



# FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

## ISSUES AT A GLANCE

### Revisiting Past Extreme Sentences: Sentencing Review and Second Chances

*Fair and Just Prosecution (FJP) brings together recently elected district attorneys<sup>1</sup> as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" briefs provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.*

#### SUMMARY

**This FJP "Issues at a Glance" brief discusses why, consistent with their mission to promote public safety, fiscal responsibility, and justice, prosecutors should seek to review and address excessive sentences that are currently being served. It then looks at the types of mechanisms that may be available for this purpose, depending on the jurisdiction. Finally, it provides specific recommendations of steps that elected prosecutors can take to advance sentencing review and promote second chances as a mechanism to remedy past extreme sentences.**

The United States has the highest incarceration rate in the world, imprisoning people at a rate that is more than five times higher than in other industrialized countries.<sup>2</sup> Moreover, the U.S. jail and prison population has increased by about 500 percent over the last forty years.<sup>3</sup> The growth is fueled, in part, by the increasing length of sentences in recent decades – sentences for violent

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<sup>1</sup> The term "district attorney" or "DA" is used generally to refer to any chief local prosecutor, including State's Attorneys, Prosecuting Attorneys, etc.

<sup>2</sup> The Sentencing Project (2019), *New Prison and Jail Population Figures Released by U.S. Department of Justice*, <https://www.sentencingproject.org/news/new-prison-jail-population-figures-released-u-s-department-justice>.

<sup>3</sup> The Sentencing Project, *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts>.

***"I think a prosecutor has a continuing obligation to justice, past the sentencing date.... We have to be willing to roll up our sleeves, look through the files of old cases, and really... compare them to our contemporary law and practice."***

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

crimes and drug crimes increased by more than 35% between 1990 and 2009.<sup>4</sup>

Over the past decade, however, there has been increasing recognition that mass incarceration is both unjust and harmful to communities. This, in turn, has led to bipartisan efforts to roll back the excesses of mass imprisonment. Though encouraging, the recent small drop in the national incarceration rate is insufficient to address the magnitude of our nation's history of mass incarceration.<sup>5</sup> At the current rate of decline, it would take 75 years just to cut the U.S. prison population in half,<sup>6</sup> which would still leave us with an incarceration rate that is more than double the current world prison population rate.<sup>7</sup>

Because we have such a large number of people in prison, and because so many of them are serving decades-long sentences, truly addressing mass incarceration requires much bolder action than we have seen to date. Specifically, in order to ensure that our incarceration policies are in fact promoting public safety, fiscal responsibility, and justice, we must actively engage in a wholesale effort to reconsider the sentences of those who are already incarcerated.

Though prosecutors have historically viewed their role in a case as ending once a conviction is secured and appeals have been finalized, a growing number of district attorneys now recognize that their offices have both the power and the responsibility to correct past injustices. A sizeable number of DAs have established conviction integrity units or processes to revisit wrongful convictions. Even among individuals who have been validly convicted, however, far too many are serving sentences that are disproportionate to their crime, out-of-line with contemporary criminal justice and sentencing practices, or otherwise unjust.

The efforts to revisit these sentences must come from all of the relevant voices in the criminal justice system – not just from advocates and individuals who are serving sentences. In particular, prosecutors – among the most powerful players in the system – need to be more proactive in revisiting past decisions that have led to our current incarceration crisis.

**As part of their mandate to promote both public safety and justice, elected prosecutors should actively support and engage in efforts to revisit past extreme sentences for those who are currently incarcerated. While the mechanisms for doing so will vary based on the local legal landscape, establishing some starting point for review of decades-long sentences is critical.**

This issue brief outlines key background information on (a) why it makes sense to give people who are currently incarcerated opportunities for early release, (b) what mechanisms are available to achieve this, and (c) how prosecutors can be involved in advancing this work.

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<sup>4</sup> The Pew Center on the States (2012), *Time Served: The High Cost, Low Return of Longer Prison Terms*, 3, [http://www.pewtrusts.org/~media/assets/2012/06/06/time\\_served\\_report.pdf](http://www.pewtrusts.org/~media/assets/2012/06/06/time_served_report.pdf).

<sup>5</sup> Kang-Brown, J., Schattner-Elmaleh, E., and Hinds, O. (2019), *People in Prison in 2018*, Vera Institute of Justice, 1, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/people-in-prison-in-2018/legacy\\_downloads/people-in-prison-in-2018-updated.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/people-in-prison-in-2018/legacy_downloads/people-in-prison-in-2018-updated.pdf).

<sup>6</sup> The Sentencing Project, *New Prison and Jail Population Figures*, *supra* note 2.

<sup>7</sup> Walmsley, R. (2018), *World Prison Population List, twelfth edition*, World Prison Brief and Institute for Criminal Policy Research, 2, [https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf). The U.S. prison population rate is 655 per 100,000 people, whereas the world prison population rate is estimated to be 145 per 100,000 (and of course the latter rate would be even lower if the U.S. was excluded from the calculation).

## BACKGROUND

### A. Why Revisit Past Sentences?

There are a multitude of reasons, grounded in both data and sound policy, that suggest a need to revisit past sentences, as noted below.

**Evidence at both the state and federal level demonstrates that it is possible to release a substantial number of people from prison without negatively affecting public safety.**<sup>8</sup> A 2016 study by the Brennan Center for Justice concluded that approximately 39 percent of the people incarcerated in state and federal prisons could be released or have their sentences reduced with limited impact on public safety, either because they never posed a public safety threat or because they have already served sufficiently long sentences and are not a current danger to the community.<sup>9</sup> This is borne out in practice. For example, in 2014, Proposition 47 was enacted in California, retroactively classifying certain felony crimes as misdemeanors. Despite reducing California's prison population by about 13,000 people, the implementation of Prop. 47 had no effect on violent crime.<sup>10</sup> Similarly, recidivism rates are nearly identical between individuals who received sentence reductions as a result of retroactive federal sentencing changes and a comparison group who served their full sentences prior to the sentencing changes.<sup>11</sup>

**Many individuals in prison have "aged out" of criminal behavior<sup>12</sup> and are at very low risk of committing future crimes.** For most crimes, including murder, rape, robbery, assault, burglary, motor vehicle theft, weapons law violations, and drug crimes, the peak age of arrest is in the late teens or early twenties, with steep drop-offs by the mid-to-late-twenties or thirties (depending on the type of crime).<sup>13</sup> Less than 2% of all arrests are of individuals aged 60 or older.<sup>14</sup>

**Keeping aging, low-risk individuals in prison is extremely expensive and harms public safety by diverting resources away from effective crime-prevention strategies.** The average cost to

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<sup>8</sup> Mauer, M. (2018), *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC Law Review, 87(1), 113-131, 125-127, <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment>.

<sup>9</sup> Austin, J., et al. (2016), *How Many Americans Are Unnecessarily Incarcerated?*, Brennan Center for Justice, 7-8, [https://www.brennancenter.org/sites/default/files/publications/Unnecessarily\\_Incarcerated\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf).

<sup>10</sup> Bartos, B.J. and Kubrin, C.E. (2018), *Can We Downsize Our Prisons and Jails Without Compromising Public Safety?: Findings from California's Prop 47*, Criminology & Public Policy, 17(3), 693-715, [https://www.researchgate.net/profile/Charis\\_Kubrin/publication/326917965\\_Can\\_We\\_Downsize\\_Our\\_Prisons\\_and\\_Jails\\_Without\\_Compromising\\_Public\\_Safety\\_Findings\\_from\\_California's\\_Prop\\_47/links/5b71f75f299bf14c6d9beb8a/Can-We-Downsize-Our-Prisons-and-Jails-Without-Compromising-Public-Safety-Findings-from-Californias-Prop-47.pdf](https://www.researchgate.net/profile/Charis_Kubrin/publication/326917965_Can_We_Downsize_Our_Prisons_and_Jails_Without_Compromising_Public_Safety_Findings_from_California's_Prop_47/links/5b71f75f299bf14c6d9beb8a/Can-We-Downsize-Our-Prisons-and-Jails-Without-Compromising-Public-Safety-Findings-from-Californias-Prop-47.pdf).

<sup>11</sup> Mauer, *Long-Term Sentences*, *supra* note 8, at 126.

<sup>12</sup> Loeber, R. and Farrington, D.P. (2014), *Age-Crime Curve*, in *Encyclopedia of Criminology and Criminal Justice* (Bruinsma, G. and Weisburd, D., eds.), [https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-5690-2\\_474](https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-5690-2_474).

<sup>13</sup> Snyder, H.N. (2012), *Arrest in the United States, 1990-2010*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, <https://www.bjs.gov/content/pub/pdf/aus9010.pdf>. See Fair and Just Prosecution (2019), *Young Adults in the Justice System*, [https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP\\_Brief\\_YoungAdults.pdf](https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP_Brief_YoungAdults.pdf), for additional discussion of adolescent brain development and its impact on criminal behavior.

<sup>14</sup> *Id.* at 17-18. Individuals aged 60 or over make up 22 percent of the U.S. population. U.S. Census Bureau (2018), *American Community Survey 1-year estimates*, <https://data.census.gov/cedsci/table?q=S0101&g=&table=S0101&tid=ACSST1Y2018.S0101>.

incarcerate someone for one year in the U.S. in 2015 was \$33,274.<sup>15</sup> In some regions the cost is even higher; New York City spent a staggering \$167,731 per person in 2012.<sup>16</sup>

It costs substantially more to incarcerate older adults, who are more likely to have chronic health problems, dementia, mobility issues, and loss of hearing and vision than their younger counterparts.<sup>17</sup> Those in prison also typically experience deteriorating health at a younger age than their peers who are not incarcerated.<sup>18</sup> Due in part to the increase in multi-decade-long and life sentences, the number of people aged 55 or over in U.S. prisons increased by 280 percent between 1999 and 2016. Eleven percent of the U.S. prison population is now 55 or over.<sup>19</sup> Absent efforts to revisit past sentences, these numbers are likely to continue to grow, particularly given the fact that *one out of 7 people in prison is serving either a life sentence or a "virtual life sentence" of 50 years or more.*<sup>20</sup> Spending these massive sums on imprisoning low-risk individuals likely has a negative effect on public safety as it means that there is substantially less money available for evidence-based crime-prevention strategies, ranging from targeted interventions for high-risk individuals to broader social programs that have been proven to reduce crime, such as high-quality preschools<sup>21</sup> or urban improvement programs.<sup>22</sup>

**It is impossible to know at the time of sentencing how someone will change in the future.**

Many people who commit crimes, including the most serious crimes, subsequently demonstrate substantial growth. Georgetown Law Professor Shon Hopwood explains that “[o]ur system asks too much of prosecutors, probation officers, and federal judges to determine at the front-end, during charging and sentencing decisions, which defendants will remain a danger and are unredeemable.”<sup>23</sup>

The same maturation process that causes reductions in crime as people get older also leads to other growth. Disciplinary infraction rates are substantially higher among the youngest people in prison, particularly those aged 24 or under; as people mature, they become significantly less likely

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<sup>15</sup> Mai, C. and Subramanian, R. (2017), *The Price of Prisons: Examining State Spending Trends, 2010-2015*, Vera Institute of Justice, 7, [https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy\\_downloads/the-price-of-prisons-2015-state-spending-trends.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-2015-state-spending-trends/legacy_downloads/the-price-of-prisons-2015-state-spending-trends.pdf).

<sup>16</sup> Santora, M. (2013), *City's Annual Cost Per Inmate Is \$168,000, Study Finds*, The New York Times, <https://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html>.

<sup>17</sup> McKillop, M. and Boucher, A. (2018), *Aging Prison Populations Drive Up Costs*, The Pew Charitable Trusts, <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Sentencing Project (2018), *The Facts of Life Sentences*, <https://www.sentencingproject.org/wp-content/uploads/2018/12/Facts-of-Life.pdf>.

<sup>21</sup> Schindler, H.S. and Yoshikawa, H. (2012), *Preventing crime through intervention in the preschool years*, in The Oxford Handbook of Crime Prevention (Welsh, B.C. and Farrington, D.P., eds.), 70-88, <https://books.google.com/books?hl=en&lr=&id=ZRo1DQAAQBAJ&oi=fnd&pg=PA70>.

<sup>22</sup> Spector, J. (2016), *Another Reason to Love Urban Green Space: It Fights Crime*, CityLab, <https://www.citylab.com/solutions/2016/04/vacant-lots-green-space-crime-research-statistics/476040>.

<sup>23</sup> Hopwood, S. (2019), *Second Looks & Second Chances*, Cardozo Law Review, 41, 83, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3404899](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3404899). Hopwood's own history illustrates this: when Hopwood was convicted of bank robbery and using a firearm during a crime of violence at age 23, his sentencing judge, Richard G. Kopf, "would have bet the farm and all the animals that Hopwood would fail miserably as a productive citizen when he finally got out of prison." Hopwood's subsequent transformation has led Judge Kopf to conclude: "Hopwood proves that my sentencing instincts suck." Liptak, A. (2013), *The Robber, the Judge, and the Case for Leniency*, The New York Times, <https://www.nytimes.com/2013/08/27/us/taking-a-second-chance-and-running-with-it.html>.

to engage in misconduct in prison.<sup>24</sup>

In other words, many people who are deemed “incorrigible” at the time of sentencing can and will in fact be rehabilitated. Mechanisms to review past sentences or provide early release allow a sentence to be adjusted to reflect who someone has become since the time of sentencing, rather than continuing to incarcerate them because of an initial sentencing decision that was made without the benefit of this knowledge and that may have been based on an inaccurate prediction of how the person would behave going forward.

**Providing opportunities for early release or sentence reductions for people who are currently in prison promotes rehabilitation and public safety by giving those who are incarcerated an incentive to change and grow.** Opportunities for early release serve to motivate people to engage in rehabilitative activities in prison and to maintain positive connections outside of prison, ultimately reducing the odds that they will commit future criminal acts.<sup>25</sup> In contrast, the absence of any vehicle for sentence reduction often results in the loss of hope or any reason to focus on positive steps towards reentry into the community.<sup>26</sup>

**Reducing long sentences helps enable people to successfully adjust back to life outside of prison and may reduce the odds that they will commit another crime after they are released.** The longer a prison sentence, the more likely it is to have a negative impact on factors that influence successful reentry – disrupting relationships with family and other potential social supports, inhibiting one’s ability to make important decisions independently (given that there are few opportunities to do so in prison), causing job skills to atrophy, and limiting knowledge of up-to-date technology.<sup>27</sup> Though there is mixed evidence on the impact of sentence length

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<sup>24</sup> Valentine, C.L., Mears, D.P., and Bales, W.D. (2015), *Unpacking the Relationship between Age and Prison Misconduct*, *Journal of Criminal Justice* 43(5): 418-427, [https://www.researchgate.net/publication/283194323\\_Unpacking\\_the\\_relationship\\_between\\_age\\_and\\_prison\\_misconduct](https://www.researchgate.net/publication/283194323_Unpacking_the_relationship_between_age_and_prison_misconduct); Mauer, M. and Nellis, A. (2018), *The Meaning of Life: The Case for Abolishing Life Sentences*, The New Press, 48.

<sup>25</sup> Hopwood, *Second Looks & Second Chances*, *supra* note 23, at 112-113.

<sup>26</sup> For example, after the adoption of a policy in Georgia that required people convicted of certain crimes to serve at least 90% of their sentence, these individuals no longer had a strong incentive to engage in rehabilitative programs and behaviors. As a result, those impacted by the reform had more disciplinary infractions, completed fewer prison rehabilitative programs, and most notably, had higher recidivism rates. Kuziemko, I. (2013), *How should inmates be released from prison? An assessment of parole versus fixed-sentence regimes*, *The Quarterly Journal of Economics*, 371–424, [https://scholar.princeton.edu/sites/default/files/kuziemko/files/inmates\\_release.pdf](https://scholar.princeton.edu/sites/default/files/kuziemko/files/inmates_release.pdf).

<sup>27</sup> Hopwood, *Second Looks & Second Chances*, *supra* note 23, at 110; Barkow, R. (2019), *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, Harvard University Press, 44.

**“It is vital to our health and public safety that we foster and reward those who rehabilitate from a serious offense. We should not be dissuaded by the same echoes of fear that gave us mass incarceration.”**

— WASHINGTON, D.C. ATTORNEY GENERAL KARL RACINE

on recidivism,<sup>28</sup> researchers looking at the impact of sentence length in Texas<sup>29</sup> and Chicago<sup>30</sup> found not only that longer sentences increased recidivism post-release, but that this increase in recidivism exceeded any crime-prevention benefit during the time of incapacitation, such that longer sentences actually resulted in more crime overall. Reducing the time that people spend in prison can help mitigate these harms and avoid a potentially larger criminogenic impact of longer sentences.

**Long sentences have no meaningful effect on crime deterrence.** One of the most common claims made by those who favor longer sentences is that such sentences are necessary to deter crime on the front end – that people will decide against criminal activity due to fear of harsh punishment. Yet there is little evidence that longer sentences actually deter crime.<sup>31</sup>

**As a result of sentencing changes made during the “tough on crime era,” hundreds of thousands of people are serving sentences that are substantially harsher than they would have received for the same crime historically.**<sup>32</sup> The advent of mandatory minimums, three-strikes laws, sentencing enhancements, and lengthened sentence ranges for specific crimes heralded an increase in the amount of time served in the U.S. by about a third for violent crimes and drug crimes and about a quarter for property crimes from 1990 to 2009.<sup>33</sup> In some states, the increase in time served was much more drastic: 166 percent in Florida, 91 percent in Virginia, and 86 percent in North Carolina.<sup>34</sup>

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<sup>28</sup> A Fact Sheet by the Pew Charitable Trusts explains: “The relationship between the length of prison terms and recidivism is one of the central points of debate in sentencing and corrections policy. Many people assert that longer prison terms are more effective at deterring future crimes because they set a higher price for criminal behavior and because they hold offenders until they are more likely to ‘age out’ of a criminal lifestyle. Others argue the opposite—that more time behind bars increases the chances that inmates will reoffend later because it breaks their supportive bonds in the community and hardens their associations with other criminals. The strongest research finds that these two theories may cancel each other out. Several studies, looking at different populations and using varied methodologies, have attempted to find a relationship between the length of prison terms and recidivism but have failed to find a consistent impact, either positive or negative.” The Pew Charitable Trusts (2013), *Prison Time Served and Recidivism*, <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/10/08/prison-time-served-and-recidivism>.

<sup>29</sup> Executive Office of the President of the United States (2016), *Economic Perspectives on Incarceration and the Criminal Justice System*, 39, <https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf> (discussing Mueller-Smith, M. (2015), *The Criminal and Labor Market Impacts of Incarceration* (working paper), <https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>).

<sup>30</sup> Roodman, D. (2017), *Aftereffects: In the U.S., Evidence Says Doing More Time Typically Leads to More Crime After*, Open Philanthropy Project, <https://www.openphilanthropy.org/blog/aftereffects-us-evidence-says-doing-more-time-typically-leads-more-crime-after> (discussing Green, D.P. and Winik, D. (2010), *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, *Criminology*, 48(2), 357-387, <http://www.donaldgreen.com/wp-content/uploads/2015/09/Green-Winik-Criminology-2010.pdf>).

<sup>31</sup> Roodman, D. (2017), *The Impacts of Incarceration on Crime*, The Open Philanthropy Project, 48, [https://www.openphilanthropy.org/files/Focus\\_Areas/Criminal\\_Justice\\_Reform/The\\_impacts\\_of\\_incarceration\\_on\\_crime\\_10.pdf](https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf); Executive Office of the President, *Economic Perspectives*, *supra* note 29, at 37.

<sup>32</sup> Mauer and Nellis, *The Meaning of Life*, *supra* note 24, at 27-30; Courtney, L., et al. (2017), *A Matter of Time: The Causes and Consequences of Rising Time Served in America’s Prisons*, The Urban Institute, 1, <https://apps.urban.org/features/long-prison-terms/intro.html>.

<sup>33</sup> The Pew Center on the States, *Time Served*, *supra* note 4.

<sup>34</sup> *Id.*

**Sentences in the U.S. are also substantially longer than sentences in other countries.**<sup>35</sup> While this is true for a broad range of crimes,<sup>36</sup> the differences can be seen most starkly with regard to the longest sentences. In most European countries, sentences are rarely longer than 20 years even for serious crimes.<sup>37</sup> In comparison, across the U.S., thousands of people have been given life without parole (LWOP) sentences for nonviolent crimes.<sup>38</sup> In South Carolina, for example, nine percent of people serving LWOP sentences have been convicted of only drug or property crimes.<sup>39</sup> Since sentencing structures tend to be proportional based on the perceived severity of the crime, the high prevalence of life sentences (along with the existence of the death penalty) in the U.S. creates upward pressure on other sentences, leading to longer average sentence lengths across many types of crimes.<sup>40</sup>

**Many people in prison are serving sentences far out of step with contemporary sentencing norms in the U.S.** Despite increasing legislative efforts to roll back some of the most punitive sentencing laws, many of these changes have not been retroactive.<sup>41</sup> For example, until recently, second degree robbery (which does not involve a weapon or significant injury) constituted a “strike” under Washington State’s “three-strikes” law. In 2019, Washington removed second-degree robbery from the list of crimes included in its three-strikes law. Though the original version of the bill would have made this change retroactive, it was amended to be prospective-only. As a result, while someone with two strikes who commits second degree robbery today would be sentenced to less than seven years, 62 individuals remain sentenced to life without parole because they received a strike for second degree robbery.<sup>42</sup>

In addition, a growing number of DAs are exercising their discretion to seek sentences far shorter than typically sought by their predecessors and more squarely in line with contemporary notions of justice. However, many individuals in the same jurisdictions continue to serve longer sentences for those same crimes that were imposed prior to the current DA’s administration.

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<sup>35</sup> Mauer and Nellis, *The Meaning of Life*, *supra* note 24, at 85-88; Justice Policy Institute (2011), *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf>.

<sup>36</sup> Justice Policy Institute, *Finding Direction*, *supra* note 35.

<sup>37</sup> Mauer, *Long-Term Sentences*, *supra* note 8, at 127.

<sup>38</sup> Mauer and Nellis, *The Meaning of Life*, *supra* note 24, at 14.

<sup>39</sup> *Id.*

<sup>40</sup> Mauer and Nellis, *The Meaning of Life*, *supra* note 24, at 3-4.

<sup>41</sup> Renaud, J. (2018), *Eight Keys to Mercy: How to shorten excessive prison sentences*, Prison Policy Initiative, 5, [https://www.prisonpolicy.org/scans/long\\_sentences\\_printable.pdf](https://www.prisonpolicy.org/scans/long_sentences_printable.pdf).

<sup>42</sup> Associated Press (2019), *Washington lifers stay jailed despite ‘3 strikes’ law change*, <https://q13fox.com/2019/05/21/3-strikes-sentencing-reform-leaves-out-washington-inmates>. As discussed below, King County (Seattle), WA Prosecuting Attorney Dan Satterberg is working to support clemency for individuals under his jurisdiction in this type of situation.

**“Sometimes extreme sentences reflect unscientific beliefs; sometimes they reflect racism; and sometimes they reflect judges who punish you 10 times harder if you went to trial.... There are a lot of people in jail who very clearly don’t need to stay in jail.”**

— PHILADELPHIA (PA) DISTRICT ATTORNEY LARRY KRASNER



**Cases that have resulted in lengthy sentences have often involved mitigating factors that call into question the appropriateness of these harsh sentences.** Though the U.S. Supreme Court has repeatedly recognized the diminished culpability of minors,<sup>43</sup> there are nearly 12,000 individuals across every state but Maine and West Virginia who are serving life or virtual life sentences for crimes that they committed while they were under age 18.<sup>44</sup> Similarly, though adolescent brain development research shows that 18- to 24-year-olds share many of the characteristics that led the Court to find diminished culpability among minors,<sup>45</sup> of the people serving the longest 10 percent of prison terms, nearly 40 percent were age 24 or younger when they entered prison.<sup>46</sup> In addition, studies have found that about two-thirds of women incarcerated for killing a partner or someone else who was close to them had been abused by the person that they killed.<sup>47</sup>

**Other systemic problems have resulted in individuals receiving sentences that are vastly disproportionate to their crime.** For instance, due to felony murder laws (which make someone liable for murder if they participated in a felony that resulted in someone dying), a substantial number of people who never intended or anticipated that anyone would be killed, nor participated in the actual murder, are nevertheless serving murder sentences. In some cases, they actually received longer sentences than the person who was directly responsible for the killing.<sup>48</sup> These concerns led California to enact a new law in 2018 that limits felony murder to cases in which the individual either committed the killing, acted with an intent to kill, or was a major participant in the underlying felony and acted with reckless indifference to human life.<sup>49</sup>

**Incarceration deeply impacts not only the individuals who are in prison, but also their families, loved ones, and communities.** Revisiting past sentences “gives a second opportunity to not only the incarcerated individual, but provides a second opportunity for their children and families to restore, repair, and renew those broken bonds that have been severely severed by such harsh, cruel, and unusual punishment, such as life without parole,” as explained by Ebony Underwood, Founder and CEO of We Got Us Now, a national movement built by, led by and about children and young adults impacted by parental incarceration.<sup>50</sup>

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<sup>43</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

<sup>44</sup> Mauer and Nellis, *The Meaning of Life*, *supra* note 24, at 15.

<sup>45</sup> Arain, M., et al. (2013), *Maturation of the adolescent brain*, *Neuropsychiatric Disease and Treatment*, 9, 449–461, 453, [https://www.researchgate.net/publication/236195824\\_Maturation\\_of\\_the\\_adolescent\\_brain](https://www.researchgate.net/publication/236195824_Maturation_of_the_adolescent_brain). In particular, development of the prefrontal cortex, which is responsible for the ability “to exercise good judgment when presented with difficult life situations,” is not complete until around age 25.

<sup>46</sup> Courtney, *A Matter of Time*, *supra* note 32, at 2.

<sup>47</sup> Staley, M. (2007), *Female Homicide Commitments: 1986 vs. 2005*, State of New York Department of Correctional Services, 14, [https://doocs.ny.gov/system/files/documents/2019/09/Female\\_Homicide\\_Commitments\\_1986\\_vs\\_2005.pdf](https://doocs.ny.gov/system/files/documents/2019/09/Female_Homicide_Commitments_1986_vs_2005.pdf); Mauer and Nellis, *The Meaning of Life*, *supra* note 24, at 17 (citing Haley, J. (1992), *A Study of Women Imprisoned for Homicide*, Georgia Department of Corrections).

<sup>48</sup> Thompson, C. (2015), *Charged With Murder Without Killing Anyone*, The Marshall Project, <https://www.themarshallproject.org/2015/09/24/a-person-can-be-charged-with-murder-even-if-they-haven-t-killed-anyone>.

<sup>49</sup> California Legislature (2018), SB-1437 *Accomplice liability for felony murder*, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180SB1437](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1437); Ulloa, J. (2018), *California sets new limits on who can be charged with felony murder*, Los Angeles Times, <https://www.latimes.com/politics/la-pol-ca-felony-murder-signed-jerry-brown-20180930-story.html>.

<sup>50</sup> We Got Us Now, *Second Look Act*, <https://www.wegotusnow.org/secondlook>.



**Historically, not only were sentences shorter, but most people were able to leave prison long before the completion of their sentence due to sentence reduction mechanisms that are no longer widely available.** In the late 1970s, about 70 percent of people who left prison were released through discretionary parole. However, sixteen states subsequently abolished parole, and the rest dramatically reduced their use of it, such that in 2011, only 26 percent of prison releases were based on discretionary parole.<sup>51</sup> States have also eliminated or reduced opportunities for individuals to reduce their sentences by earning “good time credits” for positive behavior or participation in programming.<sup>52</sup> In addition, the use of clemency has declined steeply as well, to the point that it is almost non-existent in some states.<sup>53</sup> Furthermore, thousands of people who are currently incarcerated were sentenced at a time “when it was understood that parole was a built-in element of the sentencing decision.”<sup>54</sup> The subsequent declines in parole grant rates mean that these individuals are serving substantially more time than anyone at the time of sentencing expected or intended them to serve if they demonstrated rehabilitation.

Moreover, parole boards often focus almost exclusively on the severity of the underlying crime in making their determination, rather than looking at how the individual has changed since the time of the crime.<sup>55</sup> This of course defeats the purpose of parole; if the decision was meant to be based on the crime, then the release date could be determined at sentencing, and there would be no reason to have a parole system or for those crimes to be parole-eligible.

**Communities of color are disproportionately affected by overly-harsh sentences.**<sup>56</sup> Revisiting past sentences can potentially provide an opportunity for addressing racial disparities in sentence lengths. It is important to note, however, that sentencing review will not necessarily reduce racial disparities if it does not involve a conscious effort to focus on these disparities; in fact, race-neutral criminal justice reform sometimes ends up exacerbating racial disparities by providing the largest benefits to white people.<sup>57</sup>

**Crimes deemed as “serious” or “violent” often result in sentences that are misaligned to the underlying conduct.** The majority of people in state prisons are incarcerated for crimes that bear the “violent” label, which typically results in substantially harsher treatment than crimes considered

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<sup>51</sup> Barkow, *Prisoners of Politics*, *supra* note 27, at 78.

<sup>52</sup> *Id.* at 79-80.

<sup>53</sup> Drinan, C.H. (2012), *Clemency in a Time of Crisis*, Georgia State University Law Review 28(4), 1123-1160, <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1119&context=scholar>. Also see, e.g., Notterman, B. (2019), *The Demise of Clemency for Lifers in Pennsylvania*, NYU Law Center on the Administration of Criminal Law, [https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA\\_Final%20\(1\).pdf](https://www.law.nyu.edu/sites/default/files/CACL%20Clemency-PA_Final%20(1).pdf); Notterman, B. (2019), *Willie Horton’s Shadow: Clemency in Massachusetts*, NYU Law Center on the Administration of Criminal Law, [https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA\\_Accessible.pdf](https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20MA_Accessible.pdf).

<sup>54</sup> The Sentencing Project (2008), *State Advocacy News: Retroactivity and Criminal Justice Reform*, <https://www.sentencingproject.org/news/state-advocacy-news-retroactivity-criminal-justice-reform>. Though that website discusses this phenomenon specifically in Wisconsin, similar situations exist across the country.

<sup>55</sup> American Civil Liberties Union (2016), *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, 4, [https://www.aclu.org/sites/default/files/field\\_document/121416-aclu-parolereportonlineingle.pdf](https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlineingle.pdf).

<sup>56</sup> Courtney, *A Matter of Time*, *supra* note 32, at 2.

<sup>57</sup> See, e.g., Citizens for Juvenile Justice (2014), *Unlocking potential: Addressing the overuse of juvenile detention in Massachusetts*, 12, <https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/59020c2820099e50e40da9dc/1493306416763/Unlocking+Potential+-+March+2014-DIGITAL.pdf>.

to be “non-violent.”<sup>58</sup> However, there is increasing recognition that the distinction between “violent” and “non-violent” is imprecise and often arbitrary, and the aforementioned reasons for revisiting past sentences apply just as strongly, if not more so, to so-called “violent” crimes. Laws defining violent crimes are often broad, encompassing behaviors, such as breaking into a car, that may not commonly be considered violent in general parlance.<sup>59</sup> In addition, while certain crimes may involve violence, “‘violent’ rarely describes a type of person;”<sup>60</sup> whether or not someone will engage in violence is typically driven more by the situation a person is in than by the individual’s personality traits.<sup>61</sup> As with other crimes, the vast majority of people convicted of “violent crimes” age out of criminal activity.<sup>62</sup> In fact, people incarcerated for violent crimes actually have *lower* recidivism rates than those in prison for other offenses.<sup>63</sup> Cases involving violence are also particularly likely to have mitigating factors at play, as people who commit violence have generally experienced serious victimization themselves.<sup>64</sup> People of color are also disproportionately likely to be incarcerated for a crime labeled as violent.<sup>65</sup>

## B. Mechanisms for Sentencing Review and Second Chances

Opportunities for people to be released prior to the end of their sentence vary substantially by jurisdiction, but the primary mechanisms are:

- Parole
- Clemency
- Judicial Resentencing
- Good Time Credit
- Compassionate Release
- Retroactive Sentencing Reform

While the efficacy and reach of these processes vary by jurisdiction, and while only some of these mechanisms afford prosecutors an opportunity to directly support early release or resentencing, it is important for a DA to understand the different mechanisms for early release and the extent to which they are available and used within the DA’s jurisdiction, particularly as the DA considers ways to engage in systemic change. These mechanisms are discussed in Appendix I. Notably, the availability and use of these mechanisms has greatly declined across the country, though there have been recent increases in a few localities.<sup>66</sup>

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<sup>58</sup> Austin, J., et. al. (2019), *Reconsidering the “Violent Offender”*, 2, [https://thecrimereport.org/wp-content/uploads/2019/05/Reconsidering-the-Violent-Offender\\_DIGITAL.pdf](https://thecrimereport.org/wp-content/uploads/2019/05/Reconsidering-the-Violent-Offender_DIGITAL.pdf).

<sup>59</sup> *Id.* at 16-17.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> *Id.* at 7.

<sup>62</sup> *Id.* at 5.

<sup>63</sup> *Id.* at 24-26.

<sup>64</sup> *Id.* at 7-14.

<sup>65</sup> *Id.* at 4.

<sup>66</sup> For example, in November 2019, the Oklahoma Pardon and Parole Board unanimously voted to recommend the sentences of 527 state inmates be commuted, and the Governor signed off on those commutations, resulting in the largest single-day commutation in U.S. history. Bellware, K. (2019), *Oklahoma approves largest single-day commutation in U.S. history*, The Washington Post, <https://www.washingtonpost.com/nation/2019/11/03/oklahoma-approves-largest-single-day-commutation-us-history>.

## EXAMPLES OF DA POLICIES THAT ADVANCE SENTENCING REVIEW AND SECOND CHANCES

Prosecutors have often reflexively opposed all applications for early release or resentencing, in addition to opposing any legislative efforts to make second chances and resentencing opportunities more available. As discussed above, however, providing second chances to individuals who have received long sentences promotes both public safety and justice – objectives integral to a prosecutor’s job. Automatically opposing second chances, on the other hand, undermines these goals.

In order to truly bolster public safety and justice, prosecutors must therefore proactively push for second chances, both by supporting relief in individual cases, and by engaging in broader advocacy efforts aimed at expanding opportunities for early release and sentence reductions in their jurisdiction.

Since prosecutors have typically opposed these efforts, there are relatively few examples of prosecutors taking a leadership role in supporting sentencing relief. However, a small number of DAs have taken a different approach, instead using their power to remedy past injustices and help create a smaller footprint – and more just outcomes retroactively as well as prospectively – for the justice system.

For example, **King County (Seattle, WA) Prosecuting Attorney Dan Satterberg** “is committed to reexamining older cases with long prison sentences in light of newer court rulings and research.”<sup>67</sup> Since 2009, his office has advocated for clemency for twenty-one individuals, many of whom had received life sentences under Seattle’s “three-strikes” law.<sup>68</sup> All of these requests were granted, illustrating the power of prosecutorial support in these cases.<sup>69</sup> As former Washington State Governor Christine Gregoire explained: “Any time a prosecutor endorses clemency, that’s a pretty persuasive argument for me. Prosecutors and defense counsel can grant you a whole lot more perspective on the case, the individual, and the circumstances [of their crime] than the record alone would tell you.”<sup>70</sup>

More recently, in April 2019, **Kings County (Brooklyn, NY) District Attorney Eric Gonzalez** announced that for individuals who had pled guilty, his office will consent to parole at the earliest opportunity, “absent extraordinary circumstances and subject to their conduct during incarceration.” Gonzalez noted the reasoning behind this change: “To continuously keep people in jail for terms longer than they need to be in there, simply as more punishment, is unjust and unfair. We made a deal with them that after 15 years or 20 years or whatever the number, they would be eligible to get a fair hearing on parole, and largely they are not.” Prosecutors, he said, “were still putting over-emphasis on the nature of the crime in ways that are unfair because the

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<sup>67</sup> Radil, A (2019), King County prosecutors help cut ‘breathtaking’ prison sentence, KUOW, <https://www.kuow.org/stories/king-county-prosecutors-help-cut-breathtaking-prison-sentence>.

<sup>68</sup> *Id.*; The Seattle Times (2018), *The Times recommends: Dan Satterberg for King County Prosecuting Attorney*, <https://www.seattletimes.com/opinion/editorials/the-times-recommends-dan-satterberg-for-king-county-prosecuting-attorney/>; Interview with Carla Lee, Deputy Chief of Staff, King County Prosecuting Attorney’s Office, Sept. 19, 2019.

<sup>69</sup> *Id.*; McCray, R. (2017), *For a New Breed of Prosecutors, Justice Sometimes Entails a Second Chance*, The Appeal, <https://theappeal.org/for-a-new-breed-of-prosecutors-justice-sometimes-entails-a-second-chance-a10fe0104a1b/>.

<sup>70</sup> McCray, *For a New Breed of Prosecutors*, *supra* note 69.

person can never do anything about the nature of the crime.”<sup>71</sup> His office has also started to consider supporting parole for individuals who were given long prison sentences for crimes they committed at age 23 or younger.<sup>72</sup> To facilitate these efforts, Gonzalez established a new Post-Conviction Justice Bureau. In addition, the Bureau will respond to clemency applications from the governor’s office and help people seal criminal records.

Aiming to go further in revisiting past sentences than had been possible under California law, **Santa Clara County District Attorney Jeff Rosen** sponsored **California Assembly Bill 2942**, which went into effect at the beginning of 2019 and allows district attorneys to revisit past sentences. If they determine that further confinement is no longer in the interest of justice, prosecutors can now recommend that a court recall the case and issue a lesser sentence.<sup>73</sup> Rosen was inspired to support AB 2942 after working on a case in which he had successfully secured release of someone who had been sentenced under California’s three-strikes law, but only by engaging in what he described as “legal gymnastics.”<sup>74</sup> He “realized the most straightforward way to [get people resentenced] would be to change the law.”<sup>75</sup> Since the law’s enactment, in addition to Rosen, several other California DAs have either already begun recommending resentencing for some individuals or have announced plans to do so.<sup>76</sup>

## KEY PRINCIPLES FOR SENTENCING REVIEW

While mechanisms for sentencing review may vary, there are several overarching principles DAs should consider in addressing these issues:

1. The broad aim of resentencing reforms should be to address and **avoid unnecessary continued incarceration**.
2. Even those who commit serious crimes can and do demonstrate rehabilitation. As such, it is best to **avoid categorical exclusions**, such as excluding people with multiple crimes or certain types of crimes from being eligible for consideration.
3. Decision-making should focus on **who the person is today**, not who they were in the past. Neither the crime itself, nor prison disciplinary infractions that are more than five years old, should be primary factors in making these decisions.

<sup>71</sup> Robbins, T. (2019), *Took a Plea? Brooklyn’s District Attorney Will Support Your Parole*, The Marshall Project, <https://www.themarshallproject.org/2019/04/17/took-a-plea-brooklyn-s-district-attorney-will-support-your-parole>.

<sup>72</sup> *Id.*

<sup>73</sup> Sentence Review Project, *Frequently Asked Questions*, <https://www.sentencereview.org/faq>.

<sup>74</sup> Barry, K.C. (2018), *A New Power for Prosecutors is on the Horizon—Reducing Harsh Sentences*, The Appeal, <https://theappeal.org/a-new-power-for-prosecutors-is-on-the-horizon-reducing-harsh-sentences>.

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., California State Assembly Democratic Caucus (2019), *San Diego Man Believed to be the First Californian to Get His Sentence Reduced Under AB 2942, Resulting in His Release*, <https://a19.asmdc.org/press-releases/20190801-san-diego-man-believed-be-first-californian-get-his-sentence-reduced-under>; San Joaquin County District Attorney’s Office, *Post Conviction Review Unit*, <https://www.sjgov.org/da/pcru>.

**“We know that we’ve over-incarcerated ourselves. As part of that tough on crime [philosophy], we used to give people 50, 60, 70 years for robbery cases. That doesn’t comport with modern-day thoughts of justice. It does not make public safety sense keeping folks in jail who no longer pose any public safety risk.”**

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

4. Respecting and supporting survivors of crime should be a priority throughout this process, but it is important to keep in mind that survivors have a broad range of opinions about sentencing relief. Moreover, **survivors' opinions should not be outcome-determinative** for decisions about who should receive second chances, as these decisions should primarily be based on the individual's rehabilitation and an individualized determination of the person's circumstances and any danger he or she poses today to the community.
5. Since people of color have been disproportionately harmed by extreme sentences, one of the primary aims of efforts to revisit past sentences should be to **reduce racial disparities** caused by past sentencing practices.

## RECOMMENDATIONS<sup>77</sup>

1. **Start by assessing the landscape in the jurisdiction.** Some important questions include:
  - a. What mechanisms for providing second chances to incarcerated individuals are available in the jurisdiction?
  - b. How often are people released as a result of these mechanisms? If these mechanisms are rarely used, what are the barriers to more frequent use of these mechanisms?
  - c. Who are the primary decisionmakers determining whether and when release is granted? Who is bringing cases to the attention of these decisionmakers or assisting in the preparation of applications for release under these mechanisms?
  - d. What organizations are available to provide reentry support to help ensure that individuals who are released are able to successfully transition back into the community? How can the office connect with individuals who have been incarcerated, family members of people who are or were incarcerated, and survivors of crime to incorporate their perspectives?
  - e. Is there any pending legislation that would create or expand release mechanisms? If not, how can support for legislative or systemic change be generated?
  - f. What data is available regarding people who are currently incarcerated? How can the office access that data or other information that would be useful for identifying potential candidates for second chances and areas of focus for systemic efforts around sentence review?
2. **Create a sentencing review unit ("SRU") or (if the office lacks sufficient resources for a separate unit) a sentencing review process** to proactively support release through the mechanisms available in the jurisdiction. In addition to addressing excessive sentences for individuals who are currently incarcerated, the sentencing review work may also include supporting pardons or expungement for individuals who are not incarcerated but continue to be impacted by a conviction, such as those facing immigration consequences of an old conviction. Ideally, an SRU should be an independent unit that operates based on written policies formulated after consultation with stakeholders through a transparent process. It should be led by a respected senior lawyer who reports directly to the district attorney and be

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<sup>77</sup> Many of these recommendations are consistent with and are modeled on a companion piece to this Issue Brief, "Model District Attorney Sentencing Review Guidelines," developed by The Justice Collaborative (TJC) and available at <https://fairandjustprosecution.org/wp-content/uploads/2020/01/Model-Sentencing-Review-Guidelines-FINAL.pdf>. The Model District Attorney Sentencing Review Guidelines provide a detailed model for how elected prosecutors can develop and implement effective and robust sentencing review policies in their respective offices.

staffed with prosecutors committed to its mission. As a general matter, an SRU or sentencing review process should not be part of the appellate unit or report to an appellate supervisor; their functions are distinct, and it is best to maintain separation of these two parts of the office if possible. Though sentencing review is also distinct from conviction integrity, both sentencing review and conviction integrity have primary aims of correcting past injustices, so it may be appropriate to co-locate these functions within one unit.

3. **Develop an office policy to inform decision-making on what cases the office will review and how it will decide whether to take a position on those cases.** For example:
  - a. If parole is available in the jurisdiction, consider adopting a presumption of supporting parole absent credible evidence that someone “presents an unacceptable risk of reoffending if released.”<sup>78</sup> At a minimum, do not oppose parole unless there is a clear reason to do so.
  - b. For clemency and resentencing (if it is available in the jurisdiction):
    - i. Establish a non-exhaustive list of types of cases that the office will prioritize for review, such as:
      1. Cases in which the individual was a minor or young adult at the time of the crime;
      2. Cases in which the individual has already served a lengthy sentence. An appropriate threshold to consider might be 10-15 years (sentences longer than 20 years are very rare in many other countries), or shorter if the case also falls under one of the other priority categories;
      3. Cases in which the individual has reached an age that suggests a low likelihood of committing future criminal acts (for example, if the individual is 35 or over and has already served 15 years, or 50 or over and has already served 10 years);
      4. Cases in which an individual received a disproportionate sentence due to a mandatory minimum, three-strikes rule, or other sentencing enhancement;
      5. Cases in which the sentence is the result of a clear racial disparity (for example, disparate punishments for crack cocaine vs. powder cocaine);
      6. Cases in which an individual would have received a shorter sentence today; or
      7. Cases in which individuals were convicted based on a felony-murder theory of liability.
    - ii. Establish criteria that the office will consider in evaluating a case for support, such as:
      1. Any evidence of a diminished role in the crime;
      2. Any evidence of substantial growth or extended good behavior while in prison, with a focus on the past five years and the absence of violent infractions during those five years;
      3. Any additional evidence of low risk of recidivism upon release; and/or

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<sup>78</sup> Renaud, *Eight Keys to Mercy*, *supra* note 41, at 3. This standard was proposed by several leading experts on parole, Edward E. Rhine, Joan Petersilia, and Kevin R. Reitz, in their 2017 article *The Future of Parole Release* (Crime and Justice 46, 279-338). See Footnote 16 in *Eight Keys to Mercy* for more detail on these experts.



4. Any evidence that a person's crime stemmed primarily from substance use disorder, a mental health issue, trauma, or financial instability, such that society would be better served by assisting this person in obtaining needed services rather than incarceration.
  - c. For compassionate release, while prosecutors do not have the expertise to assess someone's medical condition, consider adopting a presumption of support of such a release petition absent strong evidence that the individual is likely to commit a serious crime and that he or she is physically capable of committing such an act. At a minimum, do not oppose compassionate release unless there is a clear reason to do so.
  - d. To the extent that the office identifies cases that are appropriate for release or a sentence reduction but that do not clearly qualify for release under existing mechanisms, consider alternate avenues for release, such as developing arguments, to the extent they may be legally viable, that changed circumstances make the case appropriate for resentencing; that the judge has the authority to approve a release "in the interest of justice;" etc. This admittedly may require developing creative approaches, given the novel nature of these petitions, and it would be advisable to simultaneously pursue changes to rules or statutes that will provide such authority more explicitly, as noted below.
4. For cases that the office identifies as appropriate for support, where possible, **submit a memo in favor of release** to the decision-making authority on behalf of the DA's office.
5. Leverage the position as a respected justice system leader to **engage decisionmakers about the benefits of granting release or sentence reductions**. Talk to parole board members, the governor, judges, and others who might hear cases for resentencing about why broad use of these mechanisms promotes public safety, fiscal responsibility, and justice.
6. **Promote and support legislation to expand the sentencing review mechanisms available in the jurisdiction**, such as retroactive sentencing reform, legislation to establish or expand judicial resentencing, etc.
7. **Support the inclusion of people who have been incarcerated and people who have had family members incarcerated as members of parole boards, other similar decision-making bodies, and any advisory committees related to sentence review**.
8. **Advocate for other changes to enable people to become strong candidates for release and to be successful upon reentry**. This includes, for example, ensuring that everyone who is incarcerated has access to the rehabilitative programming that will allow them to demonstrate that they are taking appropriate rehabilitative steps, and expanding reentry services so that individuals who are released and their families are more prepared for the transition back into the community.
9. **Develop a communications strategy to create broader public understanding of and support for this issue**. In addition to emphasizing the reasons why this reform benefits the community, it is also helpful to put a face to this issue and destigmatize those returning to the community by highlighting the stories of individuals and their contributions after returning from incarceration, particularly if they received the benefit of one of the early release mechanisms discussed above. In addition to giving constituents a better understanding of this issue, these efforts can also help reduce the backlash that may occur if someone who is released commits a new crime. Communications should be framed in the context of shared

values. In the event someone who has returned to the community commits a new crime, this previous framing will enable the office to quickly remind people why they were in favor of reform in the first place.

10. **Address the needs of survivors of crime.** Survivors of crime have a broad range of opinions regarding sentencing review. Some strongly support second chances, while others may find it retraumatizing to know that the person who harmed them or their loved one may be released earlier than expected. It is not appropriate to make the ultimate decision of whether or not to support release or resentencing based solely on survivors' opinions since the primary focus should be on the individual's rehabilitation, but it is important to ensure (in both the office's work on individual cases as well as legislation that the office supports) that survivors are (a) informed about the process, (b) given the opportunity to participate or not as they choose, and (c) receive appropriate supports to address any ongoing trauma as well as to address any practical concerns that they might have. Some survivors may appreciate having an opportunity to engage in a restorative justice process either before or after the individual is released.
11. **Ensure that data on race is collected and that any disparities are addressed.** Since people of color have disproportionately received excessive sentences, reducing racial disparities should be a primary goal of this work, but it is not a guaranteed outcome, as discussed above. It is therefore important for the DA's office to track data on race and other factors to ensure that it is achieving this goal or to identify and address ways in which it is failing to do so. Sentence review legislation should include a data collection component as well.
12. **Incorporate the principles underlying sentence review into the office's prospective sentencing work and into advocacy for sentencing reform.** For example, ensure that all office staff are aware of the office's sentence review work and the reasons behind it. Promote diversion and community-based treatment and accountability measures, and use incarceration only as a last resort. Ensure that sentences are proportional to the crime and take into account any mitigating circumstances. When possible, avoid charging cases in ways that will trigger mandatory minimums, and avoid the use of sentencing enhancements. Require DA or high-level supervisor approval in order to seek a sentence over 15 years. Establish an office policy that encourages prosecutors, as a matter of practice, to recommend the lowest end of any calculated sentencing range. Include parole opportunities in plea bargaining and sentence recommendations when possible.

## CONCLUSION

Ending mass incarceration is a challenging and ambitious task – and addressing past excessive sentences is a particularly complex piece of that puzzle. Nevertheless, district attorneys can be powerful drivers of change in this area, both by supporting the use of existing mechanisms within their jurisdiction and by advocating for new or expanded mechanisms. Moreover, this work is a crucial step towards creating a justice system that truly promotes both justice and public safety. Achieving “justice for all” requires not only forward-looking reform, but also striving to identify and address past injustices.

*“Every defendant is a member of our community. Whether they go to prison or not, at some point they return to our community. So how do we repair this violation so people are able to move on with their lives even after they've been held accountable?”*

— DURHAM COUNTY (NC) DISTRICT ATTORNEY SATANA DEBERRY

## RESOURCES

- Rachel Barkow (2019), *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, <https://www.hup.harvard.edu/catalog.php?isbn=9780674919235>.
- Shon Hopwood (2019), *Cardozo Law Review, Second Looks & Second Chances*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3404899](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3404899).
- Daniel Landsman (2019), *FAMM, A Second Chance Starts With A Second Look: The Case for Reconsideration of Lengthy Prison Sentences*, <https://famm.org/wp-content/uploads/Second-Look-White-Paper.pdf>.
- Marc Mauer and Ashley Nellis (2018), *The Meaning of Life: The Case for Abolishing Life Sentences*, <https://thenewpress.com/books/meaning-of-life>.
- Marc Mauer (2018), *The Sentencing Project, Long-Term Sentences: Time to Reconsider the Scale of Punishment*, <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment>.
- Jorge Renaud (2018), *Prison Policy Initiative, Eight Keys to Mercy: How To Shorten Excessive Prison Sentences*, <https://www.prisonpolicy.org/reports/longsentences.html>.
- The Justice Collaborative (2020), *Model District Attorney Sentencing Review Guidelines*, <https://fairandjustprosecution.org/wp-content/uploads/2020/01/Model-Sentencing-Review-Guidelines-FINAL.pdf>.

## APPENDIX I – MECHANISMS FOR SENTENCING REVIEW AND PROVIDING SECOND CHANCES

Opportunities for people to be released prior to the end of their sentence vary substantially by jurisdiction, though the availability and use of these mechanisms has greatly declined across the country. While only some of these mechanisms afford prosecutors an opportunity to directly support early release or resentencing, it is important for a DA to understand the different mechanisms for early release and the extent to which they are available and used within the DA's jurisdiction, particularly as the DA considers ways to engage in systemic change efforts. The primary mechanisms for sentencing review or early release are discussed below.

1. **Parole** – Parole means that someone is released from prison before the end of their sentence to serve the remainder of the sentence under supervision in the community. This includes both “mandatory release” (also referred to as “non-discretionary parole”) and “discretionary parole.”

Mandatory release refers to situations in which it is predetermined, either by statute or at the time of sentencing, that someone will be released at a specific point to serve the remainder of their sentence in the community. Discretionary parole, on the other hand, means that at some point during someone's sentence, he or she will become eligible for consideration for supervised release, but that a parole board will decide whether to grant that release.

Increasing opportunities for parole is wise policy – releasing people with appropriate (and not unduly onerous or unduly long) supervision<sup>79</sup> before the end of their sentence is more effective for reducing recidivism and costs less than incarcerating them for their full sentence and releasing them without supervision.<sup>80</sup>

As discussed above, however, many states have eliminated parole or substantially limited eligibility.<sup>81</sup> Even in states that grant parole more frequently, release has become virtually unavailable for certain crimes.<sup>82</sup> This is largely because parole boards often focus almost exclusively on the severity of the underlying crime in making their determination, rather than looking at how the individual has changed since the time of the crime.<sup>83</sup>

2. **Clemency and Pardons** – Clemency is a power granted to the governor (or the president in the federal system), an executive board (typically appointed by the governor), or some combination of both, to grant pardons and/or commutations of sentences. A pardon

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<sup>79</sup> In addition to the massive growth in the U.S. prison population, there has been a similar tremendous rise in the number of people on community supervision. This is particularly concerning because, in many states, parole and probation revocations are themselves a major driver of incarceration. About one-fifth of people released from state prisons end up being sent back merely as a result of technical violations of supervision. The Pew Charitable Trusts (2018), *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, 4, 10-11, [https://www.pewtrusts.org/-/media/assets/2018/09/probation\\_and\\_parole\\_systems\\_marked\\_by\\_high\\_stakes\\_missed\\_opportunities\\_pew.pdf](https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf). Moreover, multiple studies have found that unnecessarily intensive supervision either has no impact or actually increases reincarceration and recidivism. Doleac, J.L. (2018), *Study after study shows ex-prisoners would be better off without intense supervision*, The Brookings Institution, <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision>.

<sup>80</sup> Barkow, *Prisoners of Politics*, *supra* note 27, at 79.

<sup>81</sup> Even among states where it remains available, parole grants vary tremendously; ranging from 87 percent in Nebraska and 80 percent in New Hampshire to 0 percent in Illinois and 2 percent in Florida. Renaud, *Eight Keys to Mercy*, *supra* note 41, at 2-3.

<sup>82</sup> Barkow, *Prisoners of Politics*, *supra* note 27, at 77.

<sup>83</sup> American Civil Liberties Union, *False Hope*, *supra* note 55, at 4.

completely absolves the person of a crime. Pardons are often granted to individuals who are not currently serving sentences but whose conviction continues to negatively impact them. For example, a governor might grant a pardon to someone who is now facing immigration consequences due to an old conviction. Commutations, on the other hand, reduce a sentence, either making someone eligible for release earlier than would otherwise be the case, or releasing them outright.<sup>84</sup>

Prior to the introduction of parole in the 1900s, clemency was granted “frequently and routinely,” as leaders recognized that “initial sentencing decisions were often mistaken and that people and circumstances change over time.”<sup>85</sup> After parole was adopted, the use of clemency declined because parole was viewed as fulfilling much of the same function, but more recent eliminations or reductions of parole have not led to a resurgence in the use of clemency; it too is granted far less than it has been in the past.<sup>86</sup>

- 3. Judicial Resentencing** – Also sometimes referred to as “Second Look” provisions, judicial resentencing provisions allow a case to be brought back into court, in some cases after a minimum period of incarceration, for a judge to consider reducing the sentence. By way of recent example, in 2018, California enacted AB 2942, which amended the California Penal Code to allow prosecutors to request that a judge reduce a previously-imposed sentence if doing so would best serve the interests of justice.<sup>87</sup> Limited resentencing provisions are available in other states as well; for example, in Maryland, if a defendant files a motion within the first 90 days after a sentence is imposed, the judge may reduce the sentence at any point during the first five years,<sup>88</sup> a provision that is taken advantage of somewhat regularly.<sup>89</sup> However, most states either lack a broad resentencing provision, or if any exist, they are used very infrequently.<sup>90</sup>

Other models for judicial resentencing legislation include the proposed federal “Second Look Act,” introduced by Senator Cory Booker and Representative Karen Bass, which would allow people in federal prison to petition a court for resentencing after serving at least ten years of their sentence.<sup>91</sup> The American Law Institute’s (ALI) Model Penal Code §305.6: Modification of Long-Term Prison Sentences specifically endorsed and encouraged states to establish a process for a judicial panel or other judicial decisionmaker to modify sentences, and proposed

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<sup>84</sup> Renaud, *Eight Keys to Mercy*, *supra* note 41, at 4.

<sup>85</sup> Barkow, *Prisoners of Politics*, *supra* note 27, at 81.

<sup>86</sup> Renaud, *Eight Keys to Mercy*, *supra* note 41, at 7; Barkow, *Prisoners of Politics*, *supra* note 27, at 81-83.

<sup>87</sup> California Legislative Information (2018), *Assembly Bill No. 2942: An act to amend Section 1170 of the Penal Code, relating to recall of sentencing*, [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB2942](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2942).

<sup>88</sup> Maryland Rules, Rule 4-345. *Sentencing – Revisory Power of Court*, <https://casetext.com/rule/maryland-court-rules/title-4-criminal-causes/chapter-300-trial-and-sentencing/rule-4-345-sentencing-revisory-power-of-court>.

<sup>89</sup> Renaud, *Eight Keys to Mercy*, *supra* note 41, at 4.

<sup>90</sup> *Id.* However, legislation to establish a resentencing mechanism has been introduced in several states. See, e.g., Washington State Legislature (2019), SB 5819 - 2019-20: *Establishing a postconviction review board and review process for early release of qualifying offenders*, <https://apps.leg.wa.gov/billssummary?BillNumber=5819&Initiative=false&Year=2019>; General Assembly of the State of Missouri (2019), HB 195: *Allows a court to reduce a life without parole sentence to a sentence of life with eligibility for parole in certain circumstances*, <https://www.cqstatetrack.com/tehis/redir?id=5c08de1024d>.

<sup>91</sup> Congress.gov (2019), S.2146 - *Second Look Act of 2019*, <https://www.congress.gov/bill/116th-congress/senate-bill/2146?s=1&r=34>.

a set of principles to guide lawmakers in crafting such legislation.<sup>92</sup> In doing so, the ALI explained:

The Institute calls for a new approach to prison release in cases of extraordinarily long sentences for two reasons: First, American criminal-justice systems make heavy use of lengthy prison terms—dramatically more so than other Western democracies—and the nation’s reliance on these severe penalties has greatly increased in the last 40 years. The impact on the nation’s aggregate incarceration policy has been enormous. At the time of the revised Code’s preparation, the per capita incarceration rate in the United States was the highest in the world. As a proportion of its population, the United States in 2009 confined 5 times more people than the United Kingdom (which has Western Europe’s highest incarceration rate), 6.5 times more than Canada, 9 times more than Germany, 10 times more than Norway and Sweden, and 12 times more than Japan, Denmark, and Finland. The fact that American prison rates remain high after nearly two decades of falling crime rates is due in part to the nation’s exceptional use of long confinement terms that make no allowance for changes in the crime policy environment.

Second, § 305.6 is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition.<sup>93</sup>

4. **Good Time** – Also sometimes called “meritorious credit,” this release mechanism allows people to earn time off their sentences by avoiding disciplinary infractions and participating in prison programming. Good time credit incentivizes people to engage in behaviors that support rehabilitation. The amount of good time credit someone can earn varies depending on the state, and in many states, there are barriers to earning early release through good time. For example, people with certain crimes are often ineligible. In addition, good time that someone has already earned can be lost based on minor disciplinary infractions, and there is often insufficient space available in the rehabilitative programs that allow one to earn these credits (plus, these limited slots often go to individuals who are low risk and close to release, even though people at higher risk of engaging in additional criminal activity benefit the most from rehabilitative programming).<sup>94</sup>
5. **Compassionate Release** – Compassionate Release is meant to shorten someone’s sentence when circumstances such as age or significant illness “lessen the need for, or morality of, continued imprisonment.”<sup>95</sup> In addition to allowing people to spend the end of their life with loved ones, compassionate release avoids vast health care expenditures in prisons on individuals who do not present a public safety risk. However, the process for

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<sup>92</sup> *Model Penal Code § 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation*, <http://www.thealiadviser.org/wp-content/uploads/2019/03/Modification-of-Long-Term-Prison-Sentences.pdf>.

<sup>93</sup> *Id.* at 3.

<sup>94</sup> Renaud, *Eight Keys to Mercy*, *supra* note 41, at 4.

<sup>95</sup> Famm (2018), *Everywhere and Nowhere: Compassionate Release in the States, Executive Summary*, 1, <https://famm.org/wp-content/uploads/Exec-Summary-2-page.pdf>.



obtaining compassionate release is often long and complicated, and most people are turned down or die while they are still waiting for a decision. Therefore, though it is (at least theoretically) available in 49 states and Washington D.C., very few people are actually granted compassionate release.<sup>96</sup>

- 6. Retroactive Sentencing Reform** – As discussed above, there have been recent legislative changes to roll back mandatory minimums, three-strikes rules, and other punitive laws in some states. Some of these reforms have been retroactive, ensuring that people who are currently incarcerated also receive the benefits of new thinking about smart sentencing. However, many of these changes have been prospective-only, leaving many people who were sentenced under schemes that are now recognized as unjust and/or counterproductive to continue to serve sentences that are longer than they would receive today. Retroactive sentencing reform is critical for addressing mass incarceration on a systemic level and ensuring that people who are currently incarcerated are not left behind in reform efforts.

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<sup>96</sup> *Id.*

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