PROSECUTORS, DEMOCRACY, AND JUSTICE:

HOLDING PROSECUTORS ACCOUNTABLE

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Reimagining the Role of the Prosecutor in the Community

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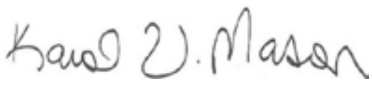
A Letter from the Co-Chairs of the IIP Advisory Board

The Executive Session on Reimagining the Role of the Prosecutor in the Community (Executive Session), hosted by the Institute for Innovation in Prosecution at John Jay College of Criminal Justice (IIP), is guiding high-level culture change in the field of prosecution. Through a series of facilitated convenings and conversations spanning three years, the Executive Session brings together the foremost experts in the field of prosecution – elected prosecutors, legal professionals, scholars, policy experts, and individuals directly impacted by the justice system.

The collaborative research and engagement that informs the Executive Session enables a thorough dive into some of the most complex topics facing prosecutors and their communities: reimagining the role of the prosecutor in a democratic society; producing public safety while reducing harms created by the criminal justice system; and addressing the legacy of racial inequality and structural injustice, to name a few. In order to disseminate these conversations into the field, Executive Session members partner to undertake research and author papers, with an eye towards developing innovative responses. The papers are based on the opinions of the authors, available research, and insight from Executive Session members. While the papers do not represent a consensus of all members, they have been informed by critical engagement and collaborative discussion amongst members. The expertise and diversity of members provide a nuanced lens to some of the most pressing topics in the field of prosecution, and to the criminal justice system overall.

The Executive Session and the papers emerging from it are intended to uplift the evolving role of prosecutors and their power to facilitate the creation of an increasingly equitable and effective American criminal justice system.

For further information about the Executive Session on Prosecution or the IIP, please write to IIP_JohnJay@prosecution.org.



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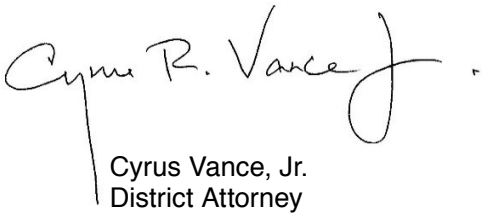

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Prosecutors, Democracy, and Justice: Holding Prosecutors Accountable

Jeremy Travis, Carter Stewart, and Allison Goldberg

I. INTRO

As the nation grapples with fundamental questions about the nature of our democracy, advocates for criminal justice reform see hope in the nascent focus on one of the most powerful stakeholders in the legal system: the prosecutor.[i1] Across the country, prosecutor campaigns have shifted from debates over conviction rates and sentence lengths to candidates vying to show their commitment to ending mass incarceration and ameliorating other harms associated with the criminal justice system.[ii] While 85 percent of incumbent prosecutors ran unopposed between 1996 and 2006,[iii2] and 95 percent of elected prosecutors were white in 2015,[iv] recent elections saw unprecedented electoral competition and diversity in prosecutor races across the country. As reform-minded prosecutors[3] are elected in growing numbers, communities are holding them to account on their campaign promises to bring about deep criminal justice reforms. At the core of this new era of prosecutorial accountability[4] is a more fundamental question: are reformers justified in betting on our democracy, specifically the election of a new generation of prosecutors, as an avenue to justice reform?

The electoral wins of reform-minded prosecutors are certainly cause for optimism, but they also necessitate public discourse about what it means for prosecutors to play a role as agents of change. Certainly the reform agenda is daunting. Even a campaign pledge to end mass incarceration by reducing the number of people in jails and prisons does not explicitly recognize the broader ways in which the state criminalizes and supervises large swaths of the US population, disproportionately low-income individuals and people of color, while affronting common standards of human dignity. With over six million people under correctional supervision,[5] excessive use of the arrest powers, and stubbornly high levels of distrust of the criminal justice system in the communities most directly impacted,[v] the need to temper the justice system's excessive reach remains urgent. By promising to unwind the machinery that created this state of affairs, reform-minded prosecutors are tackling an enormous challenge.

There is a deep irony to the assertion that prosecutors can be expected to lead the

[1]Prosecutors are elected more frequently than any other actor in the criminal justice system, including judges, sheriffs, and public defenders. Prosecutors are currently elected in all but four states – Connecticut, Delaware, New Jersey, and Rhode Island.
[2]This is compared with 35 percent of state legislative incumbents who ran unopposed.
[3]Throughout the paper, we use the term "reform-minded prosecutors" rather than "progressive prosecutors", as we realize that the term "progressive" connotes different meanings in different contexts, and several prosecutors who are elected on a reform agenda may not identify as progressive.
[4]"Accountability" is a complex term. We use it throughout this paper as a way to ensure that prosecutors are acknowledging and minimizing harms of the justice system, and that prosecutors are answering to the communities they serve. Accountability can take the form of truth-telling and reckoning, providing transparency of decisions and impacts, and explaining whether and how promises were kept. The democratic process serves as a powerful form of accountability for elected officials, including prosecutors.
[5]According to an April 2018 bulletin by the Bureau of Justice Statistics, an "estimated 6,613,500 persons were under the supervision of U.S. adult correctional systems on December 31, 2016."

campaign for justice reform. With enormous discretion over charging, bail recommendations, plea policies, and sentencing, not to mention their outsized role in promoting tough on crime policies, district attorneys[6] hold significant influence throughout the criminal justice system and arguably helped power the dynamics leading to the current realities of punitive excess. Why, skeptics have asked, is it now reasonable to expect prosecutors to change course, reconsider the last half-century of their profession's history, and suddenly become champions for charting a new course? At a time when people are looking towards prosecutors as leaders in reform, there is necessarily a reckoning with what it means for prosecutors to play a role in dismantling a system they helped to create.[7]

As the number of reform-minded prosecutors grows, and the public's desire for change is increasingly vested in these elected officials, this paper asks questions at the center of this movement: how should prosecutors be evaluated on their campaign promises to be agents of fundamental change? And how should the public hold them accountable for using their powers to hasten the end of, what some scholars have called the "era of punitive excess?"[8] To answer these questions, we first posit the three pillars of the reform imperative confronting elected prosecutors: the need to reverse the realities of punitive excess, promote equity, and affirm human dignity. We then describe the ways that an elected prosecutor can exercise leadership in this movement. Next, we turn our attention to the traditional methods of exercising prosecutorial discretion and propose how a reform-minded prosecutor should use these core powers to advance the reform agenda. Finally, we return to the question of democratic accountability and suggest a series of questions the public might ask of their elected prosecutor – in essence, the outlines of a report card to determine whether their hopes for change have been realized. This paper does not include a comprehensive review of the extensive literature on mass incarceration or of the emerging public discourse around the role of the prosecutor.[9] Rather, we hope this paper contributes to a new framework that can guide prosecutors in orienting their strategies to unwind punitive excess, promote equity, and affirm human dignity. Our deepest hope is that this framework can support communities as they hold reform-minded prosecutors to account for advancing the cause of justice.

II. THE REFORM IMPERATIVE: UNWIND THE MACHINERY OF PUNITIVE EXCESS, PROMOTE EQUITY, AND AFFIRM THE HUMAN DIGNITY OF ALL WHO ARE IMPACTED BY THE JUSTICE SYSTEM

Prosecutors' first and foremost mission is to protect the public and uphold the law. Achieving this goal requires more than securing convictions for cases brought by their office. Modern prosecutors' offices are finding new collaborative relationships with police and communities to promote safety.[10] In our democracy, it's appropriate that these officials be held accountable for keeping communities safe. But in the modern reform era, when crime rates are at historic low levels, criminal justice leaders have learned that progress in reducing crime cannot be equated with success at achieving the separate goal of building public trust in the justice system and in the rule of law. More is required. Today's criminal justice eco-system is energized by reform and driven

[6]In many jurisdictions, locally elected prosecutors have the title District Attorney, commonly abbreviated as DA. There is variation in local prosecutor titles across the country, including State's Attorney, County Attorney, and Prosecuting Attorney. This paper commonly uses the terms "district attorney" and "prosecutor" interchangeably when speaking generally, and uses the specific titles of elected prosecutors when speaking about their offices in particular.
[7]John Pfaff's *Locked In* examines how prosecutors' use of discretion has led to more people incarcerated for longer sentences, and contributed to the sprawling reach of the criminal justice system.
[8]"Punitive excess" is a term increasingly used in criminal justice reform to describe the extensive punishment with which the state responds to behavior defined as criminal. Square One, a think-tank at the Columbia University Justice Lab, has examined the links between criminalization, politics, the courts, and the consequences of punitive excess.
[9]Preet Bharara, Rachel Barkow, Emily Bazelon, John Pfaff, Chris Stone, the Brennan Center for Justice, the Vera Institute of Justice, Fair and Just Prosecution, Color of Change, and the ACLU's Smart Justice Initiative have all produced important work in recent months on the role of prosecutors and criminal justice reform.
[10]Particularly noteworthy has been the use of data to focus prosecutorial resources in ways that reduce crime, reflected in the national conference on Intelligence-Driven Prosecution led by the Manhattan District Attorney's office. Prosecutors are also key partners in the focused deterrence strategies promoted by the National Network for Safe Communities at John Jay College of Criminal Justice.

by the urgency felt by the individuals and communities directly impacted by the justice system's overly-punitive nature. People running for prosecutor today are increasingly campaigning on platforms that acknowledge such harm, publicly recognize that the justice system has gone off-track, and pledge to chart a course to right its wrongs while enhancing safety for all. We discern three interconnected calls for reform in the modern era: a demand to unwind the machinery that has produced the realities of punitive excess; a call to promote equity in society's response to crime;[11] and an expectation that the value of human dignity will infuse and inform the operations of the justice system.[vi12] A candidate for elected prosecutor who runs on a reform platform should be responsive to all three dimensions of the reform movement. Here we review the challenges underpinning these calls and set these principles as aspirational goals that prosecutors can work towards, and to which they can be held to account.

unique."[viii] Nearly half a million of those behind bars are awaiting trial and have not been convicted of a crime. An additional 4.5 million people are under correctional supervision in the community, typically in the form of probation and parole.[ix] The vast majority of those under correctional control are convicted of misdemeanors.[x] Misdemeanors may initially result in what appears to be a relatively minor sanction, such as probation or a fine, but research demonstrates how even light touches from the criminal justice system can cause more harm than good.[xi] A conviction of any type can spark myriad collateral consequences, including barriers to employment, housing, and public aid. These consequences now impact nearly one in three Americans who have a criminal record, as well as their families and communities.[xiii] Extensive research shows how punitive excess can in fact undermine public safety and have criminogenic effects, such as disrupting

Today's criminal justice eco-system is energized by reform and driven by the urgency felt by the individuals and communities directly impacted by the justice system's overly-punitive nature.

i. Unwind Punitive Excess: We live in an era of extensive state control by operations of the justice system, what some scholars call the "carceral state."[vii] Over two million people are behind bars in the country's prisons and jails, a rate of incarceration that has increased 500 percent over the last forty years and that is "historically unprecedented and internationally

opportunities for stability and desistance, familial and community ties, and collective efficacy.[xiv13] A reform-minded prosecutor should acknowledge this reality, communicate the extent of the harms associated with the justice system footprint, and pledge to take steps to mitigate these harms and reverse course.

[11]For a robust discussion on the prosecutor's role in addressing racial inequality, see *Race and Prosecution*, an Executive Session paper authored by Angela J. Davis, John Chisholm, and David Noble.

[12]The Vera Institute of Justice has led initiatives to center criminal justice reform on human dignity, including through their Reimagining Prisons Project. In 2019, Vera and the Institute for Innovation in Prosecution launched Dignity, Racial Justice, and Prosecution, a year-long initiative with 25 criminal justice reform leaders to center human dignity in prosecution.

[13]Longitudinal studies by Robert Sampson and John Laub show how key "turning points," such as stable employment and relationships, support people in desisting from crime. Punitive excess, including exorbitant prison sentences or collateral consequences that extend beyond a court-ordered sanction, interrupt opportunities for these turning points. Additionally, the long-term and concentrated effects of incarceration on communities, "impair children, family functioning, mental and physical health, labor markets, and economic and political infrastructures … [and] the likelihood that concentrated incarceration [and collateral consequences] is criminogenic in its effects on those communities becomes stronger," writes Todd Clear. Furthermore, the National Academy of Sciences report on the causes and consequences of incarceration found "that the United States has gone far past the point where the numbers of people in prison can be justified by social benefits and has reached a level where these high rates of incarceration themselves constitute a source of injustice and social harm."

ii. Promote Equity: The modern justice system operates in the long shadow of slavery, Jim Crow, racial oppression, police practices used to enforce segregation, and racist patterns of criminalization and punishment. Criminal laws have been used as instruments of exclusion targeting marginalized groups throughout American history, and this legacy persists today.[14] Research has shown that people of color are disproportionately impacted at every stage of the criminal justice system, from stop, arrest, and charge, to pretrial detention, sentencing, and reentry.[xv] The net result of these realities is stark: according to the Sentencing Project, "a black male born in 2001 has a 32% chance of spending time in prison at some point in his life, a Hispanic male has a 17% chance, and a white male has a 6% chance."[xvi] Ironically, even some efforts that have successfully reduced punitive excess have increased racial disparities. For instance, as rates of juvenile detention began to decline across the country, racial disparities in juvenile detention increased.[xviii] Similarly, a report by the Data Collaborative for Justice at John Jay College[15] found that as arrests for misdemeanors dropped throughout New York in recent years, racial disparities grew. Equity is not just a racial consideration, but also a socio-economic one. In recent years, the justice reform movement has focused on the deep connections between racial disparities and the criminalization of poverty.[xviii] The Department of Justice's investigation into the Ferguson Police Department, after police fatally shot 18-year-old Michael Brown, revealed a municipal budget built on fines and fees that saddled the majority African-American community of Ferguson with debt and criminal records, while also increasing unnecessary interaction between police and residents. Subsequent inquiries have revealed similar structures across the country.[16] Unsurprisingly, these and other law enforcement tactics that have a disproportionate impact undermine public trust in law enforcement, particularly in the communities most directly affected by both violence and incarceration.[xix] Ample empirical studies demonstrate that people are more likely to cooperate with law enforcement – for instance, by calling the police to report a crime or working with prosecutors to investigate crime – when the law and its actors are viewed as legitimate.[xx][17] Accordingly, the justice system's extensive and disproportionate reach has harmed community trust and collaboration, ultimately undermining its goal of public safety. Finally, as Bruce Western and Becky Pettit have written, the direct and collateral harms of punitive excess disproportionately experienced by low-income communities of color "deepens disadvantage and forecloses mobility for the most marginal in society."[xxi] A prosecutor committed to the modern reform movement should: (1) recognize the connection between the historical racial and economic injustice in America and the current law enforcement systems, and (2) explicitly embrace an agenda of truth-telling and repair.

iii. Affirm Human Dignity: The modern reform movement is centered on the principle of human dignity. This principle requires that the prosecutor take steps to ensure that every interaction affirms the human dignity of those touched by crime and the operations of the justice system.[xxii][18]

[14]Michelle Alexander's the *New Jim Crow* documents the ways that the criminal justice system has perpetuated and exacerbated the American history of racial hierarchy.
[15]Formerly the Misdemeanor Justice Project at John Jay College.
[16]For further information on fines and fees, see the Fines and Fees Justice Center, and the US Department of Justice's *Investigation of the Ferguson Police Department*, a report published in 2015.
[17]Tom Tyler and Tracey Meares have conducted multiple studies on procedural justice in the legal system. Their foundational research, coupled with recent surveys and analyses by the National Initiative for Building Community Trust and Justice, demonstrate the importance of and strategies for law enforcement to reconcile harm and strengthen trust with the communities they serve in order to better fulfill their public safety aims.
[18]Guidance for these efforts can be found in the principles set forth in *Parallel Justice for Victims of Crime*, a 2010 book by Susan Herman. "The tenets of Parallel Justice require that prosecutors make three commitments to crime victims: to make their safety a high priority, to implement their rights within the criminal justice system, and to inform them of their rights to pursue justice in the civil courts," writes Herman.

Victims of crime are demanding respectful treatment in courts. Some ask that they be referred to as survivors, not victims, to acknowledge their struggles. Individuals who have served time in prison expect to be referred to as people, not inmates or felons. It's important to note that people who are charged with crime frequently have also been harmed by crime.[xxiii][19] Not only are the binary or oppositional labels of "victim" and "offender" inaccurate, the reality of the overlapping experiences creates a special obligation for prosecutors to affirmatively recognize that many people they prosecute have endured the trauma of victimization and to advocate for a justice system that more effectively addresses, rather than compounds, that trauma.[20] Recognizing the dignity of those charged with crime is inherently and inextricably linked to recognizing the dignity of those affected by crime. Support for the human dignity principle can also be found in the Supreme Court decision in *Brown v. Plata* concerning overcrowding and lack of medical care in California prisons. Justice Anthony Kennedy, writing for the majority, discerned a constitutional basis for this principle: "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment."[xxiv][21] Yet, as evident in *Plata*, the legal system has too often failed to live up to this standard. From the deprivation of liberty and harsh conditions of confinement, to the daily "degradation ceremonies" in courts,[22] to the insensitive treatment of victims, the ways in which the modern criminal justice system affronts common standards of human dignity are evident.[23] To meet the expectations of the reform movement, a prosecutor should adopt policies that promote human dignity in every interaction with any member of the public. Specifically, the prosecutor should find ways to bring the staff of their office into proximity to the experiences of people outside the courthouse by listening to victims, defendants, police officers, incarcerated individuals, communities impacted by crime, community leaders and children of incarcerated parents. Moreover, a prosecutor must recognize and promote the inextricable link between affirming human dignity, building public trust, and thereby promoting public safety.

When considering the human stories behind the above statistics, the devastation is nearly unconscionable.[24] The carceral state has deprived individuals of their liberty, children of their parents, and communities of opportunities for stability and well-being. The tangible impact on peoples' daily lives drives a dissatisfaction with incremental reform and a call for deep, tangible change.[25] Today's criminal justice reform movement is more than a series of policy suggestions, or a catalogue of demands, or a simple criticism of the status quo. The movement is powered by a set of big ideas, grounded in a deep critique of our history and elevated by an expectation for a fundamentally different approach to justice. A reform-minded prosecutor will harness, and advance, those big ideas.

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[19]According to the Alliance for Safety and Justice's report *Crime Survivors Speak*, young people, people of color, and people living in low-income communities "experience the most crime." These are the same populations overrepresented as defendants in the criminal justice system. For robust narratives about the victimization of people charged with crimes, see Bruce Western's *Homeward* and Danielle Sered's *Until We Reckon*.

[20]See the IIP Executive Session paper, *Prosecutors and Crime Survivors*, by Jean Peters Baker and Lenore Anderson.

[21]For a fuller discussion on human dignity in the law, and specifically in *Plata*, see the articles "From Health to Humanity," by Jonathan Simon and "Dignity as an Indispensable Condition of Criminal Justice" by Joseph Margulies.

[22]Nicole Gonzalez Van Cleve, Associate Professor at the University of Delaware, delineates "degradation ceremonies" in routine court proceedings in a paper for the Square One Roundtable on the Future of Justice Policy.

[23]How does this occur? In other international and historical contexts, scholars have proposed that bureaucratic systems allow for dehumanization by squeezing the empathy out of system actors. Decision-makers become focused at the bureaucratic task at hand – in the case of prosecutors, making bail, charging, and sentencing decisions – neglecting how these decisions directly impact individuals, families, and communities.

[24]"If we were to simply calculate the aggregate life-years of our fellow citizens who were sent to prison … we would weep," Jeremy Travis noted in a recent speech on trends in the operations of the criminal justice system in New York City.

[25]For a robust critique of the current reform movement and a call for more comprehensive and urgent action, see "The Punishment Bureaucracy," a 2019 article by Alec Karakatsanis in the *Yale Law Journal*.

III. LEVERAGING THE PROSECUTOR'S LEADERSHIP ROLES TO ADVANCE REFORM

Given the public discourse about the extensive reach of the criminal justice system, its disproportionate impact on low-income communities of color, and its damage to basic notions of human dignity, it is reasonable to expect that elected officials – especially prosecutors, the highest elected law enforcement official – will acknowledge and address the origins of these ailments as well as potential solutions. Prosecutors are uniquely positioned to demonstrate that the reform imperative is compatible with, and in fact essential to, public safety. Articulating this position will require a reform-minded prosecutor to promote public understanding of the fact that an excessive and inequitable justice system has undermined its public safety aims. The research literature and human narratives make clear that, by interrupting economic prospects, familial ties, and opportunities for stability, the justice system has fractured communities' ability to maintain safety.[xxv26] By creating and exacerbating structural inequities, the justice system has harmed trust in and willingness to work with law enforcement by those most affected by both violence and punitive excess.[xxvi27] These insights run counter to the traditional tough-on-crime views of our recent past and require elected officials to acknowledge that this conventional wisdom does not hold.

More specifically, this truth-telling role will require the reform-minded prosecutor to acknowledge that certain traditional justice system responses – including aggressive police tactics, lengthy prison sentences, long terms of community supervision, or excessive fines and fees – have not been shown to reduce crime. In fact, there is evidence that they may be counter-productive. For instance, a recent study found that police stops, especially when they happen frequently and are enforced on young people, may have a criminogenic effect.[xxvii28] Interestingly, evidence from jurisdictions that have reduced incarceration rates shows that crime rates have also declined. One such case involves a prosecutor-led reform initiative. In Cook County (IL), a suite of reforms instituted by State's Attorney Kim Foxx contributed to a nearly 20 percent reduction in incarceration rates during 2018, while crime rates simultaneously dropped by nearly eight percent during the first half of that same year.[xxviii] These numbers are a powerful indication that reform and safety go hand in hand, and illustrate the potential of bold leadership.

As the elected chief local law enforcement official, prosecutors can exercise enormous influence. They have the power to convene, inform, and guide public discourse on criminal justice policy. They can use these powers to activate the public consciousness and public resources to advance a more equitable and effective criminal justice system.[29] Exercising

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[26]"Collective efficacy is defined as the process of activating or converting social ties among neighborhood residents in order to achieve collective goals, such as public order or the control of crime … Empirically, collective efficacy has been represented as a combined measure of shared expectations for social control and social cohesion and trust among neighborhood residents," writes Robert J. Sampson, who has led empirical studies measuring the impacts of collective efficacy. The consequences of punitive excess on communities most affected interrupts opportunities for collective efficacy.

[27]"Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public. This reaction occurs both during personal experiences with legal authorities and when community residents are making general evaluations of the law and legal authorities," writes Tom Tyler, who along with Tracey Meares, has led empirical research on the impact of "procedural justice" on compliance with the law. When the law is not viewed as fair, due to excessiveness and/or disproportionality, people are less likely to view legal actors as legitimate or to comply with their orders.

[28]Conversely, empirical research led by Patrick Sharkey has also shown how community-based organizations are effective at reducing crime without the collateral harms of the criminal justice footprint.

[29]See the Executive Session paper, *Prosecutors and Frequent Utilizers*, by John Choi, Bob Gualtieri, and Jeremy Travis.

this type of leadership will undoubtedly be met with resistance, including challenges from other prosecutors, law enforcement leaders, editorial writers, and other elected officials.[xxix][30] But reform-minded prosecutors can leverage empirical evidence, their growing power in numbers, as well as their public mandate to resist political pushback and continue their work towards a more just system.

We can view the prosecutor's power as existing in three interrelated leadership domains: leadership within their profession, among criminal justice stakeholders, and in the public sphere more broadly.

i. Leadership within the Profession: An elected prosecutor can exercise leadership through networks of like-minded colleagues, as well as through national and state-level professional associations. The advent of a number of national organizations dedicated to the reform movement – the Institute for Innovation in Prosecution, the Reshaping Prosecution Program at the Vera Institute of Justice, the Association of Prosecuting Attorneys, Fair and Just Prosecution, and others – provides a home for intellectual stimulation, sharing of best practices, and networking among like-minded colleagues. Under the right circumstances, state prosecutor associations could provide a powerful platform for a reform-minded official. It is well recognized that these organizations have traditionally played an important role in influencing criminal justice legislation. Most frequently, however, this influence has been in the direction of more punitive policies, a reality that poses a complex challenge to reform-minded prosecutors.[xxx] This dissonance between his campaign commitments and the state prosecutor organizations' resistance to reform led Philadelphia (PA) DA Larry Krasner to leave his state's largest prosecutor association.[31] As reform-minded prosecutors challenge the mores of their state associations, they are likely to confront harsh political realities and raise complex ethical questions regarding the exercise of their discretion. For instance, after the Georgia legislature recently passed a law significantly limiting access to abortion, several prosecutors in the state, including DeKalb County (GA) DA Sherry Boston, said they would not enforce the law.[xxxi] In Florida, Orange-Osceola State Attorney Aramis Ayala announced early in her term that she would not seek the death penalty. But such bold stances do not come without risks. After her announcement, then-Florida Governor Rick Scott removed more than two dozen cases from SA Ayala, the state legislature cut $1.3 million from her budget, and the state prosecutor's association filed an amicus brief *against* SA Ayala. The Florida Supreme Court ultimately denied SA Ayala's petition, asserting that Governor Scott was within his executive power when he removed the cases.[xxxii] The ruling has potentially significant implications for prosecutorial discretion, and has also raised national consciousness about the resistance that reform-minded prosecutors experience.

This resistance has been focused, in particular, on women of color. In addition to SA Ayala, Kim Foxx, SA of Cook County (IL); Rachael Rollins, DA of Suffolk County (MA); and other women of color serving as prosecutor have experienced unprecedented retaliation, including personal threats, as they take strides towards reform. Preeminent legal scholar Angela J. Davis and Melba Pearson, Deputy Director for the ACLU of Florida, documented the resistance that African-American women are experiencing as chief prosecutors, and noted that newly-elected white male prosecutors have taken similar stances and implemented similar policies without comparable backlash.[xxxiii] Reform-minded prosecutors must

[30]James M. Doyle, a Boston defense lawyer, details why reform led by newly-elected Suffolk County (MA) DA Rachael Rollins is enduring pushback from "courthouse regulars," and why the reform is essential.

[31]While reform-minded candidates are elected in growing numbers, the vast majority of the country – including in rural communities, where incarceration is on the rise – continue to be represented by state and local prosecutors who have more traditional notions of a prosecutor's role. In state prosecutor associations, traditional prosecutors have power in numbers, and often set the legislative priorities of these organizations.

acknowledge this reality, proactively support one another, and resist vitriolic reactions from within and outside the profession. Resisting this pushback also provides an opportunity to communicate the larger goals of the reform movement to the public that elected them. As DA Krasner wrote in an op-ed supporting the unsuccessful candidacy of Tiffany Cabán for DA in Queens, New York,[xxxiv32] "Keep the people informed of your achievements and your struggles; they will be with you even when the institutions attack, and they will attack."[xxxv] DA Krasner has also experienced these institutional attacks, as the Pennsylvania legislature passed a bill that grants "authority to the state's attorney general to prosecute certain firearms violations in Philadelphia — and nowhere else in the state," writes the *Intercept*.[xxxvi] As reform-minded prosecutors experience the inevitable resistance to their agenda for change, they will find support among a growing set of like-minded prosecutors across the country.[33] Their challenge is to find ways to leverage access to their professional associations to promote a diversity of views among the state's elected district attorneys, and communicate with the public the rationale behind their policies.[34]

ii. Leadership among Criminal Justice Stakeholders: In addition to guiding debates in their professional associations, reform-minded prosecutors can lead discourse with other criminal justice stakeholders. This includes colleagues who operate within the criminal justice system as well as those who have influence in criminal justice policy. Prosecutors are uniquely positioned as elected officials to interrogate the operations of the criminal justice system to promote policies that will reduce the reach of the system, to mitigate racial disparities, to advance public safety, and to treat all participants in court proceedings respectfully. Through such evaluations, prosecutors can encourage local police officers, defense attorneys, judges, and corrections, probation, and parole officers to take steps towards reform goals. Prosecutors can also speak with their city council and state legislature to pass policies and budgets that align with these aims. Ramsey County (MN) Attorney John Choi partnered with his local public defender to advocate for drug sentencing reform.[xxxvii] San Francisco (CA) District Attorney George Gascón supported state legislation that would clear old arrest and conviction records, while he simultaneously erased thousands of decades-old marijuana convictions,[xxxviii] an important policy as a recent study shows that expungement can reduce future offending while increasing future wage earnings.[xxxix] Prosecutors should cite studies like this and other evidence of public safety benefits while promoting reform. For instance, participants of Youth and Communities in Partnership, a diversion program run by the Brooklyn (NY) District Attorney's Office for young people facing gun possession charges, had a "22 percent lower rearrest rate within three years than others in their 16-to-24-year-old age group who went to prison and then were released," writes journalist Emily Bazelon in the *New York Times*. Bazelon cites these statistics as she refutes critique from New York Mayor Bill deBlasio that reform-minded prosecution strategies are contributing to crime.[35] While some critics

[32]The New York City Board of Elections conducted the first boroughwide recount in recent history after the primary election for Queens District Attorney in June 2019 was too close to call. In August 2019, the recount determined that Melinda Katz, the Queens Borough President, led Tiffany Cabán by 55 votes. In her concession speech, Cabán encouraged her supporters to continue organizing for criminal justice reform.

[33]The opposition to reform can also come from those in national leadership. On August 12, 2019 in remarks at the at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference, Attorney General William Barr said, "These anti-law enforcement DAs have tended to emerge in jurisdictions where the election is largely determined by the primary … Some are refusing to prosecute various theft cases or drug cases, even where the suspect is involved in distribution. And when they do deign to charge a criminal suspect, they are frequently seeking sentences that are pathetically lenient. So these cities are headed back to the days of revolving door justice."

[34]While facing criticism from more traditional prosecutors and institutions, reform-minded prosecutors should also be prepared for continued pressure from the communities who elected them, who will continue to demand urgent and sustained change. Electoral success will require that they regularly and proactively communicate with this base. As a corollary, reform-focused advocates should publicly support prosecutors when they take bold stances.

frame reform efforts as hindering the work of law enforcement or jeopardizing public safety, data like this demonstrate how reform can in fact enhance law enforcement strategies to advance public safety.

Several prosecutors have also aimed to minimize the risk of deportation during plea negotiations, while also publicly advocating against raids by Immigration and Customs Enforcement in court, noting that the risk of deportation chills engagement with victims, witnesses, and communities, an essential component of preventing and investigating crime.[xl] Effective advocacy for system reform often requires prosecutors to be in conflict with other criminal justice agencies. For example, a death in custody may require prosecutors to investigate their local sheriff's department. Instituting a wrongful conviction unit may put prosecutors in tension with their own staff as well as colleagues on the bench.[36] In the instance of an officer-involved fatality, prosecutors must ensure a thorough, transparent, and independent investigation, potentially causing tension with local police departments.[xlii37] Although taking these steps may generate controversy, they can also build public trust. Indeed, several scholars have noted that prosecutors' failure to investigate and indict officers for the killing of unarmed people, disproportionately people of color, spurred the election of progressive prosecutors.[xliii38] While these tensions may seem like hurdles for reform-minded prosecutors, they in fact represent key benchmarks of reform by demonstrating how the system is being held to account and how the human dignity of all those touched by the system, especially those most directly harmed, is upheld. By simultaneously advocating for system change, supporting effective crime reduction strategies, and ensuring accountability for system harms, prosecutors can guide their jurisdiction toward a justice system that is worthy of public confidence.

iii. Leadership in the Public Sphere: Prosecutors have a powerful public voice. The reform era demands that this voice be exercised on behalf of fundamental change. Through regular public forums, speeches, op-eds, and data reports, prosecutors can explain the rationale behind the reform imperative and guide public opinion. In some instances, this imperative will require that the prosecutor speak out against more punitive policies that are often the default position when crime becomes a top-level public concern. As a law enforcement official representing constituents, a prosecutor can resist a pendulum swing in a more repressive direction by citing research on the safety benefits of reform and the harms of punitive excess. Modern prosecutors are also adopting polies that promote the value of transparency and public accountability. SA Foxx has done this through an unprecedented data report covering six years of felony criminal case data, including 45 million data points and discretionary decisions from case review through disposition. Similarly, DA Gascón has released a data dashboard with decades' worth of information on case intake and processing.[xliii] Transparency also necessitates discourse about how stark racial disparities permeate the criminal justice system and can support a conversation about the legacy of racial oppression. During a talk at Harvard Law School in 2017, Tori Verber Salazar, DA of San Joaquin County (CA), acknowledged

[35]In the same article, Emily Bazelon notes that Brooklyn (NY) DA Eric Gonzalez's diversion program is an essential part of the "progressive platform" on which his constituents elected him.
[36]Darcel Clark, DA of Bronx (NY), instituted one of the country's most robust conviction integrity units when she became prosecutor, after she served as an Associate Justice for the New York State Supreme Court Appellate Division.
[37]John Choi, Ramsey County (MN) Attorney discusses this tension in the IIP Executive Session paper, *Prosecutors and Officer-Involved Fatalities*. Kim Gardner, Circuit Attorney of St. Louis (MO) has faced significant backlash from her local police union after creating a no-call list of police with evidence of Brady violation. She, along with several other jurisdictions, expanded this list following research by the Plain View Project, which showed offensive social media posts by former and current police.
[38]For tangible actions that prosecutors can take and that communities can advocate for to prevent and address officer-involved fatalities, see the Institute for Innovation in Prosecution's Toolkit on this issue, which was developed through a working group led by family members who lost loved ones to police violence; elected prosecutors; and law enforcement experts.

that her office has played a role in the country's history of racial injustice, apologized for these lasting harms, and committed to using her power to end inequities in the justice system today.[xliv] By acknowledging past and present harms while outlining action to correct them, an elected prosecutor can garner public support for building a more equitable and effective criminal justice system. Addressing these structural inequities may also provide a platform for a prosecutor to support greater investment in other social systems, such as health care, housing, and education. Recognizing that criminal justice involvement is often the culmination of other system failures and inequities, prosecutors can advocate for adequate public resources to meet peoples' basic needs.[xlv] This sort of leadership "shifts the focus of prosecution from punishment to problem solving, and metrics of success beyond conviction and recidivism rates to individual and community well-being."[xlvi] In this way, the public can hold a reform-minded prosecutor accountable for being a consistent voice for transparency, equity, and historical truth-telling, and for charting a path that can reconcile past and present injustices.

IV. ADVANCING REFORM THROUGH THE EXERCISE OF PROSECUTORIAL DISCRETION

While adding their voice to the public discourse, prosecutors can also shape the priorities, policies, and practices of their offices to advance reform goals. The tools at hand – from the first day in office – are powerful and visible. Prosecutors' offices, through policy and everyday practice, can affect hundreds of lives and the public's perceptions of justice by the exercise of discretion in five domains: charging, bail recommendations, plea policies, sentence recommendations, and post-sentence reviews. To be clear, these domains are not the only ways that prosecutors can exercise power. For instance, prosecutors can convene grand juries to investigate public agencies, issue reports on police practices, support research on racial disparities in the operations of their offices, or convene blue ribbon task forces on pressing justice reform issues. Nevertheless, the five domains detailed here serve as immediate points where prosecutors can exercise their power over cases in fundamentally different ways. Through these domains, prosecutors can create policies that ensure the parsimonious use of the powers of the justice system, require weighing the harm caused by crime with the potential harm of a system response, and measure success based on the high aspirations of the reform imperative, rather than on conviction rates. While some may view these policies as too incremental, or too far from current modes of operation, they in fact offer direct, tangible steps to begin to reverse the system's excessive punitiveness, promote the equitable operations of the justice system, and affirm the human dignity of all who come into contact with the system.

The public can hold a reform-minded prosecutor accountable for being a consistent voice for transparency, equity, and historical truth-telling.

Effective leadership in the reform era requires a willingness to challenge professional norms. Prosecutors must both partner with, and when appropriate, challenge colleagues to support systemic changes, and be a consistent voice for principles that may run counter to the popular mood. It requires resisting the fallacious argument that reform and safety are at odds, and promoting the empirical connections between the reform imperative and public safety aims. It requires resisting the historical pattern of turning to punitive policies during moments of rising crime rates, and instead calling on community-led strategies to prevent crime. It requires a reckoning of what safety means – is it merely the absence of crime? Or does it, more broadly, encompass thriving communities? – and how to get there. And it requires leading by example through the use of prosecutorial discretion.

i. Charging: At the front door of the criminal

Through their significant discretion, prosecutors can ensure parsimonious use of the justice system, weigh the harm caused by crime with the potential harm of a system response, and measure success based on the reform imperative.

justice system, prosecutors decide whether there is sufficient evidence to file a charge, what charges to file, and against whom those charges are made. In exercising discretion over charging,[39] prosecutors should consider strategies to produce a wider range of potential outcomes that more effectively achieve safety and justice than do a traditional charge and case processing. In the modern reform era, outcomes should encompass a goal of shrinking the justice footprint in order to garner trust and legitimacy, while promoting public safety and equity. For example, a prosecutor might adopt a policy of not filing charges for certain categories of low-level offenses. Prosecutors should also take care to ensure that individual charges are appropriately calibrated to the harm that the crime caused, to avoid the trend toward over-criminalization of anti-social conduct that is not truly criminal. Similarly, prosecutors should avoid over-charging, either in the severity or the number of charges, a practice that has traditionally been used as leverage to obtain a guilty plea. Finally, and most fundamentally, the prosecutor should take special care to avoid filing charges where the police have failed to meet the requisite legal threshold, a practice that may put the prosecutor at odds with the police. Consistent with the goal of producing better outcomes, a prosecutor can adopt expansive approaches to pretrial diversion, which provide opportunities for certain categories of individuals who would otherwise face criminal charges to instead participate in supportive programs, and offer non-criminal justice responses, such as mental health care or case management support, where appropriate.

Several prosecutors across the country are using their charging power in these ways. Suffolk County (MA) DA Rachael Rollins campaigned on a promise to not file 15 low-level charges,[xlvii] and Dallas County (TX) DA John Creuzot instituted similar policies after pledging to reduce incarceration rates by 15 to 20 percent.[xlviii] Manhattan (NY) DA Cyrus Vance, Jr. has announced that his office will no longer prosecute most farebeating or marijuana possession arrests, and has encouraged local police to reduce arrests for these low-level offenses. Leading change at the federal level, former Attorney General Eric Holder instructed US Attorneys to file below the maximum charge whenever possible.[xlix] Kim Ogg, DA of Houston (TX), "says that her decision not to prosecute most marijuana cases – which amount to about 10,000 charges annually in Harris County – will save her cash-strapped department $26 million a year," which could be reinvested into investigating rape cases and other more serious crimes, reports *Governing* Magazine.[l] Scott Colom, DA of the 16th District Court of Mississippi, increased the standard of proof for indictment, closing the front door of the justice system and serving as a check on both the arrest power of the police and the charging power of his office. Although the American Bar Association's *Criminal Justice Standards for the Prosecution Function* states that probable cause is a minimum standard for charging, there are ongoing debates in the field about whether prosecutors should raise this standard to beyond a reasonable doubt in order to ensure the integrity of charges and minimize the justice footprint. Prosecutors are also considering innovative ways to defer or dismiss charges. John Chisholm,

[39]As documented in John Pfaff's seminal book, *Locked In*, prosecutors' decisions to file more felony charges during the past three decades, even as violent crime rates fell, was a significant factor in incarceration growth.

DA of Milwaukee (WI), uses an "early intervention" program, which includes an eight-question assessment that each defendant receives after arrest and before arraignment. The program results in either dismissal or reduction of charges, and allows the prosecutor to focus on the individual facing charges, rather than on the charge recommended by the arresting officer, writes Angela J. Davis.[li]

ii. Bail Recommendations: Once a case is filed, prosecutors typically present the charges at arraignment and make their bail recommendations. Although judges determine whether to detain someone pretrial, research has found that a prosecutor's recommendation is the most influential factor over a judge's decision, and one that has significant implications for people accused.[lii] Of the 630,000 people in jail today, 443,000 are awaiting trial. People held pretrial, who by definition have not been convicted of a crime, face the stringent conditions and consequences of incarceration and, thus, the added pressure to enter a plea deal. Additionally, "compared to defendants released at some point prior to trial, defendants held for the entire pretrial detention period had … [three times] greater likelihood of being sentenced to prison [and two times] longer prison sentences," according to a study published by Arnold Ventures.[liii][40] Further, even a short jail stay can increase the likelihood of future justice involvement.[liv]

By confronting the harsh realities of pretrial detention, a reform-minded prosecutor can make a significant contribution to reducing mass incarceration. Cook County (IL) SA Foxx revised her bail policies during her first three months in office after reviewing local jail "data that revealed that over 200 people were held on bonds under $1,000, and that specific low-level offenses were driving pretrial detention."[lv][41] With this data in hand, SA Foxx trains line staff to proactively request release on recognizance for low-level offenses.[lvi][42] Philadelphia (PA) DA Larry Krasner implemented similar policies, ceasing to seek cash bail for offenses that comprise 61 percent of all local cases.[lvii] A recent study evaluating the impacts of this policy found "a 22% … decrease in the fraction of defendants who spent at least one night in jail … [with no detected] change in failure-to-appear in court or in recidivism."[lviii][43] Similar policies are emerging in prosecutors' offices throughout the country, demonstrating the leadership of reform-minded prosecutors and the potential ripple effect of their policies. In order to ensure that their policies are put into effect, prosecutors should monitor the recommendations of their assistant attorneys and the decisions of judges. They can do this through internal training and supervision structures and by working directly with the local judiciary. Moreover, local court watchers – "groups that ask ordinary people to watch the daily machinery of the justice system and report back what they see"[lix] – offer an important source of accountability. Nicole Gonzalez Van Cleve has also promoted the value of court watchers as a way of ensuring that defendants and victims are treated with dignity.[lx] While some prosecutors may initially be uncomfortable with the external documentation of their staff's decisions, they should see it as an opportunity to improve their office's transparency, trust with their communities, and strategies for implementing meaningful reform. After revising their bail policies and being held to account on them, the Manhattan District Attorneys' Office said of court watchers, "Open courts are one of the great hallmarks of our justice system and we welcome the

[40]Formerly the Laura and John Arnold Foundation.
[41]SA Foxx's bail policy was reviewed in detail during a webinar hosted by the Institute for Innovation in Prosecution in September 2017, and uplifted in an accompanying issue brief.
[42]SA Foxx also introduced complementary policies to reduce the jail population and the use of fines and fees more broadly, including raising the felony theft threshold and not prosecuting financially-related traffic offenses.
[43]While data on the impacts of bail reform is still pending in much of the country, the study in Philadelphia is not an anomaly. In Washington, DC, where cash bail was eliminated in 1992, 91 percent of released defendants remained arrest-free through adjudication, and 90 percent of released defendants made all scheduled court appearances, suggesting that common concerns around bail reform, i.e. recidivism and failure to appear, are not pronounced.

engagement and public accountability that court observers provide."[lxi]

Preliminary examinations of prosecutor-led bail reform shows a decrease in pretrial detention rates, with no apparent change in court appearance or recidivism rates.

iii. Plea Policy: Following arraignment,[44] prosecution and defense continue to gather evidence, litigate, prepare for trial, and, in the 95 percent of cases that result in a conviction, reach a plea deal.[lxii] During the plea process, prosecutors frequently tell defendants that they will face the most severe charge, or the "top count," if they go to trial rather than accept a plea, a practice that is legal and has been affirmed by the courts.[lxiii45] While defendants consider potential "plea discounts" – also known as "trial penalties"[46] – they may also face plea deadlines, often referred to as "exploding offers." These offers set a finite timeframe to accept the plea before the conditions become more severe. Additionally, discovery policies vary widely across the country and often rely on the subjective assessment of prosecutors as to whether information is "material" to the case.[lxiv47] Thus, facing the threat of trial penalties, looming deadlines, and potentially limited access to evidence against them, many defendants feel pressure to admit guilt and enter a plea. In this way, the plea machinery extends the reach of the criminal justice system, while undermining constitutional liberties, by pressuring people to bear a criminal record for a crime they may not have committed, yet have little ability to show that it has not been proven beyond a reasonable doubt.[lxv48]

Reform-minded prosecutors can refine their plea policies in order to ensure transparency and constitutional protections of the accused. A 2007 report by the Justice Project details the country's variety of state statutes governing discovery and promotes best practices, including open-file discovery, automatic and mandatory disclosures, timing, certification, and remedies for non-compliance. Prosecutors can advocate for state statues that would mandate these best practices, and proactively implement them in their offices. Colorado's discovery procedures are uplifted in the report, as they mandate that prosecutors provide "written or recorded statements of the accused and co-defendants as soon as possible (but no later than twenty calendar days after the filing of charges) and that grand jury transcripts should be provided no longer than thirty days after indictment. All other discoverable materials should be provided no later than thirty days before trial."[lxvi] The New York State Legislature passed significant discovery reform, going into effect January 1, 2020. The legislative

[44]Plea policies vary across jurisdictions, but in general the process takes place following arraignment.
[45]In *Bordenkircher v. Hayes* (1978), the Supreme Court ruled that a defendant's due process rights are not violated if prosecutors heighten charges during trial after a plea is declined.
[46]The difference in terminology is indicative of ongoing debates about the purpose, costs, and benefits of plea deals. For instance, some argue that "plea discounts" allow individuals charged and individuals harmed by crime to avoid a lengthy court process, while the term "trial penalties" tends to connote the detriments of the plea process to the civil liberties of the accused.
[47]Discovery policies vary widely across the country, including as to whether evidence is material to the case. In states that do not specify what constitutes timely disclosure, discovery procedures may be arbitrary and disadvantageous for defense. For a thorough review of the variety of discovery policies in state statutes, see *Expanded Discovery in Criminal Cases*, a 2007 report by the Justice Project, funded by Pew Charitable Trusts. For a fuller debate of what constitutes "materiality," see "Prosecutorial Disclosure Obligations," a 2011 article by Ellen Yaroshevsky in the *Hastings Law Journal*. Moreover, the Supreme Court ruling in *Brady v. Maryland* (1963) mandates that prosecutors disclose exculpatory evidence, and ABA standards instruct prosecutors to "make timely disclosure to the defense [before trial of a criminal case]."
[48]For a fuller discussion on the plea machinery and its implications, see *Prosecution and Public Defense*, an Executive Session paper by Roy L. Austin, Jr., Kirk Bloodsworth, and Carlos J. Martinez.

provisions include "'automatic' discovery of all relevant materials that the prosecution has in its possession … [and it] requires the prosecution to turn over all 'discoverable' materials as soon as practicable, but no later than 15 days after arraignment," according to a summary from the Center for Court Innovation.[lxvii][49] In Seattle (WA), Prosecuting Attorney Dan Satterberg's Early Plea Unit also pledges to provide discovery as soon as possible and to ensure that defense counsel are able to meet with early plea deputy prosecutors.[lxviii] Ramsey County (MN) County Attorney John Choi, Brooklyn (NY) DA Eric Gonzalez, and Manhattan (NY) DA Cyrus Vance, Jr. have revised their plea policies, as these prosecutors hired immigration attorneys to guide the plea process in order to minimize the risk of deportation and other collateral consequences.[50] Some reform-minded prosecutors have also created policies that stipulate that if a person declines a plea deal and goes to trial, they are not penalized with a top charge or longer sentence recommendation for exercising their constitutional right. Recently, Scott Colom, DA of the 16th District of Mississippi, acknowledging the dangers of the trial penalty, instituted a policy that prosecutors will not make sentence recommendations to the judge if a person declines a plea and goes to trial. Prosecutors can also set policies that they will not use "package deals"[51] or cooperation agreements,[52] two of several "hard bargaining" tactics that can coerce defendants and compromise constitutional protections.[lxix][53]

Plea and discovery policies are inextricably linked to charging and bail, and revising them are critical steps on the road to unwinding the machinery of punitive excess. When a person is charged, detained pre-trial, and offered the possibility of a lighter sentence and returning home if they accept a plea, the pressure to do so may be insurmountable, despite the conviction, stigma, and collateral consequences that accompany a plea. Some proponents of the status quo argue that pleas allow the system to function because trials require far more time and resources. But others note that if more cases went to trial, it would pressure stakeholders to rely more on alternatives to prosecution and incarceration. A reform-minded prosecutor can note that critical values are at stake – the need to protect civil liberties while also minimizing the reach of the criminal justice system.

iv. Sentence Recommendations: If an individual enters a guilty plea or is convicted at trial, prosecutors make sentencing recommendations to the court.[54] It is at this decision point that reform-minded prosecutors can have the greatest impact on actually reducing the levels of community supervision and the rate of incarceration in their jurisdiction. Here, prosecutors should consider what sentence will be the most effective and least harmful for the individual convicted, their family, and community. In cases where the statute allows a non-custodial sentence, a prosecutor can recommend probation rather than prison. In such cases, the prosecutor can recommend shorter probation sentences and only those conditions necessary for rehabilitative purposes. If the statute establishes a mandatory minimum, the prosecutor can recommend no more than that minimum; if the prosecutor recommends more than the minimum, they should make a clear statement of reasoning on the record. If

[49]While clarifying timeframes and discovery procedures is an important step towards ensuring due process and civil liberties, prosecutors and other stakeholders should consider how best to implement these policies. For instance, building the electronic infrastructure and a coordinated system for automatic sharing between police and prosecutors, and prosecutors and defense could help all adhere to a more timely process.

[50]These policies were implemented following *Padilla v. Kentucky*, the Supreme Court case that mandates defense counsel to inform their client if a plea deal includes risk of deportation. Though not mandated, several prosecutors are also heeding the *Padilla* ruling, recognizing that a potential life-sentence of deportation is not proportional for many crimes.

[51]Package deals refer to offers to dismiss charges against the defendant's family or friends if the defendant accepts a guilty plea.

[52]Cooperation agreements refer to deals with defendants who are willing to provide evidence relevant to other investigations.

[53]For a fuller analysis of "hard bargaining" and its implications, see Cynthia Alkon's 2017 article in the *Nevada Law Journal*, "Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?".

[54]As is true in bail hearings, judges frequently agree with the sentences that prosecutors suggest.

a minimum sentence is still excessive, a prosecutor can state this fact on the record in individual cases and, more broadly, use their public platform to advocate that the state adopt legislation reducing mandatory minimum prison terms. In this way, by promoting practices that reduce reliance on the use of community supervision and incarceration, a reform-minded prosecutor can serve as a counterweight to the traditional view that intensive supervision and prison sentences are necessary to secure public safety.

Prosecutors can cite the empirical evidence that shows that intensive supervision and prison sentences are not necessary to secure public safety.

In justifying a policy seeking minimal sentences, the reform-minded prosecutor can reference the research documenting the devastating and enduring harmful effects of incarceration. According to this literature, incarceration creates and exacerbates trauma, and imposes lasting economic hardships, which in turn, can contribute to more criminal activity, not less. Incarceration also undermines the stability of families and communities.[lxx] Very importantly, and counter to the traditional narrative that prison sentences are needed to reduce crime, the prosecutor can highlight a report by the National Academies of Sciences, which found that high rates of incarceration have not been effective in reducing crime.[lxxi]

Recent innovations in the field demonstrate how alternatives to incarceration, including for offenses categorized as violent,[lxxii][55] offer promising public safety benefits. Evaluations of diversion programs for young people facing felony charges, such as Make It Right and Youth and Communities in Partnership, operated by the San Francisco and Brooklyn DA Offices respectively, find lower levels of recidivism among participants than among young people serving traditional sentences for comparable charges.[lxxiii] [lxxiv][56] Recognizing the harms of incarceration and the promise of alternatives, DA Krasner issued a five-page policy memorandum directing his staff to, among other things, rely more on diversion and use incarceration only as a last resort. He also recommended that his ADAs document the costs to taxpayers of their sentencing recommendations.[lxxv] He presented on early results of these efforts during a City Council budget hearing in April 2019, where he cited that "defendants sentenced during the last three months of 2018 were ordered to serve an estimated total of 2,233 years behind bars – a 46 percent decrease compared with the first three months of 2014," at an approximate cost savings of $82 million per quarter.[lxxvi] In addition to minimizing the harms associated with carceral sanctions, prosecutors should also oppose the imposition of excessive fines and fees that frequently accompany a criminal conviction. Alexes Harris, sociologist at the University of Washington, has shown how fines and fees – including restitution, court fees, and processing charges – saddle people in a cycle of debt, criminalization, and supervision, and are disproportionately imposed on low-income people of color.[lxxvii]

[55]For a comprehensive analysis of empirical studies on violence, see *Reconsidering the "Violent Offender,"* a paper from the Square One Project at the Columbia Justice Lab, which makes several important observations, including that violence is contextual, that prisons can produce violence and exacerbate trauma, and that the label "violent offender" is generally misleading and undermines parsimony.

[56]These innovations build upon previous alternative sanctions, including diversion programs that aim to address underlying issues that lead people towards criminal involvement. Former Brooklyn (NY) District Attorney Charles Hynes implemented Drug Treatment Alternatives to Prison (DTAP), a largely successful program that suspended sentences for people facing nonviolent felony charges, offered them participation in a therapeutic community, and dismissed charges at program completion.

v. Post-Sentence Reviews: Although this reality is not frequently articulated, prosecutors continue to wield influence over sentencing long after the sentence is imposed in court. Most prominently, prosecutors play an important role in the decisions of parole boards in those states with indeterminate sentencing systems. Parole boards typically consider prosecutors' recommendations when deciding whether to release an individual coming before them. Similarly, governors often solicit the views of prosecutors when considering applications for clemency, pardons, or commutation. A reform-minded prosecutor who is committed to ending mass incarceration should create a policy presumptively favoring release at these cases of post-sentence review. Such a policy, perhaps with exceptions, would constitute a powerful recognition of the statistical reality that the likelihood of recidivism falls sharply over time[lxxviii] and that each additional year of incarceration takes an enormous toll on the lives of the incarcerated individual and their family.[lxxix] In appropriate cases, the voice of the prosecutor speaking on behalf of mercy and forgiveness would add a human touch to an otherwise mechanical and unforgiving system of justice.

DA Gonzalez recently announced a new policy to "consent to parole at the initial hearing for all those who entered into plea agreements," with only limited exceptions, reports the *Marshall Project.*[lxxx] In announcing his new policy, DA Gonzalez noted that important consideration was made for victims, including how the completion of a sentence can provide closure for victims' families, as it did for his own after the loss of his brother. This policy marks a pointed departure from traditional practice in his office, under which the prosecuting attorney filed a pro forma letter at the time of sentencing opposing parole at first review years later. By shifting the presumption in favor of release, this policy represents a significant step toward reducing incarceration. Prosecutors can also advance parole conditions that support, rather than hinder reintegration. In particular, prosecutors could challenge their state's practices of parole revocation, as "45 percent of state prison admissions nationwide are due to violations of probation or parole for new offenses or technical violations," according to a 2019 report from the Council of State Governments Justice Center.[lxxxi] DA Gonzalez's new parole effort "will be merged with the conviction review unit in a new Post-Conviction Justice Bureau. The bureau will also help people seal old criminal records and address applications for clemency received from the governor's office," reports *The Marshall Project.*[lxxxii]

DA Gascón has launched a similar initiative, the Sentencing Review Unit, "to identify individuals who should be considered for resentencing by collecting and analyzing data on every person currently incarcerated in the City and County of San Francisco. It'll then conduct in-depth case reviews, resulting in recommendations for sentence reduction as well as resources to facilitate individuals' successful return to the community."[lxxxiii] PA Satterberg has created a clemency initiative in his office. "I always thought there had to be some sweet spot between 15 months and forever," said PA Satterberg in an article by the *Appeal*, adding that he considers factors beyond convictions, such as participation in educational and vocational training during incarceration.[lxxxiv57] Denver (CO) DA Beth McCann is vacating "low-level marijuana criminal convictions that occurred in Denver before marijuana legalization."[lxxxv] Miami-Dade (FL) State Attorney Katherine Fernandez-Rundle has partnered with her local public defender, Carlos Martinez, to set up clinics around the city that allow people to clear old records.[lxxxvi] SA Fernandez-Rundle, PD Martinez, and prosecutors and public defenders from Broward County and Palm Beach are also working together in collaboration with the Florida

[57]In a recent *New York Times*, "Letter to the Editor," Lucy Lang, IIP Executive Director and former prosecutor, and James M. Doyle, a defense attorney, encourage prosecutors to use their clemency initiatives to not just remedy past excessive sentences, but to also consider lessons for future sentencing decisions.

Rights Restoration Coalition, a grassroots organization led by returning citizens, to modify the sentences of people who have completed their sentence yet still owe fines and fees.[lxxxvii] This innovative approach emerged in response to Florida's recent legislation that bans people with fines and fees from voting.[lxxxviii] The bill was passed after the electorate voted overwhelmingly in favor of a ballot proposition that restored the right to vote for people convicted of felonies.

As elected officials, prosecutors can be strong advocates for the proposition that full citizenship for individuals who have been in prison, or convicted of a crime, is a vital component of a robust democracy. One way to do this is to support policies that promote successful reentry and the restoration of rights. Stephanie Morales, Commonwealth's Attorney of Portsmouth (VA) has done just this. She has been a vocal supporter of restoring the rights of people with criminal records, while also creating a reentry and reintegration initiative for formerly incarcerated people in her district. Similarly, while she was San Francisco DA, Kamala Harris created one of the nation's first reentry initiatives, Back on Track, a program that provided job training and case management for young adults charged with low-level drug crimes.[lxxxix] By investing in and promoting successful reentry, prosecutors are also promoting racial justice. In myriad ways, the stigma of a criminal conviction and the burden of collateral consequences are most acutely felt by people of color. In Devah Pager's seminal research on employment opportunities for people with a criminal record, she found that white men who reported a criminal conviction received more callbacks from employers than black men who did not report a criminal conviction.[xc] Similar inequities are felt in access to housing, education, and civic engagement.[xci58] Furthermore, if prosecutors engage impacted communities in the design of these policies, they will be recognizing that those with the deepest knowledge of the system's challenges are essential partners in crafting solutions.[59] In these ways – by taking a strong position on post-sentence reviews, promoting successful reentry, and advocating for full civic participation of those convicted of crimes – prosecutors can take a leadership position in the modern criminal justice reform movement.

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V. WHAT DOES SUCCESS LOOK LIKE?

A reform-minded prosecutor will inevitably face the question of accountability – certainly on Election Day – for achieving the promised reforms and meeting public expectations. In thinking about how to assess progress, we refer to the multiple roles that an elected prosecutor plays in our democracy. We believe this framework can help prosecutors move beyond a traditional perspective of their role to a more expansive notion of their dynamic responsibilities as leaders in the reform era.

In our conception, prosecutors serve in five distinct capacities: as CEO of their office, a leader in the jurisdiction's criminal justice system, a respected voice in times of crisis, a "minister of justice" knowledgeable about the issues of crime, and a leader of the broader justice reform movement. For each of these

[58]In 2016, over 6 million Americans, including one in 13 African-Americans, were unable to vote due to a felony conviction.
[59]This reality has been increasingly acknowledged thanks to the leadership and advocacy of JustLeadershipUSA, All of Us or None, Florida Rights Restoration Coalition, and other organizations led by formerly incarcerated people.

roles, there are tangible metrics for success. These metrics – sometimes quantitative, often aspirational – can help prosecutors move beyond traditional measures, such as conviction rates, to more elevating goals, such as enhancing safety, cutting back the reach of the justice system, promoting public trust, and reducing racial disparities. Some of these metrics are quite concrete, such as reducing the number of low-level charges filed and reducing the local incarceration rate, or tracking the recidivism rate of diversion programs. More ambitious would be metrics that track levels of community satisfaction with the justice system, or views of victims about the operations of the police, courts, and prosecutors. A robust system of non-traditional measures can help prosecutors more comprehensively evaluate and refine their strategies.[xcii60] These metrics can also be used internally to guide the actions and evaluate the performance of their ADAs, and to determine that announced policies are implemented in practice. These internal metrics are an important tool in driving culture change. But public accountability is also critical, and requires a high degree of transparency. Policies on the exercise of discretion outlined above should be published. Data on the operations of the office should be made public. Goals should be clearly stated and progress towards those goals should be shared publicly, on a regular basis. With a concrete expectation of how the prosecutor wields their dynamic power, the public can use this framework as a report card to evaluate how a prosecutor is delivering on their campaign promises to drive change, and to hold them to account.

A reform-minded prosecutor should be held accountable for creating an organizational culture that is committed to carrying out that mission. In the modern reform era, that leadership role will require special attention to advancing the goal of promoting human dignity in all interactions with the public – including and especially defendants, victims, and witnesses. Added to this is the goal of advancing equity, which would require metrics to determine whether racial (or other) disparities exist in the treatment of cases and taking appropriate steps to mitigate any such disparities. To advance the goal of reducing punitive excess, the elected prosecutor, in their role as CEO, should ensure that all staff understand the contributions that the office has historically made to punitive excess, and hold itself accountable for reducing those harms and publicly acknowledging that historical record.

A critical dimension of the CEO role is establishing policies that promote this new mission, creating metrics to determine whether those policies are being observed, and publicly announcing both the policies and the progress toward successful implementation. For example, a policy to no longer ask for bail to be set for a category of misdemeanor arrests should be publicly announced, a feedback loop should be created to ensure compliance, and a system should be established to inform the public whether the policy has been followed and to what effect. If a goal is established to divert certain types of cases, or a category of defendants, to programs outside the traditional system, then the elected prosecutor should make a public announcement of that policy, with an articulation of eligibility criteria, and regularly publish findings of the impact and effectiveness of that policy and the programs involved. A third example: if a prosecutor decided to change office policy

The public can assess prosecutors according to their five distinct capacities to drive meaningful reform.

Chief Executive Officer. On a fundamental level, an elected prosecutor is the Chief Executive Officer of a major public institution, responsible for leading an organization with the critical mission of promoting public safety, advancing justice, and ensuring the rule of law.

[60]The ACLU Campaign for Smart Justice outlines four commitments from reform-minded prosecutor candidates, including "the willingness to set a specific decarceration goal" and a "pledge [for] radical transparency."

regarding sentencing recommendations, those changes should be clearly articulated, the adherence to those policies tracked, judicial concurrence rates measured, and the impact on incarceration levels tracked over time. In order to ensure these policies are implemented to effect, prosecutors must institute rigorous staff training and monitor office practices, while also discussing with staff the rationale behind these changes. This dialogue is particularly essential to drive culture change, as many reform-minded prosecutors note that deeply embedded practices pose a challenge, that staff buy-in is essential for reform goals, and that the practice of ADAs must be assessed according to policy and reform goals. All of these policy changes should be evaluated in terms of impact on defendants of color, outcomes in terms of reductions in re-arrest rates and other measures, and ultimately cost-effectiveness. In addition to allowing a reform-minded prosecutor to assess the impact of articulated reforms, this approach to the challenges of accountability recognizes that a district attorney, whether elected on a reform platform or not, bears general good-government responsibility for reporting to the public on the operations of a critical public agency.

Justice System Leader. An elected prosecutor occupies a second role as a critical leader in the operations of the criminal justice system. Once elected on a platform critical of the status quo, a reform-minded prosecutor bears a responsibility beyond the operations of their office. For example, a prosecutor who campaigns on a platform of eliminating – or reducing – the system's reliance on cash bail, or simply promises to reduce the level of pretrial detention, can be expected to be a strong advocate for pretrial reform. In this case, the prosecutor could challenge other stakeholders in the system to reduce trial delay, facilitate easier ways to post bail, or identify those judges who set bail amounts even in cases where the prosecutor does not oppose release. A prosecutor critical of certain police practices who declines to prosecute certain crimes can be expected to work with their police department to advance parallel reforms, such as by encouraging the police to cease stops and arrests for low-level offenses. A prosecutor who believes that justice would be better served with a stronger public defense bar can be expected to make good on that commitment in public statements and budget advocacy. Merely building a prosecutor's office committed to reform is not enough to live up to the more expansive campaign promises to seek fundamental system changes.

We can attach some very simple metrics to this aspect of the prosecutor's role. Has the number of cases declined for prosecution increased? Has the practice of diverting cases to achieve better outcomes for defendants increased? Have the bail-setting practices of the jurisdiction moved in the direction of increased pretrial liberty, and has the rate of pretrial detention gone down? Are cases being resolved more quickly because of new discovery practices? Has the length of probation sentences decreased, have the probation conditions been tailored to the needs of the individual, and have the number of probation and parole revocations been cut back? Has the aggregate number of years of prison time committed for that jurisdiction been reduced? Have more parole releases been granted, and more clemency petitions supported? How much money has been saved for the taxpayers by the reforms instituted by the prosecutor? Certain dimensions of the era of punitive excess – such as these, but certainly including others – are easily measured. The public should expect that these metrics will be embraced by the prosecutor and published for public comment. Then, each year, the prosecutor should clearly articulate and publish the goals of the office for the coming years. And, very importantly, the public should expect that each year forward movement will be observable and significant.

Crisis Manager. The third role that an elected prosecutor plays is as a respected public figure in times of crisis – someone who steps into the public eye when an incident or controversy calls for comment or action. These are moments when the values and commitments of the reform-minded prosecutor are perhaps most evident. When, for example, a horrific crime is committed by someone released from jail in the jurisdiction of a prosecutor committed to bail reform, how does the elected district attorney respond? When a county decides to build a new jail but there is strong evidence that more effective pretrial release practices would obviate the need for that expenditure,

what is the role of the district attorney? When a police department decides to undertake an aggressive campaign of pedestrian stops and low-level enforcement in response to public concern, how should the district attorney respond? When there is an officer-involved fatality, how can the prosecutor ensure their community that there will be a timely, thorough, transparent, and independent investigation?[61] When a governor shuts down a successful system of parole release because a parolee committed a crime, does the district attorney have a voice? These examples pose opportunities for the district attorney, as the chief law enforcement officer of the jurisdiction, to serve as a tempering voice in the midst of public clamor to move policies in the direction of punitiveness.

Minister of Justice. The fourth role that an elected prosecutor can play is that of Minister of Justice, a public figure who can step above the daily controversies, step outside the daily operations of the justice system, exercise leadership outside the management of the office, and articulate the larger goals, aspirations, and shortcomings on the journey toward justice. On a very fundamental level, this means that the elected district attorney can remind the public that crime is a complex phenomenon, often involving issues of mental illness, substance use, economic challenges, situational dynamics, and the ups and downs of the life course. For example, a prosecutor who speaks knowledgeably about the realities of brain development among young people, the science showing that addiction is a brain disease, and the connection between homelessness and minor offenses would be performing an invaluable public service. Similarly, a prosecutor who articulates the fact that long prison sentences have virtually no public safety benefit would promote understanding of efforts to reduce mass incarceration. Finally, an elected district attorney who speaks authoritatively about the ways that the enforcement of the law has historically been instrumental in the enforcement of racial hierarchy in the United States would become a leader in the larger project of historical reckoning that is now underway.

Leader in the Justice Reform Movement. The fifth and final role of the prosecutor – one that is potentially the most powerful – is to be actively aligned with other forces for fundamental reform in society's response to crime. As a leader in the justice reform movement, elected district attorneys can lend the power of their office to the larger national project of restoring balance, fairness, equity, and reason to the nation's response to crime and pursuit of justice. In the myriad ways outlined in this paper, a reform-minded district attorney will reflect a commitment to this cause; but this final role is perhaps the most demanding because it means allying oneself with those who are most critical of the system and the historical role of the prosecutor in creating the current realities of injustice. There are instances in our nation's history where leaders have taken unconventional positions and created alliances with unlikely partners. Sometimes, this exercise in leadership requires challenges to the status quo. Imagine a district attorney who testifies on behalf of retroactive application of sentencing reforms, who marches with those who demand an end to the violence in their neighborhoods, who carries a sign pronouncing that "black lives matter," who advocates for more funding for community organizations rather than the traditional law enforcement agencies, who stands with the transgender activists arguing for equal treatment, who speaks on behalf of immigrant communities facing brutal deportation policies. The traditional prosecutor's role dedicated simply to processing cases in ways consistent with the law seems squarely out of step with the demands of the times.

The most optimistic view of the current criminal justice reform era is that our democracy, in fits and starts, is beginning to serve as a midwife for the emergence of a new approach to justice.[62] This new vision prioritizes investing in, rather than incarcerating, communities to create safety. This vision holds out the promise that

[61]The Institute for Innovation in Prosecution's *Toolkit on Officer-Involved Fatalities and Critical Incidents* provides actionable and adaptable steps for prosecutors to reduce and address police use-of-force, including investigative guidelines to ensure a timely, transparent, and thorough investigation. An August 2019 Executive Session paper on this issue, by Roy L. Austin, Jr, Valerie Bell, and John Choi, also highlights how prosecutors can build trust with their communities following an officer-involved fatality.

Our democracy, in fits and starts, is beginning to serve as a midwife for the emergence of a new approach to justice. This new approach holds all actors in the justice system – including prosecutors – accountable for promoting fairness, human dignity, safety, and community well-being.

the commission of a crime will be seen as an opportunity to promote healing for all parties to that harm, with only parsimonious application of the sanctioning power of the state. This new vision holds all actors in the justice system – from police officers to prosecutors, judges to corrections officers, treatment providers to legislators – accountable to the public for more than simply running an efficient justice bureaucracy. In this new vision, they would be accountable for holding a public trust called the justice system, with a commitment to promoting fairness, human dignity, safety, and community well-being. Perhaps, when we look back on this era decades from now, we will see that the growing demands for fundamental change now barely audible on the fringes of the reform movement have indeed led to the emergence of a very different justice system. If that vision becomes a reality, we will note the irony that it was elected prosecutors who helped our democracy come to terms with our past and point the way to that future.

[62]Potential new approaches are being analyzed and debated through the Square One Project at the Columbia Justice Lab. As evident in their hashtags #reimaginejustice and #wedonttinker, Square One is dedicated to "taking on the fundamental issues: poverty and racial inequality, violence and safety, criminalization and punishment. We're challenging traditional responses to crime, and looking in new places for more effective responses, by asking a new question: if we start over from 'square one,' how would justice policy be different?"

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