

Working Toward a Fair and Just Reentry Process: The Role of Prosecutors

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Prosecutors, although wielding immense power and a prominent platform, have traditionally viewed their roles as relatively confined to the “front end” of the criminal legal system and to a person’s path through that process—deciding whom and what to charge, negotiating a plea or trying the case, and determining upon conviction what sentence to recommend. Reform-minded elected district attorneys (the terms “district attorney,” “DA,” or “elected prosecutor” are used in this article generally to refer to any chief local prosecutor, including state’s attorneys, prosecuting attorneys, and attorneys general with local jurisdiction) have increasingly recognized that many opportunities exist to improve justice system responses during these stages, including rethinking decision making around charging low-level offenses, diverting cases that do not need to be in the criminal legal system, proactively addressing over-incarceration, and recommending alternative responses in lieu of prison. *See Fair & Just Prosecution, 21 Principles for the 21st Century Prosecutor* 3–11 (2018), <https://tinyurl.com/fzzjmj4n>. These practices are helping create a new normal in the field of prosecution, particularly as communities grow tired of past “tough on crime” approaches that have placed our nation in the dubious position of incarcerating at a rate second to none. Yet, despite strides that have limited incarceration through reforms such as these, there are still roughly 1.8 million people in our nation’s prisons and jails.

About 95 percent of people who are incarcerated will return home to their communities. *See Recidivism and Reentry*, Bureau of Just. Stat. (BJS), <https://tinyurl.com/2p9b6da7>. Sadly, our current justice system is not set up to help people live, work, and thrive once they are home. In fact, because of the lack of preparation, support, and services, many formerly incarcerated individuals wind up re-incarcerated. According to a BJS review of criminal history data from 34 states, 6 in 10 people released from prison in 2012 were rearrested within three years. And from its study of people released in 2005, BJS found that 77 percent were arrested again within five years of release.

To reduce the number of people cycling through the system, more must be done while people are incarcerated and during the critical initial weeks and months after release to foster successful reentry into the community. As a growing cohort of reform-minded DAs around the country understands, a holistic view of public safety—and one that best protects our communities—requires engagement, coordination, and support for individuals at every stage of the criminal legal process and beyond to close this revolving door. This means that prosecutors must also step outside of their traditional role.

DAs are often leaders in setting public safety values and priorities in their communities. They can and should use their power and voices to support individuals with reentry, both during incarceration and after their release. DAs can help reduce the number of people cycling in and out of the system by working to limit the inhumane conditions inside jails and prisons and the resulting adverse impact on individuals

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behind bars, advocating for programming and rehabilitative services in correctional facilities, removing barriers and hurdles that inhibit successful transition into the community upon release, and equipping people for reentry with the tools and opportunities they need to resume their lives. See Cyrus R. Vance Jr., Stanley Richards & Courtney M. Oliva, *Reimagining the Role of the Prosecutors in the Community: Prosecutors, Reentry, and Public Safety* 8–9 (Inst. for Innovation in Prosecution at John Jay Coll. 2019), <https://tinyurl.com/mr3f5b7y>.

This article will discuss these important strategies and how DAs can (1) use the tools available to them to minimize the harms of incarceration and support programming and services that will help individuals prepare for reentry and reintegration and (2) engage in efforts to support communities and ensure that people are set up for success post-release.

During Incarceration: Minimizing the Adverse Impact of Incarceration and Supporting Reentry Programming and Services

Far too often, conditions behind bars are inhumane and can exacerbate the problems and challenges that precipitate criminal conduct. Incarceration negatively impacts self-worth and personal growth, stifles familial and community connections, and creates barriers to leading productive lives outside of prison walls.

Though the prison and jail population has declined in recent years, the United States still maintains the largest incarceration rate per capita in the world. See John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, Pew Rsch. Ctr. (Aug. 16, 2021), <https://tinyurl.com/2p8teup>. Correctional facilities remain overcrowded, which adversely affects living conditions, facility management, and the health and safety of those who are incarcerated.

These conditions only worsened during the COVID-19 pandemic. Correctional facilities serve as congregate care settings, with limited access to appropriate protective equipment and materials to maintain sanitary conditions, limited ability for incarcerated people to adopt public health mitigation measures such as social distancing, and relatively low rates of vaccination. Fair & Just Prosecution, *COVID-19 and the Criminal Justice System: Improving Conditions of Confinement and Protecting Constitutional Rights* (2021), <https://tinyurl.com/3dykbnws>.

In addition to conditions that can adversely impact physical health, incarceration can produce long-term adverse psychological consequences resulting from dehumanizing treatment including deprivation of liberty and privacy, witnessing violence, extreme atypical living norms, and separation from others. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment* (prepared for the From Prison to Home Conf., Jan. 30–31, 2002), <https://tinyurl.com/yc335v5y>. Moreover, there is often an inability to maintain a healthy lifestyle, with limited access to nutritious food, time outdoors, or physical activity, and a woeful lack of access to treatment and resources for individuals with chronic physical health, mental health, and substance use issues.

These psychological and physical harms—when coupled with the isolation from everyday life—make returning to outside society a daunting task, and particularly challenging to navigate on one's own. The process of returning home often requires accessing information and seeking services from multiple entities for health care, housing, education, and employment—entities that incarcerated people have been disconnected from or without access to anywhere from several weeks to many years. For these reasons, it is critical to provide programming and services *inside* facilities *prior* to release that can make the necessary connections and help people prepare for this challenging transition.

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As leaders with a mandate to improve community safety, DAs need to be engaged in helping ensure that our correctional facilities and systems are set up to help people succeed upon release. They can do so by working to minimize the harms of incarceration, advocating for people to be treated with dignity and respect while confined, and supporting programming and services that will help prepare individuals for reentry and reintegration.

Promote Humane and Rehabilitative Conditions in Confinement

Prosecutors have a key role to play in advocating for humane and constitutional conditions of confinement, including access to necessary health care and rehabilitative opportunities. As a first step, all prosecutors should visit jails and prisons to get a full picture of the impact of their decisions, as well as to monitor conditions behind bars. They should acknowledge their duty to promote the safety, rights, and just treatment of individuals who are in correctional facilities based on prosecutorial decisions and advocacy. In 2019, over 40 DAs from around the country pledged to visit prisons and jails and to require their line prosecutors do the same. See Fair & Just Prosecution, *Building Empathy Through Experience: Elected Prosecutors' Pledge to Facilitate Officewide Prison, Jail and Juvenile Facility Visits* (Jan. 9, 2020), <https://tinyurl.com/2u29dx8z>. As they noted in this joint statement, “it is vital for prosecutors to understand the true impact of their decisions and to see firsthand the jails, prisons and juvenile facilities in their jurisdiction.”

When unsafe and unconstitutional conditions are identified, prosecutors also have an obligation to shed light on these problems and ensure that an investigation occurs. At times, that might involve referring cases to the U.S. Department of Justice Civil Rights Division for monitoring, prosecution, or other remedies.

In addition to taking measures to advocate for and ensure health, safety, and well-being inside facilities, elected prosecutors can also use their voices to advocate for an entirely different approach to incarceration, one that is guided by principles of human dignity. Fair & Just Prosecution, *Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences* (2020), <https://tinyurl.com/2p8s7b3h>. In countries like Germany and the Netherlands, corrections systems are organized around the central tenets of resocialization and rehabilitation. See Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States* (Oct. 2013), <https://tinyurl.com/3fue9y7v>. In these systems, life in prison is not predicated on extreme or harsh punishment—instead it aims to instill fundamental skills that people need to succeed in the community and relies on normalized everyday life and the use of incentives and rewards to create behavior change. DAs should work with correctional and law enforcement leaders in their communities to learn from and adopt these proven models and best practices.

Advocate for Behavioral Health, Educational, Vocational, and Other Programming

While corrections directors and administrators lead and oversee the programming and services provided inside correctional facilities, securing the necessary buy-in, support, and funding to implement new or expanded services is often a challenge. This is where the voice and support of DAs can go a long way. Prosecutors can become champions of behavioral health, educational, vocational, and other services behind prison walls by highlighting their effectiveness in reducing recidivism and urging local and state officials to provide the necessary resources for their implementation.

Behavioral health services within correctional facilities are critical. Research estimates that around 65 percent of incarcerated people have a substance use disorder. And evidence has shown that taking measures to provide comprehensive treatment while individuals are incarcerated is effective in reducing both drug use and reoffending after they return to the community. See Nat'l Inst. on Drug Abuse, *Drug*

Facts: Criminal Justice (last updated June 2020), <https://tinyurl.com/2p8x8k4u>. For persons with an opioid use disorder, these treatment services include offering a choice among all forms of FDA-approved medications for OUD, which have also been shown to reduce the risk of drug overdose death after a person's release. Prosecutors can advocate for the use of this and other evidence-based behavioral health treatment services in prisons and jails. See Press Release, Law Enf't Action P'ship & Fair & Just Prosecution, Law Enforcement Calls for Medication-Assisted Treatment Programs in Correctional Facilities (Apr. 3, 2019), <https://tinyurl.com/45d9zckb>.

Additionally, prosecutors can adopt policies to help ensure that the treatment and services that people receive while incarcerated will be supported and continued upon their release into the community. In jurisdictions such as Philadelphia, Pennsylvania, and Burlington, Vermont, District Attorney Larry Krasner and State's Attorney Sarah George, respectively, encouraged access to and implemented policies that encourage the use of life-saving opiate treatments like buprenorphine, as well as harm reduction tools (including use of fentanyl test strips) to detect and prevent potential overdoses. See Brandon del Pozo, Lawrence S. Krasner & Sarah F. George, *Decriminalization of Diverted Buprenorphine in Burlington, Vermont and Philadelphia: An Intervention to Reduce Opioid Overdose Deaths*, 48 J. L. Med. & Ethics 373 (2020), <https://tinyurl.com/3f7z8hzi>. Research and evaluation of reentry programs and services has shown that interventions that facilitate connections to therapeutic and substance use treatment post-release are some of the most promising and effective. See Grant Duwe, *The Use and Impact of Correctional Programming for Inmates on Pre-and Post-Release Outcomes 2–3* (Nat'l Inst. of Just. 2017), <https://tinyurl.com/yyny3j5e3>.

In addition to behavioral health services, educational programs—both traditional and vocational training—have been shown to be among the most effective interventions at reducing recidivism. A RAND study found that people who participate in any kind of educational program while incarcerated are up to 43 percent less likely to reoffend and return to prison. See Lois M. Davis et al., *How Effective Is Correctional Education, and Where Do We Go from Here? The Results of a Comprehensive Evaluation* (RAND Corp. 2014), <https://tinyurl.com/2p8pyesp>. These individuals are also more likely to find a job after their release. Prosecutors can advocate for and support initiatives that will help bring resources, funding, and technology to ensure adequate educational offerings within correctional facilities. Recently, for example, the U.S. Department of Education announced the expansion of the Second Chance Pell experiment to reinstate Pell Grant eligibility for incarcerated students. Elected prosecutors should work with corrections officials, and others in their community, to ensure that incarcerated people are aware of this funding opportunity and know how to access it.

Participate in Transitional Planning and In-Reach Initiatives

To better enable people to prepare for life following incarceration, system leaders should work collectively to facilitate connections and provide guidance prior to release that will put people in better positions once back in the community.

DAs should work with other system officials to support such programming. This includes partnering with corrections, probation, and parole entities to identify and support community-based organizations that can provide in-reach and transitional services such as reentry planning. In Massachusetts, for example, the Suffolk County DA's Office partnered with the Boston Police Department, Suffolk County Sherriff, and State Department of Probation, Correction, and Parole through the Boston Reentry Initiative. This project helped people who were still incarcerated to obtain social service assistance and other planning support to facilitate their return to the community upon release from prison. See *Program Profile: Boston (Massachusetts) Reentry Initiative*, Nat'l Inst. of Just.: Crime Solutions (June 10, 2011), <https://tinyurl.com/274y69zt>.

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Additionally, an individual's ability to maintain connections with family and community while in jail or prison is a key component to a successful transition back to life in the outside world. DAs should urge the adoption of local and statewide policies that ensure available and affordable prison communications options. In 2015, for example, 51 former attorneys general urged changes to ensure that telephone communications for families of incarcerated people aren't cost prohibitive. See Peter Wagner & Alexi Jones, *State of Phone Justice*, Prison Pol'y Initiative (Feb. 2019), <https://tinyurl.com/aybe42wn>. Attorneys general and other elected prosecutors nationwide should continue pushing for changes to policies and practices that impose high costs on prison and jail phone calls and other forms of electronic communication. They should also help remove other hurdles to maintaining social connections by, for example, supporting efforts to place individuals in correctional facilities that are close to the communities they come from and mitigating excessive costs or red tape.

After Release: Ensuring Sufficient Support for Success in the Community

Once back in the community, formerly incarcerated people face a number of barriers that impact various aspects of everyday life, ranging from the burdens of oversupervision, to the obstacles created by criminal histories, to lack of coordination among many services and supports. DAs committed to promoting safer and healthier communities need to acknowledge these barriers and play a leadership role in working with policymakers to eliminate and alleviate them.

Work with Probation and Parole to Limit Unnecessary, Excessive, and Ineffective Supervision

Following incarceration, many individuals are placed under some form of community supervision. This supervision has increased exponentially over the past few decades. Today, one in 55 people nationwide is on probation or parole. See Adam Gelb et al., Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunities* (2018), <https://tinyurl.com/34wvz7kz>.

People under supervision must comply with a laundry list of conditions, requirements, and limitations on top of the many other challenges they face as they aim to navigate life post-release. Too often these lengthy and overly restrictive supervision conditions do nothing to improve community safety. Instead, they often lead to re-incarceration for minor noncriminal and technical violations such as breaking curfew or missing an appointment with a probation or parole officer. In 2017, these violations made up a quarter of all state prison admissions. See Council of State Gov'ts Just. Ctr., *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets* (June 2019), <https://tinyurl.com/yckvkhp7>. Continually crowding our nation's prisons and jails with individuals who make these small mistakes perpetuates a cycle of criminal legal system involvement and makes it difficult for people to move forward with their lives. Prosecutors should work with judges and probation and parole entities to reduce the number of conditions and requirements that often result in people being reincarcerated for minor rule violations, and they should oppose, rather than reflexively seek, incarceration for such violations.

Elected prosecutors can also employ policies in their offices to reduce unnecessary and excessive supervision. Most reoffending occurs in the initial weeks and months under supervision, so terms that extend on for many years are often counterproductive and interfere with people's ability to lead independent and productive lives. In Philadelphia, for example, District Attorney Larry Krasner reduced the number of people under community supervision by one-third—from 42,000 people in 2018 to 28,000 in 2021—by implementing policies that guided staff prosecutors not to seek supervision terms longer than 36 months for felonies and 12 months for misdemeanors. See Samantha Melamed, *How Philly, the Nation's Most Supervised Big City, Cut Its Probation Numbers by a Third*, Phila. Inquirer (Apr. 19, 2021), <https://tinyurl.com/bd66xrzb>. And in the Western Judicial Circuit in Georgia, District Attorney Deborah Gonzalez has recognized that there is no evidence that lengthy probation makes communities safer or

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more secure, and as a result directed line prosecutors to support limiting the length of probation to two years, when statutorily permissible. *See* Memorandum from Off. of the Dist. Att’y, W. Jud. Cir., Fairness and Equity in the Western Judicial Circuit District Attorney Office (Jan. 1, 2021), in *DA Gonzalez Outlines Policies of Reform in Memorandum to Staff*, Classic City News (Jan. 2, 2021), <https://tinyurl.com/yzcs3vys>.

Limit the Impact of Criminal History Records

Criminal history records can follow individuals for a lifetime, impacting housing, education, employment, and even an individual’s ability to remain in this country. These collateral consequences harm not just the individual, but also their family and broader community. There are a number of ways that DAs can mitigate these life-altering adverse effects of a criminal conviction.

Access to housing and justice system involvement are inextricably linked. Having a criminal record creates a host of barriers to securing safe housing, including by potentially restricting housing assistance or impacting credit ratings; imposing limitations on living with certain family, associates, or acquaintances due to community supervision conditions; and limiting job opportunities that would make stable housing affordable. As a result, it is not surprising that people who have been incarcerated even just *once* are seven times more likely than non-justice system involved people to face homelessness, and people who have been incarcerated more than once are 13 times more likely to experience homelessness. *See Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, Urb. Inst. (Sept. 16, 2020), <https://tinyurl.com/mryam8kp>.

Additionally, numerous policies and practices limit or restrict employment prospects and the ability to obtain professional licensure. On average, the unemployment rate for formerly incarcerated people is 27 percent, compared to just six percent for the general population. *See* Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, Prison Pol’y Initiative (July 2018), <https://tinyurl.com/yk2r9was>. These are not coincidences; a number of system failures, broken processes, and limitations placed on people with criminal histories add extra hurdles to finding shelter and work. Criminal history records and convictions also further disenfranchise individuals returning to their communities by restricting the right to vote and impacting access to social service benefits.

DAs can serve a critical role in advancing and championing efforts to limit these unnecessary and harmful effects. There is a growing movement around the country to advance “clean slate initiatives,” which allow people the opportunity to seal or expunge records after a certain amount of time—initiatives that many forward-thinking elected prosecutors are embracing and, in some cases, leading. In 2021, over 80 prosecutors and law enforcement leaders joined a statement in support of these important reforms. *See* Press Release, Fair & Just Prosecution, Joint Statement on Supporting Clean Slate Initiatives (Apr. 2021), <https://tinyurl.com/5n8npxn7>. In Washtenaw County, Michigan, Prosecuting Attorney Eli Savit established a Conviction Integrity and Expungement Unit. *See* Washtenaw Cnty., Off. of Prosecuting Att’y, *2021 Year End Report*, <https://tinyurl.com/h8jn9c3d>. Capitalizing on Michigan’s recent expungement laws, PA Savit’s office partnered with community organizations to assist individuals with the expungement process and cover costs associated with filing. To inform residents of the new laws and services being provided, the office implemented community outreach efforts to talk to residents across the county and held multiple expungement fairs. In 2021, the office, in collaboration with community partners, was able to assist more than 500 county residents expunge their records. Dallas County, Texas, District Attorney John Creuzot’s office supports similar efforts by partnering with the clerk’s office for an annual Expunction Expo—just last year, the partnership helped to expunge roughly 800 criminal records. *See* Annissa Obasi & Karen Wise, *Dallas County’s Expunction Expo*, Tex. Dist. & Cnty. Att’ys Ass’n (July–Aug. 2021), <https://tinyurl.com/yckha7py>. A number of these initiatives have even made the clearing of these records automatic,

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further reducing individual burdens and barriers and acknowledging that everyone deserves a second chance.

Prosecutors can advocate for other law and policy changes so that people are not impeded by the collateral consequences of convictions. A number of DAs have recognized the importance of the devastating immigration consequences resulting from often minor convictions. Many DAs—including District Attorneys Diana Becton of Contra Costa County, California, Eric Gonzalez of Brooklyn, New York; Michael Dougherty of Boulder County, Colorado, and Larry Krasner of Philadelphia, Pennsylvania, as well as County Attorney John Choi of Ramsey County, Minnesota, and Prosecuting Attorney Carol Siemon of Ingham County, Michigan—have implemented policies requiring that line prosecutors consider a person’s potential immigration consequences when making charging and plea bargaining decisions. *See* Memorandum from Off. of Ramsey Cnty. Att’y, Prosecution Policy Regarding the Consideration of Collateral Consequences in Plea Negotiations and Sentencing (Jan. 31, 2019), <https://tinyurl.com/457sxbw8>; Memorandum from Off. of Dist. Att’y, Contra Costa Cnty., Immigration Policy (May 8, 2019), <https://tinyurl.com/2y85kdna>. Prosecutors can also support individuals’ right to vote and sit on juries. Hillsborough County, Florida, State Attorney Andrew Warren created a process to help eligible persons resolve court fines and fees in order to restore their right to vote. *See Hillsborough County Restoration of Voting Rights for Returning Citizens*, Off. of State Att’y, 13th Jud. Cir. (Dec. 17, 2019), <https://tinyurl.com/3jddz6jp>. District of Columbia Attorney General Karl Racine and Lincoln County, Maine, District Attorney Natasha Irving have supported efforts to enable people with criminal convictions to serve on juries, with studies and legal scholars demonstrating that jury service is optimally positioned as a means for furthering reintegration into society. *See* James M. Binnall, *Felon Jurors in Vacationland*, 71 Me. L. Rev. 71 (2019), <https://tinyurl.com/hf4r2bsy>. These are a few examples of how DAs can engage—but they can and should be doing more, including pushing for legislative and policy reforms that in other ways work to eliminate criminal history barriers to housing supports, education, social services, employment, licensure, voting rights, and jury service.

Foster Community Engagement and Coordination

Just as system leaders and stakeholders play a role in helping prepare people for their return to the community, they also play a role in ensuring that the community is equipped to receive people who are coming home. To this end, a number of states and local jurisdictions have established reentry working groups or councils, organized networks of community groups, individuals, and governmental agencies across a variety of disciplines that have a role or interest in coordinating available services and supports. Having a mechanism in place for coordination is essential to help community groups and service providers adequately respond to and support the reintegration of people following release from incarceration.

As with many aspects of the criminal legal system, prosecutors can’t transform the reentry process on their own. Reentry councils, however, foster collaboration of leaders across the criminal legal system, as well as across health, labor, and other sectors that are critical to post-release success. Elected prosecutors can and should serve as leaders on these councils.

King County, Washington, Prosecuting Attorney Dan Satterberg sits on the Statewide Reentry Council. The Council works to increase collaboration between state and local programs relevant to reentry, improve outcomes for people returning to the community, develop statewide goals, and recommend system and policy changes to improve reentry services and supports across the state. *See* Wash. Rev. Code § 43.380. Similarly, in San Francisco, California, District Attorney Chesa Boudin serves as a member of the San Francisco Reentry Council, which includes 24 members across the disciplines of social services, youth and family services, housing, public health, probation, and parole that play a role in preparing for and supporting the return of individuals into the community. *See Reentry Council*, City & Cnty. of San

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Francisco, <https://tinyurl.com/4m9en28b>. As part of these efforts, DAs have the opportunity to support and meet victims, families, and community members and hear their needs and concerns directly. Where such councils don't exist, DAs can use their role as public safety leaders in their community to bring stakeholders together to create them.

Conclusion

Every contact point and interaction with the criminal legal system impacts not only the lives of those convicted of a crime, but also their families, networks, and society at large. Therefore, the decisions and responses that system leaders employ impact us all as well.

Prosecutors play a major role in the criminal legal system and in the ongoing conversations in their jurisdictions and around the country about improving public safety. Elected DAs have a duty to utilize their power and voice to help facilitate better outcomes for both the individual and the entire community. That duty does not end with a conviction or sentence, but rather extends beyond a case's disposition to efforts that can support the individual's reentry and reintegration. During incarceration, prosecutors can urge humane and rehabilitative conditions of confinement, advocate for programming and services to support successful reentry, and participate in transitional planning and in-reach initiatives. And for individuals released back into the community, prosecutors can work with probation and parole to end unnecessary and ineffective supervision, limit the impact of criminal history records, and foster community engagement and coordination.

When prosecutors engage in reentry efforts from incarceration through release and reintegration, they help close the revolving door of our jails and prisons, and as a result enhance public safety and help people lead healthy and productive lives. Many reform-minded prosecutive leaders are rising to the challenge; hopefully their efforts will encourage others to act.