jails in New York City, St. Louis, and Philadelphia <sup>365</sup> and campaigns to stop the construction of new jails, such as the JusticeLA campaign to stop the construction of two new jails for \$ 3.5 billion in Los Angeles. <sup>366</sup> All of these organizers understand that the punishment bureaucracy will fill jails and prisons with bodies wherever they exist.

- . Policies to reserve profitable marijuana business licenses to people with prior marijuana convictions or people living in communities disproportionately targeted by police for drug arrests. <sup>367</sup>

- . Reparations for police torture. <sup>368</sup>

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<sup>364</sup> See, e.g., About, DETROIT COOPERATIVE, <http://detroitcooperatives.nationbuilder.com> [<https://perma.cc/7D6Y-XXP7>]; Cooperatives, SUSTAINABLE ECON. LAW CTR., <https://www.theselc.org/cooperatives> [<https://perma.cc/3YHX-X2WU>]; Jordan Heller, *One of America's Poorest Cities Has a Radical Plan to Remake Itself*, HUFFPOST (Nov. 27, 2018), [https://www.huffingtonpost.com/entry/cleveland-ohio-poorest-cities-regeneration\\_us\\_5bf2e9d5e4b0f32bd58c1374](https://www.huffingtonpost.com/entry/cleveland-ohio-poorest-cities-regeneration_us_5bf2e9d5e4b0f32bd58c1374) [<https://perma.cc/MDV4-X2TF>]. See generally GAR ALPEROVITZ, AMERICA BEYOND CAPITALISM (2d ed. 2011).

<sup>365</sup> Felipe De La Hoz, *Activists Launch #CLOSERikers Campaign to Close Rikers Island*, OBSERVER (Apr. 15, 2016), <https://observer.com/2016/04/activists-launch-closerikers-campaign-to-close-rikers-island/> [<https://perma.cc/SS4K-LCPT>]; Rachel Sudduth, *Close the Workhouse Campaign Releases Plan to Permanently Close Facility*, KMOV4 (Sept. 13, 2018), [https://www.kmov.com/news/close-the-workhouse-campaign-releases-plan-to-permanently-close-facility/article\\_e883a142-b763-11e8-b516-a728bc8ef89e.html](https://www.kmov.com/news/close-the-workhouse-campaign-releases-plan-to-permanently-close-facility/article_e883a142-b763-11e8-b516-a728bc8ef89e.html) [<https://perma.cc/BW9N-UPG4>]; Michaela Winberg, *Advocates: Closing the Dilapidated, Decaying House of Correction Isn't Enough*, BILLY PENN (Apr. 19, 2018), <https://billypenn.com/2018/04/19/advocates-closing-the-dilapidated-decaying-house-of-correction-isnt-enough/> [<https://perma.cc/P3QH-QDMV>].

<sup>366</sup> JUSTICELA, <http://justicelanow.org/> [<https://perma.cc/SJ5X-J2UU>].

<sup>367</sup> Max Blau, *Legal Pot Is Notoriously White. Oakland Is Changing That.*, POLITICO (Mar. 27, 2018) <https://www.politico.com/magazine/story/2018/03/27/oakland-legal-cannabis-hood-incubator-217657> [<https://perma.cc/TNM5-HV3B>].

<sup>368</sup> David Schaper, *Chicago Creates Reparations Fund for Victims of Police Torture*, NPR (May 6, 2015), <https://www.npr.org/sections/two-way/2015/05/06/404545064/chicago-set-to-create-reparation-fund-for-victims-of-police-torture> [<https://perma.cc/3UJ5-NYDE>].



. Community land trusts that attempt to bring affordable housing and neighborhood control to heavily policed neighborhoods. <sup>369</sup>

. Restorative justice that changes norms around how to think about accountability when a person harms another person. Shifting to restorative models in Washington, D.C., for example, they have nearly [\*934] eliminated the use of jails to incarcerate youth in the juvenile system. <sup>370</sup>

. Pilot reinvestment programs to shift savings from decreased parole revocation expenditures to community-based projects led by directly impacted people. <sup>371</sup>

. Two-way text messaging, phone-call reminders, childcare in court, and transportation to court are being developed as alternatives to the money bail system, and to the for-profit e-incarceration movement that is replacing money bail with GPS monitoring and pretrial supervision.

. Hundreds of poetry, theater, and art programs for children and adults who are survivors of human caging have grown organically around the country to involve thousands of people. <sup>372</sup> These programs build community, solidarity, connection, creativity, compassion, and healing, and they help foster empathy and relationships between people impacted by the punishment system and segments of society that have long been indifferent to their stories.

Ideas like these hold enormous promise. But investment in them is dwarfed by the tens of billions of dollars spent on punishing people. Whether we can improve and scale these and other transformative ideas depends on whether we can change the stories that the punishment bureaucracy tells about why it exists [\*935] and what it does. Only by having an honest conversation about what the punishment bureaucracy is can an informed movement dismantle it. Many human beings have a lot at stake in whether we can.

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<sup>369</sup> *Community Land Trust*, DETROIT PEOPLE'S PLATFORM, <http://detroitpeoplesplatform.org/resources/community-land-trusts/> [<https://perma.cc/ECK5-MNME>].

<sup>370</sup> Shortly before publication of this Essay, I spoke with District of Columbia officials who reported to me that the average daily population of committed children incarcerated in the juvenile secure facility was down to fifteen. Interview with Seema Gajwani, Special Counsel for Juvenile Justice Reform, Office of the Attorney General, in Washington, D.C. (March 1, 2019).

<sup>371</sup> See, e.g., Christie Donner, *Community Reinvestment as the New Public Safety Model*, COLO. JUST. REP. 3 (Winter 2018), <https://www.ccjrc.org/wp-content/uploads/2018/11/Winter-2018.pdf> [<https://perma.cc/3R4E-T83S>]; *Community Reinvestment in Colorado*, CO. CRIM. JUST. REFORM COALITION, <https://www.ccjrc.org/wp-content/uploads/2018/10/Oct-2018-Community-Reinvestment-Overview.pdf> [<https://perma.cc/S5SE-QZHG>] (Oct. 2018).

<sup>372</sup> See, e.g., Melissa Harris, *Reality Onstage - How Theater Helps Young Women in Prison*, CHI. TRIB. (Nov. 25, 2012), <https://www.chicagotribune.com/entertainment/ct-xpm-2012-11-25-ct-ae-1125-plays-in-prisons-20121125-story.html> [<https://perma.cc/X3XM-68A2>]; Reed Johnson, *A Bookstore That's Like a Favorite Aunt*, L.A. TIMES (May 28, 2011), <http://articles.latimes.com/2011/may/28/entertainment/la-et-tia-chuchas-20110528> [<https://perma.cc/8JT2-8SXQ>]; Robert Samuels, *How a Book Club Is Helping to Keep Ex-Offenders from Going Back to Jail*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/local/how-a-book-club-brought-inmates-together-even-on-the-outside/2015/02/25/0468c8ca-a277-11e4-903f-9f2faf7cd9fe\\_story.html?utm\\_term=.b0c4af845050](https://www.washingtonpost.com/local/how-a-book-club-brought-inmates-together-even-on-the-outside/2015/02/25/0468c8ca-a277-11e4-903f-9f2faf7cd9fe_story.html?utm_term=.b0c4af845050) [<https://perma.cc/7NSR-APPE>].