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THE OPPORTUNITY IN CRISIS: HOW 2020’S CHALLENGES PRESENT NEW OPPORTUNITIES FOR PROSECUTORS

CHESA BOUDIN*

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INTRODUCTION

As San Francisco District Attorney, I was elected in late 2019 on an ambitious platform focused on ending mass incarceration and decreasing

* Thank you to Cristine Soto Deberry, Rachel Marshall, Scott Stillman, and Gena Castro-Rodriguez for their support in writing this article and to all the staff at the San Francisco District Attorney’s Office for their help in envisioning and implementing the policies herein.

racial disparities in the criminal justice system.¹ Little did I imagine that my first year in office would bring an acute national focus to the exact issues on which I had campaigned.

Two phenomena have, thus far, largely defined the year 2020. First, the COVID-19 pandemic, which continues to have a grossly disparate impact on communities of color² and on those living and working in prisons and jails.³ Second, a national Black Lives Matter movement grew in response to the murder of George Floyd—potentially the largest national movement in U.S. history—demanding police accountability and criminal justice reform with a focus on racial equity.⁴ The nation’s collective response to these developments—how the country navigates an unprecedented national health crisis and an unprecedented protest movement—will have lasting implications for myriad aspects of American life, including the criminal justice system.

COVID-19 and the growth of the Black Lives Matter movement created a tremendous impetus for wide-ranging criminal justice reform, including decarceration and police accountability.⁵ Although some criminal justice jurisdictions have actively resisted change,⁶ and others have simply been

¹ Tim Arango, *Dad’s in Prison, Mom Was on Parole. Their Son is Now Running for D.A.*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/chesa-boudin-san-francisco-da.html> [https://perma.cc/72J9-V9N5].

² *Health Equity Considerations and Racial and Ethnic Minority Groups*, CENTER FOR DISEASE CONTROL (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [https://perma.cc/6AUS-MSKU].

³ Eric Reinhart & Daniel Chen, *Incarceration and its Disseminations: COVID-19 Lessons from Chicago’s Cook County Jail*, 39 HEALTH AFFAIRS 1412 (2020) (exploring the role of jails and prisons in the spread of COVID-19).

⁴ Larry Buchanan, Quoctrung Bui, & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [https://perma.cc/VGS5-AZ YW]; see generally BLACK LIVES MATTER, <https://blacklivesmatter.com/> [https://perma.cc/V J3B-AR3W].

⁵ Deanna Van Buren & F. Javier Torres-Campos, *Mass Decarceration, COVID-19, and Justice in America*, STAN. SOC. INNOVATION REV. (June 9, 2020), <https://ssir.org/articles/entry/mass-decarceration-and-covid-19> [https://perma.cc/JL69-Y3B3]; Mary Blankenship & Richard v. Reeves, *From the George Floyd Moment to a Black Lives Matter Movement, in Tweets*, BROOKINGS (July 10, 2020), <https://www.brookings.edu/blog/up-front/2020/07/10/from-the-george-floyd-moment-to-a-black-lives-matter-movement-in-tweets/> [https://perma.cc/B9NQ-P42D].

⁶ Editorial Bd., *Editorial: No, Criminals Aren’t Rampaging Across California Because of Our Zero-Dollar Bail Policy*, L.A. TIMES (May 27, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-05-27/la-ed-zero-bail-lies-coronavirus> [https://perma.cc/K4JC-DP96].

unprepared for it,⁷ San Francisco was ready. After all, San Francisco voters had just elected me on explicit promises to deliver many of the reforms now in the national spotlight, and we were changemaking even before the first case of COVID was diagnosed in the United States.⁸

Even before my election, the San Francisco District Attorney's Office ("SFDAO") was already ahead of the criminal justice reform curve nationally by most any metric. Since 1991, none of my three elected predecessors had chosen to seek the death penalty.⁹ In 2005, then-District Attorney Kamala Harris launched the "Back on Track" program as an alternative to the war on drugs.¹⁰ Former District Attorney George Gascón advanced decarceration through state legislative reforms¹¹ and initiated a series of "collaborative courts" and restorative justice programs as alternatives to traditional criminal prosecution.¹² Well before George Floyd was killed, San Francisco leaders had implemented a wide range of police reforms, which included and went even further than the "8 Can't Wait."¹³ These reforms, and many, many more contributed to San Francisco having an incarceration rate less than half that

⁷ *Courts' Responses to the Covid-19 Crisis*, BRENNAN CENT. FOR JUST. (September 10, 2020), <https://www.brennancenter.org/our-work/research-reports/courts-responses-covid-19-crisis> [<https://perma.cc/P8TF-CPTY>].

⁸ Evan Sernoffsky, *Chesa Boudin, Reformer Public Defender, Wins Election as San Francisco's New DA*, S.F. CHRON. (Nov. 9, 2019, 5:54 PM), <https://www.sfchronicle.com/bayarea/article/Chesa-Boudin-reformer-public-defender-wins-14823166.php> [<https://perma.cc/A27P-CK64>].

⁹ Romy Ganschow, *Death by Geography: A County by County Analysis of the Road to Execution in California*, ACLU OF N. CAL., https://www.aclunc.org/sites/default/files/death_by_geography.pdf [<https://perma.cc/Z4JM-4UZW>].

¹⁰ Jacquelyn L. Rivers & Lenore Anderson, *Back on Track: A Problem-solving Reentry Court*, BUREAU OF JUST. ASSISTANCE (Sept. 2009), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/BackonTrackFS.pdf> [<https://perma.cc/2GWN-X4LE>].

¹¹ George Gascón, *Prop. 47 is Necessary to Put War on Drugs Behind Us*, S.F. CHRON. (Nov. 24, 2018, 6:52 PM), <https://www.sfchronicle.com/opinion/article/Prop-47-is-necessary-to-put-the-war-on-drugs-13413035.php> [<https://perma.cc/9UYV-BJUQ>].

¹² Katherine Weinstein Miller, *Changing the Life Trajectory of Justice-involved Young Adults in San Francisco*, HARV. KENNEDY SCHOOL MALCOM WEINER CENT. FOR SOC. POL'Y, <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/research-publications/young-adult-justice/developments-in-young-adult-justice/changing-the-life-trajectory-of-justice-involved-young-adults-in-san-francisco> [<https://perma.cc/BL7A-GRM4>].

¹³ See generally Matthew Yglesias, *8 Can't Wait, Explained*, VOX (June 5, 2020, 4:00 PM), <https://www.vox.com/2020/6/5/21280402/8-cant-wait-explained-policing-reforms> [<https://perma.cc/L3MS-K7A6>]; Alex Shultz, *DeRay McKesson on the 8 Reforms That Could Dramatically Reduce Police Violence*, GQ (June 3, 2020), <https://www.gq.com/story/deray-mckesson-interview-8-cant-wait> [<https://perma.cc/6RUR-3E5B>].

of the rest of California before I took office.¹⁴ And yet these reforms were not nearly enough to undo the failings of past criminal justice policies; they were not enough to build trust between impacted communities and law enforcement. The tensions, shortcomings, and distrust that the Black Lives Matter movement brought to national focus will not be resolved through catchy slogans, social media campaigns, quick fixes, or singular policies. The point, here, is not to analyze the history of reforms in San Francisco but rather to make explicit that there is still much work ahead in undoing the complex systems of oppression and racism baked into the criminal justice system.

This Essay focuses on policies implemented in one local jurisdiction, specifically one District Attorney's office, in the context of the COVID-19 pandemic and the Black Lives Matter movement during the first several months in office of a newly elected District Attorney: me. In some ways, what follows is San Francisco-centric. Yet most of the policies and initiatives described below serve as examples of new ways to approach common challenges for virtually any law-enforcement jurisdiction in the country, most of which are dealing with similar challenges exacerbated by COVID-19 and highlighted by the racial justice movement.

An as yet unwritten part is the still unfolding historical context: the impact of COVID-19 on criminal courts, jails, and prisons, and the ongoing story of how Black Lives Matter went from being an isolated social movement to mainstream cause celebre.¹⁵ Rather than self-consciously seeking to write a first draft of a history that is very much still in the present, this Essay focuses on the challenges of the moment and SFDAO's responses. A few years from now historians will have more perspective on the lasting impacts of these phenomena on the criminal justice system. But policymakers cannot afford to wait until a crisis has passed to formulate responses; instead we must be dynamic, make calculated risks, and hope that our ideas, vision, and political will are adequate to meet the challenges of the moment.

Parts I, II, and III, respectively set out in detail many of the more than a dozen wide-ranging policy initiatives¹⁶ SFDAO has implemented since I took the helm in January 2020 and the rationale underlying the policies.

¹⁴ James Austin, *Eliminating Mass Incarceration: How San Francisco Did It*, JFA INST. (Nov. 2015), <http://www.jfa-associates.com/publications/reduce/Reforming%20San%20Franciscos%20Criminal%20Justice%20System-JA4.pdf> [<https://perma.cc/QR9V-ZTC8>].

¹⁵ Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> [<https://perma.cc/HG2R-M3H8>].

¹⁶ The policies and initiatives described below are not an exhaustive list of significant work conducted during this period.

These policies are organized into three parts: victim support; decarceration to improve public safety; and police and prosecutor accountability. Taken together, these policies are part of an effort to transform SFDAO from an office narrowly focused on litigating cases with the goal of securing criminal convictions into a broader stakeholder investing in building public safety, healing the harm that crime causes, and honoring the dignity and rights of all those whose lives are impacted by the criminal justice system.

Before launching into these specific policy analyses, it bears mentioning that SFDAO aims to implement humane, community-informed, and data-driven policies. SFDAO has nearly a dozen research partnerships¹⁷ to help track outcomes and trouble-shoot implementations as well as to generate new policy ideas. Meaningful data take time to collect and analyze. SFDAO aims to continue to improve its policies in response to empirical data. What follows is just a beginning: new policies which do not yet have enough of a track record to be analyzed critically for their empirical impact, successes, or shortcomings over time. SFDAO is committed to continually and transparently evaluating all policies and finding ways to improve.

I. SAN FRANCISCO DISTRICT ATTORNEY 2020 POLICY INITIATIVES: VICTIM SUPPORT

Many prosecutors have traditionally conflated their advocacy for victims with seeking convictions and draconian punishments.¹⁸ Yet police cannot always make arrests in every crime, and District Attorneys cannot always secure convictions in those cases where police make arrests.¹⁹ District Attorneys can, however, do far more to recognize and support victims of crime, especially violent crime. Over \$80 billion of the \$182 billion spent annually on criminal justice goes to incarceration.²⁰ Far too little is invested

¹⁷ These partnerships include: UC Berkeley's California Policy Lab, University of San Francisco, Hatchuel Tabernik & Associates, CSU Longbeach, Justice Research & Statistics Association, Measures for Justice, RAND, UC Irvine, CUNY-Institute for State and Local Governance, American Institutes of Research, and Stanford University (Computational Policy Lab).

¹⁸ EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 168 (2019); see also F.T. Green, *The Victims' Rights Movement Helps Prosecutors, Not Victims*, THE OUTLINE (June 10, 2019, 12:32 PM), <https://theoutline.com/post/7547/victims-rights-movement?zd=1&zi=nwzdoqev>. [<https://perma.cc/BER9-A3PN>].

¹⁹ Nor would it be in the interests of justice to seek convictions in every possible case.

²⁰ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/GL69-A2SU>]; *The 2019-20 Budget: California Spending Plan Judiciary*

in supporting and healing victims of crime.²¹ Many victims feel re-victimized by the criminal justice process,²² reporting that they are treated more like pieces of evidence than human beings who have been hurt.²³ In some situations, victims are even jailed under material witness statutes by prosecutors focused more on using victims to secure convictions than on hearing or supporting them.²⁴

Only a trivial percentage of most District Attorneys' budgets is dedicated to victim services.²⁵ Yet victim support remains a priority for SFDAO and the office has found numerous ways to expand support for crime victims, specifically in the context of COVID-19 and Black Lives Matter. This Part presents examples of early 2020 initiatives, including: (1) compensating victims of police violence; (2) expanding emergency support

and Criminal Justice, LEGIS. ANALYST'S OFF. (Oct. 17, 2019), <https://lao.ca.gov/Publications/Report/4097#:~:text=The%202019%2D20%20budget%20provides,19%20General%20Fund%20spending%20level> [<https://perma.cc/8PYY-E9Q3>].

²¹ See *Types of Funding*, OFF. FOR VICTIMS OF CRIME: FUNDING & AWARDS (April 23, 2020), <https://ovc.ojp.gov/funding/types-of-funding> [<https://perma.cc/M3YP-X27B>] (detailing the federal Office for Victims of Crime funding); *Victim Services in California: A Recommendation for Combining the State's Victims' Programs*, CAL. VICTIM COMPENSATION BD. (Oct. 2018), <https://victims.ca.gov/reports/consolidationreport2019/FinalConsolidationReport.pdf> [<https://perma.cc/4LNL-3RUM>] (detailing the California Victim Compensation Board's funding); *OVC Formula Chart: 2019 Crime Victims Fund Allocation*, OFFICE FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/sites/g/files/xyckuh226/files/media/document/crime-victims-fund-compensation-allocations-2019.pdf> [<https://perma.cc/U37V-FQ2F>].

²² Negar Katarai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81 (2020) (detailing ways in which criminal courts contribute to retraumatizing victims of violent crime).

²³ See Andrew J. Karmen, *Who's Against Victims' Rights? The Nature of the Opposition to Pro-victim Initiatives in Criminal Justice*, 8 J. CIV. RTS. & ECON. DEV. 157, 158 (1992) (summarizing history of victim rights movement and lack of legal standing victims had at least until the 1970s). For an international example, see *Rape Victims are Treated 'Like a Piece of Evidence'*, DAILY MAIL (May 25, 2011, 9:51 AM), <https://www.dailymail.co.uk/news/article-1390724/Rape-victims-treated-like-piece-evidence--Woman-clashed-Ken-Clarke-reveals-details-secret-meeting.html> [<https://perma.cc/NCY9-8WJ8>].

²⁴ Emily Lane, *Victims Jailed in New Orleans for Refusing to Testify, Watchdog Group Says*, NOLA (Apr. 11, 2017, 10:18 PM), https://www.nola.com/news/crime_police/article_518fe6ad-37cd-590f-b440-4d86ad9eab15.html [<https://perma.cc/5BZE-DJUX>]; see generally Preston Burton, Paige Ammons, & Caroline Eisner, *Coercive Process for Material Witnesses Needs Reform*, LAW360 (Mar. 24, 2019, 8:02 PM), <https://www.law360.com/article/s/1140264/coercive-process-for-material-witnesses-needs-reform> [<https://perma.cc/5YFB-YE6D>].

²⁵ Victim Services Budget as a percent of the total General Fund Contribution for fiscal year 2019-2020: \$2,220,918 as a percent of \$65,467,956 = 3.39 percent.

for victims of domestic violence; and (3) launching a unit focused on economic crimes against workers.²⁶

A. COMPENSATION FOR VICTIMS AND WITNESSES OF POLICE VIOLENCE

Events, including the shooting of Jacob Blake, and the killings of Breonna Taylor, Tony McDade, and George Floyd, remind us that additional safeguards are needed to protect victims of police violence. Victims and witnesses who are injured, killed, or traumatized by police are not legally considered victims of crime until and unless the offending officer is charged with a crime. Under California law, if an officer is not charged, victims and witnesses of that officer's violence do not qualify for California Victims of Crime Compensation. California Government Code section 13956 allows victims to be excluded from accessing state-level crime victims' compensation if they are assumed to have contributed to their victimization—something officers have a vested interest in suggesting. Indeed, the Code requires that their victimization status is determined and certified by the very law enforcement agencies that may be responsible for the harm, making it nearly impossible to qualify for resources like medical, mental health, funeral and burial, and relocations resources. Victims of excessive force and police violence and those who love them need financial resources and support to recover and heal from the violence, just like any other victims of violence do.

SFDAO announced victim of crime compensation from SFDAO Victim Services Division local funds to provide to victims of police violence, witnesses of police violence, loved ones of police violence victims, and protestors injured by police.²⁷ The compensation offered includes funeral and burial assistance, medical and mental health bills, relocation support and crime scene clean up where appropriate.

These victim services and support resources are available on a case-by-case basis and do not require that police reports list the individual as a “victim” or that SFDAO criminally prosecutes the officers. The policy also

²⁶ This is not an exhaustive list of the Victim Services Division's award-winning work, much of which is grant funded to fill the gap in needed services and what County is willing to support. For more, see Dr. Gena Castro Rodriguez, *End of Year Report 2019*, S.F. DIST. ATT'Y: VICTIM SERV'S DIV. (2019), <https://sfdistrictattorney.org/wp-content/uploads/2020/09/VSD-End-of-Year-Report.pdf> [<https://perma.cc/Q5YU-TA88>].

²⁷ Press Release, S.F. Dist. Att'y, District Attorney Boudin Announces Expansion of Services, Including Victim Compensation, to Victims and Witnesses of Police Violence, (June 9, 2020), <https://sfdistrictattorney.org/article/district-attorney-boudin-announces-expansion-services-including-victim-compensation-victims> [<https://perma.cc/QM7B-WNZZ>].

includes a partnership with University of California San Francisco's Trauma Recovery Center to refer victims in need of professional support services on a *pro bono* basis. SFDAO is stepping in to do what the state of California Victim Compensation Board would otherwise do. SFDAO is also actively working to encourage other jurisdictions in California to follow suit and to change the state law that creates this gap in services.²⁸ This initiative is more than just SFDAO temporarily filling a void. It is a significant practical and symbolic step in fulfilling SFDAO's vision of its role as more than just a law enforcement agency that incidentally provides for victim healing by locking up perpetrators. SFDAO strives to be an organization that promotes community safety, justice, and healing for victims regardless of the litigation status of the person who harmed them.

B. EMERGENCY SUPPORT FOR DOMESTIC VIOLENCE VICTIMS²⁹

Early in the COVID-19 pandemic, it seemed that intimate partner violence, child abuse and other domestic violence crimes were on the rise³⁰ but less likely to be reported.³¹ Shelter-in-place orders meant that vulnerable victims of abuse in the home were required to remain at home with their abusers. During the first week after the shelter-in-place directive SFDAO saw a sixty percent increase in client referrals to the Victim Services Division, compared to the same week in 2019. The following week brought a thirty-three percent *decrease* in new client referrals, also compared to 2019.³² From March 17, 2020 when shelter-in-place began in San Francisco through June 30, 2020, there was a significant decrease in new domestic

²⁸ On July 8, 2020, California Assembly Member Sydney Kamlager introduced legislation tracking these San Francisco Policy changes but it did not become law. S. 329, 2019-2020 Reg. Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB329 [<https://perma.cc/MD4R-TFXV>].

²⁹ This section draws on work done by Gena Castro-Rodriguez and Paige Allmendinger in the Victim Services Division.

³⁰ Amanda Taub, *A New Covid-19 Crisis: Domestic Abuse Rises Worldwide*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html> [<https://perma.cc/VK7S-ERU7>].

³¹ Nina Agrawal, *The Coronavirus Could Cause a Child Abuse Epidemic*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/opinion/coronavirus-child-abuse.html> [<https://perma.cc/3NHE-3E3K>].

³² Gena Rodriguez & Paige Allmendinger, S.F. DIST. ATTY: VICTIM SERVS DIV., *Heightened Domestic Violence Threat in the Time of COVID-19*, S.F. DIST. ATTY: VICTIM SERV'S DIV (April 20, 2020), <https://sfdistrictattorney.org/victim-services/heightened-domestic-violence-threat-covid-19/> [<https://perma.cc/G2Y7-XRFL>]. SFDAO continues to monitor these trends to ensure appropriate distribution of resources and ultimately identify if there is a causal relationship between the shelter-in-place directive and referrals to the Victim Services Division.

violence referrals both as an absolute number and as a percentage of total victim referrals when compared with the same period in 2019 or 2018. While the data on referral volume paint a seemingly counter-intuitive picture, there are reasons to believe, based on the nature of the crime and our current circumstances, that domestic violence is on the rise during the pandemic.³³ COVID-19 raises threats of domestic violence and child abuse, while simultaneously erecting greater barriers for victims to reach out for help.³⁴

To better support domestic violence victims, and to help prevent future violence, SFDAO arranged emergency housing for those in need of refuge. Working with other city agencies and through private partnerships, SFDAO secured a range of housing options and made them available at no cost to domestic violence victims and their dependents. In partnership with San Francisco Mayor London Breed and Veritas Investments, a San Francisco-based real estate investment company, SFDAO secured 20 furnished apartments for temporary use by domestic violence victims.³⁵ The project was later expanded to include hotel rooms for shorter-term emergency use by domestic violence victims; a partnership to provide housing through Airbnb;³⁶ and a partnership with Lyft to provide free transportation vouchers to victims.³⁷

Many of the people who received benefits from these partnerships could not afford to wait for a criminal case to run its course. Some of them may not have wanted or even benefited from formal criminal justice system involvement but still needed support; SFDAO provided services regardless of whether these victims were connected to a criminal case. SFDAO strongly believes these services should not be tied to the existence of charges, nor depend on a victim's participation in criminal prosecution when charges are filed. These emergency services for vulnerable victims can save lives,

³³ Taub, *supra* note 30.

³⁴ Agrawal, *supra* note 31.

³⁵ Press Release, S.F. Dist. Att'y, District Attorney Boudin Teams Up with Mayor Breed to Announce Temporary Housing for Survivors of Domestic Violence (Apr. 9, 2020), <https://sfdistrictattorney.org/press-release/da-boudin-announces-temporary-housing-for-survivors-of-dv/> [<https://perma.cc/4DME-8QHF>]; *San Francisco Secures Housing For Domestic Violence Survivors During Coronavirus Shelter-In-Place*, CBS S.F. BAY AREA (Apr. 9, 2020, 2:32 PM), <https://sanfrancisco.cbslocal.com/2020/04/09/sf-housing-domestic-violence-survivors-coronavirus-shelter-in-place/> [<https://perma.cc/3TZ2-PAYY>].

³⁶ *Supporting Domestic Violence Survivors in California*, AIRBNB (May 29, 2020), <https://news.airbnb.com/supporting-domestic-violence-survivors-in-california/> [<https://perma.cc/MR6P-9LKM>].

³⁷ *District Attorney Partners with Lyft to Help Domestic Violence Victims*, S.F. NEWS (Apr. 23, 2020), <https://www.thesfnews.com/district-attorney-partners-with-lyft-to-help-domestic-violence-victims/54702> [<https://perma.cc/3YA7-VFB3>].

prevent future harm, and empower victims without the delays necessarily associated with litigation.

C. ECONOMIC CRIMES AGAINST WORKERS³⁸

The pandemic severely impacted the economy and especially essential workers. Although prosecutors' offices are not typically associated with employment rights and workplace safety, I pledged to enforce laws in this area to hold employers accountable. This work is needed more than ever during the pandemic.

SFDAO is committed to protecting workers harmed by economic crimes and to holding unscrupulous employers accountable. Safeguarding workers from exploitation is vital to accomplishing the office's mission to promote and ensure public safety, as harm to workers causes a multitude of interconnected and compounding damages throughout society.³⁹ As the California Supreme Court underscored, when "minimum employment standards" are unfulfilled, "the public will often be left to assume the responsibility of the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions."⁴⁰

The pandemic and Black Lives Matter exposed egregious inequalities and exploitation in the workplace and illustrate the need for SFDAO's enforcement of labor laws. Various frontline workers have been deemed "essential" to justify putting them in harm's way, often without providing appropriate protective equipment, pay raises, or mandated safeguards.⁴¹ Due

³⁸ This section draws on work by Assistant District Attorney Scott Stillman.

³⁹ The California Constitution authorizes the Legislature to enact laws to protect workers. See CAL. CONST. art. 14, § 1 ("The Legislature may provide for minimum wages and for the general welfare of employees"); see also *Gould v. Maryland Sound Industries, Inc.*, 31 Cal. App. 4th 1137, 1148 (1995) (internal quotation marks and citation omitted) ("California courts have long recognized wage and hours laws concern not only the health and welfare of the workers themselves, but also the public health and general welfare."); *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 358 (1989) (recognizing that California's worker protection laws "have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury").

⁴⁰ *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 953 (2018).

⁴¹ See Adie Tomer & Joseph W. Kane, *To Protect Frontline Workers During and After COVID-19, We Must Define who They are*, BROOKINGS (June 10, 2020), <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/> [<https://perma.cc/2UVU-RUW8>] (describing the need for clearer definitions of "frontline" and "essential" workers and industries); see also *Attorney General Becerra Joins Coalition Urging Whole Foods and Amazon to Step Up on Worker Protections and Paid Sick*

to historic and systemic racism, many occupations have become segregated, with Black and Latinx workers disproportionately represented among lower-paying, frontline positions like cashiers.⁴² Further, a study found that only 19.7 percent of Black workers and 16.2 percent of Latinx workers have jobs that allow them to work from home compared to 37 percent of Asians and 29.9 percent of Whites.⁴³ This means that workers of color disproportionately provide our essential services—jobs that put workers in contact with potentially virus-infected members of the public—and also work in the highest injury risk positions (even prior to the pandemic),⁴⁴ all on top of a long record of racial disparities in pay, scheduling, and promotions.⁴⁵

Leave, OFF. OF THE ATT'Y GEN. OF CAL. (Mar., 25, 2020), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-joins-coalition-urging-whole-foods-and-amazon-step> [<https://perma.cc/6HUR-7BTW>] (noting that the California Attorney General joined a coalition of 14 other Attorney Generals across the country to urge Whole Foods and Amazon to improve worker protections and access to paid sick leave); James J. Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, FORDHAM URB. L.J. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3662434 [<https://perma.cc/HB G7-8PPE>] (describing the lack of legal and health protections for many essential workers); *Judge Orders Oakland McDonald's to Step Up COVID Precautions*, CBS S.F. BAY AREA (Aug. 15, 2020, 8:23 A.M.), <https://sanfrancisco.cbslocal.com/2020/08/15/judge-orders-oakland-mcdonalds-to-step-up-covid-precautions/> [<https://perma.cc/2LAE-CJS4>] (describing an Alameda County Superior Court Judge's issuance of a preliminary injunction against the owners of a McDonald's in Oakland, California that required the restaurant to implement various safety requirements such as providing "adequate and sufficient masks" after a coronavirus outbreak infected thirty-five people as alleged by workers at the restaurant); Daniel Schneider & Kristen Harknett, *Essential and Unprotected: COVID-19-Related Health and Safety Procedures for Service-Sector Workers*, SHIFT PROJECT (May 2020), <https://shift.berkeley.edu/files/2020/05/Essential-and-Unprotected-COVID-19-Health-Safety.pdf> [<https://perma.cc/XA4F-NVGL>]. Out of approximately 8,000 service-sector employees who were surveyed between March 7 and April 9, 2020, fewer than 10% reported access to masks in early March 2020 and that rose to just 40% by early April, and even then, only a mere 20% reported they were *required* to wear masks. *Id.*

⁴² Catherine Ruetschlin & Dedrick Asante-Muhammad, *The Retail Race Divide*, DEMOS (June 2, 2015), <https://www.demos.org/research/retail-race-divide-how-retail-industry-perpetuating-racial-inequality-21st-century> [<https://perma.cc/93UG-9GCK>]; see also Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html> [<https://perma.cc/AF85-WB76>].

⁴³ Elise Gould & Heidi Shierholz, *Not everybody can Work from Home*, ECON. POL'Y INST. (Mar. 19, 2020 1:15 PM), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/> [<https://perma.cc/EC7K-FZ4R>] (noting women are also overrepresented and underpaid in jobs that have been labeled "essential" during the pandemic).

⁴⁴ Seth A. Seabury, Sophie Terp, & Leslie I. Boden, *Racial and Ethnic Differences in the Frequency of Workplace Injuries and the Prevalence of Work-Related Disability*, NCBI, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6198680/> [<https://perma.cc/XKE4-VP64>].

⁴⁵ See Rueschlin & Asante-Muhammad, *supra* note 42.

Discouragingly, when Black workers voice their concerns about potential spread of coronavirus at work, they face the real threat of retaliation.⁴⁶ Because essential workers risk their own health and safety to sustain the rest of society's needs during this pandemic, it is paramount that government entities tasked with enforcing laws prioritize legal protections for these workers.⁴⁷

To that end, SFDAO launched the Economic Crimes Against Workers Unit ("ECAW") to investigate and prosecute violations committed by employers against workers.⁴⁸ This innovative unit, one of the first of its kind in the nation,⁴⁹ focuses on crimes such as wage theft, labor trafficking, criminal immigration-related workplace retaliation, as well as civil enforcement of California's Unfair Competition Laws.

ECAW's first case was an action against DoorDash, Inc.,⁵⁰ a gig economy company headquartered in San Francisco which has the nation's largest market share in the on-demand food-delivery space.⁵¹ The complaint alleges that DoorDash illegally misclassifies its delivery workers as

⁴⁶ Irene Tung & Laura Padin, *Silenced About COVID-19 in the Workplace*, NAT'L EMPL. LAW PROJECT, 2 (June 2020), <https://www.nelp.org/publication/silenced-covid-19-workplace> [<https://perma.cc/CK6P-K7QX>] (finding Black workers were more than twice as likely as white workers to report that they or someone at work may have been retaliated against for raising concerns about COVID-19 spreading in the workplace).

⁴⁷ See Chris Benner, *On-demand and On-the-Edge: Ride hailing and Delivery workers in San Francisco*, INST. FOR SOC. TRANSFORM., UC SANTA CRUZ, 3 (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOntheEdge_ExecSum.pdf [<https://perma.cc/Y2YK-TKHJ>] (noting a survey showing that 63 percent of San Francisco platform workers believed "public officials should enforce laws so app-based workers who are misclassified as independent contractors could have access to unemployment, paid leave, and other benefits under city and state laws").

⁴⁸ Press Release, S.F. Dist. Att'y, District Attorney Launces New Economic Crimes Unit to Protect Workers' Rights (Apr. 21, 2020), <https://sfdistrictattorney.org/press-release/new-economic-crimes-unit-to-protect-workers/> [<https://perma.cc/YY4P-87JJ>].

⁴⁹ Philadelphia DA Larry Krasner created a Labor Liaison position to prosecute crimes against workers as part of his office's Economic Crimes Unit. See Press Release, Phila. Dist. Att'ys Off., RELEASE: District Attorney Krasner Announces New Labor Liaison to Bolster Protections for Workers (Oct. 8, 2019), <https://medium.com/philadelphia-justice/release-district-attorney-krasner-announces-new-labor-liaison-to-bolster-protections-for-workers-62159359ddca> [<https://perma.cc/P6DC-UUAJ>].

⁵⁰ DoorDash is a business that delivers food, beverages and other items from local restaurants and stores to nearby customers. It employs workers to act as couriers, picking up orders from merchants and delivering them to customers. DOORDASH <https://www.doordash.com/about/> [<https://perma.cc/SU6D-XNML>] (last visited Oct. 14, 2020).

⁵¹ *2020 Edison Trends U.S. On-Demand Food Delivery Sales Report*, EDISON TRENDS (May 19, 2020), <https://trends.edison.tech/research/on-demand-food-delivery-sales-2020.html> [<https://perma.cc/H7CM-LZBH>].

independent contractors.⁵² The case was brought using the civil enforcement powers of the DA's office under California's Business and Professions Code section 17200 *et seq.* (California's Unfair Competition Laws).⁵³ The lawsuit seeks restitution for workers, an injunction requiring DoorDash to properly classify its delivery workers as employees, and civil penalties.

Misclassification of workers as independent contractors instead of employees has been a widespread problem in California.⁵⁴ It has especially negative impacts in the midst of the coronavirus outbreak because it leaves workers without even the most basic workplace protections at the time those are most needed. When workers are misclassified as independent contractors, they are unlawfully denied their guaranteed rights to minimum labor standards, including the right to minimum wage and overtime pay, meal and rest breaks, workers' compensation coverage, paid sick leave, family leave, reimbursement for business expenses, and access to wage replacement programs like disability insurance and unemployment insurance.⁵⁵

Misclassification is particularly prevalent in the gig economy.⁵⁶ During this health crisis, gig workers like DoorDash's couriers have seen demand for their services skyrocket,⁵⁷ and are at risk as they provide essential

⁵² Press Release, S.F. Dist. Att'y, SFDA Chesa Boudin Announces Employee Protection and Unfair Business Practices Action Against Doordash for Illegally Misclassifying Its Delivery Workers (June 16, 2020), <https://sfdistrictattorney.org/press-release/sfda-announces-action-against-doordash/> [<https://perma.cc/5MDB-5Q8Y>].

⁵³ CAL. BUS. & PROF. CODE § 17200 (West 2020) (“[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice”); *id.* § 17204 (“Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney”).

⁵⁴ See *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 913 (2018) (Speaking to the pervasive problem of misclassification, the California Supreme Court cited to regulatory agencies of both federal and state governments that found misclassification is a “very serious problem” that was “depriving . . . millions of workers of the labor law protections to which they are entitled”)

⁵⁵ *Misclassification*, CAL. DEP'T OF INDUS. RELS. (Dec. 2019), https://www.dir.ca.gov/Fraud_Prevention/Misclassification.htm [<https://perma.cc/THB3-KTCW>].

⁵⁶ In passing California's landmark Assembly Bill 5 addressing misclassification, the California Legislature noted that “[r]ecent research also supports the prevalence of misclassification and finds some of the highest misclassification rates in the economy's growth industries, including home care, janitorial, trucking, construction, hospitality, security, and the app-based ‘on demand’ sector.” ASSEMBLY COMM. ON LABOR & EMPL., REPORT ON ASSEMBLY BILL 5 (April 3, 2019).)

⁵⁷ Between March 2 and April 16, 2020, food delivery sales increased 51 percent according to data analyzed by Edison Trends. *Online Grocery Sales Up 90% & Food Delivery Sales Up 51% Since March 2*, EDISON TRENDS (May 1, 2020), <https://trends.edison.tech/research/covid-19-online-food-services.html> [<https://perma.cc/UJ7Q-24ZR>].

services.⁵⁸ Yet, they do so without basic employment protections under state and local laws as a result of these gig companies' misclassification of their workers as independent contractors.⁵⁹ This means that gig workers lack access to protections such as paid sick days and medical care through workers' compensation coverage.⁶⁰

Health crises like COVID-19 and social movements like Black Lives Matter reaffirm that ensuring safety and health in our communities must start with protecting and empowering society's most vulnerable. Dedicating resources to curbing workplace injustices and supporting victims who suffer harm at the hands of their employers will improve public safety and should therefore be a priority for all District Attorneys. Now, in the midst of this

⁵⁸ See *COVID-19: Dasher Exemption to Shelter-in-place Orders Letter*, DOORDASH (2020), https://help.doordash.com/dashers/s/article/COVID-19-Dasher-Exemption-to-Shelter-in-place-Orders-Letter?language=en_US [<https://perma.cc/MUL9-3BR9>].

⁵⁹ Instead of properly classifying their workers as employees and providing them with the full panoply of employment benefits and protections to which they are entitled, gig companies such as Uber, Lyft, DoorDash, Postmates, and Instacart spent over \$200 million to support the passage of Proposition 22, a California voter initiative on the November 2020 ballot. Top Contributor Lists, *November 2020 General Election*, CAL. FAIR POLITICAL PRACTICES COMM'N (accessed Dec. 2, 2020) <https://www.fppc.ca.gov/transparency/top-contributors/nov-20-gen.html> [<https://perma.cc/F8MF-YFPH>]. Proposition 22's language provides that "an app-based driver is an independent contractor and not an employee or agent with respect to the app-based driver's relationship with a network company" if four conditions are met and obligates the "network company" to provide "app-based drivers" with the limited benefits outlined in the statute, such as "a guaranteed minimum level of compensation" at "the net earnings floor" for "all engaged time" and "a quarterly health care subsidy" for those app-based drivers who average at least fifteen hours per week of engaged time in the calendar quarter. See *Request for Title and Summary for the 'Protect App-Based Drivers and Services Act'*, (A.G. No. 19-0026)—*Amended Language* (Dec. 9, 2019), <https://www.oag.ca.gov/system/files/initiatives/pdfs/19-0026A1%20%28App-Based%20Drivers%29.pdf> [<https://perma.cc/S4BP-4FSC>] Proposition 22 as passed will take effect on the fifth day after the Secretary of State certifies the voting results. CAL. CONST. ART. II, § 10, subd. (a)).

⁶⁰ See *State of California Executive Order N-62-20* (May 6, 2020), <https://tinyurl.com/yceb3cue> [<https://perma.cc/HW49-7ZDC>] (declaring that "the provision of workers' compensation benefits related to COVID-19 . . . will reduce the spread . . . and otherwise mitigate the effects of COVID-19 among all Californians, thereby promoting public health and safety"); LeaAnne DeRigne, Patricia Stoddard-Dare, & Linda Quinn, *Workers Without Access to Paid Sick Leave Less Likely to Take Time Off Compared to Those With Paid Sick Leave*, 35 HEALTH AFFAIRS 520, 525 (2016) (estimating that sick employees who continued going to work infected an additional seven million people during the 2009 H1N1 Influenza outbreak and that lack of paid sick leave resulted in an additional 1,500 deaths during that same outbreak); Kevin Miller, Claudia Williams, & Youngmin Yi, *Paid Sick Days and Health: Cost Savings from Reduced Emergency Department Visits*, INST. FOR WOMEN'S POLICY RESEARCH, 7 (Nov. 14, 2011), <https://tinyurl.com/y7htdqjh> [<https://perma.cc/2C73-5BJJ>] (concluding workers who do not have paid sick days are more likely to delay necessary medical care, which can cause minor health problems to turn into more serious and expensive ones).

pandemic and the country's reckoning with structural racism, units protecting workers' rights are more needed than ever before.

II. DECARCERATION TO IMPROVE PUBLIC SAFETY AND RACIAL EQUITY

The United States incarcerates more people than any other country in the world,⁶¹ with 2.2 million people living in jails and prisons at any given time.⁶² Nearly twenty-five percent of them are awaiting trial in county jails, presumed innocent,⁶³ and often held solely because they cannot afford a cash bail payment that would secure their release.⁶⁴

But the problem is actually far worse than even that striking number conveys. People enter and leave jails and prisons every day, so the number of people who are incarcerated in a given year is much higher. There are more than ten million people arrested annually⁶⁵—all of whom are deprived of their liberty and separated from their home, work, family, and community. Four and a half million more people each year remain on probation or parole,⁶⁶ subject to random stops and searches, forced to check in with officers sometimes multiple times a week, and required to submit to whatever other conditions a court might require.

It is then no surprise that half of all Americans have an immediate family member who is either currently or formerly incarcerated.⁶⁷ In theory, incarceration serves as a form of deterrence, punishment, rehabilitation, and

⁶¹ Peter Wagner, Leah Sakala, & Josh Begley, *States of Incarceration: The Global Context*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/global/> [https://perma.cc/6MMY-QNEN].

⁶² *Criminal Justice Facts*, SENTENCING PROJECT (2020), <https://www.sentencingproject.org/criminal-justice-facts/> [https://perma.cc/6WLR-9WDU].

⁶³ *Why We Need Pretrial Reform*, PRETRIAL JUST. INST. (2018), <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/#:~:text=Six%20out%20of%2010%20people,population%20growth%20between%202000%2D2014> [https://perma.cc/C5XK-DBVC].

⁶⁴ Matt Krupnick, *Bail Roulette: How the Same Minor Crime Can Cost \$250 or \$10,000*, GUARDIAN (Sep. 20, 2017, 6:00 AM), <https://www.theguardian.com/us-news/2017/sep/20/bail-disparities-across-the-us-reflect-inequality-it-is-the-poor-people-who-suffer> [https://perma.cc/J8TU-SAU4].

⁶⁵ Rebecca Neusteter & Megan O'Toole, *Every Three Seconds*, VERA INST. OF JUST. (Jan. 2019), <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview> [https://perma.cc/42NE-CNQG].

⁶⁶ *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, PEW RESEARCH (Sept. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities> [https://perma.cc/27J9-YVMY].

⁶⁷ *Every Second: The Impact of the Incarceration Crisis on America's Families*, FWD.US (2018), <https://everysecond.fwd.us/#chapter1-3> [https://perma.cc/V5B4-MQCC].

protection for society from people who cause harm. But there is scant empirical evidence that incarceration is an effective response to most crime;⁶⁸ in fact, incarceration tends to increase, not decrease, recidivism—especially for lower risk individuals.⁶⁹ Since the vast majority of people incarcerated will be released sooner or later,⁷⁰ building long-term safety means relying on more than just incarceration.

Not only does the United States incarcerate too many people, it does so in ways that have tremendously disparate impacts based on race.⁷¹ Though even before 2020 San Francisco had made massive strides compared to other jurisdictions, San Francisco's incarceration rate for African Americans was still substantially higher than the rates of Los Angeles, Washington D.C., and Chicago, and more than six times the rate of New York City.⁷² San Francisco's population is approximately five percent Black,⁷³ but nearly fifty percent of the jail is Black.⁷⁴

Black and Brown people in San Francisco are more likely to be harmed by the criminal justice system.⁷⁵ They are more likely to be victims of

⁶⁸ Incarceration may be an effective way to warehouse people and separate them from society. While crimes, including violent crimes, are still committed in prisons and jails, society at large is protected.

⁶⁹ Paul Gendreau & Claire Goggin, *The Effects of Prison Sentences on Recidivism*, PRISON POL'Y (1999), <https://www.prisonpolicy.org/scans/e199912.htm> [<https://perma.cc/Q2WA-KZRS>].

⁷⁰ As many as fourteen percent of people in prisons are serving life sentences. *The Facts of Life Sentences*, SENT'G PROJECT 1 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/12/Facts-of-Life.pdf> [<https://perma.cc/K6VB-BCNX>]. However, most people arrested experience short periods of incarceration: over 10 million people are booked into county jails every year. Zhen Zeng, *Jail Inmates in 2018*, U.S. DEP'T OF JUST. (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf> [<https://perma.cc/7SDR-PQVC>].

⁷¹ *Racial Disparity, Issues*, SENT'G PROJECT, <https://www.sentencingproject.org/issue/racial-disparity/> [<https://perma.cc/HBD4-VLBX>].

⁷² Compare data available at *Incarceration Trends, San Francisco County, CA*, VERA INST. OF JUST., <http://trends.vera.org/rates/san-francisco-county-ca> [<https://perma.cc/JK53-3AWZ>].

⁷³ *San Francisco County, California, Quick Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/sanfranciscocountycalifornia> [<https://perma.cc/R578-CUDH>].

⁷⁴ *Agenda, Safety and Justice Challenge Subcommittee*, SAN FRANCISCO SENT'G COMM'N (Aug. 18, 2020, 12:00 PM), https://dev-district-attorney-wp.pantheonsite.io/wp-content/uploads/2020/08/Agenda-and-Meeting-Packet_SJC-Subcommittee_8-18-20_v2.pdf. [<https://perma.cc/J2AW-Z2LB>].

⁷⁵ John MacDonald & Steven Raphael, *An Analysis of Racial and Ethnic Disparities in Case Dispositions and Sentencing Outcomes for Criminal Cases Presented to and Processed by the Office of the San Francisco District Attorney*, S.F. DIST. ATT'Y (Dec. 2017), <https://sfdistrictattorney.org/wp-content/uploads/2020/10/Analysis-Racial-and-Ethnic-Disparities-in->

crime,⁷⁶ less likely to report crime, and more likely to be stopped by the police. Once stopped, they are more likely to be searched without their consent, despite being less likely to be found with contraband.⁷⁷ Black San Franciscans are over seven times more likely to be arrested than their white counterparts, and they are eleven times more likely to be booked into county jail.⁷⁸ They are held in pretrial custody longer⁷⁹ and are over ten times more likely to be convicted of a crime.⁸⁰ After conviction, Black defendants receive sentences that are, on average, twenty-eight percent longer than those received by white defendants.⁸¹ Disparately negative encounters with authority figures start from a young age; students of color are much more likely to be targets of zero-tolerance discipline policies in schools,⁸² facilitating a school-to-prison pipeline that often begins a lifetime of entanglement in the criminal justice system.⁸³

Case-Dispos-and-Sentencing-Outcomes-FINAL-REPORT.pdf [https://perma.cc/8CW9-QG5Y].

⁷⁶ *African Americans Have Made Up More Than Half Of Homicides in San Francisco in 2015*, CBS SF BAY AREA (June 11, 2015, 10:57 AM), <https://sanfrancisco.cbslocal.com/2015/06/11/african-americans-have-made-up-more-than-half-of-homicides-in-san-francisco-in-2015/> [https://perma.cc/B2AJ-3Y3T]; Timothy Williams, *San Francisco Police Disproportionately Search African Americans, Report Says*, N.Y. TIMES (July 11, 2016) <https://www.nytimes.com/2016/07/12/us/san-francisco-police-disproportionately-search-african-americans-report-says.html> [https://perma.cc/N5WX-XW4P].

⁷⁷ *Report of The Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement*, SF BLUE RIBBON PANEL, 30 (2016) https://sfdistrictattorney.org/wp-content/uploads/2020/09/BRP_report.pdf [https://perma.cc/EZ2F-KAK4].

⁷⁸ *San Francisco Justice Reinvestment Initiative: Racial and Ethnic Disparities Analysis for the Reentry Council*, W. HAYWOOD BURNS INST. FOR JUV. JUST. FAIRNESS & EQUITY 5 (2013), https://www.burnsinstitute.org/wp-content/uploads/2013/12/JRI_SF-RED-Analysis-SUMMARY-of-FINDINGS.pdf [https://perma.cc/JY3C-B3ZX].

⁷⁹ Emily Owens, Erin M. Kerrison, & Bernardo Santos Da Silveira, *Examining Racial Disparities in Criminal Case Outcomes Among Indigent Defendants in San Francisco*, QUATRONE CTR. FOR THE FAIR ADMIN. OF JUST. 2 (2017), <https://www.law.upenn.edu/live/files/6792-examining-racial-disparities-may-2017-summary> [https://perma.cc/ABU2-9Q27].

⁸⁰ W. HAYWOOD BURNS INST. FOR JUV. JUST. FAIRNESS & EQUITY, *supra* note 78 at 5.

⁸¹ Owens, Kerrison, & Da Silveira, *supra* note 79 at 2.

⁸² Zero tolerance policies treat both minor and major infractions severely as opposed to graduated discipline approaches. *See, e.g.*, Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice*, IND. EDUC. POLICY CTR., 11 (2000), <https://web.archive.org/web/20140824031650/http://www.indiana.edu/~safeschl/ztze.pdf> [https://perma.cc/3GQT-TK9F].

⁸³ *Expansive Survey of America's Public Schools Reveals Troubling Racial Disparities*, U.S. DEPT. OF EDUC., (Mar. 21, 2014), <https://www.ed.gov/news/press-releases/expansive-survey-americas-public-schools-reveals-troubling-racial-disparities> [https://perma.cc/F9S4-C6S6]; Farnel Maxime, *Zero-Tolerance Policies and the School to Prison Pipeline*, SHARED

Collectively, these facts may be shocking to those not directly impacted, and they serve as a chilling reminder of the lasting consequences of centuries of systemic racism beginning with slavery, through Jim Crow, housing policy, and the Drug War.⁸⁴ Society must not allow these disparate outcomes to persist—and, perhaps surprisingly, needed changes can come from a prosecutor’s office. SFDAO has taken considerable steps this year to address the problems of overincarceration. This Part reviews the following initiatives: (A) creation of primary caregiver diversion; (B) eradication of status enhancements; (C) elimination of cash bail; and (D) reducing the jail population.

A. PRIMARY CAREGIVER DIVERSION

Incarcerating primary caregiver parents can have devastating consequences for children left behind.⁸⁵ Black children are six times as likely as white children to have a parent incarcerated; these children are victimized both by their parents’ choices and society’s commitment to meting out harsh punishments.⁸⁶ The collateral consequences of parental incarceration may undermine public safety by placing children at risk and perpetuating an intergenerational cycle of crime and incarceration.⁸⁷ Particularly for primary caregivers who commit nonviolent offenses (and thus pose a comparatively lower risk to society than those accused of violent crime), the potential public safety benefits of incarceration are outweighed and undermined by the trauma and attendant consequences dependent children suffer. Recognizing

JUST., (Jan. 18, 2018), sharedjustice.org/domestic-justice/2017/12/21/zero-tolerance-policies-and-the-school-to-prison-pipeline [<https://perma.cc/4CC4-UP7V>]; *School-to-Prison Pipeline Infographic*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline/school-prison-pipeline-infographic> [<https://perma.cc/Y4JE-HHSH>].

⁸⁴ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012); Mike Males & William Armaline, *San Francisco’s Arrest Rates of African Americans for Drug Felonies Worsens*, CTR. ON JUV. & CRIM. JUST. (2012), http://www.cjcj.org/uploads/cjcj/documents/Drug_Policy_2012_in_SF.pdf [<https://perma.cc/U66E-WD4Q>].

⁸⁵ See generally Chesa Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011) (gathering sources, describing the scope of parental incarceration and the rights of children left behind).

⁸⁶ Leila Morsy & Richard Rothstein, *Mass Incarceration and Children’s Outcomes*, ECON. POL’Y INST., (Dec. 15, 2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/> [<https://perma.cc/M9J8-XSSV>].

⁸⁷ Jeremy Travis, Elizabeth Cincotta McBride, & Amy L. Solomon, *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, URBAN INST. JUST. POL’Y CTR., 2 (2005); Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 478 (2006); Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV. 283, 289 (2009).

this, in January of 2020 California enacted Penal Code section 1001.83, which allows local jurisdictions to implement primary caregiver diversion for non-violent and non-serious crimes.⁸⁸

SFDAO became the first prosecutor’s office in the state to implement the new diversion law.⁸⁹ The policy’s basic premise is that society is safer when primary caregivers are free to be at home supporting their children rather than in cages. Eligible defendants can earn a dismissal through a rigorous diversion program that includes parenting classes for a minimum of six months.

The hope is that by diverting primary caregivers away from the criminal justice system and incentivizing them to care for their dependent children, we will help break the cycle of incarceration and keep communities safer. Although the policy is facially race-neutral, it will disproportionately benefit children of color, as their parents are overrepresented in the criminal justice system.

B. STATUS ENHANCEMENTS

California’s “tough on crime” era led to what are known as “status” sentencing enhancements,⁹⁰ which punish status rather than conduct. This era contributed to mass incarceration, devastated communities of color, expanded prison budgets at a cost to schools, separated families and communities, and, in many ways, actually undermined public safety.⁹¹

The use of sentencing enhancements in San Francisco accounts for about one out of every four years served in jail and prison.⁹² Status

⁸⁸ Violent and serious offenses are terms of art and California law lists qualifying offenses. See CAL. PENAL CODE §§ 667.5(C), 1192.7, & 1192.8 (West 2018).

⁸⁹ Meyer Gorelick, *Boudin Launches Pretrial Diversion Program for Parents of Minor Children*, S.F. EXAM’R (Jan. 14, 2020), <https://www.sfexaminer.com/news/boudin-announces-diversion-program-for-eligible-caregivers/> [<https://perma.cc/8GTP-JK22>].

⁹⁰ California sentencing law is tremendously complex and beyond the scope of this article. In short, most felony offenses have a statutorily prescribed low, mid, and high term from which a sentencing judge may choose. Those terms can be “enhanced” based on specific conduct in the underlying offense—for example causing great bodily injury, or personal use of a firearm—or based on the status of the defendant—for example membership in a criminal street gang or prior convictions. See generally J. Richard Couzens & Tricia A. Bigelow, *Felony Sentencing After Realignment*, CA. COURTS (May 2017), https://www.courts.ca.gov/partners/documents/felony_sentencing.pdf [<https://perma.cc/N46P-3G3L>].

⁹¹ See generally Gendreau & Goggin, *supra* note 69.

⁹² Elan Dagenais, Raphael Ginsburg, Sharad Goel, Joseph Nudell, & Robert Weisberg, *Sentencing Enhancements and Incarceration: San Francisco, 2005-2017*, STAN. COMPUTATIONAL POL’Y LAB, at 1 (Oct. 17, 2019), https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf [<https://perma.cc/QB4F-KQ3Z>].

enhancements—mostly Proposition 8 priors⁹³ and Three Strikes⁹⁴ enhancements—account for half of the time served for enhancements.⁹⁵ A 2019 Stanford study found that these status enhancements exacerbate the already large racial disparities that exist in sentencing and concluded that California could substantially reduce incarceration by ceasing to use enhancements.⁹⁶

California’s mass incarceration problem is rooted in the extreme sentencing laws passed by voters in the 1990s, including the 1994 Three Strikes Law.⁹⁷ The Three Strikes Law doubled sentences for those with certain deemed “serious” or “violent” felony convictions known as “strikes” and led to life sentences for those with two prior strike offenses.⁹⁸ This meant that overnight, potential sentences for many people with prior convictions rose to double, triple, or greater from the previous maximums. The impact of the Three Strikes Law is staggering. In 1990, California had a prison population of 92,604.⁹⁹ In 1999, five years after the passage of Three Strikes, California had increased its population to 163,000.¹⁰⁰ By 2006, the prison population had ballooned to over 175,000 prisoners.¹⁰¹ In June of 2019, the state prison population was 125,472.¹⁰² According to the Stanford Three

⁹³ Proposition 8 created so called “nickel priors” whereby any prior conviction for a serious or violent felony can add five additional years to a future serious or violent felony.

⁹⁴ See Michael Vitiello, *Three Strikes: Can We Return to Rationality*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997) (explaining the three strikes sentencing framework).

⁹⁵ Dagenais, Ginsburg, Goel, Nudell, & Weisberg, *supra* note 92, at 1.

⁹⁶ *Id.* at 10.

⁹⁷ See generally Mugambi Jouet, *Mass Incarceration Paradigm Shift?: Convergence In an Age of Divergence*, 109 J. CRIM. L. & CRIMINOLOGY 703, 721 (2019) (highlighting extreme three strikes sentences and the contribution to mass incarceration); Evelyn J. Patterson, *Hidden Disparities: Decomposing Inequalities in Time Served in California, 1985-2009*, 49 LAW & SOC’Y REV. 467, 470 (2015) (describing three strikes sentencing as a major contributor to mass incarceration in California).

⁹⁸ CAL. PENAL CODE § 667; Barry Krisberg, *How do you Eat an Elephant? Reducing Mass Incarceration in California One Small Bite at a Time*, 664 ANNALS 136, 140 (2016).

⁹⁹ James Stephan, *Census of State and Federal Correctional Facilities*, 1990, BUREAU OF JUST. STAT., at 2 (May 1, 1992), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4067>. [<https://perma.cc/FE9P-NC9R>].

¹⁰⁰ Allen J. Beck, *Prisoners in 1999*, BUREAU OF JUST. STAT., at 3 (Aug. 2000), <https://webcache.googleusercontent.com/search?q=cache:McWUsXQUOUJ:https://www.bjs.gov/content/pub/pdf/p99.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-b-1-d> [<https://perma.cc/4HSA-RJCU>].

¹⁰¹ William J. Sabol, *Prisoners in 2006*, BUREAU OF JUST. STAT., at 14 (Dec. 2007), <https://www.bjs.gov/content/pub/pdf/p06.pdf+&cd=1&hl=en&ct=clnk&gl=us&client=firefox-b-1-d>. [<https://perma.cc/85YZ-APFP>].

¹⁰² CAL. DEP’T OF CORRS. & REHAB., SPRING 2020 POPULATION PROJECTIONS at v (2020), <https://www.cdcr.ca.gov/research/population-reports-2/> [<https://perma.cc/9EVT-HHJ9>].

Strikes Project, forty-five percent of inmates serving life sentences under the Three Strikes law are Black and the law is applied disproportionately against mentally ill and physically disabled defendants.¹⁰³ One study found that, “the three-strikes law did not decrease serious crime or petty theft rates below the level expected on the basis of preexisting trends.”¹⁰⁴

The Three Strikes Law is not the only status-based sentencing enhancement law that has contributed to mass incarceration and racial disparities in California. Gang enhancements¹⁰⁵ have been criticized as unfairly targeting particularly young men of color.¹⁰⁶ Analysis by the LA Times suggests that the CALGang database, a statewide list of gang members and affiliates, is outdated, inaccurate, and rife with abuse.¹⁰⁷ According to California Department of Corrections and Rehabilitation data from 2019, more than 90 percent of adults with a gang enhancement in state prison are either Black or Latinx.¹⁰⁸ What’s more, as Fordham Law Professor John Pfaff (who studies the causes and effects of mass incarceration) explains: there is strong empirical support for declining to charge these status enhancements.¹⁰⁹ Lengthy sentences imposed by strike laws and gang enhancements provide little additional deterrence, often incarcerate past what

¹⁰³ See generally Dagenais, Ginsburg, Goel, Nudell, & Weisberg, *supra* note 92; THREE STRIKES PROJECT, *Three Strikes Basics*, <https://law.stanford.edu/stanford-justice-advocacy-project/three-strikes-basics/> [<https://perma.cc/XC3N-5NLW>].

¹⁰⁴ Lisa Stolzenberg & Stewart J. D’Alessio, *Three Strikes and You’re Out’: The Impact of California’s New Mandatory Sentencing Law on Serious Crime Rates*, 43 CRIME & DELINQ. 457, 457 (1997).

¹⁰⁵ See CAL. PENAL CODE §§ 186.22 et seq. (West 2018).

¹⁰⁶ See, e.g., Fareed Nassor Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 138 (2019) (“Legal scholars have proven, through empirical data, that the use of gang affiliation as a basis of enforcement is not only unduly prejudicial, but also inherently racist.”).

¹⁰⁷ See Anita Chabria, Kevin Rector & Cindy Chang, *California Bars Police from Using LAPD Records in Gang Database. Critics Want It Axed.*, L.A. TIMES (July 14, 2020, 10:49 AM), <https://www.latimes.com/california/story/2020-02-03/california-attorney-general-xavier-becerra-changes-course-on-revamping-the-states-gang-database> [<https://perma.cc/6HHT-PT4D>]; see also Anita Chabria, Leila Miller & Nicole Santa Cruz, *LAPD Scandal Opens Window into California’s Secret Gang Database as Reforms Debated*, L.A. TIMES (Feb. 3, 2020, 9:36 AM), <https://www.latimes.com/california/story/2020-07-14/california-bars-police-from-using-lapd-records-in-gang-database-as-scandal-widens> [<https://perma.cc/A5ME-7XS2>].

¹⁰⁸ Abené Clayton, *92% Black or Latino: The California Laws that Keep Minorities in Prison*, GUARDIAN, (Nov. 26, 2019, 6:00 AM), <https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos>. [<https://perma.cc/P26X-SRYV>].

¹⁰⁹ JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION 192–94 (2017).

is required for public safety, and may even lead to greater rates of reoffending in the long run.¹¹⁰

Pfaff cited a growing body of empirical studies which have made clear that what effectively deters violent and antisocial behavior is not the threat of a long sentence imposed at some point in the future on those limited cases that result in an arrest and conviction,¹¹¹ but instead the risk of detection and apprehension in the first place.¹¹² Effective policing deters; long sentences do little.¹¹³ Some studies indicate that spending more time in prison may actually increase the risk of later reoffending.¹¹⁴ This makes sense: as the number of traumas experienced in prison grows, the ability to reintegrate after release may fall. This effect is especially pronounced in private prisons.¹¹⁵

Given this backdrop, SFDAO announced that—absent extraordinary circumstances—it would no longer seek strike convictions against juveniles, allege prior strikes¹¹⁶ or five year priors,¹¹⁷ or use gang charges or enhancements.¹¹⁸ The presumption is that the sentence for the underlying crime, and the ability to charge appropriate conduct enhancements (e.g., personal infliction of great bodily injury, personal use of a firearm), are sufficient to protect public safety and hold people accountable.

¹¹⁰ *Id.*; see also Sarah Lynn Van Hofwegan, *Unjust and Ineffective: A Critical Look at California's Step Act*, 18. S. CAL. INTERDISC. L.J. 679, 688–89 (2009), <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/18-3%20Van%20Hofwegan.pdf> [<https://perma.cc/W3HP-YV52>].

¹¹¹ PFAFF, *supra* note 109, at 192–93.

¹¹² *Id.* at 193–94.

¹¹³ *Id.* at 194.

¹¹⁴ Gendreau & Goggin, *supra*, note 69 (finding that longer prison sentences slightly increased recidivism); Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011) (finding that incarceration does not reduce recidivism and, instead, has a criminogenic effect). https://www.researchgate.net/publication/258194311_Prisons_Do_Not_Reduce_Recidivism_The_High_Cost_of_Ignoring_Science [<https://perma.cc/77BU-WG2R>].

¹¹⁵ Derek Gilna, *Report Says Private Prison Companies Increase Recidivism*, PRISON LEGAL NEWS (May 5, 2017), <https://www.prisonlegalnews.org/news/2017/may/5/report-says-private-prison-companies-increase-recidivism/> [<https://perma.cc/K8QD-T76A>].

¹¹⁶ CAL. PENAL CODE §§ 667(d)–(e), 1170.12(a), (c) (West 2020).

¹¹⁷ *Id.* § 667(a)(1).

¹¹⁸ Evan Sernoffsky, *DA Chesa Boudin Sets New Policies on SF Police Stops, Gang Enhancements, Three Strikes*, S.F. CHRON. (Feb. 28, 2020), <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-sets-new-policies-15091160.php> [<https://perma.cc/4F9N-CHHR>].

C. MONEY BAIL

Commercial money bail is a uniquely American phenomena:¹¹⁹ an explicitly wealth-based discriminatory practice central to the determination of pretrial custody status in most jurisdictions in America that undermines the integrity of the entire criminal justice system. The private, for-profit bail bonds industry is a \$2 billion a year business.¹²⁰ The number of people detained in the United States prior to being convicted—presumed innocent—has grown from less than 125,000 on any given day in 1983 to more than 460,000 today.¹²¹

The money bail system is a cancer at the heart of America's criminal justice system. As soon as a rich person is arrested, they can buy their way out almost without exception, and remain at liberty while they fight their case. An identically situated poor person, by contrast, languishes in jail for days even if no charges are filed, simply because of their inability to make a monetary payment. The impact of even short periods of incarceration on people's lives and future prospects is hard to overstate, as is the impact on the likely outcome of criminal charges. That is, not only are people who are incarcerated pretrial exposed to violence, disease, termination of employment, eviction, loss of child custody and the like, they are also more likely to plead guilty.¹²²

Pretrial detention negatively impacts both a person's criminal case and their wellbeing in general.¹²³ Several studies reveal that those detained pretrial are substantially more likely to be convicted, likely owing to increased guilty pleas as a result of the pressure of incarceration.¹²⁴ The

¹¹⁹ Along with the Philippines, the United States is the only country in the world with a for profit bail industry. Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2008, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/9FSK-HUG4>].

¹²⁰ Kayla James, *How the Bail Bond Industry Became a \$2 Billion Business*, GLOBAL CITIZEN (Jan. 31, 2019), <https://www.globalcitizen.org/en/content/bail-bond-industry-2-billion-poverty/> [<https://perma.cc/LRH3-8SYS>].

¹²¹ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/7ATL-DT6T>].

¹²² Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017).

¹²³ *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, JUST. POL'Y INST. 13–14, 25–26 (2012), <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [<https://perma.cc/X4H4-EV7A>].

¹²⁴ Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 512 (2018);

disparities do not end there, however. Pretrial detainees are also more likely to be sentenced to incarceration,¹²⁵ and, even with controls in place, their sentences are substantially longer than those of otherwise comparable releasees.¹²⁶ A detained person may accept an overly punitive plea deal because detention impaired her ability to gather evidence or meet with her lawyer. She may be less motivated to fight the charges when the fixed costs of incarceration have already been paid: stigma, loss of employment, housing or child custody, etc.¹²⁷

Pretrial detention also causes substantial and often long-term harm to an individual's wellbeing. People held in jail pretrial may lose their jobs due to absence,¹²⁸ and, for many, their homes, apartments, or spot in a shelter. Medical care is disrupted, and those who receive government benefits often lose their health insurance, housing assistance, and other necessary subsidies when incarcerated.¹²⁹ Families are impacted because parents are unable to care for their children, who may have to move to another relative's home or enter the foster care system. Education and home life stability disappear, and children suffer lasting trauma as a result.¹³⁰

Likely because it is so destabilizing and stigmatizing, people detained pretrial are actually more likely to reoffend in the future.¹³¹ Increased

<https://academic.oup.com/jleo/article/34/4/511/5100740> [<https://perma.cc/ANM4-MNHL>]; Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 203 (2016); https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf [<https://perma.cc/RZ5Z-5UUE>]; Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. Legal Stud. 471, 471 (2016); Paul S. <http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf> [<https://perma.cc/43RD-BAME>]; Heaton, Mayson, Stevenson, *supra* note 122.

¹²⁵ Heaton, Mayson & Stevenson, *supra* note 122, at 717; Stevenson, *supra* note 124, at 513.

¹²⁶ Heaton, Mayson & Stevenson, *supra* note 122, at 718; Stevenson, *supra* note 124, at 532–35; Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. Law & Econ. 529, 546 (2017).

¹²⁷ Heaton, Mayson, & Stevenson *supra* note 122, at 712; *see also* JUST. POL'Y INST., *supra* note 123.

¹²⁸ *See, e.g.,* DeWolfe v. Richmond, 76 A.3d 1019, 1023 (Md. 2019) (ruling that people have a right to counsel at initial bail hearings under the state's constitution, in part, because a "bail determination can have devastating effects on arrested individuals," including for many who "may be employed in low wage jobs which could be easily lost because of incarceration").

¹²⁹ JUST. POL'Y INST., *supra* note 123.

¹³⁰ *Id.*

¹³¹ Gupta, Hansmen, & Frenchman, *supra* note 124; Heaton, Mayson, & Stevenson, *supra* note 122.

recidivism is found even after controlling for the initial bail amount, charged offense, demographics, and criminal history.¹³²

The goal of any pretrial release system should be to simultaneously: “(1) maximize release; (2) maximize public safety; and (3) maximize court appearance.”¹³³ Despite its widespread use, secured money bail fails to maximize release, serves essentially no public safety function, and is not necessary to ensure court appearance. As one federal court found, under California law, “there is no rational relationship between the setting of bail and the state’s legitimate interests.”¹³⁴ The failure of money bond to maximize release is uncontroversial and well-documented.¹³⁵ Research also shows, however, that, as a release mechanism, money bond does not advance public safety. Paying money, up front, to get out of jail does not correlate with a reduced likelihood of committing a new offense while on pretrial release.¹³⁶ Any argument that it could have a public safety impact ignores not only the empirical data, but everything that is currently known about criminal deterrence.¹³⁷

But what about ensuring a defendant’s appearance in court? In 2017, New Jersey ended its cash bail system. While its pretrial jail population “plummet[ed],” people continued to show up for court at “roughly the same rate.”¹³⁸ And although some studies have shown modest increases in court appearance rates by those who have posted secured money bail,¹³⁹ other

¹³² Gupta, Hansmen, & Frenchman, *supra* note 124.

¹³³ Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, NAT’L INST. OF CORR. 84 (2014), http://www.clebp.org/images/2014-09-04_Fundamentals_of_Bail.pdf [<https://perma.cc/J8GJ-UL5U>].

¹³⁴ *Reem v. Hennessy*, No. 17-cv-06628-CRB, 2017 WL 6765247, at *3 (N.D. Cal. Nov. 29, 2017).

¹³⁵ See Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, PRETRIAL JUST. INST., at 12 (Oct. 2013), https://www.ncsc.org/_data/assets/pdf_file/0017/1655/unsecured-bonds-the-as-effective-and-most-efficient-pretrial-release-option.ashx.pdf [<https://perma.cc/8E2J-4KLZ>] (showing money bail increases jail bed use).

¹³⁶ *Id.* at 10.

¹³⁷ See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in 30 CRIME & JUST. 143, 187 (2003) (explaining that the threat of harsh or mandatory prison sentences has no measurable deterrent effect on crime).

¹³⁸ Nicholas Pugliese, *Did NJ Bail Reform Cause a Surge In Crime? Court Analysis Says No*, NORTHJERSEY.COM (Apr. 2, 2019, 11:00 AM), <https://www.northjersey.com/story/news/new-jersey/2019/04/02/nj-bail-reform-no-crime-surge-pretrial-release/3336423002/> [<https://perma.cc/29V8-3BST>].

¹³⁹ Patrick Liu, Ryan Nunn, & Jay Shambaugh, *The Economics of Bail and Pretrial Detention*, HAMILTON PROJECT, BROOKINGS INST., at 11 (2018) <http://www.hamilton>

studies show no effect whatsoever.¹⁴⁰ Even if money bail promotes court appearance to some degree, which is debatable, its effectiveness pales in comparison to low-cost interventions such as providing automated court reminders in the mail, over the phone, or via text message.¹⁴¹

For all these reasons, and more,¹⁴² SFDAO implemented a policy prohibiting attorneys from asking the court to impose money bail at arraignment or in other court proceedings.¹⁴³ The policy sought to replace a wealth-based system with a risk-based system.¹⁴⁴ As the U.S. Supreme Court has held, “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”¹⁴⁵ Not only does the new policy reflect the constitutional values of equal protection, due process, presumption of innocence, and liberty as a norm in our society, but it also helps protect public safety by seeking to detain those who are shown to be too dangerous, regardless of their ability to come up with a monetary payment.

project.org/assets/files/BailFineReform_EA_121818_6PM.pdf [https://perma.cc/HJ3D-K2QQ] (discussing two studies).

¹⁴⁰ Jones, *supra* note 135, at 11.

¹⁴¹ Colin Doyle, Chiraag Bains, & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, CRIMINAL JUST. POL’Y PROGRAM, HARVARD LAW SCHOOL, at 4, 22 (2019), http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf [https://perma.cc/Q6GX-39J4]. Additionally, simply because a person missed a single court date does not mean the person has absconded with no intent to ever appear. Indeed, the opposite is true. Traci Schlesinger from the Pretrial Justice Institute said, “What we’re finding is that when people aren’t making it to court for their first appointment, most likely they’ll come to their second appointment—and nearly everyone makes it by the third.” Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, THE APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/> [https://perma.cc/7YDM-CDC2]. “Nor are missed appointments unique to the criminal justice system. Multiple studies report no-show rates of 15 to 30 percent for medical appointments, which is about the same as the criminal court FTA rate in most U.S. jurisdictions. Some parts of the civil court system, like small claims court and housing court, have absentee rates as high as 95 percent.” *Id.*

¹⁴² For example, non-refundable bail fees in San Francisco strip mostly poor and working women of color of their savings and assets. *See Do the Math: Money Bail Doesn’t Add Up for San Francisco*, FINANCIAL JUST. PROJECT, CITY AND COUNTY OF S.F. at 6, 11 (2017), https://sfgov.org/financialjustice/sites/default/files/2020-04/2017.6.27%20Bail%20Report%20FINAL_2.pdf [https://perma.cc/2YDZ-PE2B].

¹⁴³ Evan Sernoffsky, *San Francisco DA Chesa Boudin Ends Cash Bail for All Criminal Cases*, S.F. CHRON. (Jan. 29, 2020, 8:43 AM), <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-ends-cash-bail-for-14996400.php> [https://perma.cc/3D79-LHR3]. Note that the policy does not prohibit asking for bail on a bench warrant solely for the purpose of allowing a defendant who has failed to appear to be brought back to court.

¹⁴⁴ Heaton, Mayson, & Stevenson, *supra* note 122; JUST. POL’Y INST., *supra* note 123, at 40.

¹⁴⁵ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

Shortly thereafter, the onset of the COVID-19 pandemic necessitated even greater changes. Once COVID-19 spread to the United States and it became clear that jails and prisons were high risk for becoming vectors for the virus, the California Judicial Council established a range of emergency rules, including one which mandated that all counties set bail, during the post-arrest and pre-arraignment stage, at \$0 for a wide range of misdemeanors and non-violent felonies.¹⁴⁶ This state-wide emergency policy—which began April, 6, 2020—helped avoid introducing people potentially carrying the virus into local jails by instead treating them exactly the same way that the wealthy have been treated for decades: following an arrest, the police conduct a booking and then grant immediate release with a future court date. The policy, together with falling crime rates, has contributed to historic declines in jail populations across the state.¹⁴⁷

Despite the fact that COVID-19 continues to be a major threat to jail populations, and that money bail continues to be a discriminatory institution which undermines public safety and the integrity of the criminal justice system, the California Judicial Council voted to end the zero bail policy barely a month after it took effect.¹⁴⁸ Several counties opted to continue using the zero bail policy voluntarily but San Francisco Superior Court refused, over the objection of SFDAO and other stakeholders.¹⁴⁹ San Francisco wants and deserves a justice system that keeps residents safe without relying on wealth-based discrimination. San Francisco has demonstrated that it is possible to use risk rather than wealth as a basis for determining pretrial detention or release conditions. In 2020 San Francisco and the entire state, to some extent, witnessed the benefits that come from eliminating money bail at the arrest/pre-arraignment phase for non-violent/non-serious crimes: jail

¹⁴⁶ See News Release from Merrill Balassone, Cal. Courts Newsroom, Judicial Council, Chief Justice End Some Emergency Measures as California and Courts Expand Reopening, (June 10, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-chief-justice-end-some-emergency-measures-as-california-and-courts-expand-reopening> [https://perma.cc/5YTF-2W8Z]; *Appendix I: Emergency Rules Related to Covid-19*, CAL. COURTS (August 13, 2020), <https://www.courts.ca.gov/documents/appendix-i.pdf> [https://perma.cc/LU36-BGQ7].

¹⁴⁷ Joseph Hayes & Heather Harris, *California's Jail Population Has Plummeted During COVID-19*, PUB. POL'Y INST. OF CAL. (May 8, 2020), <https://www.ppic.org/blog/californias-jail-population-has-plummeted-during-covid-19/> [https://perma.cc/MB3V-VHUF].

¹⁴⁸ *Id.*; *SF DA Criticizes Superior Court for Ending Zero-Bail Policy Amid Pandemic*, NBC BAY AREA (June 19, 2020 9:54 PM), <https://www.nbcbayarea.com/news/local/sf-da-criticizes-superior-court-for-ending-zero-bail-policy-amid-pandemic/2312837/> [https://perma.cc/P7J7-4YJA].

¹⁴⁹ Tim Redmond, *SF Superior Court Ends Zero Bail Policy, Threatening Public Health*, 48 HILLS (July 9, 2020), <https://48hills.org/2020/07/sf-superior-court-ends-zero-bail-policy-threatening-public-health/> [https://perma.cc/H8KA-B7YP].

populations decreased significantly, mitigating grave public health risks, and crime fell.

D. JAIL POPULATION REDUCTION¹⁵⁰

San Francisco's county jails are housed in several separate physical structures; two of these jails are within, or adjacent to, San Francisco's Hall of Justice. The Hall of Justice itself is a seismically unsafe building containing toxic chemicals and presenting a wide range of other public safety concerns, making it an unfit place for people to work, much less live.¹⁵¹ Closing the Hall of Justice, especially the jails that house incarcerated people and jail staff 24 hours a day, has been an issue of public concern for years.¹⁵²

Closing the jail housed on top of the Hall of Justice ("CJ4")—was a hot-button issue in the 2019 DA race¹⁵³ even before the pandemic hit. During my campaign, I emphasized the need to close CJ4 as part of a broader commitment to decreasing reliance on incarceration, because I recognized the ways in which mass incarceration undermines public safety, diverts resources away from more effective interventions, and needlessly tears families and communities apart.¹⁵⁴ Then COVID-19 clarified another major

¹⁵⁰ For a more detailed discussion of SFDAO's jail population reduction efforts in the context of COVID-19 see Dylan Yep, Tara Anderson, & Todd Faulkenberry, *An Epidemic Inside A Pandemic*, The San Francisco District Attorney's Office, (Nov. 30, 2020) <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Justice-Driven-Data-An-Epidemic-Inside-a-Pandemic.pdf> [<https://perma.cc/4PLB-GMMN>].

¹⁵¹ Kristen Szi, *Unions Demand City Removes Workers From Crumbling Hall of Justice Building in San Francisco*, ABC 7 NEWS (Jan. 31, 2017), <https://abc7news.com/san-francisco-hall-of-justice-building-unions-demand-action-seismically-unsafe/1730621/> [<https://perma.cc/2H94-558V>]. For example: jail sewage spills continue to impose a fiscal and human toll on the City, Michael Barba, *Supes Approve \$2.1M Settlement Over Sewage Spills at SF's Hall of Justice Jail*, S.F. EXAM'R (July 14, 2020, 4:45 PM), <https://www.sfexaminer.com/news/supes-approve-2-1m-settlement-over-sewage-spills-at-sfs-hall-of-justice-jail/> [<https://perma.cc/9SV5-4384>], and jail staff have been accused of forcing incarcerated people to fight against each other, Evan Sernoffsky & Erin Allday, *SF Deputy in 'Fight Club' Case Was Previously Accused of Beating, Breaking Inmate's Ribs*, S.F. CHRON. (July 23, 2019, 10:00 PM), <https://www.sfchronicle.com/bayarea/article/SF-deputy-in-fight-club-case-was-previously-14118153.php> [<https://perma.cc/T8UL-F4LF>].

¹⁵² See, e.g., Res. 2-16 (S.F. Bd. Of Supervisors 2016), <https://www.sfdph.org/dph/files/jrp/BoardofSupervisorsResolution2-16.pdf> [<https://perma.cc/6NH7-TZX9>].

¹⁵³ Bryan Schatz, *Is Chesa Boudin Radical Enough?*, MOTHER JONES (Nov. 9, 2019), <https://www.motherjones.com/politics/2019/11/is-chesa-boudin-radical-enough/> [<https://perma.cc/UTD2-8AHP>].

¹⁵⁴ Chesa Boudin (@chesaboudin), *How to Reduce the Jail Population*, INSTAGRAM (Sept. 10, 2019), Gabe Stutman, *Chesa Boudin, San Francisco's D.A.-elect, talks homelessness, Jewishness and taking on the establishment*, JEWISH NEWS OF NORTHERN CA. (December 26, 2019), <https://www.jweekly.com/2019/12/26/chesa-boudin-san-franciscos-d-a-elect-talks-homelessness-jewishness-and-taking-on-the-establishment/> [<https://perma.cc/XET4-AJVH>].

way in which mass incarceration undermines public safety: jails and prisons create ideal conditions for the deadly spread of the virus, not only to those who are incarcerated and those working in prisons and jails, but to surrounding communities as well.¹⁵⁵

When I took office in January 2020, San Francisco's jails had an average daily total population of 1,164 people,¹⁵⁶ and reached a high of 1,238 on January 21.¹⁵⁷ On March 24, 2020, Dr. Lisa Pratt, Director of Jail Health Services, authored a public letter calling on San Francisco's criminal justice stakeholders to reduce the total jail population to "a target goal of 700-800 incarcerated people" to allow her staff to mitigate the spread of infection and enable social distancing.¹⁵⁸ COVID-19 brought a new urgency to my broader commitment to reducing reliance on incarceration.

In close partnership with the jail medical team and all the San Francisco Justice Partners,¹⁵⁹ SFDAO worked quickly to safely decrease the jail population. The team focused on releasing people who were at high medical risk and posed low public safety risk, regularly and systematically reviewing and triaging the entire jail population, and deploying the following strategies on a case-by-case basis to safely reduce the jail population:

- Release with narrowly tailored conditions for people charged with misdemeanors or non-violent felonies;
- Expedite release for people with upcoming release dates;
- Expand the use of housing referrals and referrals to residential programs until space and funding ran out;

¹⁵⁵ See Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324(6) JAMA 602–03 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2768249> [<https://perma.cc/99L4-HKUP>]; Eric Lofgren, Kristian Lum, Aaron Horowitz, Brooke Madubonwu & Nina Fefferman, *The Epidemiological Implications of Incarceration Dynamics in Jails for Community, Corrections Officer, and Incarcerated Population Risks from COVID-19* (May 4, 2020) (unpublished manuscript), <https://www.medrxiv.org/content/10.1101/2020.04.08.20058842v2> [<https://perma.cc/4HLV-TYSQ>]; Bob Egelko, *San Quentin Coronavirus Outbreak Apparently Result of Missed Steps by Prison Overseer*, S.F. CHRON. (July 20, 2020, 5:56 PM), <https://www.sfchronicle.com/news/article/San-Quentin-coronavirus-outbreak-apparently-15421664.php> [<https://perma.cc/9554-4ZGJ>].

¹⁵⁶ *City Performance Scorecards: County Jail Population*, S.F. SHERIFF'S DEPT., <https://sfgov.org/scorecards/public-safety/county-jail-population> [<https://perma.cc/S9AM-8YGR>].

¹⁵⁷ Daily jail count spreadsheets available from author.

¹⁵⁸ Letter on file with author.

¹⁵⁹ Including the San Francisco Pre-Trial Diversion Project, Adult Probation, the San Francisco Superior Court, the San Francisco Public Defender, the San Francisco Superior Court, and many more.

- Prioritize non-jail alternatives for elderly people and those with significant medical risks;
- Encourage settlement of cases that could resolve for probation supervision; and
- Defer the transfer of people in custody in other jurisdictions with non-serious warrants out of San Francisco.

These efforts yielded results. The jail population fell to a low of 696 on April 30, 2020¹⁶⁰ and has stabilized in the mid-700s since then—nearly a forty percent decrease over the January high. Moreover, focusing closely on every individual in jail and examining whether their ongoing incarceration outweighed the increased risk of COVID-19 resulted in some surprising finds. For example, the team identified a young woman with a high-risk pregnancy who had no criminal history and was serving a county jail sentence for a misdemeanor. Our reentry partners found a residential prenatal care facility willing to house her in lieu of the jail time. Another woman with severe mental illness who had been court ordered to a secure mental health treatment facility was languishing in jail because the City failed to make a bed available. Pressure from SFDAO helped expedite her placement in a non-carceral secure setting. Though, it should not have taken COVID-19 to force these decisions. SFDAO is committed to using incarceration as a last resort even after the pandemic ends, to fostering a culture of carefully and regularly reviewing every single in-custody case for possible settlement or release, and to remembering the ways in which over-reliance on incarceration can actually undermine public safety.

The jail population declined during this period in parallel with an historic drop in crime.¹⁶¹ From March 17, 2020, when San Francisco’s shelter in place order took effect,¹⁶² through November 8, 2020, overall reported crime reported fell 32.9 percent.¹⁶³ This decrease in the jail population along with a decrease in crime rates is significant for at least two reasons. First, it

¹⁶⁰ Daily jail count spreadsheets available from author.

¹⁶¹ ACLU Analytics, *Decarceration and Crime During COVID-19*, ACLU (July 27, 2020), <https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/> [<https://perma.cc/827U-BJ93>].

¹⁶² Erin Allday, *Bay Area Orders ‘Shelter in Place,’ Only Essential Business Open in 6 Counties*, S.F. CHRON. (last updated Mar. 19, 2020, 3:33 PM), <https://www.sfchronicle.com/local-politics/article/Bay-Area-must-shelter-in-place-Only-15135014.php> [<https://perma.cc/76FG-7CEE>].

¹⁶³ *Crime Dashboard*, S.F. POLICE DEPT., <https://www.sanfranciscopolice.org/stay-safe/crime-data/crime-dashboard> [<https://perma.cc/8FNY-ABWW>].

suggests that it is possible to safely decarcerate.¹⁶⁴ Second, falling crime rates directly contributed to a decrease in the jail population as fewer people were brought into the jail every day.¹⁶⁵ As a result of this unprecedented, and thus far sustained, decrease in the jail population, CJ4 was permanently closed in September 2020,¹⁶⁶ and SFDAO has saved the city tens of millions of dollars in incarceration costs and demonstrated a model for rapid, safe decarceration.

III. POLICE AND PROSECUTOR ACCOUNTABILITY

The rise of the Black Lives Matter movement from a relatively small protest movement to a national crusade in spring 2020 made clear the overwhelming public hunger for police and prosecutor accountability.¹⁶⁷ Many of the problems leading to police and prosecutor impunity are multifaceted and deeply entrenched. There are no easy fixes, especially for those problems which stem from engrained, toxic culture rather than from flawed policy or law. An important role that prosecutors can and should play in rebuilding trust between communities and the legal system is, of course, by prosecuting law enforcement officials when they commit criminal misconduct and thereby demonstrating that no one, including police officers, are above the law. In November 2020, my office made history by filing the first homicide charges brought against a San Francisco police officer for a

¹⁶⁴ Of course, there were numerous instances of people who were released committing new crimes, but those situations were the exception. For example, of the sixty-two sentenced individuals released prior to their original release date as a result of COVID-19 decarceration efforts, only six were rebooked prior to their original release date, and only sixteen have been rebooked into jail total with the most common reason being violation of a court order rather than a new substantive offense. See *Jail Management Data*, S.F. SHERIFF'S OFF., <https://app.powerbigov.us/view?r=eyJrIjoiNmJhNmM4NDYtNWUxZi00N2FiLWlxNWItMTA3ZDc2MzY4OWEyIiwidCI6IjYtZDVjMmNmLWNlM2UtdQzZC05YTdmLWRmY2MwMjMxZjczZiJ9>.

¹⁶⁵ March and April of 2020 are the two months with the lowest number of arrests presented to the DA office for possible charging on record while May and June averaged just lower than the monthly average for 2019. See *Clearance Rates Dashboard*, S.F. POLICE DEPT., <https://www.sanfranciscopolice.org/stay-safe/crime-data/clearance-rates-dashboard> [https://perma.cc/8QSS-YWEE].

¹⁶⁶ Michael Barba, *SF Speeds Up Jail Closure to Early September*, S.F. EXAM'R (Aug. 25, 2020 11:34 AM), <https://www.sfexaminer.com/news/sf-speeds-up-jail-closure-to-early-september/> [https://perma.cc/UFD5-DQRD].

¹⁶⁷ Chris Kahn, *Exclusive: Most Americans, Including Republicans, Support Sweeping Democratic Police Reform Proposals – Reuters/Ipsos Poll*, REUTERS (June 11, 2020, 3:43 PM), <https://www.reuters.com/article/us-minneapolis-police-poll-exclusive/exclusive-most-americans-including-republicans-support-sweeping-democratic-police-reform-proposals-reuters-ipsos-poll-idUSKBN231380> [https://perma.cc/K4AA-VW3Y].

killing committed while on duty.¹⁶⁸ But while holding law enforcement officials criminally accountable when they use deadly force in violation of the law is a key part of obtaining justice for the family of the deceased and will, hopefully, help to deter future criminal misconduct, post hoc criminal prosecution does little to fix the numerous underlying problems that lead to misconduct in the first place. What follows are just a few of the steps SFDAO has taken to address this longstanding issue. Specifically, this Part examines policies to: (1) deter police from pretextually stopping and frisking Black and Brown motorists; (2) ban local law enforcement from hiring officers with a history of serious misconduct; (3) ensure SFDAO is not complicit in covering up excessive use of force by police; and (4) avoid relying on the testimony of individual officers with specific histories of serious misconduct.

A. PRETEXTUAL STOPS: “DRIVING WHILE BLACK”

Racial profiling undermines law enforcement legitimacy, creates animus and distrust in communities of color, and decreases public safety. To ensure the protection of all San Franciscans and to build trust between communities that have been historically targeted for racially biased law enforcement, SFDAO discourages “stop and frisk”¹⁶⁹ style policing strategies.

One such police strategy is that of the pretextual stop: when police detain a person for a minor offense (i.e. traffic or other infraction) because the officer seeks to search the person.¹⁷⁰ This practice has become so commonplace that the term “DWB” or “Driving While Black/Brown” has

¹⁶⁸ Paulina Villegas, *In a possible first, San Francisco charges an officer with homicide over fatal on-duty shooting*, WASH. POST (Nov. 24, 2020, 5:12 PM), <https://www.washingtonpost.com/nation/2020/11/24/san-francisco-police-homicide-charge/> [<https://perma.cc/XD3D-AJUH>].

¹⁶⁹ A “stop-and-frisk” refers to a brief stop and pat down of a person. The Fourth Amendment requires that before stopping the person, the police must have a reasonable suspicion that a crime has been, is being, or is about to be committed. If the police reasonably suspect that the suspect is armed and dangerous, the police may frisk the suspect. The frisk is also called a “Terry Stop,” after *Terry v. Ohio*, 392 U.S. 1 (1968). However, the New York City Police department famously and controversially institutionalized a policy of systematically stopping and frisking young men of color hundreds of thousands of times per year. See *Stop-and-Frisk Data*, ACLU OF N.Y., <https://www.nyclu.org/en/stop-and-Frisk-data> [<https://perma.cc/F5GG-PJBP>].

¹⁷⁰ The use of pretext stops was sanctioned by the Rehnquist Supreme Court in the 1996 *Whren* decision. *Whren v. United States*, 517 U.S. 806 (1996). Justice Ginsburg suggested that it may be appropriate to reevaluate *Whren* in light of the criticism that the decision promotes improper police arbitrariness. See *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring). Further, what is permissible is not always good policy.

become part of the everyday vernacular.¹⁷¹ Pretextual stops have been criticized because they give “carte blanche” for police to stop motorists due to “innumerable traffic laws, many of which are vague and subjective,”¹⁷² and are prohibited under the state constitutions of Washington and New Mexico.¹⁷³

California laws make pretextual stops easy for law enforcement officers to manufacture. The California Vehicle Code contains hundreds of equipment and moving violations that can result in a stop and citation or arrest for an infraction.¹⁷⁴ Similarly, there are hundreds of local ordinances that can form the basis of a citation for an infraction.¹⁷⁵ For these reasons, law enforcement in San Francisco has almost unfettered discretion to stop an individual for an infraction when the actual goal is to conduct a subsequent search.

For almost twenty years, reports have highlighted the gravity of the problem of racial profiling caused by traffic stops and searches in San Francisco.¹⁷⁶ The problem has persisted throughout the years and been well-

¹⁷¹ See, e.g., *Driving While Black*, WIKIPEDIA, https://en.wikipedia.org/wiki/Driving_while_black [<https://perma.cc/E6ZV-8TK2>].

¹⁷² Jonathan Blanks, *A Pretextual Traffic Stop Should Require Sufficient Pretext*, CATO INST. (Apr. 5, 2019, 1:59 PM), <https://www.cato.org/blog/pretextual-traffic-stop-should-require-sufficient-pretext> [<https://perma.cc/95NN-55TL>].

¹⁷³ *State v. Ochoa*, 206 P.3d 143, 153–55 (N.M. Ct. App. 2008); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999). There has been no data to suggest that these jurisdictions have suffered from greater criminal activity as a result of their added constitutional protections. See also Megan Quattlebaum, *Let’s Get Real: Behavioral Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 32–33 (2018).

¹⁷⁴ The extensive list of statutory moving violations and equipment violations can be found at CAL. VEHICLE CODE, <https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=VEH> [<https://perma.cc/ZRH7-XDSD>].

¹⁷⁵ San Francisco has numerous and voluminous Municipal Codes that can result in citations for infractions. The San Francisco Municipal Police Code contains many of these potential violations and can be found at S.F. POLICE CODE, https://codelibrary.aml.egal.com/codes/san_francisco/latest/sf_police/0-0-0-2 [<https://perma.cc/9ZRG-QCDB>].

¹⁷⁶ See, e.g., MARK SCHLOSBERG, A DEPARTMENT IN DENIAL, THE SAN FRANCISCO POLICE DEPARTMENT’S FAILURE TO ADDRESS RACIAL PROFILING, ACLU OF NOR. CAL. (2002) <https://www.aclunc.org/sites/default/files/A%20Department%20in%20Denial%20-%20The%20San%20Francisco%20Police%20Department%27s%20Failure%20to%20Address%20Racial%20Profiling.pdf> [<https://perma.cc/Z5TM-48PU>] (reporting that Black motorists were 3.3 times more likely to be stopped by San Francisco police officers in every police district in the city than whites, while Latinx motorists were 2.6 times more likely to be stopped; police were more than twice as likely to ask to search Black motorists than whites and police were significantly less likely to find any evidence of criminality as a result of searching Black and Latinx individuals).

documented.¹⁷⁷ Black people in San Francisco, for example, made up over forty-two percent of all nonconsensual searches following stops, despite constituting fifteen percent of all stops, and around five percent of residents.¹⁷⁸ The U.S. Department of Justice did an exhaustive report documenting similar phenomena and made several policy recommendations¹⁷⁹ that have still not been fully implemented over four years later.¹⁸⁰

“Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is

¹⁷⁷ See, e.g., S.F. BLUE RIBBON PANEL, *supra* note 78 (Analysis of 2015 SFPD traffic stop data showed that Black and Latinx individuals were more likely to be searched than any other group following a traffic stop. Of those stopped in 2015, searches were conducted on 1.1 percent of Asian people, 1.7 percent of white people, 5.3 percent of Hispanic people, and 13.3 percent of Black people). See also *Community Oriented Policing Serv’s, Collaborative Reform Initiative*, U.S. DEPT. OF JUST. (2016), https://cops.usdoj.gov/html/dispatch/11-2016/assessment_of_san_francisco_pd.asp [<https://perma.cc/Y9CL-UDT7>] (finding that Black people were twenty-four percent more likely to be stopped for a traffic violation than their estimated population in the driving community and nine percent more likely than their estimated population among potential traffic; Black and Latinx drivers were disproportionately arrested and searched following traffic stops and less likely to be found with contraband than white drivers).

¹⁷⁸ Williams, *supra*, note 76. Similar disparities exist across California. Racial and Identify Profiling Advisory Board, *Annual Report 2020* CAL OFF. OF THE ATT’Y GEN., 36 (2020), <https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf> [<https://perma.cc/PG58-8DRU>].

¹⁷⁹ U.S. DEPT. OF JUST., *Community Oriented Policing Serv’s*, *supra* note 177.

¹⁸⁰ Julian Mark, *Amid Calls for Change, San Francisco Police Department Remains Slow to Reform and, Despite All Data to the Contrary, Continues to Deny Racial Bias*, MISSION LOCAL (June 3, 2020), <https://missionlocal.org/2020/06/amid-calls-for-change-san-francisco-police-department-remains-slow-to-reform-and-despite-all-data-to-the-contrary-continues-to-deny-racial-bias/> [<https://perma.cc/AKH7-JJ39>]; see also Williams, *supra* note 76 (reporting that in 2018 Black people were stopped at rates over five times their representation in the city’s overall population, a greater disparity than Los Angeles, whereas white individuals were stopped at a lower rate than their representation in the population); Anita Chabria, *Black Drivers Face More Police Stops in California, State Analysis Shows*, L.A. TIMES (Jan. 2, 2020), <https://www.latimes.com/california/story/2020-01-02/black-drivers-face-more-police-stops-in-california-new-state-data-show> [<https://perma.cc/A9MB-UPBP>]; KQED Staff & Writers, *New State Report Finds Major Racial Disparities in Police Stops Involving Black People*, KQED ONLINE (Jan. 2, 2020 4:20 PM), <https://www.kqed.org/news/11793819/new-state-report-finds-major-racial-disparities-in-police-stops-involving-blacks> [<https://perma.cc/465C-JFCR>]; CAL. OFF. OF THE ATT’Y GEN., *supra* note 178 (reporting that in 2018 Black people were stopped at rates over five times their representation in the city’s overall population, a greater disparity than Los Angeles, whereas white individuals were stopped at a lower rate than their representation in the population); Darwin Bond-Graham, *Black People in California are stopped far more often by police, major study proves*, GUARDIAN (Jan 3, 2020, 01:00:00 A.M.), <https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force> [<https://perma.cc/PXJ8-WXGD>].

looking for more.”¹⁸¹ Thus, the efficacy of this law enforcement tactic is questionable (state-wide, narcotics were seized in approximately 1.3 percent of all traffic stops, and weapons or ammunition seized in 0.6 percent of all traffic stops¹⁸²), while the cost to profiled individuals and communities is great.

This tactic hinders law enforcement’s ability to build necessary trust with affected communities and hinders the effective prosecution of criminal cases. For this reason, SFDAO implemented a new policy creating a presumption against filing possession of contraband crimes when the search stemmed from an infraction-related stop, and where no other independent probable cause (such as observed contraband in plain view) or other legal justification exists to justify the search and seizure of the contraband.¹⁸³

B. BAN HIRING POLICE OFFICERS WITH A HISTORY OF SERIOUS MISCONDUCT

The history of racial bias in law enforcement—combined with police impunity—undermines public trust, decreases reporting of even violent crimes, and makes it harder for those police and prosecutors seeking to serve the public with integrity to do their jobs. Members of the public cannot fully trust law enforcement officers or feel safe if they are uncertain whether an officer has a prior history of significant misconduct or abuse.

Yet it is difficult, and in some cases prohibited under California law, for members of the public to know about prior complaints or findings related to law enforcement officer misconduct¹⁸⁴ because of California’s “Police Officer’s Bill of Rights,” and systematic noncompliance with Senate Bill 1421, a law that sought to increase transparency of police records.¹⁸⁵ Even as

¹⁸¹ Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting). See also FRANK R. BAUMGARTNER, DEREK A. EPP, KELSEY SHOUB, SUSPECT CITIZENS (2018) (analyzing data from 20 million traffic stops in the context of race).

¹⁸² CAL. OFF. OF THE ATT’Y GEN., *supra* note 178.

¹⁸³ MJ Johnson, *DA Boudin to Stop Charging for Contraband at Traffic Stops, Gang Enhancements*, S.F. EXAM’R (Feb. 28, 2020, 4:15 PM), <https://www.sfexaminer.com/news/da-boudin-to-stop-charging-for-contraband-at-traffic-stops-gang-enhancements/> [<https://perma.cc/27XG-P5L4>].

¹⁸⁴ Stephen Stock, Jeremy Carrol, Kevin Nious, & Scott Pham, *State Law Hides Investigations of Police Misconduct from Public Scrutiny*, NBC BAY AREA (May 20, 2014, 2:57 PM), <https://www.nbcbayarea.com/news/local/state-law-hides-investigations-of-police-misconduct-from-public-scrutiny/88099/> [<https://perma.cc/36FJ-XCFC>].

¹⁸⁵ Julian Mark, *SB 1421 Madness: S.F. Police Commission Advances Enhanced Police Misconduct Records Protocol*, MISSION LOCAL (Dec. 5, 2019), <https://missionlocal.org/2019/12/sb-1421-madness-s-f-police-commission-passes-tentative-police-misconduct-records-protocol/> [<https://perma.cc/HS29-SVSD>].

San Francisco's district attorney, I have no way of knowing how many of our police officers have histories of serious misconduct or how common it is for our police department to hire an officer from another jurisdiction with a history of sustained misconduct allegations, or pending investigations into misconduct which could not be concluded because the officer left their job.¹⁸⁶

Public trust in San Francisco is badly damaged between law enforcement agencies and many of the communities they serve, particularly communities of color.¹⁸⁷ Local governments and taxpayers should hold law enforcement to the highest standard of professionalism and integrity. To address these issues and build public trust in the officers who serve as the public face of law enforcement, SFDAO partnered with Shamann Walton, a San Francisco County supervisor, to introduce a resolution on June 19, 2020 to prohibit hiring officers from other jurisdictions with prior misconduct findings for things such as excessive force, racial bias and dishonesty in reporting or investigating cases.¹⁸⁸ The basic goal of the resolution is to enhance public trust in law enforcement by ensuring that the people in uniform, carrying guns and with the power to arrest, do not have a history of serious misconduct or abuse of authority. The ultimate decision on the hiring rules will be made by San Francisco's civil service commission.

The resolution seeks to both prevent San Francisco from serving as a landing pad for officers with a history of serious misconduct leaving other jurisdictions, and to close a loophole that allows officers to evade accountability for serious misconduct: that once an officer has been accused of misconduct and is aware that an administrative investigation is underway, rather than comply with the investigation, the officer may quit and look for a

¹⁸⁶ SFDAO must rely on the police department for notification whether Brady material exists in a particular case. Not only can SFDAO not obtain this information in advance of filing a case, but even after SFDAO obtains the relevant material in one case the office may not retain it for use in other cases.

¹⁸⁷ See Julian Mark, *California just passed a sweeping police use-of-force law. San Francisco is still grappling with police bias.*, MISSION LOCAL (Aug. 20, 2019), <https://missionlocal.org/2019/08/california-just-passed-a-sweeping-police-use-of-force-law-san-francisco-is-still-grappling-with-police-bias/> [<https://perma.cc/E7CN-ZYM8>]; Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RSCH. CTR. (Sep. 29, 2016), <https://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/> [<https://perma.cc/K5LC-ACF9>].

¹⁸⁸ Memorandum from the Public Safety and Neighborhood Services Committee, S.F. BD. OF SUPERVISORS, 46-200592, at 3 (June 23, 2020) <https://sfgov.legistar.com/View.aspx?M=F&ID=8627313&GUID=05871D32-4779-4233-A2F4-D83BBCFB837> [<https://perma.cc/T5KD-ZHXF>]; **Error! Hyperlink reference not valid.**Nicholas Iovino, *San Francisco Looks to Ban Hiring of Cops With Histories of Misconduct*, COURTHOUSE NEWS SERV. (June 2, 2020), <https://www.courthousenews.com/san-francisco-looks-to-ban-hiring-of-cops-with-histories-of-misconduct/> [<https://perma.cc/3H8P-Q447>].

job in another police department. Without the participation of the accused or the ability to impose any administrative sanctions, most departments simply terminate the investigations without a final determination. The resolution would close that loophole by treating any investigation which was not completed due to the departure and non-cooperation of the officer as having resulted in a sustained finding.

All San Franciscans deserve to feel safe when interacting with police and should be able to trust that the officers tasked with protecting them have no prior history of excessive force, racial bias, or other significant misconduct. This policy is a critical step in that direction.

C. BODY WORN CAMERA VIDEO REVIEW

One particular and uniquely challenging form of police misconduct involves the fabrication of¹⁸⁹ resisting arrest¹⁹⁰ or assault-on-an-officer charges¹⁹¹ against people the officers simply do not like or, worse, as a means to cover up¹⁹² their own excessive force.¹⁹³ As one article explained, “[p]olice officers will also invent cover charges when a suspect is injured during apprehension or while in custody. In order for the officer to defend against a potential claim of excessive force, he will attest that the injuries were a result of the defendant’s assault on the officer or on the defendant’s having resisted apprehension.”¹⁹⁴ Anyone who has practiced criminal law knows this is a common enough problem but is one that evades easy statistical measure. Even the perception of this problem would undermine trust in police and suggest prosecutor complicity in police misconduct.

Traditionally prosecutors reviewing cases where police present these sorts of charges have had little choice but to accept the written police report

¹⁸⁹ *NJ Officer Pleads Guilty to Using Excessive Force, Filing False Police Report to Cover Up Taking Cash From Drivers*, NBC N.Y. (Sep. 9, 2019, 5:25 PM), <https://www.nbcnewyork.com/news/local/nj-officer-pleads-guilty-to-using-excessive-force-filing-false-police-report-to-cover-up-taking-cash-from-drivers/1990816/> [<https://perma.cc/P2ES-7V7Z>].

¹⁹⁰ CAL. PENAL CODE § 148 (West 2016).

¹⁹¹ *Id.* §§ 69, 243(c), among others.

¹⁹² Alex Emslie, *S.F. Officer’s Testimony Allowed to Stand -- Despite Episode of Misconduct, Dishonesty*, KQED (Mar. 21, 2018), <https://www.kqed.org/news/11656894/s-f-officers-testimony-allowed-to-stand-despite-episode-of-misconduct-dishonesty> [<https://perma.cc/WW8G-UG7E>].

¹⁹³ Sukey Lewis, Nadine Sebai, Alex Emslie & Thomas Peele, *Excessive Force, False Reports Detailed in Rio Vista Police Misconduct Files*, KQED (Jan. 29, 2019), <https://www.kqed.org/news/11721801/bad-arrests-excessive-force-and-false-reports-detailed-in-release-of-rio-vista-police-misconduct-files> [<https://perma.cc/2LKB-3UUE>].

¹⁹⁴ David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 476 (1999).

at face value. Now, since 2018, most San Francisco police officers have been required to wear Body Worn Cameras (“BWC”).¹⁹⁵ On June 5, 2020,¹⁹⁶ SFDAO implemented a new policy requiring review of BWC or other available independent evidence—such as video surveillance footage—prior to filing charges such as resisting arrest or assault on an officer. The office no longer risks either being complicit in covering up police misconduct or erroneously discharging a case where an officer was actually assaulted.

This simple policy change, requiring that prosecutors review the available objective evidence, represents a significant step towards ensuring that SFDAO can uphold the law and protect police officers who are assaulted during the course of their duties while simultaneously avoiding being complicit in prosecuting victims of police violence.

D. DO NOT RELY LIST

The interdependence of police and prosecutors¹⁹⁷ as well as the problem stemming from that interdependence have been well documented.¹⁹⁸ Thanks to the efforts of police unions¹⁹⁹ and law enforcement officers’ bills of rights, it is often difficult to remove even repeat offenders from the ranks of a police department.²⁰⁰ The integrity of particular criminal convictions, and the system writ large, are undermined when prosecutors rely on the reports and testimony of a specific officer with a documented history of dishonesty, racial profiling, excessive force, or other serious misconduct.

¹⁹⁵ William Scott, *Department Bulletin, Activation of Body Worn Cameras*, S.F.P.D. (2018), <https://www.sanfranciscopolice.org/sites/default/files/2019-05/18-256.pdf> [<https://perma.cc/PG9K-4ABR>].

¹⁹⁶ Press Release, S.F. Dist. Att’y, District Attorney Boudin Announces New Appointment and New Policy Designed to Protect the Public from Police Misconduct and Abuse (June 5, 2020), <https://sfdistrictattorney.org/press-release/new-appoint-and-policy-to-protect-public-from-police-misconduct-and-abuse/> [<https://perma.cc/APA2-3D8P>].

¹⁹⁷ See, e.g., Olwyn Conway, *How Can I Reconcile With You When You Have Your Foot on My Neck? The Role of Justice in the Pursuit of Truth and Reconciliation*, 2018 MICH. ST. L. REV. 1349, 1377 (2018) (“This dependency dramatically decreases the degree to which prosecutors are willing to reject officer testimony, pursue misconduct claims against officers, or challenge police narratives.”).

¹⁹⁸ See, e.g., Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895 (2020) (examining how prosecutors enable police misconduct on an institutional level).

¹⁹⁹ On police unions, see Benjamin Levin, *What’s Wrong with Police Unions?*, 120 COLUM. L. REV. 1333 (2020).

²⁰⁰ Nick Place, *Double Due Process: How Police Unions and Law Enforcement “Bills of Rights” Enable Police Violence and Prevent Accountability*, 52 U.S.F. L. REV. 275 (2018).

Of course, not all people who lie once or twice can never be trusted again, and arguably most people lie on a regular basis.²⁰¹ Yet law enforcement officers have a unique power and their misconduct “unilaterally reduces the protections of the Constitution.”²⁰² And when specific law enforcement officers commit serious misconduct in the course of their duty it casts a shadow of doubt on the integrity of their future investigations and testimony.

Accordingly, on June 15, 2020 SFDAO announced a new policy²⁰³ to no longer charge cases that rely solely on uncorroborated reports from officers with prior serious misconduct. This policy—not to seek convictions on the word of individual officers whose testimony there is specific reason to doubt—is intended to accomplish three related goals. First, it will prevent wrongful convictions in the future. Second, it will deter future misconduct by law enforcement. And third, the policy will build public trust and restore integrity to the criminal justice system. Although this policy is not enough to entirely cure the conflict²⁰⁴ of interest created by the interdependence of police and prosecutors, nor is it enough to root out the scourge of police misconduct or “testilying,”²⁰⁵ it is an essential step.

CONCLUSION

These are challenging times, unparalleled in American history. Yet this moment, like every moment of crisis, brings opportunities. The COVID-19 pandemic and the surge of the Black Lives Matter movement in the wake of George Floyd’s murder accelerated many of the precise changes that, as a candidate, I promised to work toward. To be sure, there is much work yet to

²⁰¹ *UMass Researcher Finds Most People Lie in Everyday Conversation*, EUREKALERT (2002), https://www.eurekalert.org/pub_releases/2002-06/uoma-urf061002.php [<https://perma.cc/K8BW-LYJY>].

²⁰² See Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1, 16 (2010)

²⁰³ Matt Kawahara, *Boudin Bans Prosecutions Based on Sole Testimony of Untrustworthy Police Officers*, S.F. CHRON. (2020), <https://www.sfchronicle.com/bayarea/article/Boudin-bans-prosecutions-based-on-sole-testimony-15342242.php> [<https://perma.cc/R2FV-KCCE>].

²⁰⁴ The author, together with other elected and formerly elected DAs has also advocated for a ban on police unions endorsing or directly contributing to DA candidate committees. Maria Dinzeo, *DAs Demand Ban on Endorsements and Donations to Prosecutors by Police*, COURTHOUSE NEWS SERV. (2020), <https://www.courthousenews.com/das-demand-ban-on-political-donations-endorsements-by-police-to-prosecutors/> [<https://perma.cc/PSG4-FH5N>].

²⁰⁵ See, e.g., Christopher Slobogin, *The Police: Testilying: Police Perjury and What to do About it*, 67 U. COLO. L. REV. 1037 (1996) (“[L]ying intended to convict the guilty—in particular, lying to evade the consequences of the exclusionary rule—is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: ‘testilying’”).

be done and none of the policies described *supra* will be a complete solution to the problems they seek to address. My hope is that the whole is more than the sum of its parts: the changes underway in SFDAO in 2020 are aimed not just at addressing narrow lacunas in existing policy but rather at reimagining the role of the district attorney altogether. The role of a district attorney should be understood as a community-engaged stakeholder in building broad-based public safety.

SFDAO's work is far from over; we will continue to measure and improve existing policies as well as to implement new ones as transparently and efficiently as can be done safely. Truly addressing the societal issues that drive crime cannot be done through narrow reforms that ignore broader contexts. Promoting public safety means considering public health, education, employment, housing, the environment and more. After all, healthy, equitable communities are safe communities. SFDAO will continue to innovate ways to make San Francisco healthy and equitable for all of its residents, and to encourage other jurisdictions to act more boldly to implement change and to find opportunities in what may at first appear to be obstacles.

When it comes to criminal justice policy there is no shortage of grave, complex, and well-documented problems. Each of those problems presents an opportunity for innovation and for reimagining the role of the prosecutor. I embrace the possibilities.