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“VICTIMS’ RIGHTS” AND DIVERSION: FURTHERING THE INTERESTS OF CRIME SURVIVORS AND THE COMMUNITY

Miriam Krinsky* & Liz Komar**

ABSTRACT

Against the backdrop of the prosecutorial reform movement, this Article explores the origins of the tensions between victims’ rights and criminal justice reform efforts and argues that while victims’ rights may be in tension with diversion in some individual cases, the broader needs and interests of crime survivors do not conflict with decarceral diversion and deflection strategies. The Article describes the growing movement toward diversion among reform prosecutors and briefly recounts the history of the victims’ rights movement and “tough-on-crime” politics. The Article then discusses the demographics of crime survivors, who are disproportionately from the communities most harmed by “tough on crime” policies and highlights how portraying the needs and desires of crime survivors as in tension with reform is inaccurate and unfortunate, as survivors are underserved by the “tough on crime” status quo and often in fact support less carceral approaches. This Article then explores prosecutors’ ethical duties, including their obligation to resolve cases in a manner that best achieves justice and wellbeing for the entire community. Finally, it offers several recommendations for elected prosecutors committed to decarceral strategies, with a goal of balancing defendants’ rights, the rights and interests of crime survivors, and the needs of the community. Ultimately, efforts to reduce the footprint of the criminal legal system, such as via diversion or deflection, and efforts to promote the interests of crime survivors align. The interests of crime survivors, defendants, and communities are all served by less carceral approaches that proactively invest in addressing the underlying drivers of crime and undoing the harms of mass incarceration.

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I. INTRODUCTION

THE United States has only just begun the critical work of ending mass incarceration, but already many states have taken notable strides toward both reducing incarceration and improving safety over the past decade. Between 2007 and 2017, thirty-four states lowered incarceration rates while simultaneously decreasing crime.¹ Even some highly controversial decarceral policies implemented by a new generation of elected reform prosecutors have stood the test of time and not increased crime.² And while many cities today are grappling with some in-

1. Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem> [perma.cc/3TG7-SXA8]. Between 1999 and 2012, New York and New Jersey also “reduc[ed] their prison populations by 26% while the nationwide state prison population increased by 10%.” NAZGOL GHANDNOOSH & MARC MAUER, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES, THE SENTENCING PROJECT 1 (2014), <https://sentencingproject.org/wp-content/uploads/2015/11/Fewer-Prisoners-Less-Crime-A-Tale-of-Three-States.pdf> [perma.cc/WSSF-3WT5].

2. See, e.g., Ethan Corey, *Report Find Bail Reform in Chicago Reduced Pretrial Incarceration Without Hurting Public Safety*, THE APPEAL (Nov. 19, 2020), <https://theappeal.org/report-finds-bail-reform-in-chicago-reduced-pretrial-incarceration-without-hurting-public-safety> [perma.cc/Y7FT-FQNR] (describing how after Cook County, Illinois significantly

creases in crime in the wake of the COVID-19 pandemic, crime remains far below historic highs.³

Despite this promising start, some have been quick to criticize reform-minded prosecutors seeking to change paradigms. Foremost among those who sought to promote a fear-driven narrative was former Attorney General William Barr, who stated in a 2019 speech to the Fraternal Order of Police:

Some [reform prosecutors] are refusing to prosecute various theft cases or drug cases, even where the suspect is involved in distribution. And when they do deign to charge a criminal suspect, they are frequently seeking sentences that are pathetically lenient . . .

So these cities are headed back to the days of revolving door justice. The results will be predictable. More crime, more victims.⁴

He was not alone in those criticisms; elected prosecutors seeking to advance reforms have faced considerable backlash over the last four years.⁵ Claims that prosecutors are failing to sufficiently consider crime survivors or are advancing policies that will result in more victimization are often at the heart of those critiques.

Those sweeping criticisms are not borne out by the evidence, but they do exemplify the tensions that have, at times, surfaced between “victims’ rights” and policies that adopt a less punitive approach to addressing crime, such as diversion or deflection from the criminal legal system. As

reduced reliance on cash bail in 2017, crime rates remained steady, and people released pretrial without bail were no more likely to be rearrested while awaiting trial than people released before the reforms); TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, MONTCLAIR STATE UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 3–4, 10 (2020), <https://digitalcommons.montclair.edu/cgi/viewcontent.cgi?article=1084&context=justice-studies-facpubs> [perma.cc/TD46-W7XG] (describing how individuals originally sentenced to juvenile life without parole, then resentenced and released by the Philadelphia District Attorney’s Office had a lower recidivism rate than individuals “convicted of homicide offenses nationally”).

3. See RICHARD ROSENFELD, THOMAS ABT & ERNESTO LOPEZ, COUNCIL ON CRIMINAL JUSTICE, PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2020 YEAR-END UPDATE 17–18 (2021), https://cdn.ymaws.com/counciloncj.org/resource/resmgr/covid_commission/Year_End_Crime_Update_Design.pdf [perma.cc/Q3TR-LQZN] (showing an increase in homicides in nearly all 34 cities sampled); see also Ali Watkins, *Violent Year in New York and Across U.S. as Pandemic Fuels Crime Spike*, N.Y. TIMES, (Dec. 29, 2020), <https://www.nytimes.com/2020/12/29/nyregion/nyc-2020-crime-covid.html> [perma.cc/LWD7-E2RA] (Although “New York’s 447 homicides made 2020 the city’s bloodiest year in a decade,” “crime numbers . . . remained well below the dark days of the 1980s and 1990s when New York saw more than 2,000 murders a year.”).

4. Zack Budryk, *Barr Predicts Progressive Prosecutors Will Lead to ‘More Crime, More Victims,’* THE HILL (Aug. 12, 2019, 2:32 PM) (internal quotation marks omitted), <https://thehill.com/homenews/administration/457120-barr-predicts-progressive-prosecutors-will-lead-to-more-crime-more> [perma.cc/9NNP-Q8CL].

5. See, e.g., TCR Staff, *Backlash Against Reform Prosecutors Tied to ‘Failed Approaches of Past,’* THE CRIME REPORT (Feb. 5, 2021), <https://thecrimereport.org/2021/02/05/backlash-against-reform-prosecutors-tied-to-failed-approaches-of-past> [perma.cc/24XU-FK8Z]; Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10 2020, 11:50 AM), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002> [perma.cc/CC3T-NYEP].

Professor Kay Levine writes in her accompanying piece in this Symposium, some would even describe this as a “diversion movement” that is potentially in tension with the victims’ rights movement.⁶

Practices vary by jurisdiction, but in the context of diversion, the victims’ rights movement frequently calls for three overlapping rights for crime survivors: the right to notice of the potential case disposition, the right to have their opinions heard, and the right to veto diversion.⁷ Some diversion and deflection programs, such as restorative justice programs for serious crimes, require victim consent and participation in order to function because the program itself is victim-centered, promoting the alignment of victims’ rights and diversion.⁸ But many other programs are not predicated on victim cooperation or participation. For example, if an individual is arrested for an acquisitive crime (e.g., theft or robbery) related to an underlying substance use disorder, there may be strong public safety benefits to their participation in a drug diversion program, even over the complaining witness’s objection.⁹ Prosecutors then face the challenge of reconciling victims’ rights, justice, and the needs of the community.

This Article explores the origins of the tensions between victims’ rights and criminal justice reform efforts and ultimately argues that while victims’ rights may be in tension with diversion in some individual cases, *the broader needs and interests* of crime survivors do not conflict with decarceral diversion and deflection strategies. Rather, the interests of crime survivors are served by less carceral approaches that proactively invest in addressing the underlying drivers of crime and undoing the harms of mass incarceration.

This Article first describes the growing movement toward diversion among reform prosecutors. Second, it briefly recounts the history of the victims’ rights movement and “tough-on-crime” politics. Third, this Article discusses the actual demographics of crime survivors, who disproportionately come from the communities most harmed by tough-on-crime policies. Fourth, it highlights how portraying the needs and desires of crime survivors in tension with reform is inaccurate because survivors are underserved by the tough-on-crime status quo and often support less

6. Kay Levine, *Victims’ Rights in the Diversion Landscape*, 74 SMU L. REV. 501, 516 (2021).

7. *See id.* at 503.

8. *See* DANIELLE SERED, VERA INST. OF JUST., ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 15–16 (2017), <https://www.vera.org/downloads/publications/accounting-for-violence.pdf> [perma.cc/6VDN-7UXH] (describing how restorative justice is survivor-centered, and how 90% of survivors given a choice between seeing the person who harmed them incarcerated or seeing them take part in Common Justice, a restorative justice program, have chosen Common Justice).

9. *See* Duane C. McBride, Curtis J. VanderWaal & Yvonne M. Terry-McElrath, *The Drugs-Crime Wars: Past, Present, and Future Directions in Theory, Policy, and Program Interventions*, in TOWARD A DRUGS AND CRIME RESEARCH AGENDA FOR THE 21ST CENTURY 97, 128 (Nat’l Inst. of Just. ed., 2003).

carceral approaches.¹⁰ Fifth, this Article explores prosecutors' ethical duties, including their obligation to resolve cases in a manner that best achieves justice and well-being for the entire community. Finally, this Article offers several recommendations for prosecutors committed to decarceral strategies, with a goal of balancing defendants' rights, the rights and interests of crime survivors, and the needs of the community. Ultimately, efforts to reduce the footprint of the criminal legal system via diversion or deflection and the interests of crime survivors need not be in tension. Crime survivors, defendants, and communities are all best served when prosecutors embrace evidence-based alternatives to the criminal legal system.

II. THE GROWING MOVEMENT TOWARD DIVERSION AS THE DEFAULT

Over the past five years, a new generation of prosecutors elected on platforms of transforming the criminal legal system have taken office across the country.¹¹ In major cities such as Chicago,¹² Boston,¹³ San Francisco,¹⁴ and Los Angeles,¹⁵ as well as smaller jurisdictions, such as Corpus Christi, Texas,¹⁶ and Columbus, Mississippi,¹⁷ a growing number of communities have elected chief prosecutors who campaigned on expansive platforms of reform.¹⁸ This groundswell of support for change has been rooted in the growing public understanding of the failings of a criminal legal system that for decades embraced punitive approaches that fueled mass incarceration. Increasingly, voters are recognizing that past

10. ALL. FOR SAFETY & JUST., CRIME SURVIVORS SPEAK: THE FIRST-EVER SURVEY OF VICTIMS' VIEWS ON SAFETY AND JUSTICE, 13, 15 (2016), <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> [perma.cc/XMQ2-VDS4].

11. See Tina Rosenberg, Opinion, *Can Prosecutors Be Taught to Avoid Jail Sentences?*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/25/opinion/prosecutors-sentencing.html> [perma.cc/WSK4-5KMW].

12. Mari Cohen, *Kim Foxx Defeats Three Challengers in Re-election Bid as Chicago's Chief Prosecutor*, THE APPEAL (Mar. 18, 2020), <https://theappeal.org/politicalreport/kim-foxx-cook-county-election> [perma.cc/XBL4-V65E].

13. *Meet District Attorney Rollins*, SUFFOLK CNTY. DIST. ATT'Y: MASS., <https://www.suffolkdistrictattorney.com/about-the-office/meet-district-attorney-rollins> [perma.cc/8TSE-LYQT].

14. Jay Willis, *Chesa Boudin Sworn in as San Francisco's New District Attorney*, THE APPEAL (Jan. 8, 2020), <https://theappeal.org/chesa-boudin-inauguration-san-francisco-district-attorney> [perma.cc/ZUS4-QLH2].

15. Eliyahu Kamisher, *Newly Elected Los Angeles DA Will End Cash Bail in Nation's Largest Prosecutor Office*, THE APPEAL (Dec. 7, 2020), <https://theappeal.org/newly-elected-los-angeles-da-will-end-cash-bail-in-nations-largest-prosecutor-office> [perma.cc/8URB-VNT5].

16. Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO MAG. (May 6, 2018), <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322> [perma.cc/6JCR-FPDN].

17. Rosenberg, *supra* note 11.

18. See Emily Bazelon & Miriam Krinsky, Opinion, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [perma.cc/VXU8-KTWZ].

tough-on-crime policies further entrenched racial disparities¹⁹ in every aspect of the criminal legal system²⁰ while failing to promote public safety and instead leaving deep scars in many communities.²¹ Meanwhile, the United States has the highest incarceration rate in the world²² and pours taxpayer dollars into jails and prisons²³ while underfunding systems that address root causes of crime, such as healthcare, housing, and public education.²⁴ Despite massive public investment in punishment, confidence in the police is at an all-time low,²⁵ and at least half of all violent crimes go unreported.²⁶

Accordingly, these reform prosecutors have redefined the role of the prosecutor to focus instead on correcting these failings and improving the well-being of the entire community, and in turn, are re-envisioning prosecutorial success.²⁷ Moving beyond indictments and convictions, these prosecutors are also increasingly measuring their impact in objectives, including lowered incarceration rates, reductions in racial dispari-

19. Such policies were also fueled in great part by racial animus. *See* IBRAM X. KENDI, *STAMPED FROM THE BEGINNING* 437 (2016); *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 50–73 (10th anniversary ed. 2020) (ebook).

20. Over a hundred studies show that racial disparities infect every aspect of the justice system. *See* Radley Balko, Opinion, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof*, WASH. POST (June 10, 2020) https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/?tid=usw_passupdatepg [perma.cc/7DWP-FDSR].

21. *See* ALEXANDER, *supra* note 19, at 176–80, 294–95.

22. *Incarceration Rates by Country 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> [perma.cc/V5P5-XH5U].

23. *See* Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration> [perma.cc/R9UN-KAPU] (“[T]he United States spends more than \$80 billion each year to keep roughly 2.3 million people behind bars.”).

24. *See, e.g.*, POL’Y & PROGRAM STUD. SERV., U.S. DEP’T OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION 5 (2016), <https://www2.ed.gov/rschstat/eval/other/expenditures-corrections-education/brief.pdf> [perma.cc/3JJ6-YD2C] (“Over the last three decades, state and local corrections expenditures ha[ve] increased three times faster than spending on elementary and secondary education.”).

25. Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html> [perma.cc/L59Z-ZPTP].

26. Daniel T. Wu, Jasmine C. Moore, Daniel A. Bowen, Laura M. Mercer Kollar, Elizabeth M. Mays, Thomas R. Simon & Steven A. Sumner, *Proportion of Violent Injuries Unreported to Law Enforcement*, 179 JAMA INTERNAL MED. 111, 111–12 (2019).

27. While the goals and platforms of reform prosecutors vary across jurisdictions and reflect the needs and politics of their local communities, reform prosecutors generally share a common commitment to shrinking the footprint of the justice system and addressing the underlying causes of crime with treatment and community-based interventions rather than prosecution. *See generally* FAIR & JUST PROSECUTION, BRENNAN CTR. FOR JUST., EMILY BAZELON & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [perma.cc/VMB9-435J] (setting out twenty-one practical steps prosecutors can take to change the criminal justice system for the better); *see also* EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019) (describing the movement by reform prosecutors to transform the justice system).

ties, increased stakeholder trust in the criminal legal system, and other metrics that reflect the values of these prosecutors and their communities.²⁸

Diversion programs are one tool that these prosecutors have embraced to achieve these goals. Over the past forty years, the discretionary decisions of prosecutors—particularly about how to charge crimes and offer plea bargains—have been a key driver of the United States' explosive increase in incarceration rates.²⁹ To rectify that damage, the growing reform prosecution movement prioritizes evidence-based diversion and alternatives to incarceration as the norm rather than the exception.³⁰

Diversion is a broad term that encompasses an array of interventions, but typically refers to the practice of an individual completing some sort of program, often therapeutic, prior to trial—or sometimes prior to charging or pleading—in exchange for dismissal, a reduction of the charges, and, if relevant, a significantly lower sentence, typically involving no jail time.³¹ Diversion includes interventions like drug courts, restorative justice processes, or one-time classes, and can be used in a wide range

28. For example, the Prosecutorial Performance Indicators project, a three-year collaboration among researchers at Florida International University, Loyola University Chicago, and four prosecutors' offices, produced a list of fifty-five "indicators" for measuring the performance of prosecutors' offices, including a range of measures of three dimensions: capacity and efficiency, community safety and well-being, and fairness and justice. *The Prosecutorial Performance Indicators*, PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org> [perma.cc/8B7L-VVHV]; Besiki Luka Kutateladze, Rebecca Richardson, Melba Pearson & Don Stemen, *Prosecutorial Performance Indicators: What Constitutes Success in Prosecution?*, SAFETY + JUST. CHALLENGE: BLOG (Oct. 1, 2020), <https://www.safetyandjusticechallenge.org/2020/10/prosecutorial-performance-indicators-what-constitutes-success-in-prosecution> [perma.cc/M6XZ-TU56].

29. See Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. (forthcoming 2021) (manuscript at 6–8, 23–27), <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1217&context=scholarship> [perma.cc/9ST2-E7G4]; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 59–63 (2017) (ebook) (linking mass incarceration to a rise in "prosecutor-driven prison admissions"); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305–07 (2017); see also NAT'L RSCH. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70, 89 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); *The Power of Prosecutors*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors> [perma.cc/6C64-6LMZ].

30. See, e.g., ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN 19 (2019) ("[T]he Committee recommends creating a new presumption within the Office, making community-based responses the default and incarceration the 'alternative.'"); see also FAIR & JUST PROSECUTION, *supra* note 27, at 4 (defining principle number one as "Make Diversion the Rule").

31. Some advocates and practitioners may define diversion more narrowly, limiting it to programs that are completed prearrest, allowing participants to avoid the collateral consequences of criminal-legal-system involvement almost entirely. "Alternatives to incarceration" and "deflection" may also overlap with some definitions of diversion. This article adopts a broad definition of diversion in reflection of language commonly used by prosecutors. See Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 334–37, 341–42, (2021); FAIR & JUST PROSECUTION, PROMISING PRACTICES IN PROSECUTOR-LED DIVERSION 3–14 (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJP-Brief.Diversion.9.26.pdf> [perma.cc/C8YH-AZVU]; MICHELA LOWRY & ASHMINI KERODAL, CTR. FOR CT. INNOVATION, PROSECUTOR-LED DIVERSION: A NATIONAL SURVEY

of cases.³² While many diversion programs focus on low-level cases like simple drug possession that have no formal complaining witness, many diversion programs include property crimes, crimes committed by youth, and simple assaults with a clear victim.³³ Additionally, a small but critical number of diversion programs include serious crimes, such as gun offenses³⁴ and those statutorily deemed “violent,”³⁵ an approach that is consistent with research indicating that diversion programs targeted towards high-risk individuals may be particularly effective for improving public safety.³⁶

Diversion programs are not a new innovation, and well-designed, faithfully implemented diversion programs can reduce recidivism and incarceration as well as relieve strain on resource-strapped courts, corrections systems, and prosecutors’ offices.³⁷ Diversion programs are far from the only means of achieving such outcomes. Deflection, the practice of moving a person away from the criminal legal system entirely and toward community-based services, is a key—and often even preferable—tool for shrinking the footprint of the criminal legal system, promoting reinvestment in the community, and reducing police violence.³⁸ Likewise, reform

13, 22–23 (2019), https://www.courtinnovation.org/sites/default/files/media/document/2019/prosecutor-led_diversion.pdf [perma.cc/5AKF-B6JF].

32. See LOWRY & KERODAL, *supra* note 31, at 6, 14–15; Wright & Levine, *supra* note 31, at 336, 341–42.

33. See LOWRY & KERODAL, *supra* note 31, at 13–15.

34. See, e.g., *Youth Diversion*, BROOKLYN DIST. ATT’Y’S OFF., <http://www.brooklynda.org/youth-diversion> [perma.cc/58VR-TTPR].

35. See David Noble, *Mapping the Landscape of Prosecutor-Led Pretrial Diversion*, 11 CRIM. L. PRAC. 8, 16 (2020), https://e1e6cfc6-b1d4-4e45-b03c-22d8c290e050.filesusr.com/ugd/e009e5_b2b1f668d03449dbada3b1a0538b5a35.pdf [perma.cc/6B63-KQJA] (“[N]ew York’s boroughs of Brooklyn and the Bronx are among the few jurisdictions in the country that apply an institutionalized restorative justice model to serious violent felonies (excluding rape and murder), through the organization called Common Justice.”).

36. See SARAH PICARD-FRITSCHÉ, MICHAEL REMPEL, JENNIFER A. TALLON, JULIAN ADLER & NATALIE REYES, CTR. FOR CT. INNOVATION, *DEMISTIFYING RISK ASSESSMENT: KEY PRINCIPLES AND CONTROVERSIES* 11–12 (2017), https://www.courtinnovation.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf [perma.cc/QWE6-5CRS].

37. LOWRY & KERODAL, *supra* note 31, at 7; MICHAEL REMPEL, MELISSA LABRIOLA, PRISCILLIA HUNT, ROBERT C. DAVIS, WARREN A. REICH & SAMANTHA CHERNEY, NIJ’S MULTISITE EVALUATION OF PROSECUTOR-LED DIVERSION PROGRAMS: STRATEGIES, IMPACTS, AND COST-EFFECTIVENESS 11 (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251665.pdf> [perma.cc/5Y6D-GHYG].

38. See, e.g., Jackson Beck, Melissa Reuland & Leah Pope, *Behavioral Health Crisis Alternatives: Shifting from Police to Community Responses*, VERA INST. OF JUST. (Nov. 2020), <https://www.vera.org/behavioral-health-crisis-alternatives> [perma.cc/9SFW-PZ5D]; FAIR & JUST PROSECUTION, *HARM REDUCTION RESPONSES TO DRUG USE* 7–11 (2019), https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf [perma.cc/7FPJ-KPT2]. Not all diversion programs however are effective means of reducing incarceration or improving equity. For example, drug courts have been subject to extensive criticism. See, e.g., Christine Mehta, *Neither Justice nor Treatment: Drug Courts in the United States*, PHYSICIANS FOR HUM. RTS. (June 15, 2017), <https://phr.org/our-work/resources/neither-justice-nor-treatment> [perma.cc/DX7N-TJD5]; FAIR & JUST PROSECUTION, *RECONCILING DRUG COURTS, DECARCERATION, AND HARM REDUCTION* 7–11 (2021), <https://fairandjustprosecution.org/wp-content/uploads/2021/02/FJP-Drug-Courts-Issue-Brief.pdf> [perma.cc/TR5U-9WX6].

prosecutors are also increasingly embracing decriminalization of low-level offenses as a path to improving public safety.³⁹ Given that a growing body of evidence confirms the potential efficacy of these approaches, they offer a means to prevent future victimization without the enormous individual, societal, and fiscal costs associated with incarceration and system involvement. As such, victims' rights-based restraints on diversion present prosecutors with a dilemma: Should one individual's desire for more punishment trump the needs of the broader community? And does granting crime survivors such a right advance justice? As discussed below, the history of such restraints on diversion and their original tough-on-crime goals offer some insight into these questions.

III. HISTORY OF THE VICTIMS' RIGHTS MOVEMENT AND INTERSECTIONS WITH TOUGH-ON-CRIME POLITICS

A. THE VICTIMS' RIGHTS MOVEMENT

For decades, crime survivors have fought to change the U.S. criminal legal system to better reflect their experiences and needs.⁴⁰ Yet crime survivors are far from a monolithic group, and despite how they are often portrayed, they do not universally desire to see the perpetrators of harm harshly convicted and punished.⁴¹ Many crime survivors of color have long advocated for more restorative, community-based responses to harm in light of the suffering the carceral state has historically wrought on Black and brown communities.⁴² The victims' rights movement, espe-

39. See, e.g., SUFFOLK CNTY. DIST. ATT'Y, THE RACHAEL ROLLINS POLICY MEMO 26, D-1 (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [perma.cc/DV4T-TA9Y] (listing several offenses that the Suffolk DA's office will decline to prosecute as a matter of policy and noting that in Suffolk County, between 2014 and 2019, increased prevalence of low-level crime dismissal or diversion corresponded with decreases in property crime and violent crime throughout the county). See also Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR (Nov. 26, 2020, 8:12 AM), <https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair> [perma.cc/ARD8-9BU2].

40. See OFF. FOR VICTIMS OF CRIME, OFF. OF JUST. PROGRAMS, LANDMARKS IN VICTIMS' RIGHTS AND SERVICES (2020), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrv2020/info_flyers/2020-NCVRW-Landmarks-in-Victims-508.pdf [perma.cc/4EY6-G9F7].

41. See Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 319–28 (2020) (“[S]ometimes, victims will prefer a criminal prosecution to go forward and will benefit from its success; sometimes, the public interest in a criminal prosecution should outweigh the victim's interest in an alternative; and sometimes, restorative justice is not a viable alternative because of the character of the offender. There are victims who want aid, social services, and restitution without participating in a criminal adjudicatory process. There are also victims who want no part of any process at all—restorative or adjudicatory.”); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION* 142–56 (2012) (discussing efforts by Black survivors to address both violence against women and the carceral state).

42. See RICHIE, *supra* note 41; see also Lynne Henderson, *Commentary, Co-opting Compassion: The Federal Victim's Rights Amendment*, 10 SAINT THOMAS L. REV. 579, 600 (1998) (“[A]frican-American women already have reason to be mistrustful of a criminal justice system that disproportionately affects the African-American community and African-American men. The punitive history of oppression, lynching, and harsh treatment by a white-dominated legal system and the damage that system has done to the African Ameri-

cially as it gained political prominence in the Reagan era, is far narrower, and often fails to reflect the voices of all crime survivors, and was strongly influenced by conservative tough-on-crime ideology.⁴³

The victims' rights movement initially arose as part of the anti-violence movement in conjunction with 1970s feminism and emphasized justice for survivors of domestic violence.⁴⁴ The broader anti-violence movement sought legal recognition of the victims of domestic violence, more aggressive police protection of "battered women," and harsher punishment of the perpetrators of domestic violence—who, as a group, were previously often ignored by the criminal justice system entirely.⁴⁵ Within this context, the victims' rights movement strove to address the tension between recovery from trauma and the adversarial process. Research indicates that recovery from trauma is predicated on "regaining power and control over what occurs in the aftermath of an assault, including the ability to make choices about when, how, and with whom to share the[] story, and the ability to limit their exposure to situations that may cause flashbacks or retraumatization."⁴⁶ The adversarial process itself, however, often requires crime survivors to repeat their stories on demand, with everything they say subject to scrutiny, potentially confront the individual who harmed them in the courtroom, and have their narrative shaped by the prosecutor.⁴⁷ Accordingly, the movement sought, and continues to seek, a greater voice for crime survivors and greater transparency from police, courts, and prosecutors.

B. THE TOUGH-ON-CRIME OVERLAY

Tough-on-crime ideology grew in the 1960s and 1970s, with "'For Law and Order'" becoming a slogan of Nixon's 1968 presidential campaign.⁴⁸ This thinking is the "fusion of incapacitation theory and retributivism," and politicians who embraced it moved discussions around crime and

can communities in this country is neither distant nor unreal."); Aya Gruber, *How Police Became the Go-to Response to Domestic Violence*, SLATE (July 7, 2020, 4:03 PM), <https://slate.com/news-and-politics/2020/07/policing-domestic-violence-history.html> [perma.cc/SS7Z-6ENF].

43. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 763–80 (2007), (discussing the essentialism of the victims' rights movement) ("The victims' rights movement involves a non-subordinated group, backed by powerful, politically privileged actors, engaging in essentialism in order to strip a subordinated group (defendants) of the few rights that group retains.").

44. See *id.* at 762–63.

45. See, e.g., Laurie Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 21–31 (1978) (discussing successful efforts by survivors of intimate partner violence to sue the New York City Police Department for failing to protect or assist "battered women").

46. Bazelon & Green, *supra* note 41, at 296 n.15 (citing Stefanie Mundhenk, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me*, THE APPEAL (July 18, 2019), <https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me> [perma.cc/QF9Z-39PY]).

47. *Id.* at 302.

48. See Jill Lepore, *The Rise of the Victims'-Rights Movement*, THE NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement> [perma.cc/VGX3-5789].

punishment from deserved consequences to “dangerousness, as media illustrated a society plagued with crime and in desperate need of crime control.”⁴⁹ The growth of tough-on-crime ideology was also rooted in post-Jim Crow white-supremacist ideology. As many authors have traced, many tough-on-crime policies—from the increased use of capital punishment⁵⁰ to the “War on Drugs”⁵¹—were deliberate attempts to perpetuate the racial oppression of the Jim Crow era within the legal context of growing civil rights protections.⁵²

Tough-on-crime ideology also arose in the context of conservative backlash against a series of decisions by the Warren Court that provided greater protections to defendants. The Warren Court created the exclusionary rule, prohibiting the government from using most illegally obtained evidence at trial, as well as the requirements that police notify suspects of their rights and that courts appoint attorneys for defendants who cannot afford them.⁵³ In turn, “[C]onservatives, led by the[n] California [G]overnor Ronald Reagan, argued that liberals on the Supreme Court, on judges’ benches, and in the legal academy were soft on crime.”⁵⁴

Within that broader political framework, the victims’ rights movement sought to rebalance a perceived bias toward defendants in the justice system and a movement toward greater leniency by giving victims a stronger voice. The report of the 1982 President’s Task Force on Crime Victims opined that the “system [is] appallingly out of balance,” “has lost track of the simple truth that it is supposed . . . to protect those who obey the law

49. Gruber, *supra* note 43, at 767.

50. Ctr. for Death Penalty Litig. Staff, *Historical Overview: Jim Crow & the Birth of the State-Run Death Penalty (1910-1961)*, RACIST ROOTS, https://racistroots.org/wp-content/uploads/2020/09/Jim-Crow-_Birth-of-State-Run-Death-Penalty.pdf [perma.cc/KML5-GDKH] (“The state’s attempts at modernization changed only the appearance of the death penalty. They did nothing to alter the racialized fear and anger that lay at the heart of capital punishment. Lynchings continued and some trials closely resembled them, with angry mobs attempting to kidnap the accused from jails and courtrooms, and juries returning death sentences after only minutes of deliberation.”).

51. For example, the Nixon administration’s War on Drugs was explicitly racially motivated. John Ehrlichman, Nixon’s counsel and Assistant for Domestic Affairs, stated in 1994,

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.

Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER’S MAG., Apr. 2016, at 24, 24, <https://harpers.org/archive/2016/04/legalize-it-all> [perma.cc/Y8XK-G6U7]; see also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks.”* 6 J. GENDER RACE & JUST. 381, 387–412 (2002); Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 39–40, 42 (1994).

52. See ALEXANDER, *supra* note 19, at 50–57.

53. See A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 258 n.39, 261–64 (1968).

54. Lepore, *supra* note 48.

while punishing those who break it,” and has begun to “serve lawyers[,] . . . judges[,] and defendants, treating the victim with institutionalized disinterest.”⁵⁵

By the 1980s, the victims’ rights movement had been “co[-]opted” by advocates of tough-on-crime politics,⁵⁶ who had little “tolerance for victims’ desires that conflict[ed] with state prosecutorial goals.”⁵⁷ For example, the goals of the 1982 Task Force on Crime Victims, which was staffed by leading advocates of tough-on-crime politics,⁵⁸ were clear: to “restore balance” to the criminal legal system, rather than to remedy harm.⁵⁹ In turn, the wins of the victims’ rights movement were generally limited to rights which advanced punitive goals.⁶⁰

C. APPLYING THESE IDEOLOGIES IN THE CONTEXT OF DIVERSION

Over the ensuing years, crime survivors’ rights have expanded in response to this advocacy. Now, crime survivors are “entitled to notification of court proceedings, the right to seek monetary compensation from offenders, and the opportunity to make a victim impact statement, among other rights.”⁶¹ In the context of diversion, the victims’ right movement has sought to propel three common overlapping objectives, which vary by jurisdiction: the right to notice of potential diversion, the opportunity to voice an opinion on that potential case disposition, and often the power to “veto” diversion altogether.⁶² The former two practices can increase prosecutorial transparency and procedural justice for crime survivors, both of which are valuable for psychological recovery.⁶³ However, the practice of permitting complaining witnesses to restrain diversion by a veto reflects how the contours of the victims’ rights movement were shaped by tough-on-crime ideology.

Allowing complaining witnesses to veto diversion creates an opportunity for crime survivors to demand a harsher, more carceral case resolution. Crime survivors are rarely, if ever, offered the inverse of the right to restrain diversion: the power to veto *carceral* case dispositions and re-

55. LOIS HAIGHT HARRINGTON, GARFIELD BOBO, FRANK CARRINGTON, JAMES P. DAMOS, DORIS L. DOLAN, KENNETH O. EIKENBERRY, ROBERT J. MILLER, PAT ROBERTSON & STANTON E. SAMENOW, PRESIDENT’S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT, at vi (1982), <https://www.ojp.gov/pdffiles1/ovc/87299.pdf> [perma.cc/FMW5-M3SS].

56. Bazelon & Green, *supra* note 41, at 320 n.118 (citing Gruber, *supra* note 42, at 771–74).

57. Gruber, *supra* note 43, at 773.

58. See Lepore, *supra* note 48 (discussing how Frank G. Carrington, the chair of the task force, also founded Americans for Effective Law Enforcement, to protest “the due-process revolution”).

59. HARRINGTON ET AL., *supra* note 55, at ii.

60. Henderson, *supra* note 42, at 592 (“Victims’ rights presently appear to focus almost entirely on an individual’s right to have an offender swiftly punished, with the punishment based on revenge and incapacitation, despite the restitution provision, and the victim’s right to use the apparatus of the state to accomplish that objective.”).

61. Bazelon & Green, *supra* note 41, at 294.

62. See Levine, *supra* note 6, at 503.

63. *Id.* at 504.

quire nonprosecution or a more rehabilitative or restorative case outcome. Indeed, as discussed further below, research shows that the majority of crime survivors would actually prefer more rehabilitative case resolutions.⁶⁴ Meanwhile, not only are few resources available for crime survivors who do not wish to participate in the criminal process,⁶⁵ but survivors in some jurisdictions can even be compelled to participate in the criminal legal process against their wishes, facing the threat of incarceration if they refuse.⁶⁶

In reality, the tangible needs of crime survivors often remain unmet when diversion can be vetoed, further evidence that tough-on-crime ideology centers on the needs of the carceral state rather than those of crime survivors. Objections to diversion are often justified as necessary to ensure complaining witnesses receive financial compensation for their losses by conditioning diversion on payment of restitution, but restitution too often is limited or illusory.⁶⁷ Legally, restitution is often limited from the outset; typically restricted to compensation for readily provable material loss, such as the cost of a stolen phone in a robbery, it fails to reflect the actual costs to the victim, like the expense of losing time from work or the cost of trauma therapy.⁶⁸

Furthermore, given the strong link between poverty and crime, defendants are often unable to compensate victims promptly or at all.⁶⁹ In the words of King County (Seattle), Washington Prosecuting Attorney Dan Satterberg, “The truth is victims don’t get their money in the current criminal justice system.”⁷⁰ And it may take years for the courts to collect,

64. See ALL FOR SAFETY & JUST., *supra* note 10, at 15–20.

65. SERED, *supra* note 8, at 12 (“A truly survivor-centered response to violence would include the broad availability of mental health treatment, counseling, trauma-informed care, and culturally rooted healing practices, and would emphasize the removal of barriers to accessing these supports. This holds true not only for community-based services, but also for victims compensation—in which the state reimburses survivors for costs, such as hospital bills associated with a crime. Despite widespread recognition that many survivors do not believe that engaging law enforcement will make them safer, the law nonetheless requires that victims ‘cooperate’ with law enforcement to receive this help.”).

66. Samantha Michaels, *Should Rape Victims Have to Spend Time in Jail for Not Testifying?*, MOTHER JONES (Apr. 19, 2019), <https://www.motherjones.com/crime-justice/2019/04/should-rape-victims-have-to-spend-time-in-jail-for-not-testifying> [perma.cc/K8JC-CYZH].

67. DOUGLAS N. EVANS, JOHN JAY COLL. OF CRIM. JUST., COMPENSATING VICTIMS OF CRIME 1 (2014), https://www.njjn.org/uploads/digital-library/jf_johnjay3.pdf [perma.cc/L5D4-SN94] (“Victim compensation funds assist approximately 200,000 victims and survivors of crime each year, and nearly \$500 million is awarded to victims and survivors annually. However, this represents only a small percentage of all victims. In 2012, there were nearly seven million victims of violent crime age 12 and older.” (citations omitted)).

68. *The Reality of Restitution*, VICTIM WITNESS ASSISTANCE PROGRAM OF THE U.S. ATT’Y’S OFF. FOR THE S. DIST. OF ILL., U.S. DEP’T OF JUST., <https://www.justice.gov/usao-sdil/victim-witness-assistance/reality-restitution> [perma.cc/N824-R5AK].

69. See *The Restitution Process*, U.S. ATT’Y’S OFF. FOR THE DIST. OF ALASKA, U.S. DEP’T OF JUST., <https://www.justice.gov/usao-ak/restitution> [perma.cc/82VN-WY7L].

70. See Matt Markovich, *A ‘Free Ride’? King Co. Taxpayers to Pay Back Some Crime Victims in New Program*, KOMO NEWS (Nov. 24, 2020), <https://komonews.com/news/operation-crime-justice/new-king-county-program-will-use-taxpayer-money-to-support-crime-victims> [perma.cc/NB7F-NDYJ].

while taxpayers continue to shoulder the cost of the case remaining open in the legal system, and the cost of chasing these payments may far exceed the restitution itself.⁷¹ Meanwhile, outside the restitution process, survivors of crime often incur enormous psychological, medical, financial, and social costs from their experiences that go unmet by the criminal legal system. In short, offering crime survivors the opportunity to veto diversion does little to guarantee them justice, and as discussed further below, does not advance the desires and needs of a large number of survivors.

IV. THE DIVERSE DEMOGRAPHICS OF CRIME SURVIVORS

To understand the needs of crime survivors and the way in which the criminal legal system has failed them, it is critical to understand *who* is most likely to experience crime. And in looking at this data, the extent to which these individuals do not reflect the stereotypical “public face” of the victims’ rights movement is striking.⁷²

“[P]eople of color are 15[%] more likely to be victims of crime” and are “nearly one-third more likely to have been victims of violent crime than white people.”⁷³ The majority of homicide and robbery victims in the United States are young Black men and boys from the ages of twelve to twenty-four.⁷⁴ As the ACLU has noted, “About 22[%] of Black women in the United States have experienced rape[,] 40[%] will experience intimate partner violence in their lifetime[,] and Black women are killed at a higher rate than any other group of women.”⁷⁵ Rates of violence are even higher against Black trans and nonbinary individuals.⁷⁶ Meanwhile,

71. *Id.*

72. Vik Kanwar, *Capital Punishment as “Closure”: The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 231–32 (2002) (discussing how sentimentalized victims—often young white girls—are the preferred public face of victims, in contrast to both the demographic reality of victimization and the well-established overlap between survivors and perpetrators of harm).

73. ALL. FOR SAFETY & JUST., *supra* note 10, at 8.

74. See DANIELLE SERED, VERA INST. OF JUST., *YOUNG MEN OF COLOR AND THE OTHER SIDE OF HARM: ADDRESSING DISPARITIES IN OUR RESPONSES TO VIOLENCE* 5 nn.8–9 (2014), <https://www.vera.org/publications/young-men-of-color-and-the-other-side-of-harm-addressing-disparities-in-our-responses-to-violence> [perma.cc/GSG8-PD9D].

75. Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non> [perma.cc/GQ7D-BY6M]; see also Camila Domonoske, *CDC: Half of All Female Homicide Victims Are Killed by Intimate Partners*, NPR (July 21, 2017, 2:22 PM), <https://www.npr.org/sections/thetwo-way/2017/07/21/538518569/cdc-half-of-all-female-murder-victims-are-killed-by-intimate-partners> [perma.cc/YSG4-TVQQ].

76. SANDY E. JAMES, CARTER BROWN & ISAIAH WILSON, 2015 U.S. TRANSGENDER SURVEY: REPORT ON THE EXPERIENCES OF BLACK RESPONDENTS 3 (2017), <https://www.transequality.org/sites/default/files/docs/usts/USTSBlackRespondentsReport-1017.pdf> [perma.cc/V4QJ-72F2] (“53% of Black respondents have been sexually assaulted at some point in their lifetimes, compared to 47% in the USTS sample overall. 13% of Black respondents were sexually assaulted in the past year, compared to 10% in the USTS sample overall.”).

many Black crime victims lack access to appropriate services.⁷⁷

Many crime survivors, especially young people of color, are also criminalized by the criminal legal system. “Nearly [all those] who commit violence ha[ve] also survived it.”⁷⁸ The young men most likely to engage in urban gun violence are also those most likely to be injured or killed by it.⁷⁹ Incarcerated women report having previously experienced physical or sexual violence at an even higher rate than men and have a lifetime prevalence of post-traumatic stress disorder of 53%, five times that of the general population.⁸⁰ And particularly for young girls of color, there is a well-documented “sexual abuse to prison pipeline.”⁸¹ The rates of prior sexual victimization among girls in the youth justice system are staggeringly high: research in some states found that about 80%–90% of girls in the youth justice system report prior sexual abuse.⁸² And as recent high profile cases have showcased, crime survivors, often youth of color, may even be criminalized for defending themselves against their abusers.⁸³

Despite this starting point, the experiences of crime survivors of color have been largely erased within discussions of victims' rights. The victims' rights movement of the 1970s centered around whiteness—lifting up the young, white female rape survivor as the prototypical victim.⁸⁴ This erasure has profound consequences. As Danielle Sered writes, it “supplants and displaces the lived experience of the vast majority of victims who do not belong to that demographic.”⁸⁵ It also tells a story of what justice looks like: “Justice in which the victim is pure and innocent, in which the person who caused harm is heartless and monstrous, in which the prose-

77. SERED, *supra* note 74, at 6.

78. SERED, *supra* note 8, at 6.

79. GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE & PICO NAT'L NETWORK, HEALING COMMUNITIES IN CRISIS: LIFESAVING SOLUTIONS TO THE URBAN GUN VIOLENCE EPIDEMIC 12 (2016), <https://giffords.org/lawcenter/report/healing-communities-in-crisis-lifesaving-solutions-to-the-urban-gun-violence-epidemic> [perma.cc/8QBP-WBPB] (“Highly concentrated levels of violence create a vicious cycle. A study of adolescents participating in an urban violence intervention program showed that 26% of participants had witnessed a person being shot and killed, while *half* had lost a loved one to gun violence. The impact of this is compounded because exposure to firearm violence—being shot, being shot at, or witnessing a shooting—*doubles* the probability that a young person will commit a violent act within two years.”).

80. STORM ERVIN, JAHNAVI JAGANNATH, JANINE ZWEIG, JANEEN BUCK WILLISON, KIERRA B. JONES, KATY MASKOLUNAS, BENJAMIN MCCARTY & CHAFICA AGHA, URBAN INST., ADDRESSING TRAUMA AND VICTIMIZATION IN WOMEN'S PRISONS 4 (2020), https://www.urban.org/research/publication/addressing-trauma-and-victimization-womens-prisons/view/full_report [perma.cc/G4FZ-4UC9].

81. See MALIKA SAADA SAAR, REBECCA EPSTEIN, LINDSAY ROSENTHAL & YASMIN VAFA, GEO. L. CTR. ON POVERTY & INEQ., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY 5 (2015), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2019/02/The-Sexual-Abuse-To-Prison-Pipeline-The-Girls%E2%80%99-Story.pdf> [perma.cc/6EEF-6L9W].

82. See *id.* at 7, 9.

83. See *Analysis & Vision*, SURVIVED & PUNISHED, <https://survivedandpunished.org/analysis> [perma.cc/9ZWG-QAA6].

84. Bazelon & Green, *supra* note 41, at 322–25.

85. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 22 (2019) (ebook).

ctor is righteous and vengeful, and in which the system as we know it contains them all in a proper and rightful order.”⁸⁶ And it ultimately conceals the most severely impacted survivors of violent crime, “who are implicitly disqualified as ‘genuine’ victims in Victims Rights’ rhetoric.”⁸⁷

In turn, due to implicit and explicit bias, crime survivors of color are less likely to be treated favorably by police, prosecutors, judges, and juries. In the context of sexual violence, these disparities are particularly well-established: “non-white victims, particularly those who suffer from poverty and substance abuse and who have criminal records, fare differently and worse at every stage of the criminal justice system.”⁸⁸

Organizations such as Crime Survivors for Safety and Justice are working to correct this historic inequity by mobilizing the voices of a wide array of survivors in the conversation around reform.⁸⁹ However, some advocates of victims’ rights continue to deny the validity of these survivors’ voices. As one conservative think tank recently wrote, “In reality, the victims for whom that organization works are not real victims of crime, but rather criminal defendants whom the group believes are ‘victims’ of the government.”⁹⁰ Prosecutors committed to serving crime survivors and disrupting cycles of violence must challenge and work against this unfortunate rhetoric or risk deeply harming survivors, public safety, and justice. They must be proactive in ensuring that all survivor voices are heard, welcomed, and respected, and that all survivors have access to appropriate services and support.

V. THE MULTIFACETED NEEDS AND DESIRES OF CRIME SURVIVORS AND STRATEGIES FOR ADVANCING THEIR INTERESTS

The needs and desires of most crime survivors are not in tension with diversion or other less punitive and carceral approaches; rather, diversion, deflection, and reform more broadly, often advance the interests of crime survivors. As discussed below, survivors at the most basic level want to feel like they are treated fairly and that their voices are heard; they want accountability for the person who harmed them (which they do

86. *Id.* at 23.

87. Kanwar, *supra* note 72, at 231.

88. Bazelon & Green, *supra* note 41, at 323; *see also* ELIZABETH KENNEDY, FEMINIST SEXUAL ETHICS PROJECT, VICTIM RACE AND RAPE: A REVIEW OF RECENT RESEARCH 11 (2003), <https://www.brandeis.edu/projects/fse/slavery/united-states/slav-us-articles/kennedy-full.pdf> [perma.cc/LK7S-P662] (“The overwhelming majority of studies confirm that the victim’s race plays a significant role throughout the process of investigating and prosecuting rape crimes: specifically, these studies suggest that African American women who are victims of rape encounter a legal system that perceives them and the seriousness of their injuries differently because of their race.”).

89. *Mission*, CRIME SURVIVORS FOR SAFETY & JUST., <https://cssj.org> [perma.cc/JQ8L-SJYW].

90. CHARLES STIMSON & ZACK SMITH, “PROGRESSIVE” PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 10 (2020), <https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore> [perma.cc/H8S7-Q859].

not typically see as synonymous with punishment or incarceration), to prevent future victimization against themselves or others, and to have their tangible and intangible needs resulting from the crime addressed. Traditional criminal legal system practices frequently fail to serve some or all of these goals, while diversion can in some cases be a more effective way to achieve them.

A. PREVENTING FUTURE VICTIMIZATION AND AVOIDING CYCLES OF INCARCERATION

Evidence-based diversion and deflection are proven means of preventing future victimization while reducing mass incarceration. Conversely, the tough-on-crime policies that drove mass incarceration have in fact disproportionately harmed the most victimized communities and criminalized many crime survivors, resulting in a loss of trust in the criminal legal system. The current criminal legal system overwhelmingly fails to offer crime survivors tangible support in recovering from harm. Indeed, a national poll of crime survivors shows that the majority support less carceral approaches and community-based solutions,⁹¹ including diversion. Prosecutors should look to reform as a means to advance public safety while better serving crime survivors and all parts of the community.

As the national poll of crime survivors makes clear, the interests of victims are broader than the wishes of a specific victim. In forging policy reforms, elected prosecutors must also weigh the best approach to prevent future victimization. Less carceral, evidence-based approaches are often a more effective means of preventing future victimization than tough-on-crime practices like lengthy sentences.⁹² The efficacy of diversion programs varies, but many models have been shown to successfully decrease recidivism.⁹³ Meanwhile, overincarceration can increase the risk of future crime,⁹⁴ at an enormous cost to individuals, communities, and taxpayers.⁹⁵ According to a 2017 review of about thirty studies on the impact of incarceration on crime rates, at best, given the current size of

91. ALL. FOR SAFETY & JUST., *supra* note 10, at 13–20.

92. See Michelle Alexander, Opinion, *Reckoning with Violence*, N.Y. Times (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [perma.cc/2NBA-5ETQ].

93. FAIR & JUST PROSECUTION, *supra* note 27.

94. Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 54S–57S (Supp. 2011), <https://journals.sagepub.com/doi/abs/10.1177/0032885511415224?journalCode=tpjd> [perma.cc/P5C9-BT9M]; Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration 3* (June 8, 2015) (unpublished manuscript), <https://www.irp.wisc.edu/new-sevents/workshops/2015/participants/papers/10-Mueller-Smith-IRP-draft.pdf> [perma.cc/9FCN-5PKV].

95. See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 99 (2008) (“Imprisonment affects the children of people who are locked up and their families; it affects community infrastructure—the relations among people in communities and the capacity of a community to be a good place to live, work, and raise children—and it affects how safe a community is to live in.”).

the U.S. prison system, additional incarceration has *no* impact on crime.⁹⁶ Likewise, a 2015 analysis of almost forty years' worth of data in fifty major cities shows that incarceration has had little effect on the drop in violent crime and only accounted for approximately 6% of the drop in property crime in the 1990s.⁹⁷ Since 2000, increased incarceration has had virtually no effect on crime rates.⁹⁸

Meanwhile, "there is little evidence that prisons reduce recidivism," and evidence in fact suggests that they make individuals more likely to commit a new crime after release.⁹⁹ While individuals are incapacitated during the time that they are physically behind bars, this effect is offset by the greater likelihood they will commit new crimes after their release.¹⁰⁰ And for individuals whose crimes stem from underlying serious mental illness or a substance use disorder, incarceration simply destabilizes treatment, whereas evidence-based therapeutic alternatives to incarceration have clear public safety benefits.¹⁰¹

Additionally, tough-on-crime policies have in fact contributed to cycles of trauma, victimization, and harm in communities of color. Violence is rarely a product of "individual pathology"; it is driven by poverty, inequity, lack of opportunity, shame, and isolation.¹⁰² Meanwhile, the collateral consequences of conviction and incarceration—ranging from the disruption of family connections, to the challenge of finding work with a criminal record, to the lost income associated with incarceration, to ongoing physical and mental health consequences—have lasting and devastating impacts on individuals and communities.¹⁰³ The factors most likely to

96. DAVID ROODMAN, OPEN PHILANTHROPY PROJECT, THE IMPACTS OF INCARCERATION ON CRIME 7–8, 22–26 (2017), https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf [perma.cc/D8QM-69GT].

97. OLIVER ROEDER, LAUREN-BROOK EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 13, 23 (2015), <https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline> [perma.cc/8BX3-4FWU].

98. *Id.* at 4.

99. See Cullen et al., *supra* note 94, at 48S, 53S–54S.

100. DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 2 (2017), https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1027&context=criminaljustice_facpubs [perma.cc/MXX9-4DG6] (explaining that there is "some evidence that incarceration itself is criminogenic," potentially because "people learn criminal habits or develop criminal networks while incarcerated" and also face "collateral consequences . . . such as loss of employment, loss of stable housing, or disruption of family ties"); José Cid, *Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates Between Prison and Suspended Prison Sanctions*, 6 EUR. J. CRIMINOLOGY 459, 471–72 (2009), <https://doi.org/10.1177/1477370809341128> [perma.cc/9TGT-S97U].

101. For example, research indicates that mental health courts have a modest impact on recidivism and significantly reduce jail time. See Evan M. Lowder, Candalyn B. Rade & Sarah L. Desmarais, *Effectiveness of Mental Health Courts in Reducing Recidivism: A Meta-Analysis*, 69 PSYCHIATRIC SERVS. 15, 19 (2018), https://ps.psychiatryonline.org/doi/abs/10.1176/appi.ps.201700107?url_ver=Z39.88-2003&rfr_id=ori%3Arid%3Aacrossref.org&rfr_dat=cr_pub%3Dpubmed [perma.cc/4F5B-QNC4].

102. SERED, *supra* note 8, at 4.

103. See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 1–2 (Marc Mauer & Meda Chesney-Lind eds., 2002); AMES C. GRAWERT, CAMERON KIMBLE & JACKIE FIELDING, BRENNAN CTR. FOR JUST., POVERTY AND MASS INCARCERATION IN NEW YORK (2021), ("Time spent in prison can reduce a person's life-

help individuals desist from crime, such as employment and family ties, are often hindered by incarceration and criminalization.¹⁰⁴ High community incarceration rates can then lead to increased crime and a range of other harms throughout the community.¹⁰⁵ In turn, the communities and individuals most deeply harmed by mass incarceration are those most likely to be victims of crime.

B. IMPROVING RESPONSES TO SURVIVORS AND EARNING TRUST

The current criminal legal system overwhelmingly fails to meet the tangible needs of crime survivors to assist their recovery from harm. The financial costs of victimization include both direct and indirect costs, ranging from property and wage loss, medical and mental health expenses, to increased insurance costs and the cost of relocation or seeking new housing.¹⁰⁶ Intangible costs include pain, suffering, reduced quality of life, and increased fear of crime.¹⁰⁷ Estimates of crime survivors' tangible and intangible costs are high: \$19,000 for a robbery with injury, \$24,000 for an assault with injury, and nearly \$90,000 for a rape.¹⁰⁸ Nonviolent crime also can result in significant costs: "identity theft victims suffer annual losses of almost \$17.3 billion."¹⁰⁹ Research indicates that whether a state has stronger or weaker "victims' rights protections" has minimal impact on whether these economic needs are met.¹¹⁰

The services available to survivors of crime vary widely by jurisdiction, though most are conditional on cooperating with a criminal prosecution, and they rarely if ever address the full scope of crime survivors' needs and losses. Historically, few victims of violence have received services—between 1993 and 2009, only "about 9% of serious violent crime victims

time earning potential by half a million dollars. In New York State alone, imprisonment translates to nearly \$2 billion annually in reduced earnings, overwhelmingly extracted from communities of color . . .").

104. Jeffrey A. Butts & Vincent Schiraldi, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections*, in *NEW THINKING IN COMMUNITY CORRECTIONS* 1, 9 (2018), https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/recidivism_reconsidered.pdf [perma.cc/5Q3S-9G29] (identifying nine critical factors for desistance: "1. Getting older and maturing, 2. [f]amily and relationships, 3. [s]obriety, 4. [e]mployment, 5. [h]ope and motivation, 6. [h]aving something to give to others, 7. [h]aving a place within a social group, 8. [n]ot having a criminal identity, 9. [b]eing 'believed in'").

105. Clear, *supra* note 95, at 110–20.

106. DEAN G. KILPATRICK, DAVID BEATTY & SUSAN SMITH HOWLEY, NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 173839, *THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE?* 8 (1998), <https://www.ojp.gov/pdffiles/173839.pdf> [perma.cc/K8L9-E6GA].

107. TED R. MILLER, MARK A. COHEN & BRIAN WIERSEMA, NAT'L INST. OF JUST., NCJ 155282, *VICTIM COSTS AND CONSEQUENCES: A NEW LOOK* 14 (1996), <https://www.ojp.gov/pdffiles/victcost.pdf> [perma.cc/UY4S-XVZ3].

108. *Id.* at 9 tbl.2.

109. Stacy Hoskins Haynes, Alison C. Cares & R. Barry Ruback, *Reducing the Harm of Criminal Victimization: The Role of Restitution*, 30 *VIOLENCE & VICTIMS* 450, 451 (2015).

110. KILPATRICK ET AL., *supra* note 106, at 8.

received direct assistance from a victim service agency.”¹¹¹ Currently, crime survivors in a few cities have access to comprehensive service models, like San Francisco’s Trauma Recovery Center, which facilitates access to victim compensation, advocacy, and healthcare.¹¹² Additionally, a division of the San Francisco District Attorney’s Office provides services to a wide array of individuals, regardless of whether they are a witness in a pending case, including victims, survivors, and witnesses to police violence, who are rarely otherwise eligible for services.¹¹³ But comprehensive approaches such as this are rare, and in rural or more poorly resourced areas, no services or compensation may be available. Plus, individuals with prior criminal records or who are viewed as somehow partially responsible for their victimization are frequently denied access to existing resources, and even individuals who are eligible for support are not always informed of its availability. As a result, the majority of crime survivors still report not receiving any assistance following their victimization, “and those who did were more far more likely to receive it from family and friends than the criminal justice system.”¹¹⁴

These failures have resulted in a profound loss of trust in the criminal legal system, which can contribute to continuing cycles of victimization. Among young men at high risk of gun violence, research has found that many carry weapons because they fear harm and do not believe the police will protect them, or because they believe they need protection from the police.¹¹⁵ And less than half of violent crimes and less than a third of property crimes are reported to police.¹¹⁶

As such, nationwide polling reflects that crime survivors understand and know well the failings of the current criminal legal system and the need for community-based solutions. Not surprisingly, crime survivors overwhelmingly support investments in preventative measures, like schools, education, mental health care, programs for at-risk youth, and drug treatment, over increased investments in jails and prisons.¹¹⁷ Like-

111. LYNN LANGTON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 234212, USE OF VICTIM SERVICE AGENCIES BY VICTIMS OF SERIOUS VIOLENT CRIME, 1993-2009, at 1 (2011), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2432> [perma.cc/L49C-FHY8].

112. NAT’L ALL. OF TRAUMA RECOVERY CTRS., TRAUMA RECOVERY CENTERS: ADDRESSING THE NEEDS OF UNDERSERVED CRIME SURVIVORS 2 (2020), <https://alliancefor-safetyandjustice.org/wp-content/uploads/2020/10/TRAUMA-RECOVERY-CENTERS-Addressing-the-Needs-of-Underserved-Crime-Survivors.pdf> [perma.cc/HU7H-MRDL].

113. GENA CASTRO RODRIGUEZ, S.F. DIST. ATT’Y’S OFF., END OF YEAR REPORT 2020, at 13–14 (2020), <https://www.sfdistrictattorney.org/wp-content/uploads/2021/02/End-of-Year-Report-2020-FINAL.pdf> [perma.cc/Y3QK-X4ZJ].

114. ALL. FOR SAFETY & JUST., *supra* note 10, at 4.

115. RACHEL SWANER, ELISE WHITE, ANDREW MARTINEZ, ANJELICA CAMACHO, BASAIME SPATE, JAVONTE ALEXANDER, LYSONDRA WEBB & KEVIN EVANS, CTR. FOR CT. INNOVATION, ‘GOTTA MAKE YOUR OWN HEAVEN’: GUNS, SAFETY, AND THE EDGE OF ADULTHOOD IN NEW YORK CITY, at vii, xi (2020), https://www.courtinnovation.org/sites/default/files/media/document/2020/Report_GunControlStudy_08052020.pdf [perma.cc/X86Y-K4UH].

116. John Gramlich, *What the Data Says (and Doesn’t Say) About Crime in the United States*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s> [perma.cc/2P3Y-SLC8].

117. ALL. FOR SAFETY & JUST., *supra* note 10, at 5.

wise, crime survivors prefer that the criminal legal system prioritize rehabilitation over punishment.¹¹⁸ In particular, violent crime survivors “preferred that prosecutors focus on solving neighborhood problems and stopping repeat crimes through rehabilitation, even if it means fewer convictions and prison sentences.”¹¹⁹ And crime survivors support treatment as an alternative to incarceration: 83% of those surveyed preferred more investment in mental health treatment over jails and prisons, and 73% preferred more investment in drug treatment.¹²⁰

Accordingly, while crime survivors want accountability, this is not synonymous with punishment.¹²¹ Crime survivors are often offered the false dichotomy of punishment or nothing at all.¹²² When survivors are offered meaningful alternatives, like restorative justice programs, evidence suggests that they embrace them.¹²³

While diversion alone is not a remedy to the ways in which the criminal legal system fails survivors, it can be a step in the right direction when used as a tool to solve the underlying causes of crime, prevent crime, earn community trust, and improve community well-being and equity. Meanwhile, excessive restraints on diversion, including providing crime victims veto authority, may ultimately harm the interests of crime survivors.¹²⁴ Therefore, as explored in the following Part, prosecutors must consider their ethical duties in regard to diversion and how the input and involvement of crime survivors in diversion are compatible with prosecutors' obligations as ministers of justice.

VI. THE ETHICAL DUTY OF PROSECUTORS

Prosecutors have always exercised discretion regarding whether to charge cases, how to charge cases, and what plea bargains to offer, and this prosecutorial discretion is fundamental to the operation of the criminal justice system.¹²⁵ The exercise of prosecutorial discretion, however, is subject to well-established ethical constraints: the prosecutor's obligation is to act as a minister of justice and “seek justice, not merely . . . convict.”¹²⁶ As such, prosecutors represent the state, *not* the crime survivor, and witnesses are offered limited, if any, input at most stages of the legal decision-making process. The prosecutor “represents society at large [and] has no personal client to direct [his or] her course of

118. *Id.*

119. JUST. POL'Y INST., CRIME VICTIMS AND JUSTICE REFORM (2016), http://www.justicepolicy.org/uploads/justicepolicy/documents/crime_victims_and_justice_reform_-_fact_sheet.pdf [perma.cc/UD23-KJQT].

120. *Id.*

121. See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18, 22–24.

122. Alexander, *supra* note 92.

123. SERED, *supra* note 8, at 16.

124. See Alexander, *supra* note 92.

125. See ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-1.2(b) (4th ed. 2017); *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987).

126. *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011).

action and must make decisions about what is in the best interests of the sovereign that ordinarily would be entrusted to a client.”¹²⁷

Prosecutors must “seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”¹²⁸ They also have a duty to do justice for the entire community and ensure the fair administration of justice.¹²⁹ As Standard 3-1.2(f) of the ABA Criminal Justice Standards for the Prosecution Function makes clear:

The prosecutor is not merely a case-processor but also a problem solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, the prosecutor should stimulate and support efforts for remedial action.¹³⁰

Prosecutors have a duty to “go beyond seeking appropriate convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends.”¹³¹ While ethical accountability for prosecutors has historically been limited, prosecutors should strive to meet the standards set out by the Supreme Court and ABA, even if accountability often only occurs at the ballot box.¹³²

Diversion decision-making implicates multiple ethical considerations. First, prosecutors have an obligation to consider the interests of victims.¹³³ Providing crime survivors with notice and an opportunity to be heard is a prerequisite to considering their interests, but this standard does not require that prosecutors heed all victim demands.¹³⁴ Additionally, the interests of victims collectively are broader than the wishes of a specific victim; prosecutors must consider how their decisions impact the risk of future victimization.¹³⁵ In the case of diversion, a program which addresses the underlying drivers of crime and reduces the rate of recidi-

127. R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 45 LOY. UNIV. CHI. L. J. 981, 992.

128. ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 125.

129. *See id.* at standard 3-1.2(a), standard 3-1.3.

130. *Id.* at standard 3-1.2(f).

131. Cassidy, *supra* note 127, at 983.

132. For example, in a study of 4,000 California state and federal cases, 707 cases were identified in which prosecutors committed misconduct, but only six prosecutors were formally disciplined. Even in the most egregious cases, accountability is rare. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 2, 16 (2010), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [perma.cc/UFN6-ZK8G]; *see also* Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007).

133. Levine, *supra* note 6, at 525.

134. *See SERED, supra* note 8, at 15–16.

135. *See id.*

vism may be broadly in the interests of victims, even if objectionable to an individual crime survivor.¹³⁶

Second, allowing crime survivors to veto diversion for some individuals injects arbitrariness into prosecutorial decision-making. As Kay Levine notes, “victims lack both this level of experience and this objectivity, and thus are likely to either over- or under-estimate how bad this crime (or offender) actually is when compared to other crimes (or offenders).”¹³⁷ Therefore, she argues, “if we allow the diversion decision to hinge on the victim’s consent, that decision may be arbitrary” and the defendant’s path through the justice system must depend on a more objective, principled foundation than victim opinion and attitude.¹³⁸

Furthermore, ceding the ultimate diversion decision or veto power to a crime survivor has the potential to increase racial disparities or other inequities in diversion decision-making. Racial disparities are already well-documented within diversion programs.¹³⁹ White defendants are more likely to receive alternative case resolutions than Black defendants, often because of eligibility criteria tied to prior criminal convictions, which disparately impact individuals from overpoliced neighborhoods.¹⁴⁰ To prevent such disparities, prosecutors must carefully collect, analyze, and monitor the demographics of diversion programs, and should also make the criteria for diversion eligibility transparent. The decisions of crime survivors, however, are not transparent, may be impacted by implicit or explicit bias, and may interfere with attempts to make diversion more equitable.¹⁴¹

Additionally, as Law Professor Angela J. Davis has argued, prosecutors have a duty to do justice for the entire community and ensure the fair

136. See ALL. FOR SAFETY & JUST., *supra* note 10, at 15–20.

137. Levine, *supra* note 6, at 519.

138. *Id.*

139. Data from the State Court Processing Statistics indicates that prosecutors were more likely to offer pretrial diversion programs to white defendants than to Black or Latino defendants between 1990 and 2006. Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in States Courts*, 3 RACE & JUST. 210, 228 (2013), <https://journals.sagepub.com/doi/pdf/10.1177/2153368713483320> [perma.cc/35TW-9QEU]; see also THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 13, 34 (2d ed. 2008), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf> [perma.cc/WAL5-MJLX].

140. Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 CT. REV.: J. AM. JUDGES ASS'N 40, 42 (2013), https://ndcrc.org/wp-content/uploads/2020/08/Achieving_Racial_and_Ethnic_Fairness_in_Drug_Courts_2013.pdf [perma.cc/W4CN-QX9P] (“Representation of African-Americans was estimated to be approximately 7 percentage points lower in drug courts than in the arrestee and probation-and-parole populations (21% vs. 28% and 28%), and approximately 20 percentage points lower than in jails and prisons (21% vs. 39% and 44%).”); African Americans experience “structural disadvantages” in “diversion programs designed around recidivism.” Caroline Hinnenkamp, *How to Reduce Racial Disparities in the Criminal Justice System*, BILL OF HEALTH, (Dec. 10, 2020), <https://blog.petrieflom.law.harvard.edu/2020/12/10/diversion-racial-disparities-criminal-justice> [perma.cc/TD3G-Q5CN].

141. Levine, *supra* note 6, at 517.

administration of justice, which includes an ethical obligation to work toward ending mass incarceration.¹⁴² Davis points toward the expanded use of diversion and clemency programs as a means towards this end.¹⁴³ While not all diversion programs reduce incarceration, and deflection is often the better vehicle for shrinking the criminal legal system,¹⁴⁴ effectively designed and implemented diversion programs have the potential to shrink the system as well,¹⁴⁵ and allowing survivors to veto diversion may interfere with this goal.

Finally, prosecutors have a duty to work towards the safety and well-being of the entire community.¹⁴⁶ Given the criminogenic impact of incarceration, allowing a crime survivor to deny someone a diversion opportunity may harm public safety by increasing the likelihood that the individual will be incarcerated and thereafter engage in future crime.¹⁴⁷ In addition, the social and economic consequences of incarceration may deepen cycles of incarceration, poverty, and trauma in vulnerable communities.¹⁴⁸

In sum, offering crime survivors a veto over diversion decisions raises many troubling ethical implications, and the path for prosecutors is clear. To protect the interests of crime survivors, defendants, and the community, crime survivors must have a voice, but not a veto.

VII. RECOMMENDATIONS FOR ETHICAL AND EVIDENCE-BASED DIVERSION

The following recommendations provide a starting place for prosecutors interested in diversion, who are committed to both serving victims and advancing evidence-based reform. As discussed above, the multifaceted needs and desires of crime survivors are not in tension with diversion; rather, working to advance more rehabilitative and restorative approaches will serve both victims and public safety. Meanwhile, the criminal legal system owes crime survivors justice beyond retribution. Diversion policies that grant crime survivors a veto should be replaced with policies that offer crime survivors a voice, meet their many needs, and make communities safer, while also reducing incarceration.

First, and most fundamentally, prosecutors should embrace and promote evidence-based diversion, including therapeutic and restorative programs, in order to address the underlying causes of crime while both

142. Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 *HOFSTRA L. REV.* 1063, 1081 (2016).

143. *Id.*

144. See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 60–98 (2018) (ebook); Beck et al., *supra* note 38.

145. See *FAIR & JUST PROSECUTION*, *supra* note 31; *LOWRY & KERODAL* *supra* note 31, at 6–7, 22–23.

146. See *ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION*, *supra* note 125, at standard 3-1.2(b), (f).

147. See Cullen et al., *supra* note 94, at 48S, 53S–54S.

148. See ALEXANDER, *supra* note 19, at 176–80, 294–95.

holding individuals accountable and decreasing incarceration and related harm to the community. The evidence is clear that crime survivors support alternatives to incarceration, and effective diversion programs can be a valuable tool to prevent future victimization. Beyond diversion, prosecutors should also explore the ability of deflection, alternatives to punishment, and decriminalization, paired with community services when appropriate, to protect the community while decreasing incarceration.

Second, prosecutors should educate themselves on, and seek to implement, restorative justice diversion programs. As Fania Davis writes,

Restorative justice provides an opportunity for those who harm and those harmed to empathize with one another, rather than foster hostility between them and their communities. It encourages the responsible person and the community, where appropriate, to take responsibility for actions resulting in harm and make amends. Restorative justice processes invite individuals and the community to take steps to prevent recurrence. Ultimately, it offers processes where the person harmed and all impacted parties can begin to heal.¹⁴⁹

Restorative justice diversion programs, such as the Common Justice Model, offer a means of addressing serious crimes without incarceration, strategies that are critical to reducing prison populations.¹⁵⁰ Restorative justice processes are survivor-centered in that the perspectives of survivors are valued and heard (though they do not necessarily dictate outcomes) and addressing the tangible needs of survivors is a priority.¹⁵¹ And the outcomes of many restorative justice programs are compelling: 90% of survivors of serious felonies choose the Common Justice approach over the traditional criminal legal process, and as of 2018, Common Justice had a remarkable recidivism rate of only 6%.¹⁵² Pima County, Arizona's RESTORE program for felony and misdemeanor sexual assaults also had notable outcomes: "[90%] of the victims who participated stated that they 'were satisfied that justice was done,'" and "[t]he

149. FANIA E. DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE: BLACK LIVES, HEALING, AND US SOCIAL TRANSFORMATION* 26–27 (2019).

150. Restorative justice diversion programs are effective and have been shown to reduce recidivism while reducing prison population. See James Bonta, Suzanne Wallace-Capretta, Jennifer Rooney & Kevin Mcanoy, *An Outcome Evaluation of a Restorative Justice Alternative to Incarceration*, 5 *CONTEMP. JUST. REV.* 319, 332–33 (2002); see also Oliva Dana & Sherene Crawford, *Restorative Prosecution? Rethinking Responses to Violence*, 64 *N.Y. L. SCH. L. REV.* 53, 65–66 (2020); FAIR AND JUST PROSECUTION, BUILDING COMMUNITY TRUST: RESTORATIVE JUSTICE STRATEGIES, PRINCIPLES AND PROMISING PRACTICES (2017), https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP.Brief_RestorativeJustice.pdf [perma.cc/B5TB-45W9].

151. SERED, *supra* note 8, at 15–16 (“A survivor-centered system is not a survivor-ruled system. Valuing people does not mean giving them sole and unmitigated control. . . . Reducing violence will require a system that centers on people who survive harm and that reckons honestly with the role prisons do or do not play in delivering safety and healing. None of this requires excluding or minimizing the legitimate perspectives of crime victims who want punishment and retribution; it only requires including other perspectives as well.”).

152. SERED, *supra* note 85, at 42, 134.

percentage of victims suffering from PTSD dropped from 82% to 66% after completing the program.”¹⁵³

Third, prosecutors owe it to victims, defendants, and the community alike to use diversion programs rooted in research. Prosecutors should not hesitate to embrace promising innovative approaches, but they should not presume all diversion programs reduce incarceration, reduce racial disparities, or have therapeutic outcomes. Prosecutors should collect data from their diversion programs and monitor for not only recidivism but also for racial disparities, potential net widening, incarceration rates, and when relevant (such as in the context of drug courts), health outcomes. In particular, prosecutors should be mindful of the wealth of research suggesting that diverting high-risk individuals, not the low-risk individuals that prosecutors are least fearful of diverting, produces the greatest public safety benefits.¹⁵⁴

Fourth, prosecutors should work to ensure victims receive prompt restitution, while also removing restitution as a barrier to diversion or otherwise penalizing individuals who lack the ability to pay. As Levine notes, “a program that makes second chances available only to the wealthiest defendants is not truly committed to compassion, fiscal responsibility, or proportionality.”¹⁵⁵ When diversion is delayed or denied based on the victim’s wish or a restitution requirement, the fiscal cost to taxpayers and the safety cost to the community may be amplified because the defendant may therefore not have access to vital services and treatment that would reduce the defendant’s likelihood of recidivism, and the case will be more likely to be resolved with costly incarceration. At minimum, restitution should be removed as a precondition of diversion in low-level cases, which are often tied to poverty. Moreover, prosecutors should support the establishment of state-run and state-funded victim compensation funds in order to meet survivors’ needs for immediate compensation, avoid penalizing people for being poor, and prevent cases from lingering in the system or ending in incarceration at great expense to taxpayers if defendants cannot pay. With the possible exception of certain white-collar cases, placing the burden of victim compensation on the state is a promising practice that has the potential to better serve both crime survivors and the community.¹⁵⁶

Fifth, prosecutors should promote robust transparency regarding the diversion process by making available to the public, including crime survivors, the criteria, content, and outcomes of their diversion programs. Ide-

153. Bazelon & Green, *supra* note 41, at 333.

154. Research indicates that interventions are most effective when focused on higher-risk populations. See PICARD-FRITSCHÉ ET AL., *supra* note 36.

155. Levine, *supra* note 6, at 524.

156. The King County (Seattle), Washington Prosecutor’s Office recently launched an initiative wherein “first-time non-violent defendants” may complete a community-based alternative to an incarceration program, and restitution, subject to a cap, will be paid to victims with taxpayer funds. See Markovich, *supra* note 70.

ally, this publicly available information should also include data around the racial and ethnic makeup of diverted and nondiverted individuals.

Sixth, prosecutors should ensure that all their interactions with crime survivors conform to the principles of trauma-informed care and procedural justice. In the context of diversion, that includes both notice of potential diversion and an opportunity for victims to be heard. However, prosecutors should retain full decision-making authority.

Meanwhile, prosecutors should advocate for comprehensive crime survivor service models that meet victims' needs and facilitate their recovery outside of, and not conditioned on, the adversarial process, such as the trauma recovery center model. While this is a challenging goal, particularly in poorly resourced areas, prosecutors should seek to promote the interests of crime survivors, and that should include seeking funding for community-based services, not merely seeking convictions. And diversion offers one potential path toward meeting this goal: savings from reduced incarceration can be reinvested in meeting the needs of survivors. Prosecutors committed to reform and reducing incarceration must not replicate the harms of the tough-on-crime movement by neglecting the tangible needs of crime survivors; meaningful support for survivors' recovery is an important element of creating a just criminal legal system.

VIII. CONCLUSION

As a new generation of prosecutors increasingly embrace diversion and noncarceral approaches, those policies may be perceived by some as conflicting with certain guarantees won by the victims' rights movement, such as policies that grant crime survivors a veto over diversion, but as discussed herein, they are in reality not in tension with victims' interests. Rather, the tension between victims' rights and less punitive policies reflects the ways in which the victims' rights movement was co-opted by tough-on-crime ideology, ultimately at the expense of crime survivors.

Prosecutors owe crime survivors *and* communities effective and equitable policies that unwind the harms of mass incarceration while making communities safer. Evidence-based diversion is not a panacea, but it is a valuable tool for twenty-first century prosecutors committed to realizing a more fair and just criminal legal system. And when all is said and done, it is a tool that benefits the *entire* community.

