

# Reimagining a Prosecutor's Role in Sentencing

## I. Introduction

Today, more than 2.1 million people are locked up in county jails and state and federal prisons.<sup>1</sup> Decades of research illustrates that mass incarceration tears apart communities, creates vast racial disparities,<sup>2</sup> and perpetuates cycles of intergenerational poverty.<sup>3</sup> Close to one in ten African American students have an incarcerated parent; one in four have a parent who is or has been incarcerated.<sup>4</sup> Incarceration produces devastating consequences for these children. Independent of other social and economic factors, children with incarcerated parents are more likely to drop out of school, to develop learning disabilities, and to suffer from migraines, post-traumatic stress disorder, homelessness, and depression, among other health issues.<sup>5</sup> And when it comes to one of incarceration's primary intents, removing individuals from the community with the goal of rehabilitating them, imprisonment fails miserably. In short, incarceration has left a massive footprint on our society, but there is little evidence of its effectiveness.

A report from the National Academy of Sciences points to the minimal impact of long prison sentences on crime prevention and their negative social consequences as a reason to focus on reducing the number of people behind bars.<sup>6</sup> The system is also immensely expensive, costing approximately \$270 billion annually without generating the basic public safety benefits one would expect from such a high price tag.<sup>7</sup> For all these reasons and more, today there is strong bipartisan agreement among politicians, law enforcement, advocates, and researchers that the draconian criminal justice policies of the past must be reversed. Yet, despite this political momentum in some quarters, pockets of the country are quick to reverse course out of fear of increases in crime. This can be seen in New York's changing attitude toward bail reform. The state's bail reform law was passed by the General Assembly in 2019 and went into effect in 2020. The reforms mandated that defendants who were arrested for most misdemeanors and many nonviolent felonies were to be released without cash bail. When the media and bail reform opponents seized on individual cases involving reoffenses by defendants who were released, some law enforcement officials and policy makers began calling for the law's repeal, perhaps out of fear that the reforms would cause a crime wave across the state and perhaps because they feared that public and media-driven perceptions of crime would detrimentally affect their political livelihoods.<sup>8</sup>

Dismantling such a vast infrastructure requires reform at many levels. Required changes include

- revamping state and federal laws to eliminate incarceration as a sanction for certain offenses and to shorten sentences,
- eliminating cash bail to ensure that fewer people are held pretrial simply because they are too poor to pay the fees,
- increasing funding for public defenders so they can serve more people,
- electing reform-minded prosecutors, and
- persuading prosecutors that their policies can transform the carceral landscape.

When it comes to the complicity of prosecutors in increasing prison populations, the last decade has witnessed the emergence of a new wave of local prosecutors who seek to transform their offices' practices away from past, incarceration-driven policies. Many of those prosecutors have championed treating incarceration as a last-resort sanction and have promised not to prosecute people charged with specific, low-level crimes. For example, in Brooklyn, New York, Kings County District Attorney Eric Gonzalez articulated, in a seventeen-point plan focused on community trust, that "the vision of Justice 2020 is for every [assistant DA] in every case to first seek out non-conviction, non-jail resolutions, and to think through all the available options before reaching a determination that a conviction or incarceration is necessary."<sup>9</sup> In Chicago, Cook County State's Attorney Kim Foxx's office "referred a quarter more people charged with felonies—including drug cases—to diversion programs, including substance use disorder treatment, in her first two years compared with the two years prior, under predecessor Anita Alvarez."<sup>10</sup>

Many of the newly elected prosecutors have also begun to change their offices' overall sentencing practices. In Suffolk County, Massachusetts, District Attorney Rachael Rollins instructed her prosecutors to "factor into all charging and sentencing decisions the potential of immigration consequences."<sup>11</sup> In Philadelphia, DA Larry Krasner ordered prosecutors on his staff to calculate the numbers and contemplate the costs of incarceration associated with each sentencing recommendation.<sup>12</sup> In San Francisco, former DA George Gascón proposed a sentence review unit to comprehensively review, identify, and seek adjustments for past excessive sentences.<sup>13</sup>



**LAUREN-BROOKE EISEN\***

Director, Justice Program at the Brennan Center for Justice, NYU School of Law

**COURTNEY M. OLIVA**

Executive Director, Center on the Administration of Criminal Law, NYU School of Law

*Federal Sentencing Reporter*, Vol. 32, No. 4, pp. 195–201, ISSN 1053-9867, electronic ISSN 1533-8363.  
© 2020 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, <https://www.ucpress.edu/journals/reprints-permissions>. DOI: <https://doi.org/10.1525/fsr.2020.32.4.195>.

While it is heartening to see so many prosecutors focused on diverting people from jail or prison, in instances where incarceration is still relied on, there remains more that can be done to change the culture surrounding sentencing by improving office procedures and bringing about attitudinal changes. For example, most offices don't incorporate longer-term or broader definitions of public safety, such as the basic notion that prison is criminogenic; that reentry concerns should be addressed or at least identified, and accounted for, before prison; and that the long-term impact of incarceration can have devastating emotional and economic effects on a defendant's family members, which can actually undermine public safety.

Americans behind bars still serve extraordinarily long prison sentences, and sentence lengths have been climbing in recent decades. The National Research Council reported that half of the 222% growth in the state prison population between 1980 and 2010 was due to an increase of time served in prison.<sup>14</sup> The Sentencing Project reported that one in nine people in prison is now serving a life sentence, nearly a third of whom are sentenced to life without parole.<sup>15</sup> While many of these people were sentenced years ago, before significant sentencing reform was implemented by state legislatures, the pipeline into prisons continues to run strong. Today, 54% of people behind bars in state prisons are there for violent offenses, illustrating just how difficult it is to significantly cut the prison population by only focusing on low-level offenders.<sup>16</sup> Many of the reforms implemented by a handful of today's prosecutors aim to improve community faith in law enforcement while reducing the justice system's impact on marginalized communities. To make further gains along this path, prosecutors should look to enact modifications related to how their offices treat the sentencing process for more serious and violent crimes.

## II. Clarifying Sentencing Goals

While punishment "is not reducible to a single meaning or single purpose,"<sup>17</sup> our criminal sentences tend to reflect four principles that centuries of punishment practices across the globe exhibit: rehabilitation, deterrence, incapacitation, and retribution. The theory of rehabilitation should perhaps be the most important of these principles. And if that goal is top of mind for many decision makers such as judges, prosecutors, and policy makers, incarceration should be used much more sparingly than it is today.

Rehabilitation is based on the belief that crime is a symptom of a social disease—that individuals who break the law have "identifiable and treatable problems" that produce criminal behavior.<sup>18</sup> Under this philosophy, educational classes, addiction therapy, and vocational training in correctional facilities promote better reintegration into communities once individuals are released from prison. However, in a country known for incarcerating more individuals than any other on the planet, programming is often scarce or nonexistent in prisons, and even more so in jails. A 2016 study by the National Center for Education Statistics

found that only 23% of both state and federally incarcerated adults reported they had participated in a job skills or job training program during their current prison term.<sup>19</sup> This study found that 14% of incarcerated adults were on a waiting list to participate in a job training program.<sup>20</sup> The demand for educational programming in prisons far exceeds capacity. A 2016 Department of Justice report found that over 15,000 individuals were on the waiting list to enter the Literacy/GED program operated by the Bureau of Prisons.<sup>21</sup> Additionally, while almost all federal prisons offer vocational training, only 7% of jails do.<sup>22</sup> These statistics are important because they illustrate that if one defines rehabilitation as a purpose of incarceration, our jails and prisons utterly fail at that task.

Further, research indicates that prison sentences in the United States have grown in length over the years. Between 1993 and 2009, the average prison stay for incarcerated people in state prisons increased by 33%. While the increase in prison stays was most dramatic for violent and public-order crimes, prison stays also increased by 18% for property crimes and by 25% for drug crimes from 1993 to 2009.<sup>23</sup> Yet the proportionality principle, the idea of punishing like cases alike and unlike cases differently, is vital to fair sentencing. Beginning in the 1980s, proportionality began to disappear from the United States as a policy goal for sentencing laws.<sup>24</sup> As noted by the National Research Council, "The principle of parsimony—that the criminal sanction imposed for an offense should be sufficient but not greater than the punishment necessary to achieve sentencing goals—is inconsistent with overly long sentences."<sup>25</sup>

Today's vast infrastructure of mass incarceration indicates that we have moved a long way from those original principles of rehabilitation and proportionality. One of the core goals of sentencing should be to protect public safety while ensuring that sentences are the most proportional and cost-efficient sanction to achieve that goal.

## III. Separating Accountability from Severity

As more local prosecutors acknowledge their power to reduce our nation's carceral footprint by diverting additional people from entering the criminal justice system in the first instance, they must not lose sight of another important power: the power to exercise proportionality during the sentencing phase of a criminal case. Consistent with a commitment to public safety, local prosecutors must do their best to separate accountability (holding someone responsible for a harm) from severity (seeking to maximize state-sanctioned punishment) when they seek resolutions in a given case. This may seem like a theoretical distinction, but it is the desire to maximize punishment that has led us to this moment of mass incarceration.<sup>26</sup>

Admittedly, the goals of public safety and equity can sometimes seem at odds when a prosecutor, during sentencing proceedings, zealously advocates the maximum punishment as a matter of course. While advocacy is certainly part of the prosecutorial role, a growing body of

elected prosecutors has come to recognize that holding someone accountable also means minimizing the direct and collateral harms that the criminal justice system can inflict, incarceration included, whenever possible. Thus, prosecutors must squarely confront this tension—rather than ignore it—and acknowledge that certain policy reforms are necessary in order to account for the long-term consequences that incarceration can impose. Put simply, accountability need not always equate to severity during sentencing proceedings.

A number of newly elected DAs have espoused this sentiment in a variety of policy statements. For instance, in defining a list of principles for the Suffolk County District Attorney's Office, Rachael Rollins acknowledged a responsibility to the very people her Office prosecutes and seeks to confine, and further explained that this responsibility does not end at sentencing.<sup>27</sup> Rollins's memorandum is noteworthy on both of those counts: for explicitly acknowledging an obligation not only to crime victims—or to an amorphous "community"—but to prosecuted individuals; and for recognizing that this obligation extends *beyond sentencing*. In redefining her Office's responsibility to include an obligation to the person prosecuted, she further noted that community-based accountability and community reintegration are goals that her Office will pursue in seeking appropriate case outcomes.<sup>28</sup> Rollins thus recognizes that while incarceration is sometimes necessary, it need not automatically be tantamount to severity.

Other concrete reforms that embody this new ethos can be found in policy memoranda issued by Philadelphia DA Larry Krasner and Delaware Attorney General Kathleen Jennings. In Philadelphia, DA Krasner explicitly directed his attorneys to charge lower gradations for certain offenses and to make plea offers below the bottom end of the mitigated range of the Pennsylvania Sentencing Guidelines for most crimes. He further required them to seek supervisory approval to offer a plea to anything above the mitigated range.<sup>29</sup> In Delaware, AG Jennings released a memorandum that similarly urged prosecutors to exercise restraint in sentencing—a practice that often begins at the screening and charging phase of a case. For instance, Jennings outlined an office-wide policy to refrain from charging multiple "minimum mandatory crimes" when one crime sufficiently accounted for the facts and circumstances of an event.<sup>30</sup> At sentencing, Jennings requires supervisory approval when seeking sentences of more than twenty years,<sup>31</sup> and she similarly urged prosecutors to recommend sentences at the lower end of the sentencing guidelines.<sup>32</sup> Both policies recognize that accountability (i.e., the decision to charge someone and initiate criminal proceedings against them) need not automatically also mean that the most severe penalties should always attach just because they can. Instead, these policy reforms seek to balance the notion of accountability and responsibility with the recognition that incarceration is an outcome that should be tailored and used more judiciously.

#### IV. Expanding the Notion of Sentencing and Public Safety

For the most part, sentencing today is seen as the culmination of a series of steps in the life cycle of a criminal case in which a defendant will be punished for what they have done. On some level, this focus on the defendant is not surprising, given the nature of our adversarial system. But focusing on the defendant in this manner also means a missed opportunity to draw important distinctions between accountability and severity. Moreover, it means that local prosecutors will fail to recognize, as DA Rollins is attempting to do, the responsibility that prosecutors owe to the person they seek to incarcerate. Likewise, it also represents a missed opportunity to acknowledge both the fact that (1) DAs have an obligation to support long-term public safety solutions, including recognizing that incarceration can harm a person's ability to reintegrate into their communities;<sup>33</sup> and that (2) incarceration imposes direct and collateral harm on the larger community, which often includes the defendant and their family members.

As a starting point, a sentencing procedure that looks at someone's long-term risk to reoffend and their odds of successful reintegration has the potential to incorporate reentry planning earlier in the process. This way of approaching sentencing also implicitly acknowledges the defendant's unique risks and needs that must be addressed if they, and their community, are to be made safer. This latter acknowledgment is important because it forces a subtle but powerful shift in attitude. Instead of focusing solely on retribution or punishment as the end goal of sentencing, it opens up space to consider reentry a legitimate factor when shaping a sentence, and it can restore a better sense of proportionality at sentencing.

Currently, reentry planning at or before sentencing is not the norm, and it will likely require a shift in resources, such as hiring social workers and other non-attorneys who are equipped to make these types of assessments. However, such planning is possible to imagine, given that some of this information is already being collected once a defendant enters the criminal justice system and their case begins—such as when a defendant is given a screening tool upon being booked into jail or interviewed by pretrial service agencies, or when a probation officer generates a report to be shared with the parties in advance of sentencing. In other words, what is needed is better coordination by key system actors.<sup>34</sup>

An example of what a reimagined sentencing process looks like can be found in Multnomah County, Oregon, which participated in the national Justice Reinvestment movement, advocating less reliance on prison and reinvestment of cost savings in local communities.<sup>35</sup> The Multnomah County Justice Reinvestment Program (MCJRP) was created in 2014 and sought to implement both case management and treatment planning at the moment a person was arrested and was facing a presumptive prison sentence. The goal in starting immediate case management and treatment planning was to offer the

person intensive supervision in the community, rather than default to incarceration.

Using a model of “informed sentencing,”<sup>36</sup> different system actors collect information about a defendant who is facing a presumptive prison sentence—including probation officers, the court, the prosecutor, and defense counsel. Probation officers will also create an individualized supervision and treatment plan before sentencing, so that it can be utilized at a judicial settlement conference.<sup>37</sup> Individual plans are obviously unique to each person, but they can include provisions for housing, substance abuse treatment, and mental health services, as well as employment or education programming.<sup>38</sup> Importantly, these plans are the result of collaboration between the parties, and the conditions are not standardized but are instead tailored to each person’s criminogenic risks and needs.<sup>39</sup>

While results are still being evaluated, the MCJRP shows reason for cautious optimism. The initial rate of incarceration for the MCJRP group dropped by 49% compared to a pre-MCJRP control group, while 58% of the comparison group were imprisoned in the year after sentencing, compared with only 33% of the MCJRP group. From the lens of public safety, there appears to be no heightened risk to supervising MCJRP participants in the community, and there was no significant difference in their twelve-month rearrest rates or their average number of arrest incidents when compared to the control group. In fact, MCJRP participants had the same or better recidivism rates compared to the control group members who were supervised on traditional probation or post-prison release supervision.<sup>40</sup>

#### **V. Plea-Bargaining as Sentencing: Eliminate Coercion in the Bargaining Process and Eliminate the Trial Penalty**

Despite what many Americans see taking place on their television screens, trials are very rare in American courtrooms. In fact, 97% of federal cases and 94% of state cases end in plea bargains, with defendants pleading guilty in exchange for a lesser sentence.<sup>41</sup> This trend gave prosecutors increased power, in that they can wave mandatory minimum sentences in front of defendants, often persuading individuals to plead guilty in lieu of participating in a trial.

Additionally, because of resource constraints, prosecutors often offer less severe sentences if defendants plead guilty—and penalize those who exercise their right to trial. It is imperative that prosecutors not threaten “resource constraints” as a justification for adding a charge or including a mandatory minimum charge if someone invokes a right to trial. Prosecutors should simply eliminate the trial penalty. By charging only what they can prove and not what they think they might eventually prove, prosecutors can ensure that defendants are not sentenced disproportionately to the harm they caused. For example, DA Kim Foxx has initiated a policy that allows line prosecutors to negotiate more reasonable plea deals and to drop charges for which prosecution would not promote safety and

community well-being. Under her administration, prosecutors dropped over 8,000 cases in 2018, compared with 6,240 cases in 2017.<sup>42</sup> In February 2019, Delaware AG Jennings issued a memo to the state’s deputy attorneys general reforming her Office’s charging practices, including not charging multiple mandatory-minimum crimes, diverting people to treatment programs, and leaving sentence recommendations “open” in plea agreements when appropriate, among other guidelines.<sup>43</sup>

It is also essential that prosecutors give defendants time to consult with their defense counsel and families once an offer is made. Oftentimes, prosecutors will rush offers, telling defendants they have only so many hours or days to accept an offer. Given that there are upwards of 40,000 collateral consequences in the United States that may affect individuals and their families, more time is needed for individuals to truly understand the impact of their potential sentences.

#### **VI. Sentencing Goals and Community Impacts**

Lastly, DAs must be cognizant of the fact that sentencing does not occur in a vacuum. Every time an office decides to incarcerate a person, this decision imposes consequences that extend beyond the immediate loss of freedom for a defendant and reverberate across communities. In other words, the decision to incarcerate impacts people beyond just the person being incarcerated, such as their family members and loved ones. Indeed, families of incarcerated people suffer a range of economic hardships as a result of incarceration. The risk of falling below the poverty line increases by 38% when a father is incarcerated; and in more than two-thirds of cases, incarceration so undermines a family’s financial stability that they have trouble meeting basic needs, such as food and housing.<sup>44</sup> These collateral costs are especially important when one realizes that roughly 1.7 to 2.7 million children have experienced parental incarceration at least once in their lifetime.<sup>45</sup>

Thus, asking prosecutors to acknowledge the full range of third-party effects of incarceration presents a useful opportunity to reframe the purpose of sentencing. A defendant may need to be held accountable, but does this mean that the prosecutors should ignore the costs imposed on a defendant’s family? After all, that family is part of the community to whom the prosecutor is accountable. Stanley Richards, Executive Vice President of the Fortune Society, noted that his own experience with the criminal justice system left him feeling like the prosecutor’s sole goal was the pursuit of punishment—not about connecting his actions to the broader safety of the community or to any notion of accountability.<sup>46</sup> Richards also noted that his incarceration created barriers to seeing his children and repairing his relationships with them.<sup>47</sup>

Richards’s experience is hardly unique, and his observation that incarceration created challenges to his reentry and family rehabilitation is consistent with what we already know—that incarceration can have long-term detrimental outcomes for families.<sup>48</sup> Using the sentencing proceeding

as an opportunity to connect the family of the incarcerated to services they might need is a small step that, like reentry planning more generally, accounts for the fact, well established by research, that families and other social networks play a key role in supporting people's transition back to the community from prison.<sup>49</sup> In many cases, the information a family needs may be readily available through victim services agencies or other programming that is already accessible to a DA's office. In other cases, an office may need to form partnerships with community organizations. However, regardless of the path taken, expanding the idea that victims can include family members of the incarcerated should be seen as a sound policy choice, because it bolsters the social and familial support structures that people will eventually lean on during the reentry process.

One unique method that some prosecutors have begun to incorporate into their sentencing practices is engaging with family members of defendants whose cases they are prosecuting. As of 2015, both San Francisco and New York have incorporated family impact statements into their presentence investigation reports. Family impact statements are designed to help courts, prosecutors, and probation officers make sentencing and supervision decisions that consider the impact of incarceration on families and children. This can help reduce the trauma of children with justice-involved parents.<sup>50</sup> Questions asked when putting together a family impact statement include inquiries about family members and the individual's role and responsibilities within the family.<sup>51</sup>

### VII. Looking beyond Sentencing

Local prosecutors should also use their considerable platform to advocate alternative sentencing mechanisms that can provide for accountability and public safety. For instance, prosecutors can partner with community organizations to create and support diversion programs that, in the first instance, provide opportunities for people to avoid the traditional (and sometimes harsh) consequences associated with traditional case-processing outcomes. Admittedly, however, some diversion programs may not be politically feasible for more serious offenses, which may limit their effectiveness.

Political challenges, however, should not deter prosecutors from exploring alternative mechanisms for holding people accountable for "serious" offenses. Restorative justice (RJ) programs offer DAs an opportunity to work in a community-based approach to respond to the harm that crime causes—serious crimes included.<sup>52</sup> In fact, in both Brooklyn and Washington, D.C., prosecutors have not shied away from using their platforms to support RJ initiatives for "serious" offenses. In D.C., the Attorney General's Office created a first-of-its-kind, in-house RJ program that focuses on juveniles and encourages prosecutors to pursue alternative resolutions to conflicts that occur in communities directly impacted by violence.<sup>53</sup> There are dedicated, full-time staff trained to run RJ circles and to assist D.C. prosecutors as they seek to find ways to

repair harm and make victims whole. While initially met with some skepticism, a number of prosecutors have come to see the value in RJ, and they have begun taking steps toward pursuing RJ outcomes for more "serious" offenses.<sup>54</sup>

In Brooklyn, the DA's Office has partnered with Common Justice to provide RJ programming. Like D.C., Brooklyn has not shied away from using RJ as a response to "serious" or "violent" crime. The Office's partnership with Common Justice demonstrates a commitment to thinking seriously about different case resolutions that do not reflexively fall back on incarceration. Notably, the partnership with Common Justice is not limited to low-level offenses: the Office will refer cases that include assault and robbery, so long as the survivor of those crimes consents.<sup>55</sup>

### VIII. Conclusion

In recent years, the role of the prosecutor has received increased scrutiny. Local prosecutors are well situated to improve the criminal justice system, given their considerable power and discretion in deciding who will become justice-involved and what charge(s) and sentence they may face. This increased scrutiny has led to an emerging trend: a wave of newly elected prosecutors who have explicitly committed to changing their office policies in order to undo overincarceration.

Many of these rollbacks focus on reducing the front-door footprint of our justice system, whether by (1) enacting bail reform to reduce the number of people detained pre-trial; (2) creating office-wide non-prosecution and/or charging policies designed to reduce the number of cases being handled; or (3) creating diversion programs that build "off-ramps" out of the system so that people are not unnecessarily saddled with a criminal conviction. These reforms are crucial in the movement to reduce overincarceration and have the potential to shrink the number of people who ultimately enter the criminal justice system.

However, prosecutors' attempt to counteract overincarceration will be incomplete without acknowledging that there are many people currently serving excessive prison sentences who will not benefit from these "front-door" reforms, and that to the extent their offices still seek prison sentences (albeit for perhaps a smaller subset of offenses), they must confront the culture of sentencing and punishment that has led to these excessive sentences. To engage in comprehensive reform, local prosecutors must squarely address sentencing practices and examine the underlying cultural factors that have historically prevented their offices from disaggregating accountability and severity. They must also be willing to take a broader view of what public safety means, including acknowledging that long prison sentences do not make communities safer and can, in fact, leave people at risk for future criminal involvement. Finally, they must use the platform their office provides them to explore alternatives to traditional sentencing outcomes, such as restorative justice programs, in order to offer better outcomes to the communities they serve.

## Notes

- \* The authors wish to thank Adureh Onyekwere and Ruth Sangee for their significant research assistance.
- <sup>1</sup> Wendy Sawyer & Peter Wagner, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2019 (Mar. 19, 2019), <https://www.risonpolicy.org/reports/pie2019.html>.
- <sup>2</sup> James Cullen, Brennan Center for Justice, *Despite Progress, Prison Racial Disparities Persist* (Aug. 19, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/despite-progress-prison-racial-disparities-persist>.
- <sup>3</sup> Bruce Western & Becky Pettit, Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility* (2010), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf), at 4.
- <sup>4</sup> Leila Morsey & Richard Rothstein, Economic Policy Institute, *Mass Incarceration and Children's Outcomes* (2016), <https://www.epi.org/publication/mass-incarceration-and-childrens-outcomes/>.
- <sup>5</sup> *Id.*
- <sup>6</sup> National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014).
- <sup>7</sup> Executive Office of the President, *Economic Perspectives on Incarceration and the Criminal Justice System*, (2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf).
- <sup>8</sup> Jesse McKinley, *The Bail Reform Backlash That Has Democrats at War*, N.Y. Times (Feb. 14, 2020), <https://www.nytimes.com/2020/02/14/nyregion/new-york-bail-reform.html>.
- <sup>9</sup> Eric Gonzalez, *Justice 2020: An Action Plan for Brooklyn* (2019), <http://www.brooklynnda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf>, at 15.
- <sup>10</sup> Filter Staff, *Chicago's "Progressive" Prosecutor Cut Prison Sentences, Not Felony Drug Prosecutions*, Filter (July 31, 2019), <https://filtermag.org/chicago-prosecutor-sentences-prosecutions/>.
- <sup>11</sup> Daniel Nihanian, *Rachael Rollins Announces New DA Policies in Boston*, Appeal (Mar. 28, 2019), <https://theappeal.org/politicalreport/rachael-rollins-announces-new-prosecutorial-policies-in-boston/>.
- <sup>12</sup> Bobby Allyn, *Philadelphia's New DA Wants Prosecutors to Talk Cost of Incarceration While in Court*, NPR (Mar. 31, 2018), <https://www.npr.org/2018/03/31/598318897/philadelphias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-court>.
- <sup>13</sup> Editorial Board, *Open Forum: SF DA George Gascón's Bold Plan to Address Mass Incarceration*, S.F. Chronicle (June 4, 2019), <https://www.sfchronicle.com/opinion/openforum/article/Open-Forum-SF-DA-George-Gasc-n-s-bold-plan-to-13927482.php?psid=Ne7j>. However, as of December 2019, despite the announcement, San Francisco had not implemented this unit yet.
- <sup>14</sup> National Research Council, *supra* note 6, at 53.
- <sup>15</sup> The Sentencing Project, "Criminal Justice Facts," <https://www.sentencingproject.org/criminal-justice-facts/>.
- <sup>16</sup> E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2014* (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>, at 1.
- <sup>17</sup> David Garland, *Punishment and Modern Society: A Study in Social Theory* 17 (1990) ("[Punishment] is not susceptible to a logical or formulaic definition . . . because it is a social institution embodying and condensing a range of purposes and stored-up depth of historical meaning.").
- <sup>18</sup> Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 70 (2005).
- <sup>19</sup> Bobby D. Rampey et al., *Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training: Program for the International Assessment of Adult Competencies* (2016), <https://nces.ed.gov/pubs2016/2016040.pdf>, at 30.
- <sup>20</sup> *Id.*
- <sup>21</sup> U.S. Dep't of Justice, Bureau of Prisons, Federal Bureau of Prisons Education Program Assessment Final Report (2016), <https://www.justice.gov/archives/dag/page/file/914026/download>, at 22.
- <sup>22</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Education and Correctional Populations* (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.
- <sup>23</sup> Lauren-Brooke Eisen, James Austin, James Cullen & Jonathan Frank, Brennan Center for Justice, *How Many Americans Are Unnecessarily Incarcerated?* (2016), <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated>, at 17. "Length of stay" is commonly used to describe the amount of time a person actually spends in prison, which often differs from the person's sentence length because low-risk inmates can frequently earn release before serving their full sentences.
- <sup>24</sup> *Retributivism Has a Past: Has It a Future?* 9 (Michael Tonry ed., 2011).
- <sup>25</sup> National Research Council, *supra* note 6.
- <sup>26</sup> Jeremy Travis, Carter Stewart & Allison Goldberg, Institute for Innovation in Prosecution at John Jay College, *Prosecutors, Democracy, and Justice: Holding Prosecutors Accountable* (2019), [https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5d6d8d224f45fb00014076d5/1567460643414/Prosecutors%2C+Democracy%2C+Justice\\_FORMATTED+9.2.19.pdf](https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5d6d8d224f45fb00014076d5/1567460643414/Prosecutors%2C+Democracy%2C+Justice_FORMATTED+9.2.19.pdf), at 2-3.
- <sup>27</sup> Rachael Rollins, *The Rachael Rollins Policy Memo* (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>, at 12.
- <sup>28</sup> *Id.*
- <sup>29</sup> *The Intercept*, *Philadelphia DA Larry Krasner's Revolutionary Memo* (Mar. 20, 2018), <https://theintercept.com/document/2018/03/20/philadelphia-da-larry-krasnere-revolutionary-memo/>, at 3.
- <sup>30</sup> Attorney General Kathleen Jennings to Deputy Attorneys General and Staff, Feb. 15, 2019, Delaware Department of Justice, *Fairness and Equality in the Criminal Justice System: Internal Policies*, <https://news.delaware.gov/files/2019/02/Memo-Internal-Policy-Changes-2.15.pdf>, at 2.
- <sup>31</sup> However, this supervisory approval requirement does not apply to violent offenses, sex offenses, or child abuse offenses. This "non-non-non" approach may undermine some of the reforms. See, e.g., Jamiles Lartey, *Can We Fix Mass Incarceration without Including Violent Offenders?*, Marshall Project (Dec. 12, 2019), <https://www.themarshallproject.org/2019/12/12/can-we-fix-mass-incarceration-without-including-violent-offenders>; Eli Hager, *When "Violent Offenders" Commit Nonviolent Crimes*, Marshall Project (Apr. 3, 2019), <https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes>.
- <sup>32</sup> Attorney General Kathleen Jennings to Deputy Attorneys General and Staff, *supra* note 30, at 5.
- <sup>33</sup> The oft-cited statistic is that 95% of people who are incarcerated return to their communities. See National Reentry Resource Center, "NRRC Facts and Trends," <https://csgjusticecenter.org/nrrc/facts-and-trends/>.
- <sup>34</sup> Rachel E. Barkow, *Prisoner of Politics: Breaking the Cycle of Mass Incarceration* 185 (2019).
- <sup>35</sup> "Justice Reinvestment" refers to a data-driven approach to improving public safety that generally reallocates money spent on corrections and uses it to fund community programs that will end the cycle of recidivism. See, e.g., Department of Justice Bureau of Justice Assistance, *Justice Reinvestment Initiative* (2018), <https://bja.ojp.gov/sites/g/files/>

- xyckuh186/files/Publications/fy-2018-justice-reinvestment-initiative-overview.pdf.
- <sup>36</sup> Kimberly Bernard, Amanda Lamb & David Schwager, *Examining the Implementation of Justice Reinvestment in Multnomah County* (2016), <https://multco.us/file/57700/download>.
- <sup>37</sup> *Id.*
- <sup>38</sup> *Id.*
- <sup>39</sup> *Id.*
- <sup>40</sup> *Id.*
- <sup>41</sup> Erica Goode, *Stronger Hand for Judges in the “Bazaar” of Plea Deals*, N.Y. Times (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html>.
- <sup>42</sup> Community Partners by Reclaim Chicago, The People’s Lobby & Chicago Appleseed Fund for Justice, *Sentences of Incarceration Decline Sharply, Public Safety Improves during Kim Foxx’s Second Year in Office* (2019), <https://news.wttw.com/sites/default/files/article/file-attachments/2019-07%20Final-Report-Kim%20Foxx-ForPrint.pdf>.
- <sup>43</sup> Attorney General Kathleen Jennings to Deputy Attorneys General and Staff, *supra* note 30, at 2.
- <sup>44</sup> Barkow, *supra* note 35, at 47.
- <sup>45</sup> Eric Martin, National Institute of Justice, *Hidden Consequences: The Impact of Incarceration on Dependent Children* (2017), <https://www.ncjrs.gov/pdffiles1/nij/250349.pdf>.
- <sup>46</sup> Cyrus R. Vance, Stanley Richards & Courtney M. Oliva, *Institute for Innovation in Prosecution at John Jay College, Prosecutors, Reentry and Public Safety* (2019), [https://cdpsdocs.state.co.us/ccjj/Resources/Ref/2019-09\\_ProsecutorsReentryPublicSafety.pdf](https://cdpsdocs.state.co.us/ccjj/Resources/Ref/2019-09_ProsecutorsReentryPublicSafety.pdf), at 4.
- <sup>47</sup> *Id.*
- <sup>48</sup> Barkow, *supra* note 35.
- <sup>49</sup> Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 Just. Q. 384 (2011), <https://www.pacific-gateway.org/reentry,%20employment%20and%20recidivism.pdf>.
- <sup>50</sup> Lindsey Cramer, Bryce Peterson, Emma Kurs & Jocelyn Fontaine, Urban Institute, *Toolkit for Developing Family Impact Statements* (2015), <https://www.urban.org/sites/default/files/publication/53651/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf>, at 3.
- <sup>51</sup> *Id.*
- <sup>52</sup> Brennan Center for Justice, *Fair and Just Prosecution & The Justice Collaborative, 21 Principles for the 21st Century Prosecutor* (2018), [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf), at 12.
- <sup>53</sup> Office of the Attorney General for the District of Columbia, “Restorative Justice Program,” <https://oag.dc.gov/public-safety/restorative-justice-program>.
- <sup>54</sup> Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers in Restorative Justice*, NPR (July 2, 2019), <https://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice>.
- <sup>55</sup> Common Justice, “Common Justice Model,” [https://www.commonjustice.org/common\\_justice\\_model](https://www.commonjustice.org/common_justice_model).