

# 21 PRINCIPLES FOR THE 21<sup>ST</sup> CENTURY PROSECUTOR



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## Introduction

Prosecutors are charged with addressing violations of criminal law and promoting public safety. In carrying out these responsibilities, they must also bear in mind their role as ministers of justice and consider the rights, needs, and interests of all members of their community — including victims and individuals who are charged with criminal conduct.

Prosecutors wield enormous influence at every stage of the criminal process, from initial charging decisions to the sentences sought and imposed. Along the way, they often control decisions about plea bargains and whether mandatory minimum sentences will be triggered, and thus greatly impact whether (and for how long) defendants remain in jail and prison.

Over the last four decades, the total incarcerated population in the United States has quintupled, to 2.2 million, or nearly 1 out of 100 adults.<sup>1</sup> About 10.6 million people cycle in and out of jail each year.<sup>2</sup> While the causes are complex, it's clear that punitive policies have contributed to the incarceration build-up. These policies have included the war on drugs, over-policing of poor and minority communities, and harsh directives from legislators, like mandatory-minimum sentencing laws. Putting so many people behind bars imposes great costs and burdens on them, their families, and our country.

In recent years, the role of prosecutors has received increasing attention. Given their powers, prosecutors are well positioned to make changes that can roll back over-incarceration. They can use their discretion to improve the overall fairness and efficacy of the criminal justice system and champion priorities that improve the safety and well-being of our communities.

Fairness is paramount. It helps achieve the mission of public safety by building trust, which in turn aids police and prosecutors in solving crime.

The 21 principles below offer practical steps prosecutors can take to transform their offices, and collectively, their profession. The principles include examples of innovative endeavors by prosecutors around the nation, not necessarily as endorsements, but as illustrations of new approaches. We recognize that prosecution is local, and some of these recommendations and examples won't be suited to all jurisdictions. We nonetheless hope that these ideas generate conversation, creative thinking, and change.

The central aspiration of these principles is at once simple and profound: that prosecutors will adopt a new and bold 21st Century vision for meting out mercy and justice.<sup>3</sup>

***“Prosecutors are gatekeepers to the justice system. They have significant discretion to decide whether to press charges and what those charges will be, to pursue charges in adult court and seek the maximum penalties or offer a negotiated plea deal. They can advocate for or oppose treatment-based alternatives to incarceration, and they recommend sentence length. Prosecutors can wield influence over how justice is served.”***

— DISTRICT OF COLUMBIA ATTORNEY GENERAL KARL RACINE



# Part One: How to Reduce Incarceration

## 1. MAKE DIVERSION THE RULE

**Overview:** Well-designed programs that divert people from jail or prison, or from the justice system entirely, can conserve resources, reduce reoffending, and diminish the collateral harms of criminal prosecution. These programs keep people in the community instead of locked up. When diversion precedes charging, participants can stay out of the criminal justice system entirely. After charging or conviction, diversion similarly provides an alternative to incarceration.

### Recommendations

- Design diversion programs for people facing felony as well as misdemeanor charges. Working with people who commit more serious offenses may offer the greatest payoff in terms of reducing recidivism.<sup>4</sup>
- Make sure people aren't denied the opportunity for diversion because they can't pay. Offer programs free of charge or on a sliding scale (i.e., take income into account in setting fees).
- Wherever possible, don't exclude people because of their criminal history, mental illness, or drug use.
- If a case should be dismissed outright, don't route it to diversion instead.
- Ensure that the program matches the risk and needs of the individual. For example, people who are lower risk should be placed in a lighter touch program (or no program at all).
- Carefully consider which program conditions (like abstaining from marijuana use) are necessary to address the underlying causes of misconduct and keep the community safe. Pay attention to whether punitive responses to non-compliance (like ankle bracelets and jail time) serve the purpose of rehabilitation or public safety.
- Don't require defendants to admit guilt to participate if an admission isn't needed to promote the goals of the program.

**Example:** In Washington, D.C., a six-month diversion program, Alternatives to the Court Experience (ACE), serves teenagers who commit offenses like vandalism and shoplifting. The program begins with an evaluation of stress, trauma, and health needs. Program coordinators develop plans that can include therapy, tutoring, mentoring, and school support. ACE has also sent participants to academies run by the National Guard and to after-school boxing programs. In the program's first two years of existence, more than 90 percent of ACE participants were not rearrested.<sup>5</sup>

*"We don't want to push people into the system. We want to steer them from it. ... The system perpetuates criminal activity."*

— 13TH JUDICIAL CIRCUIT (TAMPA, FL) STATE ATTORNEY ANDREW WARREN

## 2. CHARGE WITH RESTRAINT AND PLEA BARGAIN FAIRLY

**Overview:** Prosecutors have nearly unchecked authority to set priorities and choose the criminal charges they file, with enormous leverage over guilty pleas and the final disposition of cases. Too often, prosecutors have historically sought sentences that penalize people who exercise their right to trial, and state and federal prosecutors' associations have lobbied state legislatures and Congress for harsher penalties.

### Recommendations

- Screen cases rigorously and early to determine if evidence supports all elements of the offense so that weak cases can be declined or dismissed. Screening should be the job of experienced prosecutors who look at the accusation and evidence *before* charges are filed.
- Don't file the maximum possible charge as a matter of course. Adopt office-wide policies making clear that charges should reflect the facts and circumstances of each case and be designed to achieve a just result.<sup>6</sup>
- Absent extenuating circumstances (like the protection of a vulnerable witness), don't withdraw a plea offer if a defendant chooses to wait for the results from the Grand Jury, a motion requesting relief from a judge, or a pretrial hearing.
- Don't threaten to seek the death penalty, charge or threaten to charge life without parole or habitual offender (three strikes) offenses, or seek to transfer a case from juvenile to adult court as a way to leverage a guilty plea.
- Don't make a plea offer if you can't prove the charge beyond a reasonable doubt.
- Consider collateral consequences in plea discussions, such as impacts on immigration status.
- Limit the use (or threatened use) of sentencing enhancements (for example, based on criminal history or the presence of a weapon). Require a supervisor's approval when a sentencing enhancement is sought.
- In making sentencing recommendations, consider the systemic or socioeconomic factors that may have disadvantaged the defendant and played a part in bringing him or her before the court.
- In general, do not condition plea offers on the waiver of a defendant's right to seek pre-trial release or discovery, or to litigate constitutional violations.
- Support legislation to reduce sentence lengths and eliminate mandatory minimum sentences and three-strike laws.

**Example:** In 2016, Seattle Prosecuting Attorney Dan Satterberg introduced charging standards designed to ensure that the punishment for an offense is proportionate to the offense (taking into account criminal history) and commensurate with the punishment imposed on others who have committed a similar offense. The standards caution prosecutors against filing every case that can be filed and against overcharging to obtain a guilty plea.<sup>7</sup>

*"I don't particularly care for mandatory sentences. ... I don't think we've seen that that has worked [and] with a different approach we can actually provide more public safety through a more enlightened view on prevention as well as prosecution."*

— DENVER (CO) DISTRICT ATTORNEY BETH MCCANN

In 2018, Philadelphia District Attorney Larry Krasner instructed the prosecutors in his office to make plea offers below the bottom end of the Pennsylvania sentencing guidelines for most crimes. When a prosecutor thinks that an offer at the bottom end would be too low, he or she must seek a supervisor's approval to go higher. When the sentencing guidelines call for a sentence of two years or less, Krasner instructed prosecutors generally to seek probation, another alternative to incarceration, or house arrest.<sup>8</sup>

### 3. MOVE TOWARD ENDING CASH BAIL

**Overview:** Most people in jail in the United States are there because they can't afford bail. This starting point serves no public safety purpose, effectively punishes people for being poor, and pressures them to plead guilty. It costs taxpayers billions of dollars each year, enriching the bail bond industry.

#### Recommendations

- In general, recommend release for defendants, including those charged with felonies, unless there is a substantial risk of harm to an individual or the community. Some states, in lieu of money bail, have directed courts to use risk assessment tools in making determinations about public safety. A note of caution: There is a tension in using these tools. While they have helped reduce reliance on cash bail, some risk assessment tools have been shown to reinforce patterns of racial disparity. For example, arrest history, a variable used in some assessments, has been associated with racial bias.<sup>9</sup>
- Support pretrial services that help people remember to return to court (for example, notification by phone or text).<sup>10</sup> If a defendant has a record of failing to appear in court, consider seeking weekly calls, check-in appointments, or curfews rather than cash bail or detention.
- Publicly support the elimination of money bail. Educate the public, lawmakers, and local criminal justice leaders about the perverse effects of a system in which detention decisions turn on ability to pay rather than public safety.
- Do not seek pretrial detention because a defendant missed a court date if he or she subsequently reports to court.
- Where there are no alternatives to bail, support alternative methods of payment, like debit and credit card payments or unsecured bonds, and support non-profit bail funds, which displace the bail industry.

**Example:** In June 2017, Cook County State's Attorney Kim Foxx announced that her office would recommend releasing people pretrial when they have no violent criminal history, the current offense is a misdemeanor or low-level felony, and no other risk factors suggest they are a danger to the community or will fail to appear in court. Foxx's policy built on her previous commitment to make a similar recommendation of release for people who were in jail because they couldn't afford to post bail of \$1,000 or less.<sup>11</sup>

***"Economic bias has no place in our justice system. By primarily relying on money, our bail system has created a poverty penalty that unjustifiably discriminates against those without resources to pay. Our focus must be on public safety, not on wealth."***

— 9TH JUDICIAL CIRCUIT (ORLANDO, FL) STATE ATTORNEY ARAMIS AYALA

Kentucky has been at the forefront of pretrial reforms since 1976, when the state banned for-profit bail and established a pretrial services agency to analyze defendants' risk of flight and reoffending. In 2011, Kentucky passed a law requiring judges to release pretrial all individuals considered low and moderate-risk for reoffending or flight. Since then, the number of people arrested while out on release has declined every year: in 2015, the rate was only 10 percent.<sup>12</sup> Following this success, the Kentucky Supreme Court instituted automatic pretrial release for most non-violent defendants (excluding those accused of sex offenses) below a certain risk threshold.

## 4. ENCOURAGE THE TREATMENT (NOT CRIMINALIZATION) OF MENTAL ILLNESS

**Overview:** People who struggle with mental illness wind up in the criminal justice system more than they should. As a result, America's largest psychiatric facilities are not hospitals, but jails and prisons. People with mental illness are less likely to make bail and more likely to face longer sentences.<sup>13</sup> They make up a large percentage of death row inmates. Upon release, they are often sent back into the community without a treatment plan or the prospect of good healthcare, and too often find themselves cycling back into the criminal justice system.<sup>14</sup>

### Recommendations

- Encourage the use of public health models as a starting point for developing responses to individuals in crisis and promote community-based services to stabilize people who otherwise end up in jail.
- Support crisis-intervention training of law enforcement to de-escalate situations involving individuals with mental illness and reduce the likelihood of use of force or arrest as a response.
- When possible, divert individuals who struggle with mental illness to treatment instead of making an arrest that can lead to incarceration rather than help. Screen cases before charging to identify individuals in need of mental health services and support.
- Train line prosecutors and staff on the impact of mental illness and trauma.<sup>15</sup>
- If you have a mental health court, make sure prosecutors don't seek to supervise defendants indefinitely simply to make sure they're continuing to access services.
- Work with correctional and mental health staff to reinstate public benefits, such as Medicaid, at the time of release from custody.
- At various stages of the criminal justice process, employ and listen to individuals who have experienced mental illness as advisors, trainers, and peer support professionals.
- Bring together relevant agencies to collaborate on data-sharing, developing exit ramps from the criminal justice system, and filling gaps in community services and support.

***"The jail is not the place to deal with mental health, ... This is not what it was built for."***

— COOK COUNTY (CHICAGO, IL) STATE'S ATTORNEY KIM FOX

**Example:** Miami-Dade County trains police officers to respond to people in crisis so they can better deescalate conflicts. The police have the authority to divert people to treatment instead of jail. When people are booked into jail, they are screened for signs and symptoms of mental illness. Those with a diagnosis who need acute care and are charged with misdemeanors or low-level felonies are transferred to a community-based crisis stabilization unit within 48 hours of booking. These individuals are eligible for treatment, support, and housing services. If they complete the treatment, the charges against them may be dismissed or modified.<sup>16</sup>

In 2010, as State's Attorney in Burlington, Vermont, T.J. Donovan started the Rapid Intervention Community Court to divert into treatment people charged with low-level offenses who suffered from mental illness and addiction.<sup>17</sup> A dedicated staff member in the State Attorney's Office determines eligibility and conducts a risk and needs assessment. The person's case is dismissed if he or she successfully completes the program's requirements. Preliminary research showed that only 7.4 percent of those who did so were convicted of a new crime.<sup>18</sup>

## 5. ENCOURAGE THE TREATMENT (NOT CRIMINALIZATION) OF DRUG ADDICTION

**Overview:** The "war on drugs" has failed to curb drug use or make communities safer.<sup>19</sup> Instead, it has resulted in destructive policing and prosecution, disproportionately affecting communities of color. It's time to move toward decriminalizing drug addiction.

### Recommendations

- Don't prosecute low-level marijuana possession, and don't make exceptions because of someone's criminal record.
- Support legislation that decriminalizes marijuana and reclassifies other simple drug possession as a misdemeanor or civil violation.
- Don't seek mandatory minimum or habitual offender sentences based on underlying charges for drug possession.
- Don't prosecute people who call the police in response to an overdose and don't prosecute individuals for homicide when they share drugs that cause an overdose when there was no specific intent to cause harm or death.
- Expunge (or seek sentencing reductions for) past convictions that would be treated differently today.
- Offer drug treatment programs with evidence-based solutions, such as medication-assisted treatment, and treat use and relapse as a part of recovery. Support medically assisted drug treatment in jails.
- Support needle exchanges and safe consumption sites.
- Support training and access to naloxone and other overdose-reversal drugs.

***"[W]e know substance-use disorder is a disease. That's what the medical science tells us, and it's time we started acting like it and creating a response that's more about help and less about handcuffs."***

— KING COUNTY (SEATTLE, WA) PROSECUTING ATTORNEY DAN SATTERBERG



**Example:** Seattle City Attorney Peter Holmes stopped prosecuting marijuana possession misdemeanors in 2010. Washington State legalized marijuana in 2014, though police can still issue citations for public consumption. In 2018, Holmes moved to vacate the judgments and dismiss all marijuana possession charges brought from 1996 to 2010, citing evidence of racial disparity in arrests.

Seattle also pioneered a widely replicated pre-charge drug diversion program, called LEAD, in 2011.<sup>20</sup> The police can direct low-level drug offenders to community-based treatment and other services instead of prosecution. LEAD participants were 58 percent less likely to be arrested for another offense, compared to others who were criminally charged. In 2018, the Seattle Prosecuting Attorney's Office stopped prosecuting possession of less than a gram of heroin, cocaine, or methamphetamine.

## 6. TREAT KIDS LIKE KIDS

**Overview:** The adolescent brain differs from the adult brain in ways that increase the likelihood of risky and reckless behavior. Neurological development continues until around the age of 25, and most young people who commit crimes don't continue to do so in adulthood. Long-term outcomes for teenagers and young adults are substantially better when they have as little contact with the criminal justice system as possible, or when their cases remain in juvenile court. Prosecutors have enormous power over how teenagers and young adults are treated in the justice system. They influence decisions about whether to bring charges, what charges to bring, whether to transfer a child to the adult system, and whether to ask that a child be incarcerated.

### Recommendations

- Do not prosecute kids for typical adolescent behavior such as fist fights, smoking marijuana, disorderly conduct, or other infractions at school that don't result in serious physical harm.
- In general, don't seek incarceration for teenagers while their cases are pending. If they can't safely stay home, promote alternatives to detention such as community day supervision and treatment centers.
- After conviction, seek alternatives to incarceration for teenagers whenever possible.
- Advocate for diversion programs and specialized courts that address the needs of young adults.
- Work with law enforcement to prevent the interrogation of kids absent the presence and advice of counsel (and parents, when appropriate).
- Recognize that young people accused of crimes often have experienced trauma, and may lack the ability to express remorse, especially in the days and weeks immediately after an offense. Take that into account in charging, plea bargaining, and sentencing.<sup>21</sup>

***"The evidence is clear: Children and young adults are different, the justice system must do better, and prosecutors can lead the way."***

— DISTRICT OF COLUMBIA ATTORNEY GENERAL KARL RACINE

- Recognize that implicit racial bias often affects perceptions of adolescent culpability, predictions about re-offending, and recommendations for punishment or treatment, and develop training and policies to reduce the impact of bias when deciding how to proceed at each stage of a case.
- Protect the confidentiality of juvenile records. Expunge juvenile records for cases that are dismissed or when young people don't incur new charges after a few years.
- Don't ask to try children under the age of 18 in adult court, except in very limited circumstances and based on an evaluation of factors such as the defendant's background and circumstances and the nature of the offense. These decisions should require high-level approval in the office.
- Where a state statute mandates trying a child as an adult for a certain offense, consider charging the child with a lesser-included crime if possible.
- When a child must be tried as an adult, consider a sentence at the low end of state guidelines. In general, advocate for incarceration to be close to home and to include educational and vocational programming.
- Don't seek sentences of life without parole (or de facto life without parole) for those who committed their crime of conviction before the age of 18.

**Example:** The State Attorneys in Jacksonville and Tampa, Florida have put in place a process for issuing citations to many teenagers who would otherwise be arrested.

In San Francisco's Young Adult Court, case managers, who are licensed therapists, evaluate the risks and needs of young people between the ages of 18 to 25 and come up with wellness care plans that can include substance abuse and mental health care as well as educational, vocational, and mentor opportunities. The court accepts teenagers who have committed violent felonies as well as lower-level offenses. The rate of re-arrest for participants between 2015 and 2017 was 15 percent, less than half the rate for juveniles statewide.<sup>22</sup>

## 7. MINIMIZE MISDEMEANORS

**Overview:** Misdemeanor charges make up approximately 80 percent of state and local dockets.<sup>23</sup> The majority are for offenses like trespassing, loitering, prostitution, and drug possession. Arrests and prosecutions for misdemeanors and violations can significantly affect people's lives even when they result in short sentences or probation, costing people their employment, housing, student loans, immigration status, and even their children, and contributing to a cycle of incarceration and poverty that is hard to break.<sup>24</sup>

### Recommendations

- In general, do not charge misdemeanors, such as trespassing or loitering, which are associated with poverty, mental illness, and homelessness.

*"Restraint is the most important power of a prosecutor. We have the power to charge and the power not to charge."*

— VERMONT ATTORNEY GENERAL T.J. DONOVAN

- In general, do not charge sex workers or clients when both parties are over 18 and consent. Don't prosecute underage trafficking victims. Support efforts to decriminalize sex work and instead marshal resources to prosecute trafficking.
- Where it's not possible or doesn't make sense to decline prosecution, develop cite-and-release programs to keep people out of jail.
- Promote systems changes and procedures to ensure that defendants facing misdemeanors as well as felonies have competent lawyers and the cases go before judges.

**Example:** In 2018, two district attorneys in Texas stopped charging people with misdemeanors for possessing small amounts of marijuana. In Nueces County, District Attorney Mark Gonzalez began diverting people to drug education classes, also asking them to pay a \$250 fine or do 25 hours of community service. In Harris County, District Attorney Kim Ogg started sending people to drug education classes without arresting them or giving them a ticket.<sup>25</sup> She also stopped the prosecution of residue amounts of other drugs and ended jail time for small retail thefts.

## 8. ACCOUNT FOR CONSEQUENCES TO IMMIGRANTS

**Overview:** Criminal charges and convictions can trigger detention and deportation proceedings for people who are not U.S. citizens, subjecting them to far greater collateral punishments and taking them away from their families. Being jailed before trial also increases the likelihood of being detained and deported by federal immigration officials. These threats to immigrants discourage the reporting of crimes, making communities less safe.

### Recommendations

- Make sure prosecutors and supervisors understand the immigration consequences of plea deals and defendants receive and understand this information.
- In plea discussions and sentencing recommendations, consider the immigration consequences of a conviction. When two similarly weighted charges have different immigration consequences, choose the immigration-neutral charge.
- Support and streamline processes for vacating convictions when an immigrant who pled guilty was unaware of the immigration consequences or if there are other equitable grounds to do so.
- Work with local authorities to protect against ICE enforcement in courthouses and with probation departments to prevent ICE arrests at probation offices. Alert groups that represent immigrants if ICE seeks to question or detain individuals who come to court.
- Protect immigrants who serve as witnesses and report crimes.
- Speak out for protecting the rights of immigrants and oppose policies that entangle local law enforcement in federal immigration enforcement.

*"The current political situation is driving many people back into the shadows; it's discouraging that it's keeping crime victims from reporting when their fear of deportation is greater than the desire to engage the system."*

—HARRIS COUNTY (HOUSTON, TX) DISTRICT ATTORNEY KIM OGG

**Example:** In 2017, Brooklyn District Attorney Eric Gonzalez hired two experienced immigration attorneys to advise prosecutors on tailoring criminal charges and plea offers to avoid placing defendants at risk of deportation. For example, prosecutors initially charged a green card holder who struck a child with endangering the welfare of a child, which carries deportation consequences. Later, however, they amended the charge to fourth-degree criminal mischief, which carries the same weight under criminal law but bears no deportation risk.<sup>26</sup>

In San Francisco, District Attorney George Gascón has worked to end questioning of witnesses at trial about their immigration status and assigned victim advocates to escort fearful undocumented witnesses or victims through the courthouse. Gascón's policy requires his staff to call the San Francisco Rapid Response Network, a group of nonprofits that can summon immediate legal help, if they learn that federal immigration agents are in the courthouse.<sup>27</sup>

## 9. PROMOTE RESTORATIVE JUSTICE

**Overview:** Restorative justice is a community-based approach to responding to the harm that crime causes. In a group setting, individuals facing charges talk to the people they hurt, sharing stories and working toward accountability, repair, and rehabilitation. Restorative practices can be part of the criminal court process or a substitute for it. Research shows that crime victims often do not feel that prosecution and sentencing serve them well; restorative justice can help address their concerns.<sup>28</sup> These programs also have a consistent track record of achieving lower rates of recidivism than traditional penalties, including for serious offenses.

### Recommendations

- Learn about and visit best-practice restorative justice programs.
- Establish restorative justice programs, or if they already exist in the community, refer cases to them and treat the outcome as the resolution of the charges.
- Consider restorative justice for adult and juvenile misdemeanor and felony offenses, including cases involving violence and injury.
- Unless necessary for public safety, don't exclude participants because of their criminal records.
- When possible, and with participation by crime victims if they are interested, refer cases to restorative justice programs before arraignment.
- Ensure that statements made during the restorative justice process can't be used against the defendant if the case returns to court.

**Example:** Common Justice is an alternative-to-incarceration program in New York for violent felonies like assault and robbery. Potential cases must be approved by the Brooklyn

***"I don't think our primary responsibility should be incarceration. That should be the last option. The first option is making sure people are truly accountable and admit what they've done wrong and to try to make amends with the victims in the ways that they can."***

— KINGS COUNTY (BROOKLYN, NY) DISTRICT ATTORNEY ERIC GONZALEZ

or Bronx District Attorneys. Victims and defendants must agree to participate.<sup>29</sup> A trained facilitator helps the parties address the impacts of the crime, their resulting needs, and for the responsible party, his or her obligations. Together, the parties agree on possible remedies, including restitution, community service, and commitments to attend school or work. Responsible parties also complete a 12 to 15 month violence intervention program. Program staff monitor the responsible party's adherence to the agreements and participation in the violence intervention program, and those who complete the program successfully do not serve the jail or prison sentences they would face otherwise.<sup>30</sup>

District of Columbia Attorney General Karl Racine launched an in-house restorative justice program for young people in 2016. At restorative justice conferences, victims meet with those who have done them harm. Over 100 cases have been referred, and more than 80 percent of the young people who completed the program have avoided re-arrest. The program has several full-time facilitators who are not attorneys. Prosecutors are required to observe at least one restorative justice conference to build understanding and acceptance of alternatives to the traditional court system.

## 10. SHRINK PROBATION AND PAROLE

**Overview:** The number of people under some form of probation or parole in the United States is about 5 million.<sup>31</sup> This number is far too high, and periods of supervision are far too long. Supervision increases the likelihood that people who are otherwise at low risk of reoffending will end up incarcerated for technical violations that have little to do with public safety. The majority of violations occur within the first year, suggesting that supervision beyond that point serves little to no rehabilitative purpose. Some states have shortened supervision periods with no increase in crime or recidivism.<sup>32</sup>

### Recommendations

- Limit probationary terms after prison to one year, unless there is a compelling reason for a longer term. (For example, if probation is an alternative to incarceration as opposed to an addition to it, a longer term may be appropriate.)
- If longer terms are imposed at the outset, consider supporting requests to terminate parole and probation early for people who have fully complied with the terms of their supervision for one year.
- Limit supervision after local jail sentences to six months.
- Don't treat the use of marijuana or alcohol as a violation of supervision.
- Advocate with parole and probation departments for the use of graduated sanctions for violations. This means starting with mild sanctions (such as community service), and only if necessary moving to moderate sanctions (day reporting centers, intensive supervision) or more serious ones (ankle bracelets and brief jail stays). Don't advocate sending people back to jail for technical violations of their supervision.

***“Often thought of as a grant of mercy or slap on the wrist, parole and probation are a deprivation of liberty and can serve as an unnecessary trip wire back into incarceration.”***

— PHILADELPHIA (PA) DISTRICT ATTORNEY LARRY KRASNER



**Example:** In 2017, the members of the Georgia Council on Criminal Justice Reform, including Houston County District Attorney George Hartwig, unanimously recommended less monitoring for low-risk people on probation after two years of good behavior. The recommendation became law, and within six months affected almost 18,000 felony probation cases.<sup>33</sup> In 2018, 45 prosecutors signed on to a statement that recommended shrinking probation and parole populations, and the district attorneys in Philadelphia and Salt Lake County publicly stressed the importance of these reforms.<sup>34</sup>

## Part Two: How to Increase Fairness

### 11. CHANGE OFFICE CULTURE AND PRACTICE

**Overview:** Prosecutors are the gatekeepers of America’s criminal justice system. The policies and incentives they put into place, and the dynamics inside their offices, have a tremendous effect on the pursuit of justice in their community and the system as a whole. Prosecutors can design (or redesign) key features of the system to make it more accountable, equitable, and just.

#### Recommendations

- Work with other agencies to gather and share data on charging, plea dispositions, and sentencing (including racial disparity), findings of prosecutorial misconduct, pretrial detention rates resulting from an inability to pay bail, diversion participation and completion, charging children as adults, and other outcomes that will help your office achieve more just results.
- Adopt performance standards that reflect your values. Instead of evaluating performance based on number of convictions, trial wins, or lengths of sentences, prosecutors should encourage desired outcomes by adopting metrics like reducing incarceration, pretrial detention, and recidivism. You can measure progress by comparing rates from year to year or to other similar jurisdictions. Include these measures in promotion decisions.<sup>35</sup>
- Make data available to the public so you can be held accountable for the performance of the office.
- Conduct mandatory trainings on issues like implicit bias, debunked forensic methods, false confessions, and witness identification.
- Set procedures for defense attorneys to appeal to a supervising prosecutor if they think a charge or plea offer is unfair.
- Consider requiring a supervisor’s approval to charge potentially problematic cases, such as those with only one witness, jailhouse informants, or witnesses with credibility issues.
- Hire a diverse staff across all levels of seniority and report on staff diversity. In mid to large offices, hire a director of diversity and inclusion. Research has shown that across disciplines, teams that include people from a variety of racial, ethnic, and religious backgrounds are more

***“You have to train people, re-educate them, and change the culture so that people understand their job is not to obtain convictions. Their job is to seek justice.”***

— 13TH JUDICIAL CIRCUIT (TAMPA, FL) STATE ATTORNEY ANDREW WARREN

effective and more open to new ideas. Some research shows that increasing the number of minority prosecutors in an office decreases racial sentencing disparities.<sup>36</sup>

- Circulate surveys and seek input from partner agencies to gauge community satisfaction and identify concerns.
- Encourage prosecutors to engage in community outreach,<sup>37</sup> for example by coaching Little League teams, speaking at elementary schools, and mentoring at-risk kids. Consider setting up local storefronts so prosecutors are present in neighborhoods.
- Set up programs and opportunities for prosecutors to meet with formerly incarcerated individuals and their families and with people who have been exonerated (and do so early in prosecutors' careers). Prosecutors should also be expected to visit prisons and jails where the people they prosecute are held.

**Example:** Cook County State's Attorney Kim Foxx released a detailed and accessible data-based report on criminal justice in 2017. To exemplify transparency, the report included info-graphics illustrating the most common types of offenses, the race and ethnicity of people charged, and how cases were resolved in each category of offense. Cook County also created a position for diversity and inclusion director. The Brooklyn DA's office established a policy requiring supervisor approval for cases involving only one witness. The San Francisco DA's office has a Neighborhood Prosecutors Program, in which five ADAs work in the field alongside police and local community groups.<sup>38</sup>

## 12. ADDRESS RACIAL DISPARITY

**Overview:** Extensive evidence shows that racial disparity exists at every stage of the justice system.<sup>39</sup> Possible causes include over-policing of communities of color, and overt and implicit bias.<sup>40</sup> Prosecutors must confront these issues by looking closely at the relevant data and working to promote equity and a healthier, more cooperative relationship with the communities they serve.

### Recommendations

- Publicly commit to reducing racial and ethnic disparities that arise from prosecutorial practices.
- Engage the community and the office in a reflective conversation about the role of prosecutors in racial inequity. Implicit bias training should be part of this process.
- Track and release race and gender data for actions including bail requests, charging children as adults, other charging decisions, plea bargains, sentencing recommendations, and parole board recommendations. Permit an outside source to review the data, evaluate disparities, and make recommendations to reduce them.
- Use risk assessment tools with caution. Educate staff and other stakeholders about the potential to compound bias and consider tools designed to actively reduce racial disparities.<sup>41</sup>

*"Our justice system isn't suffering from sentences that are too short, but rather from inequities that have resulted in a loss of confidence and trust among communities most impacted by crime."*

— KING COUNTY (SEATTLE, WA) PROSECUTING ATTORNEY DAN SATTERBERG

- Make it part of the office's mission to reduce racial disparities that arise from police practices. Work with police and other agencies to meaningfully compare and address racial disparity at different points in the system. If you meet resistance, propel changes to police practice by declining to proceed with cases that are clouded by a pattern of racist conduct.

**Example:** After Milwaukee District Attorney John Chisholm took office in 2007, he opened his office's files to the Vera Institute of Justice for an analysis of racial disparity. Vera's research illustrated a higher rate of prosecution of black people arrested for possession of drug paraphernalia. In response, Chisholm stopped prosecuting most paraphernalia cases, instead referring people to treatment programs. The rate of prosecution for the remaining cases equalized for black and white defendants.<sup>42</sup>

## 13. CREATE EFFECTIVE CONVICTION REVIEW

**Overview:** Conviction Review Units (CRUs, also called Conviction Integrity Units) scrutinize old cases to determine whether the outcomes were tainted by unjust practices, faulty evidence, or bias.<sup>43</sup> CRUs provide helpful mechanisms for revisiting cases which an office previously believed to be justly prosecuted but which, in fact, may be materially flawed. Since they were first created in the early 2000s, CRUs have expanded from reviewing claims of actual innocence to reviewing violations of due process and corrupt law enforcement practices. Some offices are considering extending these principles to the review of past excessive sentences.

### Recommendations

- Create a CRU (or another conviction review process) if your office does not already have one. Small to mid-sized offices may consider partnering with a local law school, innocence project or law firm to expand capacity.
- Consider extending the CRU's mandate beyond claims of actual innocence by also scrutinizing cases in which a serious violation of a defendant's rights or other miscarriages of justice may have contributed to his or her conviction.
- Don't exclude convictions from review because they're based on guilty pleas, appeals are pending, or a defendant has served his or her sentence. Include misdemeanors if a systemic failure, for example in a crime lab, led to guilty pleas of innocent people.
- Review convictions that relied on discredited forensic methods like bite-marks or questionable diagnoses of shaken baby syndrome.
- Support efforts to provide compensation for the wrongfully convicted, restoration of rights, and expungement of wrongful convictions.
- Use the CRU as a tool for identifying and addressing the root causes of flawed prosecutions, such as *Brady* violations or reliance on discredited science, and incorporate lessons learned into officewide training and policy changes.

***"I strongly believe a prosecutor's commitment to do justice must include a process to ensure that no one has been wrongfully convicted. This goal should be in mind throughout the entire prosecution process, including after a criminal conviction is secured."***

— BOULDER (CO) DISTRICT ATTORNEY MICHAEL DOUGHERTY

- Create a process for reviewing and supporting clemency and pardon requests, as well as other relief for long sentences that raise concerns about proportionality and fairness, or that are being served by individuals who are elderly, ill, and no longer pose a danger to the community.
- Structure the unit to demonstrate its independence and importance to the office. The CRU should be led by a respected senior lawyer who reports directly to the DA and be staffed with prosecutors and investigators committed to its mission. The CRU should be housed outside of the appellate unit.
- Consider engaging outside expertise and reinforcing confidence in final decisions by creating an external advisory board for the unit.
- Release annual reports of the CRU's work and the outcomes that result, including internal reforms.

**Example:** In Brooklyn, the late District Attorney Ken Thompson created a model Conviction Review Unit in 2014 and hosted a summit on wrongful convictions the following year. Brooklyn's CRU has had nine full-time attorneys and three investigators, and had exonerated 24 people as of July 2018. It has an external advisory board that reviews case referrals, investigations, and determinations before they are finalized. Its scope is not limited to claims of actual innocence. In San Francisco, the discovery of racist and homophobic texts by San Francisco police officers led District Attorney George Gascon to convene a task force, including three retired judges, to review more than 3,000 cases connected to the police officers implicated in the scandal.<sup>44</sup>

In 2009, Seattle Prosecuting Attorney Dan Satterberg recommended clemency in the case of a man sentenced to life in prison under Washington's three-strikes law. Since then, the office has continued reviewing old cases with life sentences (often involving a minor third-strike charge), recommending clemency for 19 defendants through fall 2018.<sup>45</sup>

## 14. BROADEN DISCOVERY

**Overview:** Discovery — the process for sharing information with the defense — is essential to the fair administration of justice. Without the information the state gathers through its police powers, defendants cannot make informed decisions and defense attorneys cannot provide effective counsel. Studies have shown that withholding evidence results in disturbingly high levels of the miscarriage of justice.<sup>46</sup> When prosecutors take an expansive approach to discovery by making early and broad disclosures, they enhance the prompt and fair resolution of cases and increase the accountability of law enforcement.

### Recommendations

- Establish an open-file policy, disclosing all relevant evidence to the defense, with case-by-case exceptions as necessary to protect witness safety, prevent witness tampering, or shield sensitive private information. Protect witness safety and privacy by redacting materials, as opposed to refusing to turn them over, whenever possible.

*"It's very unjust to put defendants in a position where their lawyer can't protect them because they don't know what the state has."*

— WYANDOTTE COUNTY (KANSAS CITY, KS) DISTRICT ATTORNEY MARK DUPREE

- Share the police report and other materials in the government’s possession as soon as possible after charges are filed. As more evidence is gathered, it should be disclosed when it becomes available, before plea discussions and in ample time to prepare for trial.
- Form a committee to decide how to collect and disseminate to the defense and courts findings of misconduct in police personnel files. Consider creating a database that all prosecutors in the office can easily access and that includes information on police officers who have been found to have lied in the course of their jobs, committed civil rights violations, or used excessive force. Establish clear guidelines about how police are to be included or removed. Flag cases involving officers in the database for the prosecutors handling them.
- Designate an ethics officer to advise staff, provide training, and address allegations of misconduct in the office.
- Explain disclosure obligations to the police and other agencies (like crime labs). Require police to sign a statement in every case charged stating that all relevant documents have been provided to the prosecutor.
- Institute rigorous training and supervision to ensure compliance with the office’s open-file policy. Recognize staff who catch and remedy disclosure errors or near misses.
- Ensure appropriate consequences for prosecutors who improperly and intentionally fail to disclose evidence, including discipline, firing, and reporting ethical violations to the state bar.

**Example:** In Lowndes County, Mississippi, District Attorney Scott Colom has instituted an open discovery policy: Prosecutors are instructed to give all information they receive from law enforcement to the defense. In Kansas City, Kansas, District Attorney Mark Dupree has a similar practice, requiring prosecutors to provide all discovery to the defense immediately upon request.<sup>47</sup>

Seattle Prosecuting Attorney Dan Satterberg negotiated an agreement with law enforcement for facilitating comprehensive disclosure of information on police misconduct. A committee in his office is responsible for collecting and reviewing information regarding officer misconduct, including dishonesty or bias, so prosecutors have a systematic way to satisfy their disclosure obligations if they call police officers or crime lab technicians as witnesses.

A few states have passed open-file discovery laws. North Carolina requires prosecutors to share “any other matter or evidence obtained during the investigation of the defendant,” with limited exceptions to protect witnesses and the integrity of an investigation. Texas directs prosecutors to provide nearly all relevant evidence to the defense “as soon as practicable.” If not, the prosecutor could face discipline.



## 15. HOLD POLICE ACCOUNTABLE

**Overview:** Most police officers take great care to protect and respect the communities they serve. But when they do not, their actions can taint their departments and the justice system. When an officer is credibly accused of using excessive force or engaging in misconduct, the allegations must be thoroughly investigated. The role of prosecutors in addressing these cases is complicated by the close working relationship they have with local police departments, which can lead to conflicts of interest or the appearance of such conflicts, undermining public confidence. Investigations and prosecutions of police officers should be safeguarded by procedures focused on ensuring independence, impartiality, and transparency.<sup>48</sup>

### Recommendations

- If feasible, create an independent unit for internal investigations staffed with senior prosecutors and experienced investigators. The unit should report directly to the district attorney or his or her chief deputy. The investigators should have no daily contact with, or reliance on, the local law enforcement agency under investigation.
- Work with local law enforcement on a plan of action in the case of officer-involved shootings and misconduct allegations. The plan should include immediate notification of the DA's office, an opportunity for personnel from the office to go to the scene, and timely sharing of information and investigation of the misconduct by an entity other than the employing agency.
- Work with law enforcement partners on public disclosure of body and dash-cam videos. Adopt a policy requiring prompt release of the videos in the event of an officer-involved shooting or allegation of excessive force (absent legitimate and specific concerns about witness safety, privacy, compromising the integrity of the investigation, or prejudicing a jury).
- Consider creating an external advisory board to make recommendations before a final charging decision. If permitted, release the record of a grand jury proceeding when there is no indictment. Issue a public report detailing the investigation and explaining the findings.
- Make public all policies and protocols related to investigations of law enforcement misconduct. Report investigations, prosecutions, and dispositions regarding police-involved incidents annually.
- Support a second-look review by the state Attorney General's office or an independent prosecutor when your investigation does not result in a decision to file criminal charges.
- Support changes to state law if needed for independent and effective investigations, including reforms that ensure that police are not investigated by the agency that employs them.<sup>49</sup>

***"A police officer's word, and the complete veracity of that word, is fundamentally necessary to doing the job. Therefore, any break in trust must be approached with deep concern."***

— ST. LOUIS (MO) CIRCUIT ATTORNEY KIM GARDNER

**Example:** In 2016, the San Francisco District Attorney's office created an Independent Investigations Bureau to investigate and review all officer-involved shootings and other cases of excessive use of force. The staff, composed of six attorneys, six investigators, and two paralegals, were hired from outside the DA's office and the San Francisco Police Department. The unit operates independently to address concerns about the close working relationship between prosecutors and the police.<sup>50</sup>

## 16. END THE POVERTY TRAP OF FINES AND FEES

**Overview:** When fines are imposed after a conviction, they're intended as a form of deterrent and punishment. Fees in criminal court play a different role: they shift the costs of the criminal justice system from taxpayers in general to the people who appear in court. While fines have a place as an alternative to incarceration, when they are levied without regard to a person's ability to pay, they can trap poor defendants in a cycle of incarceration and debt. Fixed fines, as well as fees, are also unfair: a \$200 fine or fee can pose an annoyance for an affluent person and a financial calamity for an indigent one. While debtors' prisons are illegal, they effectively exist when people are sent to jail, or otherwise stuck in the criminal justice system, because they can't afford to pay fines or fees. And pursuing unpaid debt may cost the state more than the revenue it brings in.<sup>51</sup>

### Recommendations

- Speak out about the injustices caused by fines and fees and support efforts to fund courts in a way that reduces reliance on revenue from fines and fees.
- Advocate for assessing fees and fines on a sliding scale based on income and assets, taking into account debts and financial obligations such as child support and health care costs. This model has been successfully implemented in countries around the world.<sup>52</sup>
- Support reasonable payment plans, and oppose requiring people to return to court again and again because of incomplete payments. Advocate against excessive late fees, payment plan fees, collection fees, and interest payments.
- Advocate for the elimination of driver's license revocations and suspensions for nonpayment of fines and fees. Work with courts to reinstate licenses and create diversion programs for people arrested for driving on a suspended license when the suspension is for unpaid fines and fees.
- Advocate for the elimination of all fines and fees in cases involving children and teenagers under the age of 18.
- Support defense motions to reduce or waive fines and fees based on indigency. Don't ask to jail people because they can't pay their fines or fees and eliminate the use of arrest warrants for non-payment.

***"People shouldn't be punished without due process because of their lack of funds. This allows everybody equal access to the justice system, not access based on ability to pay."***

— SAN JOAQUIN COUNTY (STOCKTON, CA) DISTRICT ATTORNEY TORI VERBER SALAZAR

- Eliminate fees for diversion programs. If there is no way to avoid fees, use a sliding scale and do not restrict access to diversion for people who can't afford to pay associated fees. Oppose continuing or extending probation solely because of unpaid fines and fees.

**Example:** Sliding-scale fines have worked in the U.S. When a Staten Island court replaced fixed fines with sliding-scale fines in 1988, both collection rates and amounts collected increased.<sup>53</sup> Over the past year, California, Maine, and Mississippi have eliminated driver's license suspension for nonpayment of fines and fees.<sup>54</sup> In Minnesota, prosecutors are lobbying legislators to end driver's license suspensions for nonpayment of fines and fees.<sup>55</sup> Washington state eliminated interest on fines and fees, while California and the cities of Philadelphia and New Orleans have eliminated fees in juvenile cases.<sup>56</sup>

The Cook County State's Attorney's Office charges no fees for its diversion programs, which serve about 5,000 defendants a year. The programs are funded through municipal and county budgets, federal grants, and partner organizations.<sup>57</sup>

## 17. EXPUNGE AND SEAL CRIMINAL RECORDS

**Overview:** About 70 million Americans have a criminal record, the same number as have a college education.<sup>58</sup> A criminal record makes it harder to get a job or find housing, accounting for high rates of homelessness among people leaving prison. People may lose access to public benefits and become ineligible to receive federal loans. State laws may bar them from voting or obtaining professional and occupational licenses. Research shows that the stigma of having a record is worse for minority job applicants than for white ones, which means racial disparity in the system continues to affect people long after their sentences are served.<sup>59</sup>

### Recommendations

- In general, support petitions for expungement or sealing of records when permitted by statute.
- Support automated expungement for acts that are no longer criminal (for example, marijuana possession after state legalization). Support automated sealing or expungement for arrest records that did not lead to charges or convictions, or after a certain period of time has passed.
- Support clinics and amnesty programs to expunge records and clear old warrants in partnership with the court or the defense bar.
- In general, don't object to reinstating drivers' licenses, or to applications for certificates of relief from disability, which inform prospective employers or landlords that an individual has been rehabilitated.
- Host workshops for job trainings, resumé programs, and mock interviews. Encourage employers to hire people with criminal records.
- Support efforts to eliminate restrictions on expungement and sealing, such as long waiting periods.

*"Prior convictions can leave a lasting mark on an individual's record and life. We must continue to seek opportunities ... together with the community to ease tensions and clear old convictions."*

— CONTRA COSTA COUNTY (MARTINEZ, CA) DISTRICT ATTORNEY DIANA BECTON

- Support increasing the age for juvenile sealings from 18 to 21.
- Support efforts to ensure accuracy of criminal records, laws that require private databases to regularly remove expunged or sealed records, and ban-the-box legislation that bars employers and housing and other social service providers from asking early in the application process about criminal records.

**Example:** The State Attorney in Broward County, Florida runs one-day workshops to help people fill out paperwork, get fingerprinted, and submit their expungement applications, a process that usually takes several weeks. The San Francisco District Attorney's office is currently identifying and automatically expunging thousands of old marijuana convictions. The Pennsylvania District Attorney's Association recently supported a Clean Slate Bill (which became law) to seal some arrests and minor convictions.

The Portsmouth, Virginia, Commonwealth's Attorney's Office offers a monthly seminar to help residents remove crimes from their records and restore their rights.<sup>60</sup> The Albany County District Attorney's Office helps people navigate New York's newly passed statutes to seal their criminal records.<sup>61</sup>

## 18. PLAY FAIR WITH FORENSIC EVIDENCE

**Overview:** The power of forensic science is unmistakable. Advances in science and technology have helped solve crimes and exonerate people who were wrongfully convicted. The continued use of unreliable and misleading forensic evidence, however, imperils the integrity of the criminal justice system. It's critical for prosecutors to promote efforts that strengthen the reliability of forensic evidence and inform courts and jurors of its limitations.<sup>62</sup>

### Recommendations

- Stop using scientifically invalid evidence. Examples include: comparison of bullet leads, fire and bloodstain patterns, bite marks, shoe prints, and hair matching.
- Ensure that other types of forensic evidence used are foundationally valid and valid as applied (meaning that the particular method used by the examiner has been validated in contexts like the one at issue in the case).<sup>63</sup>
- Do not offer forensic evidence supported only by an expert's experience, as opposed to validated methods and studies.
- Critically and continually examine emerging scientific literature, which may also call old methods into question, and train staff about these changes.
- Train prosecutors to understand the validity of the proffered evidence and expert testimony. Don't let an expert declare a "match" to a degree of certainty that's not supportable. Juries overvalue such testimony.

***"My primary concern, in any case, is doing the right thing, no matter the optics, the political pressure, or any external considerations."***

— NUECES COUNTY (CORPUS CHRISTI, TX) DISTRICT ATTORNEY MARK GONZALEZ

**Example:** In 2016, the Texas Forensic Science Commission conducted a six-month investigation into the use of bite-mark testimony, which had led to wrongful convictions and lacks scientific validation according to the National Academy of Sciences. The investigation showed that board-certified forensic dentists who analyzed photographs of injuries could not agree on which ones were bite marks. The commission also heard testimony from experts on both sides of the debate. At the conclusion of the investigation, the commission placed a moratorium on the use of bite-mark testimony. It also ordered a review of all past cases in which bite-mark evidence was used, appointing a panel of experts to review trial transcripts.

## 19. WORK TO END THE DEATH PENALTY

**Overview:** Countless studies have shown that the death penalty is fraught with error,<sup>64</sup> provides no more public safety benefit than other sentences,<sup>65</sup> and is routinely imposed on people with diminished culpability, including the intellectually disabled and mentally ill, teenagers, and people who have experienced extreme childhood trauma.<sup>66</sup> Studies also show that the death penalty is applied in a racially discriminatory manner.<sup>67</sup> It is expensive and puts victims through decades of litigation and uncertainty.<sup>68</sup> And it has become increasingly concentrated in a small number of jurisdictions: two percent of counties are responsible for the majority of death sentences nationwide. This means that whether a killing takes place on one side or the other of a county line often determines whether someone will be executed for it.<sup>69</sup>

### Recommendations

- Oppose legislation to expand or expedite the death penalty and consider publicly supporting death-penalty repeal.
- If state law requires consideration of the death penalty, ensure thorough and uniform review of relevant cases. For example, establish a review committee to make case-by-case determinations. The committee could be in-house or it could include members of the bar and the community. It should consider alternative sentences and whether seeking a death sentence is absolutely required to protect public safety. Defense lawyers should have the chance to present to the committee and mitigating evidence should be considered.
- Examine previously imposed death sentences and consider alternative punishments, particularly when there is substantial evidence of reduced culpability.
- Don't threaten to seek the death penalty to coerce a plea.

**Example:** While campaigning for office in 2016, Denver District Attorney Beth McCann announced she would no longer seek the death penalty. McCann said she would support a statewide repeal by either voter referendum or legislation. Seattle Prosecuting Attorney Dan Satterberg has publicly supported repealing the death penalty in his state, saying that the system “no longer serves the interests of public safety, criminal justice, or the needs of victims.”<sup>70</sup>

*“I don't think that the state should be in the business of killing people.”*

— DENVER (CO) DISTRICT ATTORNEY BETH MCCANN



## 20. CALCULATE THE COST OF INCARCERATION

**Overview:** Reducing spending on prison has bipartisan support. The incentives to cut costs are often misaligned, however. Counties largely fund prosecutors' offices and jails while states largely fund prisons. The result is that prosecutors can send people to prison without incurring a cost for their local jurisdiction, making them less accountable for the spending. To change the dynamic, it's important to inform the public about the overall cost of incarceration.

### Recommendations

- Calculate the cost-savings of alternatives to incarceration and factor it into plea offers and sentencing recommendations. (The formula will depend on the local per-person cost of prison and jail.)
- Calculate the expected cost of incarceration for a proposed jail or prison sentence and announce it before sentencing, so judges and the public can consider it.
- Report on the annual cost of incarceration and the office's efforts to reduce it.
- Work with legislators to reduce corrections budgets along with declining prison and jail populations. Advocate for the reinvestment of savings in crime prevention, improved law enforcement, recidivism reduction, and improving the lives of people and communities affected by incarceration.

**Example:** Philadelphia District Attorney Larry Krasner has instructed prosecutors to announce the cost of incarceration at sentencing.<sup>71</sup> In a memo describing the new policy, Krasner provided the following example: "If you are seeking a sentence of three years incarceration, state on the record that the cost to the taxpayer will be \$126,000.00 (3 x \$42,000.00) if not more and explain why you believe that cost is justified."

*"Justice is defined not just in the maths of maximizing charges, convictions, sentences... it's defined in the cost, the benefits and the effectiveness of what you are doing."*

— PHILADELPHIA (PA) DISTRICT ATTORNEY LARRY KRASNER

## 21. EMPLOY THE LANGUAGE OF RESPECT

**Overview:** Commonly used terms like *convict*, *ex-convict*, *felon*, and *inmate* are dehumanizing. They reduce people to their criminal status and perpetuate the stigma of criminal convictions, promoting negative stereotypes that inhibit reform and impede rehabilitation and re-entry.

Language affects perception; it also evolves. Once-established terms are abandoned as offensive (like “coloreds” or “illegals”) while terms that once seemed unwieldy (“people of color”) become familiar. The words we use also affect policy: mass incarceration has stemmed in part from harsh law-and-order rhetoric.

### Recommendations

- When possible, in written materials and in representing the office, use phrases that convey information about criminal status without dehumanizing. Examples include “person convicted of a misdemeanor [or felony],” “incarcerated [or formerly incarcerated] person,” “people behind bars,” and “person with a criminal record.”
- Try to avoid terms like *convict*, *inmate*, and *parolee*, which reduce a person to his or her criminal status, and terms like *rapist* and *drug dealer*, which reduce a person to a particular act. (In an internal report of case outcomes, terms like *parolee* or *inmate* may be appropriate. However, such usage should be the exception.)
- In general, a person charged with a crime (but not convicted) should not be called an “offender.” The word “defendant” is a good substitute. Try to honor people’s wishes about the words used to describe them.
- In cases involving children and teenagers, refer to them and their families by their names and avoid dehumanizing references such as “minor” or “juvenile,” which have become synonymous with “criminal offender.”
- Help change the narrative of crime and justice. Phrases like “tough on crime,” “the wrong element,” and “don’t do the crime if you can’t do the time,” reinforced the narrative of mass incarceration. So do calling constitutional protections “technicalities” and “loopholes,” or describing alternatives to incarceration as “coddling.” To help propel criminal justice reform, prosecutors should talk about “mercy,” “justice,” “compassion,” and “fairness” in ways that resonate with the public.
- Counsel prosecutors to avoid dehumanizing language in court. Words like “animal” and “gangbanger” should be off limits.

**Example:** In 2016, the Justice Department announced that the Office of Justice Programs will no longer use words like “felon” or “convict” to refer to formerly incarcerated people. The new terms are “person who committed a crime” and “individual who was incarcerated.” The Department of Corrections in Pennsylvania announced a “people-first” language change for those released from jail or prison: instead of “offender,” “felon,” or “ex-con,” the department adopted the term “reentrant.”<sup>72</sup>

**“Prosecutors need a public service mentality. You need to want to serve people and meet them where they are and see there is a different side to the criminal justice system.”**

— PORTSMOUTH (VA) COMMONWEALTH’S ATTORNEY STEPHANIE MORALES

## ENDNOTES

1. Danielle Kaeble and Mary Cowhig, *Correctional Populations in the United States, 2016*, Bureau of Justice Statistics, April 2018, 2, <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.
2. Peter Wagner and Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, Prison Policy Initiative, March 14, 2018, <https://www.prisonpolicy.org/reports/pie2018.html>.
3. This project was organized and overseen by Emily Bazelon (author of the forthcoming book *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*), Lauren-Brooke Eisen (a Senior Fellow at the Brennan Center's Justice Program and a Training and Curriculum Advisor for Fair and Just Prosecution), Miriam Krinsky (the Executive Director of Fair and Just Prosecution) and Jake Sussman (the Managing Director of The Justice Collaborative). These principles are also included as a chapter in Emily Bazelon's book. Some draw from previous recommendations by the Brennan Center (found in "Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators"), Fair and Just Prosecution (including from issues briefs on the Fair and Just Prosecution website, <https://fairandjustprosecution.org/resources/issues-at-a-glance-briefs/>), and The Justice Collaborative. For their great work on this project, our thanks to FJP staff Buki Baruwa, Emily Bloomenthal, John Butler, Hannah Raskin-Gross, Courtney Khademi, Liz Komar, Julius Lang, Marie Lively, Meghan Nayak, Scarlet Neath, Rosemary Nidiry, Taylor Phares, Andy Schwarm, and Greg Srolestar; Justice Collaborative staff Jessica Brand, Sarah Lustbader, Jevhon Rivers, and Rob Smith; Bryan Furst, Katz Fellow at the Brennan Center; Columbia law student David Alpert; Yale law students Katya Botchkina, Sam Breidbart, and Laurel Raymond; and Yale College student Brett Greene. For their helpful comments we thank Roy Austin, Partner, Harris, Wiltshire & Grannis LLP, former Deputy Assistant to the President for Urban Affairs, Justice and Opportunity, White House Domestic Policy Council; Dana Bazelon, Senior Policy Counsel, Philadelphia District Attorney's Office; Rose Cahn, Criminal and Immigrant Justice Attorney, Immigrant Post-Conviction Relief Project, Immigrant Legal Resource Center; Lisa Foster, Co-Director, The Fines and Fees Justice Center; Karen Friedman-Agnifilo, Chief Assistant District Attorney, Manhattan District Attorney's Office; Seema Gajwani, Special Counsel for Juvenile Justice Reform, District of Columbia Office of the Attorney General; Mac Heavener, Chief Assistant State Attorney, 4th Judicial Circuit (Jacksonville) State Attorney's Office; Kristin Henning, Agnes N. Williams Research Professor of Law Director, Juvenile Justice Clinic Associate Dean for Clinics, Centers and Institutes Georgetown Law; Brook Hopkins, Executive Director, Criminal Justice Policy Program, Harvard Law School; Venus Johnson, Assistant District Attorney, Contra Costa County District Attorney's Office; Beth McCann, District Attorney, 2nd Judicial District (Denver), Colorado; Mitali Nagrecha, Director, National Criminal Justice Debt Initiative; Melissa W. Nelson, State Attorney, 4th Judicial Circuit (Jacksonville), Florida; Courtney M. Oliva, Executive Director, Center on the Administration of Criminal Law, NYU School of Law; Dan Satterberg, Prosecuting Attorney, King County (Seattle), Washington; David Alan Sklansky, Stanley Morrison Professor of Law, Faculty Co-Director, Stanford Criminal Justice Center; and Joanna Weiss, Co-Director, The Fines and Fees Justice Center.
4. Vera Institute of Justice. *The Potential of Community Corrections: To Improve Communities and Reduce Incarceration*, p.16. New York, NY: Vera Institute of Justice, 2013. <https://www.vera.org/publications/the-potential-of-community-corrections-to-improve-safety-and-reduce-incarceration-configure>.
5. Matthew Schwartz, "Youth Program Points to Ways D.C. Can Be 'Far More Creative' Against Crime," WAMU, February 25, 2016, [https://wamu.org/story/16/02/25/youth\\_program\\_points\\_to\\_ways\\_dc\\_can\\_be\\_far\\_more\\_creative\\_with\\_anti\\_crime\\_policies](https://wamu.org/story/16/02/25/youth_program_points_to_ways_dc_can_be_far_more_creative_with_anti_crime_policies); Armando Tull, "How a D.C. Diversion Program Helps Get Young Lives Off the Ropes," WAMU, June 30, 2016, [https://wamu.org/story/16/06/30/dc\\_diversion\\_program\\_helps\\_get\\_young\\_lives\\_off\\_the\\_ropes](https://wamu.org/story/16/06/30/dc_diversion_program_helps_get_young_lives_off_the_ropes); "How Juvenile Diversion Benefits the District," Office of the Attorney General for the District of Columbia, March 7, 2018, <https://oag.dc.gov/public-safety/juvenile-diversion-program>. Further resources: Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes* 17-18 (U. of Penn. L. Sch., Working Paper Jan. 8, 2017) (finding that pretrial detention increases the likelihood of a plea by 18 percent), available at <http://www.econ.pitt.edu/sites/default/files/Stevenson.Jmp2016.pdf>; Lindsey Devers, *Plea and Charge Bargaining*, Bureau of Justice Statistics, Jan. 24, 2011, available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (research showing that individuals in custody before their trials are more likely to accept plea bargains and are less likely to have their charges dropped by prosecutors). Crim Just. Pol'y Prog. at Harv. L. Sch., *Moving Beyond Money — A Primer on Bail Reform 6* (2016), available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf> [hereinafter *Moving Beyond Money*]; Brief of Amici Curiae, *Current and Former District and State's Attorneys et al., ODonnell v. Harris County*, No. 17-20333 (5th Cir. 2017) <https://fairandjustprosecution.org/wp-content/uploads/2017/09/Harris-County-Bail-Amicus-Brief-2.pdf>, Fair and Just Prosecution, Issue Brief, Bail Reform, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.BailReform.9.25.pdf>, Jessica Brand and Jessica Pishko, *Bail Reform: Explained*, The Appeal, June 14, 2018 <https://theappeal.org/bail-reform-explained-4abb73dd2e8a/?gi=ad48eeb73c7f>.
6. Ronald Wright and Marc Miller suggest that prosecutors should start with "appropriate" charges rather than piling on a trial penalty and take cases to the judge without an explicit bargain. They think many defendants would still plead guilty in hopes of getting a discount from the judge. Ronald Wright and Marc Miller, "The Screening/Bargaining Tradeoff," *Stanford Law Review* 55 (October 2002): 29-118.

7. Dan Satterberg, "Filing and Disposition Standards," King County Prosecuting Attorney's Office, Criminal Division, May 2016, <https://www.kingcounty.gov/~media/depts/prosecutor/documents/2016/fads-may-2016.ashx?la=en>.
8. District Attorney Larry Krasner, "New Policies Announced February 15, 2018," Memorandum to Assistant District Attorneys, District Attorney's Office, Philadelphia, Pa., March 13, 2018, <https://www.scribd.com/document/373860422/Finalized-Memo-Mar-13-2018>.
9. See Lauren-Brooke Eisen and Inimai Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislators*, Brennan Center for Justice, March 22, 2018, [https://www.brennancenter.org/sites/default/files/publications/2018\\_05\\_Agendas\\_CriminalJustice\\_pdf.pdf](https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_CriminalJustice_pdf.pdf). They point out that risk assessment tools "can negatively affect African-American and Latino defendants due to structural societal inequities" if the tools consider social factors, such as education level, family structure, or employment history. In a recent study, the risk assessment tool created by the John and Laura Arnold Foundation has been found to be fairly race neutral and to select risk factors carefully to minimize risk of bias. See DeMichele et al., "The Public Safety Assessment: A Re-Validation and Assessment of Predictive Utility and Differential Prediction by Race and Gender in Kentucky," April 25, 2018, <https://ssrn.com/abstract=3168452>.
10. Notification systems that use phone calls and texts have achieved high success rates for court appearances. See Plaintiffs' Summary of Other Jurisdictions, *O'Donnell v. Harris County*, No. H-16-1414, 2017 WL 1542457 (S.D.T.X. April 28, 2018), Multnomah County in Oregon started using automated reminders for court appearances and reported a drop in no-shows of more than 30 percent and savings of more than \$1.5 million in fiscal year 2007. Matt O'Keefe, "Court Appearance Notification System: 2007 Analysis Highlights," Multnomah County Local Public Safety Coordinating Council, June 2007.
11. Cook County State's Attorney, "State's Attorney Foxx Announces Major Bond Reform," Press Release, June 12, 2017, <https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform>. The policy calls for releasing people on their own recognizance.
12. Kentucky Justice & Public Safety Cabinet Criminal Justice Council, *2015 HB463 Implementation Report*, October 2015, 3, <https://justice.ky.gov/Documents/Statistical%20Analysis/2015KCJCReport.pdf>.
13. Improving Outcomes for People with Mental Illnesses Involved with New York City's Criminal Court and Correction Systems, The Council of State Governments, Justice Center, December, 2012; [https://csgjusticecenter.org/wp-content/uploads/2013/05/CTBNYC-Court-Jail\\_7-cc.pdf](https://csgjusticecenter.org/wp-content/uploads/2013/05/CTBNYC-Court-Jail_7-cc.pdf).
14. Fair and Just Prosecution, "Bail Reform," Issue Brief, September 25, 2017, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.BailReform.9.25.pdf>; and John K. Iglehart, "Decriminalizing Mental Illness—The Miami Model," *New England Journal of Medicine* 374 (May 2016): 1701–03, <https://www.nejm.org/doi/full/10.1056/NEJMp1602959>.
15. D.A.s should consider adopting an evidence-based definition of recovery, which is especially important when assessing whether an individual has violated a condition of diversion, deferral, or probation.
16. "Pre-Booking Diversion," Eleventh Judicial Circuit of Florida, <https://www.jud11.flcourts.org/Pre-Booking-Diversion>.
17. Marcia L. Bellas, *Chittenden County Rapid Intervention Community Court Process Evaluation Final Report*, Vermont Center for Justice Research, March 2014, [http://www.crgvt.org/uploads/5/2/2/2/52222091/ricc\\_process\\_evaluation\\_3-14-2014b.pdf](http://www.crgvt.org/uploads/5/2/2/2/52222091/ricc_process_evaluation_3-14-2014b.pdf).
18. Peter Wicklund, Patricia Breneman, and Tim Halvorsen, *Chittenden County Rapid Intervention Community Court Outcome Evaluation Final Report*, Vermont Center for Justice Research, February 2013, <https://legislature.vermont.gov/assets/Documents/2014/WorkGroups/House%20Human%20Services/Bills/S.295/Witness%20Testimony/S.295~Emmet%20Helrich~CHITTENDEN%20COUNTY%20RICC%20Program%20Evaluation~4-15-2014.pdf>.
19. Brian Stauffer, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, Human Rights Watch, October 12, 2016, <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.
20. Law Enforcement Assisted Diversion, <http://leadkingcounty.org>; and Susan E. Collins, Heather S. Lonczak, and Seema L. Clifasefi, "Seattle's Law Enforcement Assisted Diversion (LEAD): Program Effects on Recidivism Outcomes," *Evaluation and Program Planning* 64 (2017): 49–56, <https://www.leadbureau.org/evaluations>.
21. Fair and Just Prosecution, "Juvenile Justice and Young Adult Issues: Promoting Trauma-Informed Practices," Issue Brief, September 25, 2017, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.TraumaPractices.9.25.pdf>.
22. Jennifer Henderson-Frakes, Sengsouvanh Leshnick, and Hannah Diaz, *An Evaluation of San Francisco's Young Adult Court: Findings on Planning and Early Implementation*, Social Policy Research Associates, May 2017, [https://www.sfsuperiorcourt.org/sites/default/files/images/YAC%20Interim%20Report\\_05252017.pdf](https://www.sfsuperiorcourt.org/sites/default/files/images/YAC%20Interim%20Report_05252017.pdf).

23. Almost 18 million defendants have been prosecuted for misdemeanors and felonies in state court each year for the past decade or more. Court Statistics Project, "Total Incoming Criminal Caseloads Reported by State Courts, All States, 2007–2016." The share of misdemeanors tends to be about 80 percent and the share of felonies about 20 percent. The number of annual felony filings in federal court is about 140,000. Misdemeanors in federal court are rare. Court Statistics Project, "Statewide Criminal Caseload Composition in 31 States, 2016." See also Issa Kohler-Hausmann, *Misdemeanorland: Criminal Courts and Social Control in an Age of Broken Windows Policing* (Princeton: Princeton University Press, 2018), 25 and Preeti Chauhan et al., *Trends in Admissions to the New York City Department of Correction, 1995-2015*, The Misdemeanor Justice Project, John Jay College of Criminal Justice, December 13, 2016, 18.
24. Alexandra Natapoff, "Misdemeanors," in Erik Luna, editor, *Reforming Criminal Justice*, vol. 1 (Phoenix: Arizona State University, 2017), 71. San Francisco has automatic expungement program for old marijuana convictions. Matt Ferner, "Some Prosecutors Are Erasing Old Weed Convictions. Why Isn't Yours?," *HuffPost*, May 2, 2018, [https://www.huffingtonpost.com/entry/prosecutors-can-help-erase-old-weed-convictions-so-why-arent-they-us\\_5ae9e76fe4b06748dc8ed3da](https://www.huffingtonpost.com/entry/prosecutors-can-help-erase-old-weed-convictions-so-why-arent-they-us_5ae9e76fe4b06748dc8ed3da).
25. Ronald Brownstein, "Will Texas Follow Houston's Lead on Drug-Policy Reform?" *The Atlantic*, May 24, 2018, <https://www.theatlantic.com/politics/archive/2018/05/will-texas-follow-houstons-lead-on-drug-policy-reform/561035>.
26. Hillary Blout, Rose Cahn, and Miriam Aroni Krinsky, "The Prosecutor's Role in the Current Immigration Landscape," *Criminal Justice Magazine*, Winter 2018, [https://www.ilrc.org/sites/default/files/resources/prosec\\_role\\_immig\\_landscape-rc-20180215.pdf](https://www.ilrc.org/sites/default/files/resources/prosec_role_immig_landscape-rc-20180215.pdf); Fair and Just Prosecution, "Addressing Immigration Issues," Issue Brief, September 25, 2017, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>; Immigrant Defense Project, "Immigration Consequences of Crimes Summary Checklist," 2017, <https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Consq-checklist-2017-v3.pdf>.
27. Heather Knight, "S.F.'s DA, Public Defender Mend Fences Over Questioning of Immigrants," *San Francisco Chronicle*, September 2, 2017, <https://www.sfchronicle.com/news/article/Officials-bridge-divide-over-court-questioning-of-12169394.php>.
28. Alliance for Safety and Justice, "Crime Survivors Speak," <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.
29. Danielle Sered, "How to Curb Violence, and Mass Incarceration, by Focusing on Crime Victims," *Washington Post*, February 16, 2017, <https://www.washingtonpost.com/news/true-crime/wp/2017/02/16/how-to-curb-violence-and-mass-incarceration-by-focusing-on-crime-victims>.
30. "Common Justice Model," Common Justice, [https://www.commonjustice.org/common\\_justice\\_model](https://www.commonjustice.org/common_justice_model).
31. See Danielle Kaeble and Thomas P. Bonczar, *Probation and Parole in the United States*, 2015, Bureau of Justice Statistics, April 2018, 1, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188>.
32. In 2012, for example, Missouri passed a law that decreases supervision time by creating "earned compliance credits." People can shorten their time on probation or parole by 30 days for every full calendar month that they comply with the conditions of their sentences. The Pew Charitable Trusts found that in the first three years of implementation, over 36,000 probationers and parolees reduced their supervision terms by an average of 14 months without changing recidivism rates. The Pew Charitable Trusts, "Missouri Policy Shortens Probation and Parole Terms, Protects Public Safety," August 2016, [http://www.pewtrusts.org/-/media/assets/2016/08/missouri\\_policy\\_shortens\\_probation\\_and\\_parole\\_terms\\_protects\\_public\\_safety.pdf](http://www.pewtrusts.org/-/media/assets/2016/08/missouri_policy_shortens_probation_and_parole_terms_protects_public_safety.pdf). Philadelphia District Attorney Larry Krasner directed prosecutors to recommend shorter "probation tails" or no probation after a sentence of incarceration. District Attorney Larry Krasner, "New Policies Announced February 15, 2018," Memorandum to Assistant District Attorneys, District Attorney's Office, Philadelphia, Pa., March 13, 2018, <https://www.scribd.com/document/373860422/Finalized-Memo-Mar-13-2018>. In the past 20 years, the number of people on probation in New York City decreased by two thirds. Violent crime dropped by over 50 percent during the same period. Vincent Schiraldi and Michael P. Jacobson, "When Less is More," The Marshall Project, Aug. 28, 2017, <https://www.themarshallproject.org/2017/08/28/when-less-is-more>. See also Michelle S. Phelps, "The Paradox of Probation: Community Supervision in the Age of Mass Incarceration," *Law & Policy* 35 (January–April 2013): 63–64 (finding that from 1980 to 2010, both probation and incarcerated populations increased, regardless of trends in crime).
33. The Council of State Governments, "Changes to Georgia's Probation System Yield Positive Early Results," April 18, 2018, <https://csgjusticecenter.org/jr/georgia/posts/changes-to-georgias-probation-system-yield-positive-early-results>.
34. Larry Krasner and Miriam Krinsky, "Time to Rethink Probation and Parole," *Philadelphia Inquirer*, May 25, 2018, <http://www.philly.com/philly/opinion/commentary/larry-krasner-probation-parole-community-corrections-criminal-justice-philadelphia-20180525.html?arc404=true>; and Jessica Miller, "Salt Lake County District Attorney Joins National Effort to Reduce the Number of People on Probation," *The Salt Lake Tribune*, May 18, 2018, <https://www.sltrib.com/news/2018/05/17/salt-lake-county-district-attorney-joins-national-effort-to-reduce-the-number-of-people-on-probation>. See also Fair and Just Prosecution, "Prosecutors, Criminal Justice Leaders Call for End to Overuse of Probation and Parole," Press Release, May 17, 2018, <https://fairandjustprosecution.org/wp-content/uploads/2018/05/Corrections-Statement-Press-Release-Final.pdf>.

35. These metrics may be used in performance evaluations or tied to promotions or other recognition. Research shows that merely keeping track of the metrics, with no further incentives, encourages performance. See Lauren-Brooke Eisen, Nicole Fortier, and Inimai Chettiar, *Federal Prosecution for the 21st Century*, Brennan Center for Justice, September 23, 2014, 44, [https://www.brennancenter.org/sites/default/files/analysis/Federal\\_Prosecution\\_For\\_21st\\_Century.pdf](https://www.brennancenter.org/sites/default/files/analysis/Federal_Prosecution_For_21st_Century.pdf).
36. Steps for diversifying office staff include developing targeted recruitment to diverse groups (like bar association affinity groups); reassessing hiring criteria to address barriers to hiring people of color; and ensuring that underrepresented groups on staff are appropriately supported, considered for promotion, and involved in office hiring decisions.
37. Fair and Just Prosecution, "Building Community Trust: Restorative Justice Strategies, Principles and Promising Practices," Issue Brief, December 2017, [https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP.Brief\\_RestorativeJustice.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/12/FJP.Brief_RestorativeJustice.pdf).
38. Further resources: David Sklansky, "The Progressive Prosecutor's Handbook," *UC Davis Law Review Online* 50 (2017): 25–42; American Bar Association, *Criminal Justice Standards for the Prosecution Function*.
39. See, for example, Frank R. Baumgartner, Derek A. Epp, Kelsey Shoub, *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* (New York: Cambridge University Press, 2018) (finding that, compared with their share of the population, blacks are almost twice as likely to be pulled over as whites, and blacks are more likely to be searched following a stop); Stephen Demuth, "Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees," *Criminology* 41 (August 2003): 898 (finding that Hispanic defendants are more likely to be detained than white and black defendants, and racial/ethnic differences are most pronounced in drug cases); David Arnold, Will Dobbie, and Crystal S. Yang, "Racial Bias in Bail Decisions," *Quarterly Journal of Economics* (forthcoming): 3, <https://doi.org/10.1093/qje/qjy012> (noting that "compared to observably similar whites, blacks are more likely to be searched for contraband (Antonovics and Knight 2009), more likely to experience police force (Fryer 2016), more likely to be charged with a serious offense (Rehavi and Starr 2014), more likely to be convicted (Anwar, Bayer, and Hjalmarsson 2012), and more likely to be incarcerated (Abrams, Bertrand, and Mullainathan 2012)," and that "[r]acial disparities are particularly prominent in the setting of bail"); Marvin D. Free, Jr., "Racial Bias and the American Criminal Justice System: Race and Presentencing Revisited," *Critical Criminology* 10 (October 2001): 195–223 (finding evidence of discrimination in key criminal justice decision points); L. Song Richardson and Philip Atiba Goff, "Implicit Racial Bias in Public Defender Triage," *Yale Law Journal* 122 (June 2013): 2106–720 (examining implicit racial bias in the context of the public defender's office); Cassia Spohn, "Race, Sex, and Pretrial Detention in Federal Court: Indirect Effects and Cumulative Disadvantage," *University of Kansas Law Review* 57 (2009): 898–99 (finding that being under the control of the criminal justice system increased the odds of pretrial detention for blacks but not for whites). A recent investigative report in Jacksonville, Florida demonstrated that over a two year period, 2015 and 2016, one senior prosecutor's drug cases resulted in "blacks receiv[ing] sentences that were nearly four times as long on average" as white defendants. See Josh Salman, Andrew Pantazi, and Michael Braga, "Influence and Injustice," *Herald Tribune*, June 21, 2018, <http://projects.heraldtribune.com/influence>.
40. See, for example, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012), 16 ("The fact that more than half of the young black men in many large American cities are currently under the control of the criminal justice system (or saddled with criminal records) is not—as many argue—just a symptom of poverty or poor choices, but rather evidence of a new racial caste system at work."); Anthony G. Greenwald and Linda Hamilton Krieger, "Implicit Bias: Scientific Foundations," *California Law Review* 94 (July 2006): 966 ("[I]mplicit race bias is pervasive and is associated with discrimination against African Americans."); L. Song Richardson, "Police Efficiency and the Fourth Amendment," *Indiana Law Journal* 87 (Summer 2012): 1145 (arguing that "[i]mplicit social cognition research demonstrates that implicit biases can affect whether police interpret an individual's ambiguous behaviors as suspicious").
41. See note 9 on [page 27](#).
42. Jeffrey Toobin, "The Milwaukee Experiment," *New Yorker* May 11, 2015, <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment>.
43. Fair and Just Prosecution, "Conviction Integrity Units and Internal Accountability Mechanisms," Issue Brief, September 25, 2017, [https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJP.Brief\\_ConvictionIntegrity.9.25.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJP.Brief_ConvictionIntegrity.9.25.pdf).
44. Michael Winter, "3,000 cases under review over biased S.F. police texts," *USA Today*, May 7, 2015, <https://www.usatoday.com/story/news/2015/05/07/san-francisco-biased-police-texts-3000-cases-reviewed/70966314/>.
45. Jennifer Sullivan, "Freed 3-strikes offender is being watched closely by supporters, critics," *Seattle Times*, June 11, 2009, <https://www.seattletimes.com/seattle-news/politics/freed-3-strikes-offender-is-being-watched-closely-by-supporters-critics/>.
46. See, for example, Kathleen Ridolfi and Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009*, October 4, 2010, <http://digitalcommons.law.scu.edu/ncippubs/2>.



47. A recent study comparing discovery practices in Manhattan and Brooklyn demonstrated that open-file discovery, in addition to being fairer, is cost effective. In Manhattan, where prosecutors keep their files relatively closed, defendants use pre-trial suppression hearings to learn about the evidence the government possesses. In Brooklyn, where the D.A.'s office has had an open-file policy since the mid-1990s (though prosecutors can make exceptions for cases involving gangs, sex crimes, and homicides), defendants request far fewer suppression hearings, saving the state time and money. Dan Svirsky, *New York University Review of Law & Social Change* 38.3 (2014): 523–50. Further resources: Miriam H. Baer, "Timing Brady," *Columbia Law Review* 115 (January 2015): 1–68; Jenia I. Turner and Allison D. Redlich, "Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison," *Washington and Lee Law Review* 73 (January 2016): 285–408; Darryl Brown, "Discovery in State Criminal Justice," 155, in Erik Luna, editor, *Reforming Criminal Justice*, vol. 3 (Phoenix: Arizona State University, 2017); Hadar Aviram, "Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture," *St. John's Law Review* 87 (Winter 2013): 1–46; New York State Bar Association, *Report of the Task Force on Criminal Discovery*, January 30, 2015, <http://www.nysba.org/workarea/DownloadAsset.aspx?id=54572>; The Justice Project, "Expanded Discovery in Criminal Cases," Policy Review, 2007, 8, [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death\\_penalty\\_reform/expanded20discovery20policy20briefpdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf); Fair and Just Prosecution, "Promoting Transparency and Fairness Through Open and Early Discovery Practices," Issue Brief, January 2018, [https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief\\_Discovery.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief_Discovery.pdf).
48. Amari L. Hammonds, Katherine Kaiser Moy, Rachel R. Suhr, and Cameron Vanderwall, *At Arm's Length: Improving Criminal Investigations of Police Shootings*, Stanford Criminal Justice Center, October 2016, <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf>. Further Resources: *Final Report of the President's Task Force on 21st Century Policing* (May 2015) (accessible at: <http://elearning-courses.net/iacp/html/webinarResources/170926/FinalReport21stCenturyPolicing.pdf>), Action Item 2.2.3.
49. Hammonds et al., *At Arm's Length*.
50. "Independent Investigations Bureau," San Francisco District Attorney, <https://sfdistrictattorney.org/independent-investigations-bureau-iib>. Further resources: Fair and Just Prosecution, "Promoting Independent Police Accountability Mechanisms," Issue Brief, September 25, 2017, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Police-Accountability.9.25.pdf>; *Report of The Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement*, City of San Francisco, July 2016, [https://sfdistrictattorney.org/sites/default/files/Document/BRP\\_report.pdf](https://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf).
51. For instance, a study in New Orleans found that the cost of jailing people who could not pay criminal debt was \$2 million greater than the revenue obtained from that debt. Mathilde Laisne, Jon Wool, and Christian Henrichson, *Past Due: Examining the Causes and Consequences of Charging for Justice in New Orleans*, Vera Institute of Justice, January 2017, 22, <https://www.vera.org/publications/past-due-costs-consequences-charging-for-justice-new-orleans>.
52. The sliding-scale fine system has successfully been used in Europe as a default sanction for numerous crimes. When it was introduced in West Germany in the 1970s as a replacement for incarceration, the number of short-term prison sentences dropped by 90 percent. Germany still uses day fines as the only sanction imposed for three-quarters of all property crimes, and two-thirds of all assaults. *How to Use Structured Fines (Day Fines) as an Intermediate Sanction*, Bureau of Justice Assistance, U.S. Department of Justice, Nov. 1996; <https://www.ncjrs.gov/pdffiles/156242.pdf>.
53. Putting a sliding-scale system in place is typically possible with about three months of planning. The Justice Management Institute and the Vera Institute of Justice, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction*, Bureau of Justice Assistance, U.S. Department of Justice, November 1996, 7, <https://www.ncjrs.gov/pdffiles/156242.pdf>.
54. Associated Press, "California no longer will suspend driver's licenses for traffic fines," Los Angeles Times (Los Angeles, CA), June 29, 2017. <http://www.latimes.com/local/lanow/la-me-ln-driver-license-fees-20170629-story.html>; Robin Fitzgerald, "Have a suspended driver's license because you couldn't pay a fine? Here's news for you," *Sun Herald* (Biloxi, MS), Dec. 19, 2017. <https://www.sunherald.com/news/local/article190641569.html>; Susan Sharon, "Maine drivers will not have licenses suspended for failing to pay fines," *Bangor Daily News* (Bangor, ME), July 10, 2018. <http://bangordailynews.com/2018/07/10/politics/maine-drivers-will-not-have-licenses-suspended-for-failing-to-pay-fines/>.
55. Bill Salisbury, "Unpaid traffic tickets – debt trap for the poor – in MN legislators' sights," Pioneer Press (St. Paul, MN), Mar. 31, 2017. <https://www.twincities.com/2017/03/31/mn-legislature-unpaid-traffic-tickets-debt-trap/>.
56. "Legislature passes bill to bring fairness to Washington's system of legal financial obligations," ACLU Washington, last modified March 6, 2018. <https://www.aclu-wa.org/news/legislature-passes-bill-bring-fairness-washington%E2%80%99s-system-legal-financial-obligations>; "New Orleans eliminates juvenile fees & fines," Louisiana Center for Children's Rights, last modified August 2, 2018. <http://www.laccr.org/news/new-orleans-eliminates-juvenile-fees-fees/>; Nila Bala, "California won't jail children for being too poor. Will other states follow?," *Newsweek*, Dec. 30, 2017. <https://www.newsweek.com/california-jail-poor-children-court-fees-will-states-follow-765617>; Samantha Melamed, "Under fire, Philly stops suing parents of incarcerated kids for child support,"

Philadelphia Inquirer (Philadelphia, PA), March 3, 2017. <http://www2.philly.com/philly/living/Philly-ends-child-support-collection-for-parents.html>.

57. See Bannon et al., *Criminal Justice Debt*; Lauren-Brooke Eisen, "Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause," *Loyola Journal of Public Interest Law* 15 (Spring 2014): 319–42, <https://www.brennancenter.org/analysis/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate-excessive-fines-clause>; The Justice Management Institute and the Vera Institute of Justice, *How to Use Structured Fines (Day Fines) as an Intermediate Sanction*; Fair and Just Prosecution, "Fines, Fees and the Poverty Penalty," Issue Brief, November 2017, [https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief\\_Fines.Fees\\_.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief_Fines.Fees_.pdf); Council of Economic Advisers, "Fines, Fees, and Bail," Issue Brief, December 2015, [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf); Shaila Dewan and Andrew W. Lehren, "After a Crime, the Price of a Second Chance," *New York Times*, December 12, 2016, <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html>.

58. Matthew Friedman, "Just Facts: As Many Americans Have Criminal Records As College Diplomas," Brennan Center for Justice, November 17, 2015, <https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>.

59. See Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 *Annals Am. Acad. Pol. & Soc. Sci.* 195, 199 (2009) (concluding that the negative impact of criminal records for Black ex-offenders is "substantially larger" than for white ex-offenders); Scott H. Decker et al., *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment* 13 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf> (finding that white men with a criminal record had more positive responses than black men without any criminal record).

60. "Ctrl+Alt+Del Program," Portsmouth Commonwealth's Attorney, <http://www.portsmouthcwa.com/ctrlaltdel-program>.

61. "Redemption," Albany County District Attorney's Office CLEAN SLATE, <http://www.cleanslate.albanycountynyda.com/redemption>. See also "Collateral Consequences," National Juvenile Defender Center, <http://njdc.info/collateral-consequences>; Compilation of Federal Collateral Consequences, Collateral Consequences Resource Center, <http://federal.ccsresourcecenter.org/>; National Inventory of the Collateral Consequences of Conviction, Justice Center, The Council of State Governments, <https://niccc.csgjusticecenter.org>; *Disrupting the Cycle: Reimagining the Prosecutor's Role in Reentry*, NYU Center on the Administration of Criminal Law, 2017, [http://www.law.nyu.edu/sites/default/files/upload\\_documents/CACL%20Report.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/CACL%20Report.pdf); Lauren-Brooke Eisen, "Curbing Cash Register Style Justice," American Constitution Society, October 26, 2015, <https://www.acslaw.org/acsblog/curbing-cash-register-style-justice>.

62. In 2009, the National Research Council issued a report critical of the state of forensic science. In 2015, President Obama tasked the Council of Advisors on Science and Technology (PCAST), made up of leading scientists, engineers, lawyers, and policymakers, to advise him on improvements. Most of the Principles and Recommendations above come from PCAST's report, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*, September 2016, [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast\\_forensic\\_science\\_report\\_final.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf).

63. Determine whether the type or method of collecting evidence has credibility in the scientific community by consulting well-designed, peer-reviewed studies and organizations such as the National Institute of Standards and Technology.

64. There have already been 162 exonerations of people who were convicted and sentenced to death. On average, those individuals spent over a decade on death row before their exoneration. Death Penalty Information Center, "Innocence: List of Those Freed from Death Row," <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

65. Dozens of studies have found no proof that the death penalty deters crime. See Max Ehrenfreund, "There's Still No Evidence that Executions Deter Criminals," *Washington Post*, April 30, 2014, <https://www.washingtonpost.com/news/wonk/wp/2014/04/30/theres-still-no-evidence-that-executions-deter-criminals>. An analysis of thirty years of empirical studies of the death penalty concluded that there was insufficient evidence of any deterrent effect. *Glossip v. Gross*, 135 S. Ct. 2726, 2768 (2015), citing Daniel Nagin and John Pepper, editors, *Deterrence and the Death Penalty* (Washington, D.C.: The National Academies Press, 2012).

66. See Frank R. Baumgartner and Betsy Neill, "Does the Death Penalty Target People Who Are Mentally Ill? We Checked," *Washington Post*, April 3, 2017, <https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked>. Analyses of the death penalty in Oregon, Florida, Arkansas, and Ohio have all reached the same conclusion—the death penalty targets our most vulnerable. See the Fair Punishment Project's various death penalty reports, available at <http://fairpunishment.org/category/death-penalty>.

67. Numerous studies have found that African-American defendants are more likely to face a possible death sentence than white defendants. See, for example, Matt Ford, "Racism and the Execution Chamber," *The Atlantic*,

June 23, 2014, <https://www.theatlantic.com/politics/archive/2014/06/race-and-the-death-penalty/373081>. For example, one study of Harris County, Texas found that black defendants were three times more likely to face the death penalty. Ed Pilkington, "Research Exposes Racial Discrimination in America's Death Penalty Capital," *The Guardian*, March 13, 2013, <https://www.theguardian.com/world/2013/mar/13/houston-texas-death-row-black-inmates>. Juries are also much more likely to sentence someone to death when the victim is white than when the victim is black. Baumgartner, Frank R., Amanda Grigg, and Alisa Mastro, "#BlackLivesDon'tMatter: Race-of-Victim Effects in US Executions, 1977-2013." *Politics, Groups, and Identities* 3, 2: 209-21, 2015, <http://fbaum.unc.edu/articles/BlackLives-2015.pdf>. Baumgartner, Frank R., Emma Johnson, Colin Wilson, and Clarke Whitehead, "These Lives Matter, Those Ones Don't: Comparing Execution Rates by the Race and Gender of the Victim in the US and in the Top Death Penalty States." *Albany Law Review* 79, 3: 797-860, 2016, <http://fbaum.unc.edu/articles/TheseLivesMatter-AlbanyLawReview2016.pdf>.

68. Carol Williams, "Death Penalty Costs California \$184 Million a Year, Study Says," *Los Angeles Times*, June 20, 2011.

69. Richard Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All*, Death Penalty Information Center, October 2013, <https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

70. Further resources: *Capital Punishment in Pennsylvania: The Report of the Task Force and Advisory Committee*, Joint State Government Commission, Pennsylvania General Assembly, June 2018, [http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2018-06-25%20SR6%20\(Capital%20Punishment%20in%20PA\)%20FINAL%20REPORT%20June%2025%202018.pdf](http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2018-06-25%20SR6%20(Capital%20Punishment%20in%20PA)%20FINAL%20REPORT%20June%2025%202018.pdf); Brandon L. Garrett, Alexander Jakubow, and Ankur Desai, "The American Death Penalty Decline," *Journal of Criminal Law & Criminology* 107 (Fall 2017): 561-642; Robert J. Smith, "The Geography of the Death Penalty and Its Ramifications," *Boston University Law Review* 92 (January 2012): 227-90; American Bar Association, "Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," 2003, [https://www.americanbar.org/content/dam/aba/uncategorized/Death\\_Penalty\\_Representation/Standards/National/2003Guidelines.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2003Guidelines.authcheckdam.pdf).

71. Further resources: Saneta deVuono-Powell, Chris Schweidler, Alicia Walters, and Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center for Human Rights, Forward Together, and Research Action Design, September 2015, <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf>; Peter Wagner and Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative, January 25, 2017, <https://www.prisonpolicy.org/reports/money.html>; Chris Mai and Ram Subramanian, *The Price of Prisons: Examining State Spending Trends, 2010-2015*, Vera Institute of Justice, May 2017, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends>.

72. In 2016, former Attorney General Loretta Lynch delivered the closing remarks at National Reentry Week without once referring to "criminals," "convicts," or "felons." Instead, she referred to formerly incarcerated people as "returning citizens," a term that affirms their dignity and potential for successful reintegration. Further resources: Bill Keller, "The Other F-word: What We Call the Imprisoned Matters," *The Marshall Project*, April 27, 2016, <https://www.themarshallproject.org/2016/04/27/the-other-f-word>; Nancy La Vigne, "People First: Changing the Way We Talk About Those Touched by the Criminal Justice System," *Urban Wire*, April 5, 2016, <https://www.urban.org/urban-wire/people-first-changing-way-we-talk-about-those-touched-criminal-justice-system>; "Labels Like 'Felon' Are an Unfair Life Sentence," *New York Times*, May 7, 2016, <https://www.nytimes.com/2016/05/08/opinion/sunday/labels-like-felon-are-an-unfair-life-sentence.html>.

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