



# FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

## ISSUES AT A GLANCE

### Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences

*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 is the first in a series focused on lessons learned from Germany's criminal justice system that are particularly instructive for elected prosecutors in the U.S.** This brief explores how Germany promotes public safety and holds people accountable for their actions, while keeping its incarceration rate low and limiting collateral consequences. It then provides examples of how DAs are implementing reforms that are consistent with the approaches that have been successful in Germany. Finally, it offers specific recommendations for how elected prosecutors can apply these lessons within their jurisdictions.

#### BACKGROUND

Despite comprising about 4% of the global population, the United States has 22% of the world's prison population.<sup>2</sup> Faced with these concerning numbers, criminal justice leaders are increasingly looking at the experiences, challenges, and successes of other countries to expand their thinking

<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, and Attorneys General with local jurisdiction.

<sup>2</sup> Lopez, G. (2015, updated in 2016), *Mass incarceration in America, explained in 22 maps and charts*, Vox, <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts>.

***"Even though we can't 'cut and paste' German practices... into our systems, we can borrow salient philosophical approaches and program pieces that might work in our individual systems."***

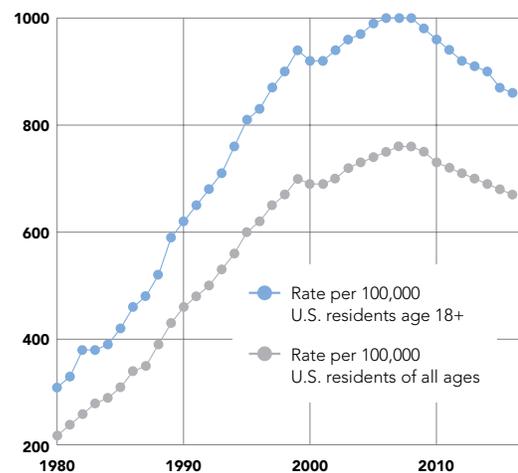
— INGHAM COUNTY (LANSING, MI) PROSECUTING ATTORNEY CAROL SIEMON

around how to address overincarceration and build healthier and safer communities in the U.S. **These concerns are particularly timely in the context of the COVID-19 pandemic**, which has further exposed the need to reduce density and overcrowding in prisons and jails to curtail the spread of disease among those in custody and personnel who work in these facilities.

As part of their mandate to do justice and promote public safety and well-being, elected DAs can and should learn from international practices. Germany provides one such model. Many elements of Germany's criminal justice system offer important lessons, including: an incarceration rate *one-ninth* that of the U.S., far fewer collateral consequences for criminal justice system involvement, humane prisons that promote rehabilitation, and developmentally-appropriate juvenile and young adult justice practices.<sup>3</sup>

In the 1960s, the incarceration rate in the U.S. was only slightly higher than in Germany.<sup>4</sup> Subsequently, the massive growth in incarceration in the U.S. over recent decades has made our country an extreme outlier internationally.<sup>5</sup> As Germany has engaged in intentional efforts to reduce its reliance on incarceration, crime rates in the country have been dropping for decades<sup>6</sup> and are at their lowest level in 30 years.<sup>7</sup> Germany thus illustrates that our country's high incarceration rates, lengthy sentences, harsh prison conditions, and emphasis on punishment rather than rehabilitation are not necessary for preventing recidivism or protecting public safety. Additionally, Germany provides a useful reference point because it has maintained its low rate of incarceration despite facing challenges that are similar to those that have shaped the

**U.S. Incarceration Rate 1980–2016**



<sup>3</sup> As noted above, this is the first in a series of briefs on lessons from the German criminal justice system; future briefs will look at additional issue areas where the practices in Germany can enlighten thinking in the U.S.

<sup>4</sup> Tonry, M. (1999), *Why Are U.S. Incarceration Rates So High?*, *Crime & Delinquency*, <https://www.uakron.edu/dotAsset/1662091.pdf>. Although crime rates in the U.S. are somewhat higher than in Germany, this difference does not come close to accounting for the massive current disparity in incarceration rates. As of 2004-2005, the one-year prevalence (i.e., the percent of the population to experience that offense within one year) was estimated to be for burglary: 0.9% in Germany versus 2.5% in the U.S.; for robbery: 0.4% in Germany versus 0.6% in the U.S.; and for assault: 2.7% in Germany versus 4.3% in the U.S. Lynch, J.P. and Pridemore, W.A. (2011), *Crime in International Perspective*, in *Crime and Public Policy* (Wilson, J.Q. and Petersilia, J., Eds.), Oxford University Press, 20-21. It is important to note, however, that violence in the U.S. is substantially more likely to be lethal than in Germany, a difference that appears to be largely attributable to the fact that firearms are much more prevalent in the U.S. Beauchamp, Z. (2018), *America doesn't have more crime than other rich countries. It just has more guns.*, <https://www.vox.com/2015/8/27/9217163/america-guns-europe>.

<sup>5</sup> Institute for Criminal Policy Research (2018), *World Prison Brief*, [http://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All). The U.S. has the highest incarceration rate in the world.

<sup>6</sup> Jehle, J. (2015), *Criminal Justice in Germany*, Federal Ministry of Justice and Consumer Protection, 2, [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal\\_Justice\\_Germany\\_en.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Criminal_Justice_Germany_en.pdf?__blob=publicationFile&v=3).

<sup>7</sup> King, E. (2018), *Germany records lowest crime rate since 1992*, Politico, <https://www.politico.eu/article/germany-crime-rate-lowest-since-1992/>.

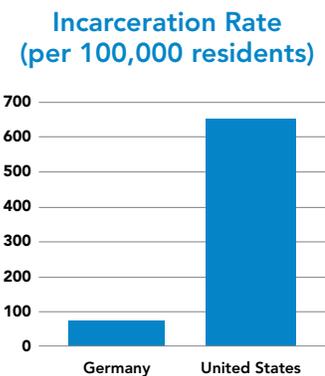
U.S. criminal justice system, including one of the highest levels of wealth inequality in Europe,<sup>8</sup> ethnic minority groups (particularly individuals of Turkish origin) who face discrimination and persistent intergenerational disadvantage,<sup>9</sup> and the highest rates of methamphetamine and amphetamine use in Europe.<sup>10</sup> As such, if elected leaders and prosecutors in the U.S. made different choices going forward, we could safely adjust to a criminal justice system with a significantly smaller footprint, more akin to that of Germany and all other Western democracies.

## KEY LESSONS LEARNED FROM GERMANY'S CRIMINAL JUSTICE SYSTEM

Since the lessons learned from Germany cover a broad range of policy areas, the potential applications in the U.S. justice system are similarly broad – and some are outside the direct purview of prosecutors. Nevertheless, district attorneys can implement numerous and significant reforms by embracing successful German approaches, and in other instances can use their powerful voice as elected leaders to advocate for change.<sup>11</sup> This section discusses how Germany's criminal justice system limits incarceration and collateral consequences.

### A. Incarceration Rates

**Germany relies primarily on non-carceral criminal justice responses, and therefore incarcerates people at a rate that is one-ninth of the U.S. rate.**<sup>12</sup> German prosecutors decline to prosecute many cases (because, for example, the crime is minor or the evidence is insufficient), but even individuals who are convicted are rarely incarcerated. The vast majority of sanctions imposed by the German criminal justice system are either fines, or in the juvenile system, educative or disciplinary measures.<sup>13</sup> Even among those who are “sentenced to prison,” most receive a “suspended” sentence, which is similar to being placed on probation, rather than actually being sent to prison.<sup>14</sup> Only about *five percent* of adult sentences consist of actual “unsuspended” imprisonment.<sup>15</sup>



<sup>8</sup> OECD Centre for Opportunity and Equality (2017), *Understanding the Socio-Economic Divide in Europe*, 10, <https://www.oecd.org/els/soc/cope-divide-europe-2017-background-report.pdf>.

<sup>9</sup> Ray, A. (2017), *Wage Discrimination in Germany Between Turkish Immigrants and German Natives: An Empirical Analysis of Labor Market Outcomes of Turkish Immigrants*, Issues in Political Economy, <https://www.elon.edu/docs/e-web/students/ipe/volumes/Ray%202017.pdf>; Diehl, C. & Granato, N. (2018), *Germany: Intergenerational inequalities in the education system and the labour market for native-born children of immigrants from Turkey and the former Yugoslavia*, in *Catching Up: Country Studies on Intergenerational Mobility and Children of Immigrations*, OECD, [https://www.oecd.org/berlin/publikationen/Catching-Up\\_Germany.pdf](https://www.oecd.org/berlin/publikationen/Catching-Up_Germany.pdf).

<sup>10</sup> Wingard, J. (2019), *Germany named drug use capital following Europe-wide sewage study*, <https://www.dw.com/en/germany-named-drug-use-capital-following-europe-wide-sewage-study/a-47968865>.

<sup>11</sup> The German justice system certainly has its weaknesses as well. For example, certain evidence that is inadmissible in U.S. courts is admissible in Germany. This issue brief specifically focuses on aspects of the German system that can be instructive to reform-oriented U.S. prosecutors.

<sup>12</sup> Institute for Criminal Policy Research, *supra* note 5. Germany incarcerates 76 out of every 100,000 individuals, whereas the U.S. incarcerates 655 of every 100,000 individuals. Germany's rate is much more in line with international standards, as the majority of countries and territories have rates below 150 per 100,000 people, and the median rate for Western European countries is 81. Walmsley, R. (2018), *World Prison Population List*, World Prison Brief, 2, [http://prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](http://prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf).

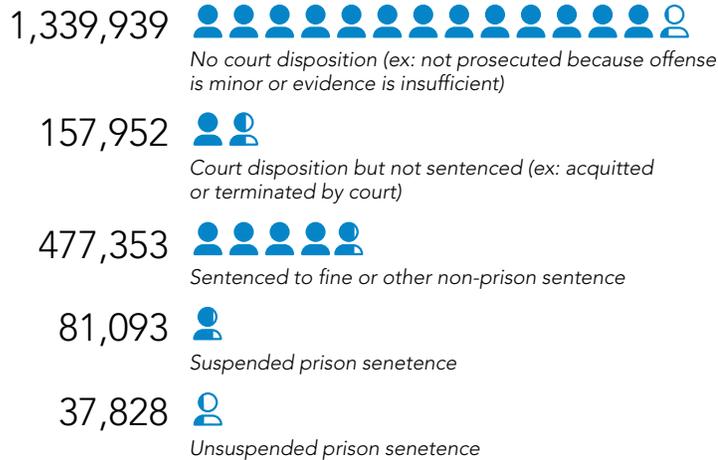
<sup>13</sup> Jehle, *supra* note 6, at 8-9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 34.

The chart below provides a stark visual depiction of the German starting point.<sup>16</sup>

### How Does Germany Keep People Out of Prison? *Of individuals who are identified as suspects:*



## B. Sentence Lengths and Day Fines

**Day fines, which are calculated based on a combination of the seriousness of the crime and the individual's ability to pay, account for 83% of adult criminal justice sanctions in Germany.**<sup>17</sup> These fines are calibrated to account for the individual's financial status and to equalize the impact of the fine across different economic strata. Most people are able to simply pay the fine and move on with their life, avoiding the harms associated with either being incarcerated or spending months or years under state supervision. If individuals are unable to pay the full fine immediately, they may be permitted to pay it in installments or to perform community service instead.<sup>18</sup>

<sup>16</sup> Chart data is from 2013, Jehle, *supra* note 6, at 9. Traffic offenses are not included.

<sup>17</sup> *Id.* at 33.

<sup>18</sup> *Id.* at 36.

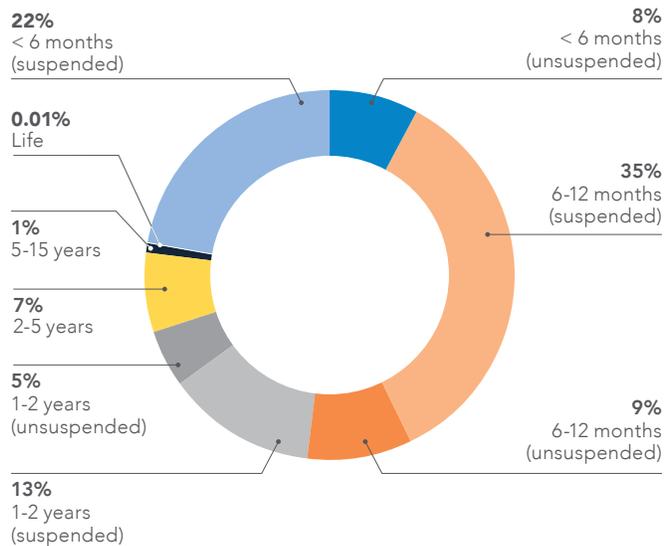
***"The number one thing I learned... — that I already knew but is driven home when you go somewhere else — is how punitive we are in the United States. We really like to punish people and we think of that almost as a virtue."***

**— DURHAM COUNTY (NC) DISTRICT ATTORNEY SATANA DEBERRY**

**For those who receive prison sentences, German sentence lengths tend to be dramatically shorter than those in the U.S.** In particular:

- About **30%** of sentences are **less than 6 months** (73% of these are suspended sentences).
- **44%** are **6 to 12 months** (80% of these are suspended sentences).
- Only **8%** of sentences are for **more than 2 years**.
- **1.4%** are **longer than 5 years**.<sup>19</sup>
- Aside from **life sentences** (imposed in only **0.01% of cases**), the **maximum sentence is 15 years**.<sup>20</sup>
- Germany **abolished the death penalty** in 1949.

**Sentence Lengths in Germany**



Individuals **are eligible for parole**

after serving two-thirds of their sentence (or half their sentence if it is their first imprisonment and is for two years or less), or after 15 years for life sentences. Life without the possibility of parole *does not exist* in Germany.<sup>21</sup>

By way of example, here is how two specific crimes were handled in 2010:

- Burglary: About a quarter resulted in day fines, more than half received sentences of a year or less, and less than 10% had sentences of more than two years. Moreover, the rate of suspended prison sentences was 60%.<sup>22</sup>
- Aggravated Robbery: About a quarter of sentences were 2 years or less (which includes suspended sentences), more than 40% were 3 years or less, about three-quarters were 5 years or less, and less than 2% were more than 10 years, with 15 years being the maximum possible sentence.<sup>23</sup>

<sup>19</sup> *Id.* at 35-36. Note that for certain serious offenses, German law allows courts to mandate “preventive detention” in addition to a prison term, which means that the individual may be held after the end of their sentence if they continue to pose a danger to the public. However, this is very rare; in 2013 for example, of 37,828 individuals who were given unsuspended prison sentences, only 32 were given orders of preventive detention in addition to their prison sentence. *Id.* at 38.

<sup>20</sup> Hammel, A. (2010), *Ending the Death Penalty: The European Experience in Global Perspective*, Palgrave Macmillan, 55.

<sup>21</sup> Bundesministeriums der Justiz und für Verbraucherschutz, *German Criminal Code*, §57 & §57a, [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#p0354](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0354).

<sup>22</sup> Albrecht, H.J. (2013), *Sentencing in Germany: Explaining Long-Term Stability in the Structure Of Criminal Sanctions and Sentencing*, *Law and Contemporary Problems*, 76, 211-236, 222, <https://scholarship.law.duke.edu/lcp/vol76/iss1/10/>.

<sup>23</sup> *Id.* at 223. In aggravated robbery cases, preventive detention is added to approximately 0.5% of sentences, meaning that individuals may be held beyond the end of their sentence. *Id.* at 224.

## C. Detention Rates

### **Pretrial detention, typically referred to as “remand” detention, is also rare in Germany.**

Pretrial detention is only permitted if there is a strong suspicion that the individual committed the alleged crime and: (a) there is a risk of absconding (which accounted for 86% of pretrial detentions in 2014), (b) there is a risk of tampering with evidence or improperly influencing witnesses, (c) there is an imminent risk of repeating or continuing a serious crime, or (d) the gravity of the crime is very severe, such as severe terrorist acts (though in practice this factor is rarely used as a basis for pretrial detention).<sup>24</sup> In 2014, of individuals whose case resulted in a final decision, *only 2.8% were held pretrial* (or about 3.5% if traffic offenses are excluded).<sup>25</sup> This is in stark contrast to detention rates in the U.S., where *more than a third* of defendants are either held on bail or detained pretrial without bail.<sup>26</sup>

## D. Collateral Consequences

### **Germany limits access to criminal records in order to reduce the collateral consequences of a conviction and promote resocialization.**

The German Federal Constitutional Court has recognized the right to “resocialization” as an integral part of constitutionally-guaranteed rights to dignity and to develop one’s personhood freely.<sup>27</sup> Germany therefore places strong restrictions on the use of criminal records to reduce the likelihood that they will impede resocialization.

In order to prevent criminal records from unnecessarily inhibiting someone’s ability to attain employment, employers may only ask about convictions that are relevant to the particular job, and potential employees are only required to report convictions that appear on a document called the “certificate of conduct.”<sup>28</sup> Minor first-time offenses are not included on the certificate.<sup>29</sup> For juvenile cases (a category which often includes offenses committed by 18-20-year-olds, as will be discussed in more detail in a future brief in this series), only unsuspended prison sentences of more than two years are included.<sup>30</sup> Additionally, offenses committed as a result of a substance use disorder are excluded if the individual received a suspended sentence.<sup>31</sup>

Moreover, in most cases, if an individual does not reoffend, **an offense will automatically be expunged** from the certificate of conduct either three or five years after the end of the sentence,

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<sup>24</sup> Morgenstern, C. and Kromrey, H. (2016), *DETOUR –Towards Pre-trial Detention as Ultima Ratio: 1st National Report on Germany*, Ernst Moritz Arndt University of Greifswald, 8-11, <http://www.irks.at/detour/DE%201st%20National%20report%20031116.pdf>. Alternatives to pretrial detention may be used if the aim of pretrial detention can be met through less intrusive measures, such as an obligation to report to a specified authority, house arrest, or bail, though this is done in a relatively small number of cases, likely resulting in people being unnecessarily held pretrial. Nevertheless, “the German organization of pre-trial detention seems to have an overall reductionist effect, producing comparably low numbers/rates of pre-trial detainees... without replacing them by a high number of supervisees.” *Id.* at 35-36.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> Dobbie, W. and Yang, C. (2019), *Proposals for Improving the U.S. Pretrial System*, The Hamilton Project, 5, [https://www.brookings.edu/wp-content/uploads/2019/03/DobbieYang\\_PP\\_20190314.pdf](https://www.brookings.edu/wp-content/uploads/2019/03/DobbieYang_PP_20190314.pdf).

<sup>27</sup> Morgenstern, C. (2011), *Judicial Rehabilitation in Germany – The Use of Criminal Records and the Removal of Recorded Convictions*, European Journal of Probation, 3, 20-35, 21, <https://pdfs.semanticscholar.org/e201/0187ea5f5e07fe753f8f1a5fd96a7bb6da16.pdf>.

<sup>28</sup> *Id.* at 25-29.

<sup>29</sup> *Id.* at 26-27.

<sup>30</sup> *Id.* at 26.

<sup>31</sup> *Id.* There are exceptions to these exceptions – for example, most sex offenses must be included regardless of the penalty, and additional information must be provided for positions that involve working with children. *Id.* at 26-27.

depending on the severity of the crime.<sup>32</sup> Full redemption, which means that a conviction is deleted from the Federal Register (rather than just the certificate of conduct) and may not be used against the individual in any legal matter, typically occurs after five to fifteen years, depending on the seriousness of the original punishment and whether it was a juvenile or adult case.<sup>33</sup>

People in Germany **do not lose the right to vote** as a result of having a conviction or being incarcerated,<sup>34</sup> and German law limits other uses of conviction records as well. For example, they cannot be considered when someone seeks to rent a home.<sup>35</sup> There is minimal impact of criminal records other than convictions (such as police and prosecution records), as these records generally may only be used by law enforcement authorities, with very restricted access for other authorities and no access for public or private employers.<sup>36</sup>

## E. Outcomes

**Crime rates in Germany have been dropping for decades**<sup>37</sup> and are at their lowest level in 30 years.<sup>38</sup> Recidivism rates in Germany are also low. A national reconviction study commissioned by the German Federal Ministry of Justice found that only 34% of individuals were reconvicted within a three-year period after either being released from prison or given a non-custodial sanction (including suspended sentences), and only 4% re-offended with crimes serious enough to be given an unsuspended prison sentence.<sup>39</sup>

## PROMISING PRACTICES IN THE U.S. TO REDUCE INCARCERATION AND COLLATERAL CONSEQUENCES

In the U.S., a growing number of elected prosecutors have embraced reforms that are more in line with the German model, prioritizing community-based responses over incarceration and striving to keep people out of the justice system entirely when possible. These practices have been put in place even while waiting for the kinds of legislative and systemic reforms that are necessary to bring the U.S. criminal justice system fully in line with Germany and broader global norms.

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<sup>32</sup> *Id.* at 29-30.

<sup>33</sup> *Id.* at 30.

<sup>34</sup> *Id.* at 21. For certain specific crimes, German law does allow courts to temporarily prohibit someone from voting for two to five years as part of their sentence, but this is extremely rare – in 2007 and 2008, for example, this was not done in any cases. *Id.*

<sup>35</sup> *Id.* at 26.

<sup>36</sup> *Id.* at 22.

<sup>37</sup> Jehle *supra* note 6, at 2.

<sup>38</sup> King, E. (2018), *Germany records lowest crime rate since 1992*, Politico, <https://www.politico.eu/article/germany-crime-rate-lowest-since-1992/>.

<sup>39</sup> Jehle, *supra* note 6, at 57-59. Comparisons with the U.S. are very challenging because the available data does not involve directly equivalent populations. U.S. recidivism numbers typically look only at recidivism among those released from incarceration, rather than the broader group that is included in the data from Germany. A review looking only at individuals released from prison found similar numbers for the U.S. and Germany, with 48% reconvicted and 35% reimprisoned within 3 years in Germany, compared to 45% reconvicted and 36% reimprisoned in the U.S. Fazel, S. & Wolf, A. (2015), *A Systematic Review of Criminal Recidivism Rates Worldwide: Current Difficulties and Recommendations for Best Practice*, 10 PLoS One, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4472929/>. However, it is important to keep in mind that the U.S. prison population includes many individuals who would not have been incarcerated at all had they committed a similar offense in Germany, and conversely, the group of individuals released from prison in Germany includes individuals who would either never be released from prison in the U.S., or who would serve such lengthy sentences in the U.S. that many of them would have aged out of offending by the time of their release.

For example, the **Brooklyn District Attorney's Office** has adopted an array of reforms to avoid unnecessary justice-system involvement, including ceasing prosecution of most low-level marijuana cases,<sup>40</sup> erasing warrants for low-level crimes,<sup>41</sup> supporting release rather than requesting bail as a default position in misdemeanor cases,<sup>42</sup> and establishing a pre-charge diversion program for people who have been arrested for small amounts of drugs.<sup>43</sup> After implementation of these changes, 2018 had the lowest number of homicides in Brooklyn since "modern" record-keeping began in 1970,<sup>44</sup> further supporting the evidence from Germany that over-criminalization and over-incarceration are not needed to ensure public safety. Building on this success, in 2019, the Brooklyn DA's Office launched *Justice 2020*, developed with support from reform experts, defense attorneys, service providers, law enforcement, formerly incarcerated individuals, clergy, and others. This initiative is designed to "take a truly comprehensive and holistic approach to implementing a new model of a progressive and modern prosecutor's office in the 21st century." To achieve this, *Justice 2020* outlines a broad array of reforms including requiring line prosecutors to consider non-carceral resolutions at every juncture of a case; shifting toward community-based responses to crime; establishing early release as the default position – not the exception – in most parole proceedings; and prioritizing collaboration with neighborhood leaders and community-based organizations to provide more diversion opportunities.<sup>45</sup> Similar reforms to bail and charging decisions were also adopted by the **Philadelphia District Attorney's Office**.<sup>46</sup>

While preventing people from getting a criminal record in the first place is often ideal, elected prosecutors have also helped increase expungement of criminal records so that, as in Germany, the long-term repercussions of a conviction are more limited. For example, after California voters passed a proposition that eliminated several marijuana-related crimes and applied this change retroactively, **former San Francisco District Attorney George Gascón** and **Contra Costa County District Attorney Diana Becton** partnered with the nonprofit organization Code for America to identify and automatically expunge more than 8,000 eligible convictions and about 2,400

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<sup>40</sup> Clifford, S., & Goldstein, J. (2014), *Brooklyn Prosecutor Limits When He'll Target Marijuana*, New York Times, <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html>.

<sup>41</sup> Baker, A. (2015), *Brooklyn Program Erasing Warrants for Low-Level Offenses*, New York Times, <https://www.nytimes.com/2015/10/08/nyregion/in-brooklyn-an-effort-to-erase-warrants-for-low-level-offenses.html>.

<sup>42</sup> Gonzalez, E. (2019), *Justice 2020: An Action Plan for Brooklyn*, <http://www.brooklynnda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf>, 16.

<sup>43</sup> *Id.* at 17.

<sup>44</sup> Jaeger, M. (2018), *District attorney says murders hit record low in Brooklyn*, New York Post, <https://nypost.com/2018/12/27/district-attorney-says-murders-hit-record-low-in-brooklyn/>.

<sup>45</sup> Gonzalez, *supra* note 42; The Brooklyn District Attorney's Office (2019), *Press Release: Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office is Implementing as Part of the Justice 2020 Initiative, Establishing a National Model of a Progressive Prosecutor's Office*, <http://brooklynnda.org/justice2020/>.

<sup>46</sup> Philadelphia District Attorney's Office, *New Policies Announced February 15, 2018*, <https://www.scribd.com/document/373860422/Finalized-Memo-Mar-13-2018>.

**"Criminal records keep people marginalized. We need to give people the opportunity to be productive citizens."**

— VERMONT ATTORNEY GENERAL T.J. DONOVAN

convictions, respectively.<sup>47</sup> **San Joaquin County District Attorney Tori Verber Salazar** and current **San Francisco District Attorney Chesa Boudin** have also backed proposed legislation that would automatically clear records that are eligible for expungement.<sup>48</sup> Others, such as **Wyandotte County (Kansas City, KS) District Attorney Mark Dupree**, have worked to make expungements more accessible by hosting expungement fairs and posting the necessary paperwork online.<sup>49</sup>

## RECOMMENDATIONS

The following recommendations outline ways in which elected prosecutors can avoid unnecessary incarceration and help align incarceration rates in our country with those in Germany, as well as international norms more generally:

1. **Prioritize deflection from the criminal justice system.** German prosecutors decline to prosecute many cases, recognizing that prosecution is often not in the public interest. Since the collateral consequences of a criminal record are significantly higher in the U.S., it is even more crucial here to avoid unnecessarily bringing people into the justice system and leaving them with a criminal record. Some cases simply do not need to be pursued, whereas others may be best addressed through a restorative justice approach or referral to community-based service providers that can best address the underlying problems. FJP's [Promising Practices in Prosecutor-Led Diversion](#) and [Building Community Trust: Restorative Justice Strategies, Principles and Promising Practices](#) issue briefs, as well as [21 Principles for the 21st Century Prosecutor](#),<sup>50</sup> provide a number of specific deflection and diversion recommendations DAs can adopt. Other sections of the 21 Principles delve into relevant topics such as how to promote treatment rather than criminalization of mental illness and drug addiction, as well as encouraging the use of alternative approaches that hold people accountable for their actions without requiring entry into the justice system.<sup>51</sup>
2. **When deflection is not possible, prioritize community-based treatment and accountability measures at every stage of a case, and treat incarceration as a last resort.** The resources listed in the previous recommendation all provide insight into how to accomplish this goal as well.

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<sup>47</sup> Lee, D. (2019), *An algorithm wipes clean the criminal pasts of thousands*, BBC News, <https://www.bbc.com/news/technology-48072164>; Gartrell, N. (2020), *Contra Costa DA to clear marijuana convictions for 2,399 people, thanks to Prop. 64*, The Mercury News, <https://www.mercurynews.com/2020/01/09/contra-costa-da-to-clear-marijuana-convictions-for-2399-people-thanks-to-prop-64/>.

<sup>48</sup> Dil, C. (2020), *Bill would seal 2 million criminal records*, recordnet.com, <https://www.recordnet.com/news/20200224/bill-would-seal-2-million-criminal-records>.

<sup>49</sup> Martin, L. (2019), *Wyandotte County's New Expungement Program Could Help People With Criminal Records Get Jobs*, KCUR, <https://www.kcur.org/post/wyandotte-countys-new-expungement-program-could-help-people-criminal-records-get-jobs#stream/0>.

<sup>50</sup> Principle 1, "Make Diversion the Rule," and Principle 7, "Minimize Misdemeanors" cover these recommendations.

<sup>51</sup> These topics are also addressed in FJP's issue briefs, [Improving Justice System Responses to Individuals with Mental Illness](#) and [Building Community Trust: Restorative Justice Strategies, Principles and Promising Practices](#).

***"The evidence is clear that our country's decades-long approach to incarceration is not working. We need to look for innovative solutions to deliver more sensible approaches – and a paradigm shift away from punitive responses – that our communities are demanding."***

— SUFFOLK COUNTY (BOSTON, MA) DISTRICT ATTORNEY RACHAEL ROLLINS

3. **Consider piloting a day fines program in your jurisdiction as an alternative to incarceration or ongoing supervision, but use caution to avoid unnecessary, excessive, or unaffordable fines (or fees).**<sup>52</sup> The Criminal Justice Policy Program (CJPP) at Harvard Law School and the University of Cologne Institute for Criminology (University of Cologne) are currently engaged in a joint research project to study how day fines are implemented in Germany and bring back policy lessons to the U.S., and prosecutors may be able to build off this work and learning in the future.<sup>53</sup> It is important, however, to exercise caution, as fining individuals for behaviors that stem from factors such as homelessness or mental illness is both unjust and likely to be counter-productive. Moreover, even relatively small fines may be out of reach and have disproportionate consequences for some individuals. Any fines and fees should therefore be calculated based on an individual's ability to pay in order to ensure equitable impact and avoid negative consequences for failure to pay a financial obligation that someone cannot afford.<sup>54</sup>
4. **Reduce sentence lengths.** Addressing mass incarceration requires not simply sending fewer people to prison, but also incarcerating people for shorter periods of time. German sentence lengths are much more in line with research showing that (a) most people who engage in crime *age out* of doing so,<sup>55</sup> and (b) there are diminishing returns (as well as high costs) associated with lengthy sentences.<sup>56</sup> DAs should establish office policies aimed at reducing sentence lengths, such as creating a default that prosecutors should ask for sentences at the lower end of the sentencing guidelines and must document in writing the reasons why a longer sentence is necessary in a particular case. One office has required DA approval to seek a sentence of 15 years or longer. In addition, if certain charges trigger mandatory minimums, prosecutors should consider whether alternate charges would be appropriate instead. Elected prosecutors can also address systemic causes of overly harsh sentences by supporting legislation to reduce sentence lengths and eliminate mandatory minimum sentences and three-strikes laws.
5. **Support mechanisms for sentencing review and early release, such as parole, clemency, compassionate release, and resentencing.** While reducing sentence lengths going forward is an important step, bringing the U.S. incarceration rate more in line with international norms will also necessitate revisiting sentences for those who are already in prison. Many are currently

<sup>52</sup> New York City Council Speaker, Corey Johnson, recently introduced legislation to establish a pilot program to enact day fines in the City, for example. Brachfeld, B. (2020), *What if NYC Fines Were Based On What You Can Pay?*, Gothamist, <https://gothamist.com/news/what-if-nyc-fines-were-based-what-you-can-pay>.

<sup>53</sup> Criminal Justice Policy Program, *Calculating the Fine: Front-End Legal Practice*, <http://cjpp.law.harvard.edu/day-fines>.

<sup>54</sup> See FJP's *Fines, Fees, and the Poverty Penalty* issue brief and FJP's *21 Principles*, Principle 16, "End the Poverty Trap of Fines and Fees," for more detailed suggestions on how to avoid punishing people for being poor.

<sup>55</sup> Loeber, R & Farrington, D.P. (2014), *Age-Crime Curve*, Encyclopedia of Criminology and Criminal Justice, 2014 Edition (Bruinsma, G. & 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); Steinberg, L., Cauffman, E., & Monahan, K. (2015), *Psychosocial Maturity and Desistance From Crime in a Sample of Serious Juvenile Offenders*, Office of Juvenile Justice and Delinquency Juvenile Justice Bulletin, <https://www.ojjdp.gov/pubs/248391.pdf>.

<sup>56</sup> The Pew Center on the States (2012), *Time Served: The High Cost, Low Return of Longer Prison Terms*, [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/prisontimeservedpdf.pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf).

***"We have to be smarter. ... We incarcerate more people in this country than any place in the world. ... We have to implement policies that work better and serve our communities and keep people safer."***

serving sentences that are significantly longer than what research shows makes sense, as discussed above. To address this, prosecutors' offices can, for example, adopt a default position of supporting (or at a minimum not opposing) parole at the first opportunity, absent extraordinary circumstances.<sup>57</sup> Elected prosecutors can also advocate for sentencing review mechanisms and legislative reforms to more systemically address overly-harsh sentences. See FJP's [Revisiting Past Extreme Sentences](#) issue brief for an in-depth look at why and how prosecutors should review and address excessive sentences that are currently being served.<sup>58</sup>

6. **Oppose cash bail and seek pretrial detention only in limited circumstances**, such as a credible reason to believe that someone is dangerous. For further discussion of how to reduce the use of pretrial detention, see FJP's [Bail Reform](#) issue brief and *21 Principles (Principle 3, "Move Toward Ending Cash Bail")*.
7. **Support legislation and other reforms that would reduce the collateral consequences of a criminal record**, such as laws that remove hurdles for obtaining public housing or educational loans. See *21 Principles (Principle 17, "Expunge and Seal Criminal Records")* for more ideas on how to limit the ongoing negative consequences of a criminal record.
8. **Advocate to expand expungement eligibility and mechanisms, proactively support expungement of eligible cases, and pursue automatic expungement whenever possible.** Consider partnering with a technology non-profit to achieve this broadly and efficiently if feasible. When automatic expungement is not possible, facilitate expungement through efforts such as expungement clinics or other pre-release community outreach efforts.

## CONCLUSION

The German criminal justice system is in many ways substantially different from the U.S. system, but the primary aims are the same – promoting justice and fairness, preventing re-offending, and keeping communities safe. Moreover, certain aspects of the German approach are well-aligned with the goals of reform-minded U.S. prosecutors who seek to avoid unnecessary incarceration, limit collateral consequences, and more broadly promote positive outcomes for both individuals who come in contact with the system and their communities. Many of the German practices discussed above could be adapted to the U.S. context, and elected prosecutors are strongly positioned to bring home lessons from Germany, both by implementing changes within their own offices and by working with other system leaders to reshape the justice system more broadly.

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<sup>57</sup> The Brooklyn District Attorney's Office has established a policy along these lines, as laid out in an April 2019 letter from District Attorney Eric Gonzalez to the Acting Commissioner of the New York State Department of Corrections and Community Supervision, <https://www.themarshallproject.org/documents/5926343-Eric-Gonzalez-letter-to-Anthony-Annucci>.

<sup>58</sup> These sentencing review reforms have broad community support – two thirds of voters support "elected prosecutors reexamining past sentences to provide a second chance to people who have been in prison for ten years or longer and who can be safely returned to the community." Barry, K.C., et al. (2020), *Policies & Polling on Reducing Excessive Prison Terms*, Data for Progress, <http://filesforprogress.org/memos/reducing-excessive-prison-sentences.pdf>. See also, Fair and Just Prosecution, *Sentencing Second Chances* (Video), <https://vimeo.com/392887695>.



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