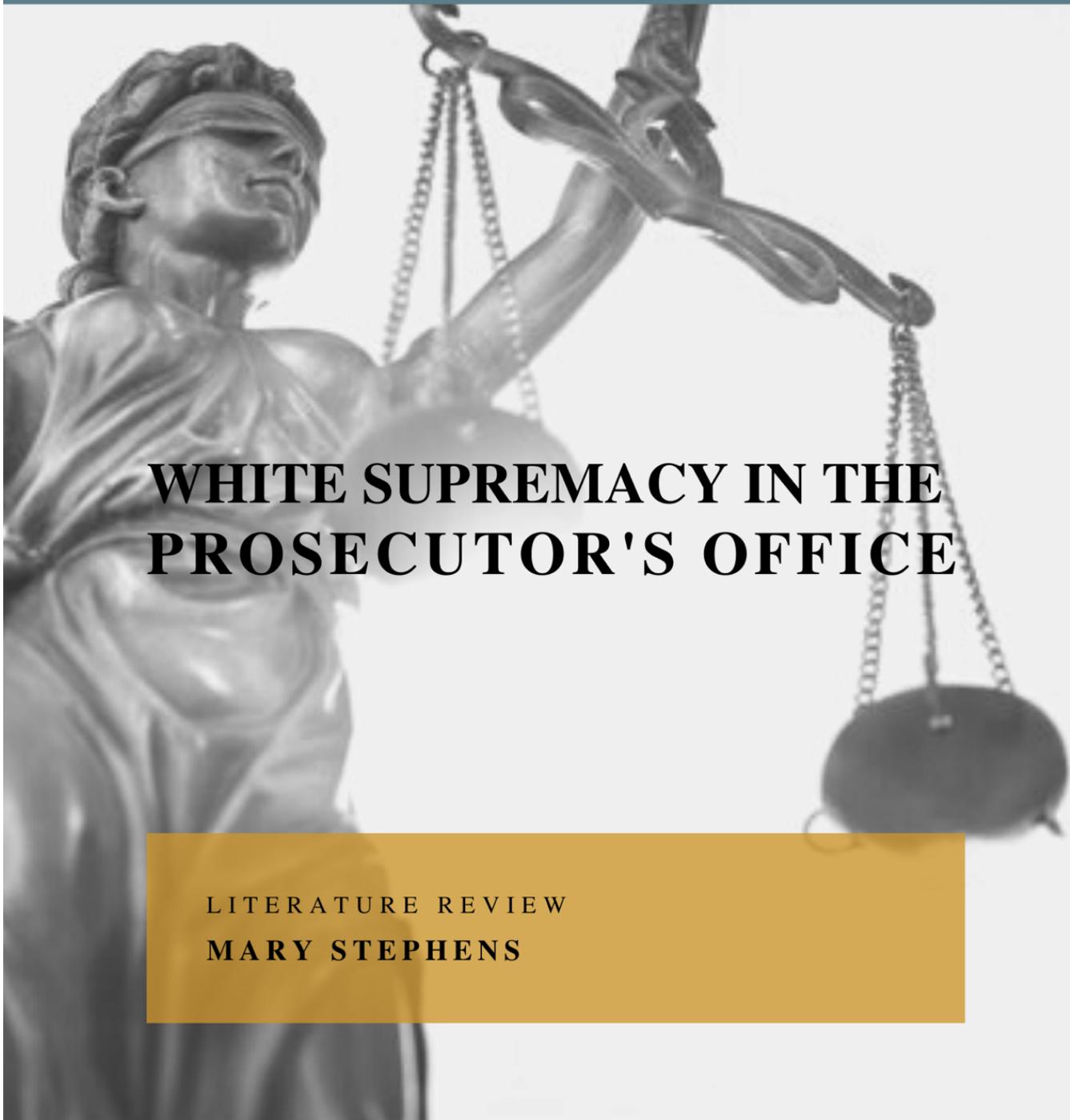


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**WHITE SUPREMACY IN THE
PROSECUTOR'S OFFICE**

**LITERATURE REVIEW
MARY STEPHENS**

Abstract

What role does the prosecutor and prosecutor's office play in further criminalizing Black, Latinx and Indigenous people within the criminal legal system? This review focuses on the ways that White Supremacy Culture influences the decision-making of public prosecutors in unintended ways. The literature posits that without strict oversight and accountability, prosecutors overwhelmingly uphold and advance white supremacist ideologies within the legal system which further criminalizes Black, Brown and Indigenous populations in the United States.

Special Thank You to Dr. Erica Acevedo-Ontiveros and Kate Saunders M.S.

Critical Race Theory

This review utilizes a critical race approach to analyze the literature on race in the prosecutor's office and emphasizes the ways that an ideology rooted in white supremacy culture operates as the foundation of prosecutorial discretion. At its base, Critical Race Theory (CRT) is a legal theory that views race as a social construct and explores the relationship between racial inequality and the law. The Fair Fight Initiative, a law enforcement accountability nonprofit, states, "The core idea [of CRT] is that racism is not merely the product of individual bias or prejudice, but a set of power-relations institutionalized within the structures and policies of our legal system. As opposed to viewing racism as simply a conflict between individuals based on race, CRT posits that racial bias is perpetuated and inflamed by the very structure of our society."¹

As a legal theory, CRT explores and illustrates how the law can promulgate or support racial disparities. As a social theory, CRT recognizes that racism is a social problem. With that dual focus, CRT focuses on institutions, structures, systems, processes, assumptions, discourses, narratives, and large macro processes that have fostered racial inequality. The theory rests on the premise that racial bias – intentional or not – is baked into U.S. laws and institutions. Black Americans, for example, are incarcerated at much higher rates than any other racial group. Critical race theorists hold that racism is inherent in the law as it currently exists.² These laws, when viewed through the framework of CRT, are inherently designed to create and maintain social, economic, and political inequalities between whites and nonwhites, especially Black Americans. In short, CRT invites scrutiny of the criminal legal system's role in that disparity with a dispassionate view that the law is built to ensure state-sponsored premature death to Black and Indigenous and all communities of color as a legal mechanism to promote white-life and ideals of white supremacy. Beyond simply studying these injustices, critical race theorists are

¹ See "Critical Race Theory" in *Fair Fight Initiative*, 2022

² See "Critical Race Theory" in *Fair Fight Initiative*. 2022

generally dedicated to applying their understanding of the institutional or structural nature of racism to the concrete goal of eliminating all race-based and other unjust hierarchies.³

Dr. Sean Walton contends that CRT understands “the concept of White supremacy is invoked to describe a process and persistent state of affairs that is prevalent in the Western world where the interests of White-identified people are given precedence over the interests of other groups through political, social, economic and cultural structures and practices that have evolved over centuries and are maintained and continually recreated by these structures and through individual actors and actions (conscious and unconscious). These structures and practices are generally taken for granted and ‘invisible’ in the normal, day-to-day operation of western societies, particularly to White people.”⁴

The criminal legal system has conflated crime with harm, even where no discernable harm has been committed. The criminal legal system was set up to enforce slavery and has been used ever since to over-police and over-arrest people of color, especially Black people. Throughout its history, the United States has criminalized low-level behavior, often in racist ways. Over-criminalization in the United States is unparalleled in any other modern country and is the direct result of increased criminalization of poverty and non-violent crimes, which disproportionately incarcerates Black, Indigenous, LGBTQ, unsheltered and immigrant populations. More than 80% of all arrests are for low-level, non-violent offenses and conduct related to poverty⁵. In other words, more and more social actions have been named as crimes with the express social function to control certain racialized populations. Renowned critical race theorist and lawyer, Dr. Michelle Alexander, states “that in the 1970s the incarceration rates in the United States increased more than 600 percent until the year 2000. An exceptional growth in the size of

³ See “Critical Race Theory” in *Fair Fight Initiative*

⁴ See Sean Walton’s “Why the Critical Race Theory Concept of ‘White Supremacy’ Should Not Be Dismissed by Neo-Marxists: Lessons from Contemporary Black Radicalism.” *Power and Education*

⁵ The Vera Institute of Justice is dedicated to end the overcriminalization and mass incarceration of people of color, immigrants, and people experiencing poverty.

our prison population, it was driven primarily by the war on drugs...a war that has targeted primarily nonviolent offenders and drug offenders and it has resulted in the birth of a penal system unprecedented in world history. Incarceration rates, especially Black incarceration rates, have soared regardless of whether crime is going up or down in any given community or the nation as a whole.”⁶ Critical race theory concludes that the criminal legal system is an elaborate and deeply flawed network of institutions whose primary function is to maintain social control over “unwanted” populations, and therefore must be reformed or abolished.

The growing resistance to over-criminalization and “tough on crime” discourse is a direct result of the interventions by critical race scholars, lawyers, organizers and abolitionist movements. Critical race practitioners and abolitionists demand reexamination of the relationship between crime and harm. A common principle in all abolitionist movements is to shift from a punitive legal system that favors increasing incarceration, alienation and shame, to a transformative justice system that privileges reparation of harm and practices of accountability.

Prosecutorial Power

“Prosecutors are the most powerful officials in the criminal legal system⁷,” states Dr. Angela J. Davis, Distinguished Professor of Law at American University Washington College of Law and expert in prosecutor power and racism in the criminal justice system. They make the decisions that control the system, and they exercise almost boundless discretion in making those decisions.⁸ One of the most

⁶ See Sarah Childress’, “Michelle Alexander: ‘a System of Racial and Social Control.’” *Frontline PBS*

⁷ See Angela J. Davis’ “The Power and Discretion of the American Prosecutor.” *Égalité Et Discrimination*

⁸ See Angela J. Davis’ “The Power and Discretion of the American Prosecutor.” *Égalité Et*

opaque aspects of the legal system is the power of prosecutorial discretion, which Davis argues is one of the major causes of racial inequality in the criminal legal system. Prosecutorial discretion is the power to decide whether or not to charge a person for a crime, and which criminal charges to file. She argues, “Prosecutors, more than any other officials in the system, have the power, discretion, and responsibility to remedy the discriminatory treatment of African Americans in the criminal legal process” (67). She suggests that this discretion, which is almost always exercised in *private*, gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve.⁹

The legal action group, In Defense Of, argues, “The electorate is supposed to hold these prosecutors accountable. But in reality, voters often do not know who their local prosecutors are or what they do in the courthouse. With largely unchecked power, prosecutors have played a central role in the aggressive expansion of our criminal legal system; in the explosion in our Nation’s prison population; in the code of silence surrounding police misconduct; in the surge in the number of Americans with criminal records; in the tragedy of lives and families and communities whose potential is severely limited by those convictions.” Prosecutors hold almost unlimited, unchecked and private power to make life-altering judgments in four key areas:¹⁰

- power to accuse / charge
- power to request bail and detain
- power of evidence
- power to coerce pleas

Discrimination

⁹ See Bubany & Skillern’s “Taming the Dragon: An Administrative Law for Prosecutorial Decision Making.” *American Criminal Law Review*

¹⁰ See “Power of Prosecutors | In Defense Of.” found in *Brooklyn Defender Services*

These key areas of prosecutorial power reflect some of the most egregious racial disparities in the criminal legal system, disproportionately impacting communities of color in the United States. The American Civil Liberties Union (ACLU) confirms the centrality, and the concomitant dangers, of prosecutorial power, “Approximately 3,000 prosecutors throughout the country are responsible for making decisions that affect the lives of millions of people. The public knows too little about prosecutors and their impact on communities. Although the mandate of prosecutors is to advance justice, many district attorneys have focused on punishment at any cost. This approach has increased the jail and prison population; led to sentences that are too severe for the offenses; produced more wrongful convictions and more death sentences; and sent people with addictions, disabilities, and mental health conditions into jails and prisons who should receive treatment or other social services instead. These consequences of unchecked prosecutorial power burden people of color and the poor disproportionately.”¹¹

In terms of racial disparities in elected prosecutorial offices, a 2017 study found that 95% of elected prosecutors in the US are white.¹² Legal scholar, Dr. Molly Sherwood, connects elected prosecutor’s role to maintaining a structure of white supremacist domination, “Some argue that the shift [toward accountability] was the result of the government's financial interest in trying criminal cases, while others argue that the shift occurred to ensure that "respectable" (white upper middle) classes were responsible for suppressing crime. This theory is supported by evidence in today's criminal legal system where white men do incarcerate Black people at disproportionate rates. In the United States, ninety-five percent of prosecutors are white and seventy-five percent are men. Compare this to the disproportionate incarceration of Black people in the United States. Black people are incarcerated at least triple the rate of

¹¹ See “The Power of Prosecutors.” *American Civil Liberties Union*

¹² See Joe Watson’s “Study: 95 Percent of Elected Prosecutors Are White.” in *Prison Legal News*

white people, and of those serving life sentences, almost half are Black.”¹³ The historical grounds American prosecution was built on do not promote accountability of public safety. Looking at the history of prosecutors and their roles as public officials, the shift to elect them was meant as a means of greater accountability, but their status as elected officials has only been detrimental to enforcing accountability and has instead resulted in prosecutors being less likely to enforce charges against police.¹⁴ Regardless of recent white-led reforms, a 2021 study from The Sentencing Project found that Black Americans are incarcerated at 5 times the rate of White Americans for the same crimes.¹⁵

Power of Discretion and Values of White Supremacy

The concept of cultural hegemony refers to the ways that domination is maintained through cultural, ideological and institutional means.¹⁶ Instead of direct and bodily violence, state and social institutions enact their power through hegemonic means, or the daily disciplining and influence over values, norms, ideas, worldview and behavior in society. Dr. Nicki Cole states, “Cultural hegemony functions by framing the worldview of the ruling class, and the social and economic structures that embody it, as just, legitimate, and designed for the benefit of all, even though these structures may only

¹³ See Molly Sherwood’s, “Missing Link: How Prosecutors Contribute to the Carceral System and Why They Must be Included in the Abolition Movement.” *Georgetown Journal of Legal Ethics*

¹⁴ See Molly Sherwood’s, “Missing Link: How Prosecutors Contribute to the Carceral System and Why They Must be Included in the Abolition Movement.” *Georgetown Journal of Legal Ethics*

¹⁵ See Ashley Nellis’, “The Color of Justice: Racial and Ethnic Disparity in State Prisons” *The Sentencing Project: Research and Advocacy for Reform*

¹⁶ Philosopher and politician, Antonio Gramsci, developed the concept of cultural hegemony while he was in prison in Italy.

benefit the ruling class.”¹⁷ The ideological and cultural norms of the criminal legal system are rooted in slave patrol and protection of white property and in the hegemony of white supremacist values and domination.

In Temo Okun’s much lauded essay, “White Supremacy Culture” (1999), she outlines the connection between culture, power and the normalized characteristics of white supremacy as they dominate every social space and institution. White supremacy as a type of hegemony is understood when Okun states, “it is powerful precisely because it is so present and at the same time so very difficult to name or identify. The characteristics are damaging because they are used as norms and standards without being proactively named or chosen by the group. They are damaging because they promote white supremacy thinking. Because we all live in a white supremacy culture, these characteristics show up in the attitudes and behaviors of all of us – people of color and white people. Therefore, these attitudes and behaviors can show up in any group or organization.”

The causal relationship between prosecutorial discretion and white supremacist values needs deeper examination. However, there is strong evidence to suggest that prosecutorial discretion advances values of white supremacist ideology within the criminal justice system whether intended or unintended. Most racial disparities are caused and/or exacerbated by prosecutors' race neutral decisions which may be influenced by unconscious racism (Davis).¹⁸ As noted by Dr. Cheryl Harris and other critical race theorists, “the tendency to blame an individual for racist views, then prescribing ‘implicit bias training’ as a solution to individual racism, lacks a deeper analysis about the ways “discretion” is less an individual’s choice as it is a structural outcome white supremacist thinking.”¹⁹ Charles Lawrence asserts

¹⁷ See Nicki Lisa Cole’s “What Is Cultural Hegemony?” *ThoughtCo*

¹⁸ See Angela J. Davis’ “In Search of Racial Justice: The Role of the Prosecutor.” *New York University Journal of Legislation and Public Policy*

¹⁹ See Cheryl I. Harris’ “Whiteness as Property.” *Harvard Law Review*

that “the most dangerous form of ‘white supremacy’ is not the obvious and extreme fascistic posturing of small neo-Nazi groups, but rather the taken-for-granted routine privileging of white *interests* that goes unremarked in the political mainstream.” Therefore, we must reexamine the widely held understanding of the relationship between racism and intentionality: although race inequity may not be a planned and deliberate goal of policy neither is it accidental. The patterning of racial advantage and inequity is structured in domination and its continuation represents a form of *tacit intentionality* on the part of white powerholders and policy-makers.

Reformist Strategies

In recent years, a movement toward progressive reformist prosecution as a way to combat racial disparity has emerged as new leaders enter the field. Like many reformist strategies, reform relies on an assumption that with positive intention and practice, institutions can be “fixed” or made to function in more just and equitable ways. Reformist strategies tend to be driven by well-meaning white individuals and leaders, instead of through systemic means. In a 2021 *Atlantic* article, Darcy Covert outlined the general shape of progressive steps, “Progressive prosecutors push for reform from within the criminal justice system, including by making commitments to reduce incarceration, hold police officers accountable, and reallocate funds to public services. But, their far-reaching discretionary power includes virtually unreviewable decisions over which charges are pursued, whether to recommend bail, the offers to make in plea bargaining, and what sentences are recommended.” Progressive prosecutors effectuate their reform agendas by declining to prosecute low-level offenses, expanding diversion programs, and appointing reform-minded individuals to critical positions.²⁰ However, while these reform strategies are imperative, without an understanding of how white supremacy operates as a White Savior, these prosecutors continue the pernicious cycle of white supremacy even in their reformist strategies.

²⁰ See Angela J. Davis’ “Prosecution and Race: The Power of Privilege of Discretion.” *Fordham Law Review*

One example of where white supremacist ideology and practice shows up, *often unintentionally*, is white women's leadership within the criminal legal system. White women have benefited from affirmative action in the criminal legal system and their leadership in decision-making and policy creation are at the fore. This type of feminism relies on the motive of civil rights for women's safety and liberation but many feminists default to white cultural norms of punitive "safety" measures, which almost always negatively impact communities of color at far higher rates than white communities. These policies often center white women's safety and liberation at the exclusion of Black, Indigenous and Latinx women in the US. This feminist turn is known as "Carceral Feminism" [and] describes an approach that sees increased policing, prosecution, and imprisonment as the primary solution to violence against women. This stance does not acknowledge that police are often purveyors of violence and that prisons are always sites of violence.²¹ Dr. Victoria Law looks at the harms of carceral frameworks, she states, "Carceral feminism ignores the ways in which race, class, gender identity, and immigration status leave certain women more vulnerable to violence and that greater criminalization often places these same women at risk of state violence. Casting policing and prisons as the solution to domestic violence both justifies increases to police and prison budgets and diverts attention from the cuts to programs that enable survivors to escape, such as shelters, public housing, and welfare." And finally, positioning police and prisons as the principal antidote discourages seeking other responses, including community interventions and long-term organizing.²²

Many [white] feminist prosecutors grapple with the problem of hyper-incarceration in the United States, and yet commentators on gender crime continue to assert that criminal law is not tough enough. This punitive impulse, prominent legal scholar Aya Gruber argues, is dangerous and counterproductive. In their quest to secure women's protection from domestic violence and rape, American feminists have

²¹ See Victoria Law's "Against Carceral Feminism" *Jacobinmag.com*

²² See Victoria Law's "Against Carceral Feminism" *Jacobinmag.com*

become soldiers in the “war on crime” by emphasizing white female victimhood, expanding the power of police and prosecutors, touting the problem-solving power of incarceration, and diverting resources toward law enforcement and away from marginalized communities.²³ Gruber asserts, “Zero-tolerance anti-violence law and policy tend to make women less safe and more fragile. Mandatory arrests, no-drop prosecutions, forced separation, and incarceration embroil poor women of color in a criminal justice system that is historically hostile to them. This carceral approach exacerbates social inequalities by diverting more power and resources toward a fundamentally flawed criminal legal system, further harming victims, perpetrators and communities alike. In order to reverse this troubling course, Gruber contends that we must abandon the conventional [white] feminist wisdom, fight violence against women without reinforcing the American prison state, and use criminalization as a technique of last--not first--resort.”²⁴

Recommendations

In closing, the literature demonstrates the need for closer examination of how white supremacy culture, values and practice influence prosecutorial discretion. Without deep consideration of how white supremacy culture operates, even well-intended strategies for systemic change run the risk of reanimating the violence of racism they seek to undo. Below are a list of strategies that prosecutors should consider to catalyze anti-racist outcomes. The following recommendations include practices for individual legal practitioners and recommendations for larger systemic change toward Black, Indigenous and Latinx freedom.

²³ See Aya Gruber’s *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*.

²⁴ See Aya Gruber’s *The Feminist War on Crime: The Unexpected Role of Women’s Liberation in Mass Incarceration*.

Key suggestions:

- Approach all policies with Critical Race Theory frameworks;
- Use of racial impact studies in prosecution offices;
- Hire prosecution and racial justice program for internal assessment;
- Mandatory employee training by the Vera Institute.

Critical Race Theory

- All staff should be required to learn and implement critical race analysis in their work.
- Implement a critical race analysis when examining data, rates of change and population demographics.
- Problematize prosecutorial discretion as an always already white supremacist framework of ‘choice’ / authority.
- Include robust conversations and investigations into values of white supremacy culture that operate in all discretionary practices and policy making.
- All staff should participate in learnings toward undoing White Supremacy Culture and practices.

Racial Impact Studies

One suggestion to combat implicit bias in prosecutorial discretion is to use Racial Impact Studies to reveal illegitimate differential treatment based on unconscious racism or class bias, or legitimately different outcomes based on disproportionate offending and uninterested or uncooperative victims. The studies may also reveal that there is no differential treatment, thereby invalidating misperceptions of unfairness. In any case, the availability of the information would be invaluable in improving the overall administration of criminal justice. The racial impact studies would involve the collection and publication of data on the race of the defendant and the victim in each case for each category of offense and the prosecutorial action taken at each stage of the criminal process. The data would be analyzed to determine if race appeared to be related to the prosecutorial decisions. These studies would possibly reveal the racially discriminatory impact of race-neutral discretionary decisions and policies and help

prosecutors formulate policies and guidelines to reduce racial disparities. Finally, I recommended the publication of the studies to inform the general public about prosecutorial practices and enable them to hold elected prosecutors accountable.²⁵

Diversion of Lower-Level Charges

An office may have a policy of declining lower-level charges—such as possession of small amounts of marijuana or small dollar shoplifting cases—even if there is sufficient evidence, because the prosecutor believes the offense does not threaten public safety enough to warrant a response by the criminal justice system. Declining or diverting cases is the most direct way that prosecutors can mitigate the overreach of the criminal justice system. Prosecutors can curb some of the detrimental effects of over-policing, particularly in communities of color, by making thoughtful decisions about when not to prosecute. Find out if your lead prosecutor has a declination or diversion policy that goes beyond cases that lack sufficient evidence—one in which cases are refused based on the office’s priorities and values.²⁶ Work with grassroot organization to build an infrastructure for diversion programs should be a primary focus of an anti-racist prosecutorial office.

Bail

Bail is supposed to ensure that people will return to court for future hearings on their cases. But money bail creates a perverse system in which people with money—regardless of the danger they may present—are able to buy their freedom, while people without money remain in jail. Although prosecutors don’t set bail, they can play a vital role in changing bail practices because their

²⁵ See Angela J. Davis’ "In Search of Racial Justice: The Role of the Prosecutor." *New York University Journal of Legislation and Public Policy*

²⁶ See “Unlocking the Black Box of Prosecution: Key Questions for Community Members.” *Vera Institute of Justice*

recommendations are one of the most significant factors affecting whether bail is set and in what amount.

Eliminate Fees and Fines

Prosecutors should reexamine the impact of fees and fines on criminalization of communities of color.

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