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## The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise

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SEEMA GAJWANI AND MAX G. LESSER

## The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise

64 N.Y.L. SCH. L. REV. 69 (2019–2020)

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## THE HARD TRUTHS OF PROGRESSIVE PROSECUTION

### I. INTRODUCTION

Newly elected Durham County District Attorney Satana Deberry came into office in 2018 seeking to “drastically decrease” the jail population, implement bold prosecutorial reforms, and address racial bias in the criminal justice system.<sup>1</sup> After less than a year leading the office, however, she noticed that among line prosecutors<sup>2</sup> in her office there is a “strong fear of getting it wrong.”<sup>3</sup> She explained that as prosecutors “all we see are failures,” because line district attorneys often face the worst of humanity and only hear about those who reoffend—and never about the individuals who go on to succeed after involvement in the justice system. “Human brains have a negativity bias and that means that [prosecutors] never fear being too punitive.”<sup>4</sup> According to Deberry, even one instance of a defendant committing a serious, violent crime after being prosecuted leniently “changes the behavior”<sup>5</sup> of prosecutors throughout the office.<sup>6</sup>

Years before Deberry’s election, officials in the San Francisco District Attorney’s Office noticed a similar pattern. According to Timothy Silard, Chief of Policy to the San Francisco District Attorney from 1996–2008, the office recruited and hired “good people” as new prosecutors.<sup>7</sup> This meant hiring prosecutors who cared about civil rights and the problem of mass incarceration.<sup>8</sup> The San Francisco District Attorney’s Office trained these new attorneys in the proper exercise of prosecutorial discretion and racial disparities in the justice system.<sup>9</sup> Despite these efforts, however, Silard found a disturbing pattern.<sup>10</sup> Over time, the new hires became increasingly punitive, and no amount of training could counter this trend.<sup>11</sup>

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1. *We Deserve Better: A Platform For a Fairer and Safer Durhamn*, SATANA DEBERRY FOR DISTRICT ATT’Y, <https://deberry4da.com/platform/> (last visited Nov. 16, 2019) (“Satana will prioritize working with the courts and Sheriff’s Office to drastically decrease the daily census count at the jail. Satana will also ensure that there is fairness in the prosecutorial decision-making process[.]”).

2. “Line prosecutor” is an informal term for an attorney who regularly prosecutes cases in court, rather than supervising attorneys who are rarely themselves in court. *See Note, The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 760–61 (2019) [hereinafter *Paradox*].

3. Telephone Interview with Satana Deberry, District Att’y, Durham County, N.C. (Sept. 9, 2019).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Timothy P. Silard*, ROSENBERG FOUND., <https://rosenbergfound.org/about-us/timothy-p-silard/> (last visited Nov. 18, 2019) [hereinafter *Timothy Silard*]; Telephone Interview with Timothy P. Silard, President, Rosenberg Found. (Aug. 30, 2019).

8. Telephone Interview with Timothy P. Silard, President, Rosenberg Found. (Aug. 30, 2019).

9. *Id.*

10. *Id.*

11. *Id.*

In recent years, there has been a wave of progressive district attorneys elected to office across the country.<sup>12</sup> These prosecutors campaigned for office by pledging to “address racial disparities,”<sup>13</sup> send fewer people to jail,<sup>14</sup> change the “culture” of the district attorney’s office,<sup>15</sup> recognize crime as a byproduct of poverty,<sup>16</sup> and end mass incarceration.<sup>17</sup> However, if what Silard noticed in the San Francisco District Attorney’s Office was not an isolated phenomenon, and line prosecutors across the country become increasingly punitive over time, changing prosecutorial culture may be harder than simply hiring and training progressive assistant district attorneys. Moreover, even progressive district attorneys are prosecutors who are expected to do their jobs—to prosecute crime, particularly violent crime.

Without reconsidering how we prosecute violent crime, mass incarceration may plateau, but it will not end.<sup>18</sup> The structure of the criminal justice system also poses a challenge for progressive reform. The current criminal justice system was designed for trials in which a defendant’s guilt is contested.<sup>19</sup> However, this system has proven

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12. Kim Foxx was elected State’s Attorney for Cook County, Illinois (Chicago) in 2016; Larry Krasner was elected District Attorney of Philadelphia, Pennsylvania in 2017; Rachael Rollins was elected District Attorney of Suffolk County, Massachusetts (Boston) in 2018. *See* Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>. Other “progressive prosecutors” have won elections in areas such as Brooklyn, Kansas City (Kansas), and Dallas. *Id.*
  13. Rollins committed to addressing racial disparities through various system changes including training of staff, declining prosecution of certain nonviolent crimes, and eliminating cash bail for certain offenders. *See Policy*, RACHAEL ROLLINS FOR SUFFOLK DISTRICT ATT’Y, <https://rollins4da.com/policy/> (last visited Nov. 10, 2019).
  14. *See Initiatives*, ERIC GONZALEZ FOR BROOKLYN DISTRICT ATT’Y, <https://www.ericgonzalez.com/initiatives> (last visited Nov. 10, 2019).
  15. *See* Sophie Tatum, *Progressive Civil Rights Lawyer to Be the Next Philadelphia District Attorney*, CNN (Nov. 8, 2017), <https://www.cnn.com/2017/11/08/politics/larry-krasner-philadelphia-district-attorney/index.html>.
  16. *See* Steve Bogira, *The Hustle of Kim Foxx*, THE MARSHALL PROJECT (Oct. 29, 2018), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx>. During her campaign for Cook County State’s Attorney, Kim Foxx talked extensively about her experience growing up in poverty and drew connections between poverty and crime. *Id.*
  17. *See, e.g., On the Issues*, KRASNER FOR DISTRICT ATT’Y, <https://krasnerforda.com/platform> (last visited Nov. 10, 2019); *Policy*, *supra* note 13.
  18. *See* John Pfaff, *Why Today’s Criminal Justice Reform Efforts Won’t End Mass Incarceration*, AM. MEDIA (Dec. 21, 2018), <https://www.americamagazine.org/politics-society/2018/12/21/why-todays-criminal-justice-reform-efforts-wont-end-mass-incarceration> (highlighting that drug convictions only make up about 15 percent of individuals incarcerated in the state system and about 53 percent of individuals incarcerated have been convicted for violent crime, leading to Pfaff’s conclusion that “there will be no dramatic reduction in the U.S. incarceration rate without a significant reduction in the number of people we lock up for violence.”). Pfaff is a Professor of Law at Fordham Law School, where he teaches criminal law, sentencing law, and law and economics. *Biography of John Pfaff*, FORDHAM U. SCH. OF L., [https://www.fordham.edu/info/23171/john\\_pfaff](https://www.fordham.edu/info/23171/john_pfaff) (last visited Nov. 1, 2019).
  19. *See Adversarial Versus Inquisitorial Legal Systems*, U.N. OFF. ON DRUGS & CRIME (May 2018), <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal->

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ill-suited for producing effective outcomes in the vast majority of cases when guilt is not in dispute and defendants accept plea bargains.<sup>20</sup>

In short, the criminal justice system is failing to promote fairness or justice, which raises a number questions: What if electing enlightened district attorneys is not enough to halt the trajectory of mass incarceration? What if hiring good prosecutors will not help change the culture of the criminal justice system? What if the problem is structural? Given these fundamental challenges, the progress of elected progressive prosecutors will be limited without better strategies to achieve their goals. One strategy progressive prosecutors should consider is restorative justice.

## II. PROBLEM: THE SCOPE, ORIGINS, AND CHALLENGES OF MASS INCARCERATION

### A. *The Scope of Mass Incarceration*

With 2.2 million people incarcerated, the United States has the highest rate of incarceration in the world.<sup>21</sup> Our rate of incarceration is nearly nine to ten times that of many European countries,<sup>22</sup> with nearly one in every one hundred American adults now locked behind bars.<sup>23</sup> Although the United States comprises about 4 percent of the world's population, we account for 22 percent of the world's prison population.<sup>24</sup> Our position as global outlier in criminal justice is a relatively new

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systems.html. In the adversarial system of justice, the prosecution and defense compete against each other in order to determine the facts of an alleged crime. *Id.* Prosecutors have the burden to prove the defendant's guilt beyond a reasonable doubt. *Id.* The adversarial system is premised on the idea that this competitive process is the best method for ascertaining the truth. *Id.*

20. A decreasing number of defendants are contesting their guilt by going to trial and are instead resolving their cases through plea bargains. For instance, defendants choose a jury trial in “less than 3 percent of state and federal criminal cases—compared to thirty years ago when 20 percent of those arrested chose trial. The remaining 97 percent of cases were resolved through plea deals.” See Innocence Staff, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 8, 2018), <https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/>. A variety of explanations have arisen for the large proportion of cases resolved through plea agreements, including the “trial tax,” the superiority of surveillance and evidence collection techniques, and inadequacy of defense counsel. See generally *The Trial Penalty: The Sixth Amendment Right to Trial On the Verge of Extinction and How to Save It*, NAT'L ASS'N OF CRIM. DEF. LAW. 24–30 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it-report-final.pdf>; Lindsey Devers, *Plea and Charge Bargaining*, BUREAU OF JUST. ASSISTANCE U.S. DEP'T OF JUST. 1–2 (Jan. 24, 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.
21. Roy Walmsley, *World Prison Population List—Twelfth Edition*, INST. FOR CRIM. POL'Y RES. 1 (2018), [http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf) (outlining that there are over 1.2 million prisoners in the United States, establishing it as the country with the highest prison population).
22. Dr. Joseph E. Stiglitz, *Foreword* to Dr. Oliver Roeder et al., *What Caused the Crime Decline?*, BRENNAN CTR. FOR JUST. 1, 1 (2015), <https://www.brennancenter.org/publication/what-caused-crime-decline> [hereinafter Stiglitz].
23. *Id.*
24. German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX (Oct. 11, 2016), <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts>.

phenomenon, as there has been a 500 percent increase in incarceration over the last forty years.<sup>25</sup> Nearly 40 percent of the people in our prisons and jails are black,<sup>26</sup> despite this racial group comprising only 13 percent of the country's population.<sup>27</sup> This dynamic also applies to the nearly eighty thousand juveniles held in detention facilities, with the custody rate for black youth more than 4.5 times the rate for Caucasian youth, and the custody rate for Hispanic youth 1.8 times that of Caucasian youth.<sup>28</sup> These racial disparities are not coincidental. They are rooted in America's history of slavery and Jim Crow laws.<sup>29</sup>

The socioeconomic consequences of these incarceration rates are even more alarming. Professor Joseph Stiglitz<sup>30</sup> notes that mass incarceration has left hundreds of thousands of American citizens "sitt[ing] needlessly in prison" instead of "contributing to our economy."<sup>31</sup> These individuals face a lifetime of depressed economic prospects which create "the cycle of poverty and unequal opportunity [that] continues a tragic waste of human potential for generations."<sup>32</sup> Furthermore, U.S. imprisonment policies have placed tremendous strain on the corrections system, with the Justice Department describing the status quo as a "budgetary nightmare"

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25. *Criminal Justice Facts*, THE SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Nov. 10, 2019).

26. *Id.*

27. *QuickFacts – United States*, U.S. CENSUS BUREAU (July 1, 2018), <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

28. Sarah Hockenberry, *Juveniles in Residential Placement, 2010*, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION 1 (2013), <https://www.ojjdp.gov/pubs/241060.pdf>.

29. See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 2–4 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>.

[T]hese racial disparities are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and help create an inaccurate picture of crime that deceptively links them with criminality... They are compounded by the racial biases that research has shown to exist in individual actors across the criminal justice system—from police and prosecutors to judges and juries—that lead to disproportionate levels of stops, searches, arrests, and pretrial detention for black people, as well as harsher plea bargaining and sentencing outcomes compared to similarly situated white people.

*Id.* at 2.

30. Dr. Joseph E. Stiglitz is an American economist and a professor at Columbia University. *Biography of Joseph E. Stiglitz*, COLUM. U., <https://www8.gsb.columbia.edu/faculty/jstiglitz/bio/> (last visited Nov. 10, 2019). Known for his pioneering work on asymmetric information, Dr. Stiglitz's work focuses on income distribution, risk, corporate governance, public policy, macroeconomics, and globalization. *Id.* He was a recipient of the Nobel Memorial Prize in Economic Sciences in 2001. *Id.*

31. Stiglitz, *supra* note 22.

32. *Id.* Stiglitz highlights the damage that the criminal justice system imposes on the development of one in every twenty-eight children with a parent in prison, thus continuing a negative and criminogenic cycle. *Id.*

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and a “growing and historic crisis.”<sup>33</sup> Such status quo has brought untenable fiscal costs—studies show that the cost of mass incarceration may be as high as “\$182 billion a year for private individuals and local, state, and federal governments.”<sup>34</sup>

### *B. The Origins of Mass Incarceration*

How did we end up such a glaring global outlier in criminal justice, at such great fiscal and human tolls? Criminologists have suggested the causes were determinate-sentencing schemes and other “tough-on-crime” policies that increased the use and severity of prison sentences.<sup>35</sup> But according to John Pfaff, it was prosecutors who translated these policies into mass incarceration.<sup>36</sup> In his book *Locked In*, Pfaff argues that due to the largely unchecked power of elected district attorneys and the incentives of “tough-on-crime” politics, the unregulated and singularly powerful prosecution function is at fault for fueling the stunning rates of incarceration reached in the United States.<sup>37</sup> According to Pfaff, although the number of crimes and arrests fell between 1994 and 2008, the filing of felony cases rose significantly.<sup>38</sup> During this period, prosecutors brought more and more felony cases against a “diminishing pool of arrestees,”<sup>39</sup> making it increasingly likely that an arrest would lead to a felony case.<sup>40</sup> This dynamic was amplified by the 50 percent increase in the number of line prosecutors between 1990 and 2007—an increase that was three times the rate of the previous twenty years.<sup>41</sup> So even as police scaled back arrests due to lower crime rates, prosecutors filed more felony charges. Therefore, between 1994 and 2008, “fewer and fewer people were entering the criminal justice system, but more and more were facing the risk of a felony conviction—and thus prison.”<sup>42</sup> Specifically, the number of felony cases rose by almost 40 percent between 1994 and 2008, and the chances that an arrest would lead to a felony case grew from about one-in-three to

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33. Eli Saslow, *Against His Better Judgment*, WASH. POST (June 6, 2015), <https://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/>.

34. Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>. For a point of comparison, NASA’s annual budget is only \$18 billion, meaning we could fund roughly ten NASA-sized agencies with the funding we spend on mass incarceration. See Lopez, *supra* note 24.

35. NAT’L RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE U.S.: EXPLORING CAUSES AND CONSEQUENCES* 77–78 (Jeremy Travis et al., eds., 2014).

36. See generally JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017) [hereinafter *LOCKED IN*].

37. *Id.*

38. *Id.* at 72.

39. *Id.* at 72–73.

40. *Id.* at 72.

41. *Id.* at 129.

42. *Id.* at 72.

about two-in-three.<sup>43</sup> This dynamic directly contributed to incarceration rates rising 40 percent during this period,<sup>44</sup> which appears to be the “one thing [that] explains”<sup>45</sup> why prison growth has significantly increased and why mass incarceration has reached a crisis point.<sup>46</sup>

Pfaff also highlights that the actual felony conviction rate has remained fairly steady, which suggests that the decision to file felony charges has been the main driver of incarceration rates.<sup>47</sup> The data on how these cases would have been handled in the past is unclear—whether it is that more cases would have been dismissed or that prosecutors are “up-charging” cases that, historically, would have been misdemeanors.<sup>48</sup> But what is clear is that this preference for charging felonies—especially for violent crimes—and the increased incarceration that resulted from it, has had minimal public safety benefit. The Brennan Center for Justice,<sup>49</sup> for instance, has concluded that these harsh, “tough-on-crime” policies were not the main driver of the crime decline,<sup>50</sup> and “increased incarceration at today’s levels has a negligible crime control benefit.”<sup>51</sup>

### C. *The Challenge of Scaling Back Prosecution*

Newly elected progressive prosecutors are inheriting bloated prosecutorial institutions. Many prosecutors have tried to scale back their prosecutions, but this has not been easy to do for even the lowest-level offenses. For example, Manhattan District Attorney Cyrus Vance attempted to roll back some of the lowest-level criminal prosecutions in his jurisdiction and was met with significant resistance from law enforcement and others.<sup>52</sup> Vance was elected with a 91 percent share of votes in 2009<sup>53</sup>

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43. *Id.*

44. *Id.* at 72–73.

45. *Id.* at 73.

46. *Id.*

47. *Id.*

48. *Id.*

49. The Brennan Center for Justice, based in New York City, is a non-partisan law and public policy institute that works to reform, revitalize—and when necessary, defend—our country’s systems of democracy and justice. *About Us*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/about> (last visited Nov. 10, 2019).

50. Dr. Oliver Roeder et al., *What Caused the Crime Decline?*, BRENNAN CTR. FOR JUST. 1 (2015), <https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline>.

51. *Id.* at 4.

52. Shayna Jacobs & James Fanelli, *Manhattan DA Cy Vance Defends Decision to Stop Prosecuting Farebeaters After Criticism From MTA*, N.Y. DAILY NEWS (Feb. 6, 2019), <https://www.nydailynews.com/new-york/manhattan/manhattan-da-clashes-mta-prosecuting-farebeaters-article-1.3801788> [hereinafter *Vance*].

53. *Cyrus Vance Jr.*, BALLOTPEdia, [https://ballotpedia.org/Cyrus\\_Vance\\_Jr](https://ballotpedia.org/Cyrus_Vance_Jr) (last visited Nov. 10, 2016).



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and touts his record as a progressive prosecutor.<sup>54</sup> In 2018, he announced that his office would no longer prosecute subway fare evasion.<sup>55</sup> From a prosecutorial standpoint, this decision made sense—fare jumping is a victimless, nonviolent offense.<sup>56</sup> Prosecution of subway fare evasion also disproportionately impacts the poor, who are less likely to be able to pay for train fares, resulting in racially disparate impacts.<sup>57</sup> Moreover, prosecuting subway fare evasion depletes finite resources that, Vance reasoned, should be reserved for the investigation and prosecution of crimes that impact public safety.<sup>58</sup> Still, opponents argue that fare evasion should be punished with criminal prosecution to demonstrate that people must “respect the rule of law,”<sup>59</sup> and not doing so would “embolden criminals.”<sup>60</sup>

In April 2019, newly elected Dallas County District Attorney John Creuzot announced that his office would stop prosecuting certain quality-of-life crimes, such as first-time marijuana possession, and theft of necessary personal items—such as baby formula, diapers, or food—valued under \$750.<sup>61</sup> These actions were met with fierce opposition by the City Council, police union, and Texas Attorney General.<sup>62</sup>

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54. In 2013, Eric Holder, President Barack Obama’s Attorney General, gave Mr. Vance an award for having developed a partnership between local youth and law enforcement aimed at reducing violence. See Josie Duffy Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html>. Vance told New York Law School’s 2015 graduating class that he had recognized racism in the criminal justice system “long before the term ‘mass incarceration’ entered the general conversation.” *Id.*

55. Brendan Cheney, *Manhattan DA Will No Longer Prosecute Turnstile Jumping*, POLITICO (Feb. 1, 2018), <https://www.politico.com/states/new-york/city-hall/story/2018/02/01/manhattan-da-will-no-longer-prosecute-turnstile-jumping-229568>.

56. The prosecution of fare jumping, a Class A misdemeanor, reflects the “quality-of-life” focus of the broken windows theory of policing. See Maura Ewing, *Will New York Stop Arresting People for Evading Subway Fares?*, THE ATLANTIC (Aug. 4, 2017), <https://www.theatlantic.com/politics/archive/2017/08/new-york-subway-fares/535866/>.

57. A study in Washington, D.C., for example, found that 91 percent of fare evasion citations were issued to black people. Eve Zhurbinskiy, *A New Report Highlights the Stark Racial Disparities in Metro Fare Enforcement*, GREATER GREATER WASH. (Sept. 20, 2018), <https://ggwash.org/view/69171/a-new-report-highlights-the-stark-racial-disparities-in-metro-fare-enforcem>.

58. *Vance*, *supra* note 52. Numerous reform-minded prosecutors have echoed the point that finite prosecutorial resources should be concentrated on crimes with the most serious public-safety impact. For example, District Attorney Rachael Rollins has highlighted that the FBI reports that “roughly 40 percent of the nation’s murders, and over half of sexual assaults, went unsolved in 2017,” which, she argues, should be where law enforcement resources are deployed. Rachael Rollins, *The Public Safety Myth*, THE APPEAL (Aug. 29, 2017), <https://theappeal.org/the-public-safety-myth/>.

59. Nicole Gelinas, *Don’t Jump That Fare*, CITY J. (Feb. 14, 2018), <https://www.city-journal.org/html/dont-jump-fare-15721.html>.

60. *Id.*

61. Stephen Young, *Dallas DA Creuzot Takes Heat from Council Members Over New Theft Policy*, DALL. OBSERVER (Apr. 23, 2019), <https://www.dallasobserver.com/news/dallas-da-creuzot-under-fire-for-criminal-justice-reforms-11646752>.

62. *Id.*

Creuzot was accused of “enabling criminals,”<sup>63</sup> abandoning the “rule of law,”<sup>64</sup> and promoting “lawlessness.”<sup>65</sup>

Rachael Rollins, Suffolk County District Attorney,<sup>66</sup> issued guidance outlining a new office policy declining to prosecute, with a few exceptions, fifteen nonviolent offenses including theft, driving without a license, and shoplifting.<sup>67</sup> However, Massachusetts Governor Charlie Baker’s office criticized Rollins, saying that these policies would restrict the government’s ability to protect victims of serious crimes and undermine efforts to fight the opioid crisis.<sup>68</sup> Specifically, Governor Baker’s office argued that such policy would hamstring the prosecution of drug dealers and distribution networks that bring opioids into the state.<sup>69</sup>

The efforts by progressive prosecutors to reduce prosecution of low-level offenses are laudable. However, experts agree that in order to significantly reduce mass incarceration within our lifetimes, governments must not only consider alternatives to prosecuting low-level offenses, but also significantly reduce incarceration for violent offenses.<sup>70</sup> Even the most radical newly elected prosecutors are going to find it difficult to reduce mass incarceration by forbearing prosecution of violent offenses, especially without providing any credible alternative public policy response to violent crime. And, as they grapple with making headway with such reforms at a policy level, they will also confront cultural resistance to perceived leniency from the line prosecutors handling cases daily within their offices, where an inordinate amount of prosecutorial power rests.<sup>71</sup>

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63. *Id.*

64. *Id.*

65. *Id.*

66. Suffolk County is located in Massachusetts and includes the municipalities of Boston, Chelsea, Winthrop, and Revere. *Where Is Suffolk County, Massachusetts?*, WORLDATLAS, <https://www.worldatlas.com/na/us/ma/c-suffolk-county-massachusetts.html> (last visited Nov. 10, 2019).

67. *The Rachel Rollins Policy Memo*, SUFFOLK COUNTY DISTRICT ATT’Y D-1 app. (Mar. 25, 2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>.

68. Walter Wuthmann, *Rachael Rollins, 100 Days In: What Has Changed, And What Hasn’t, Under The Reformer DA*, WBUR (Apr. 12, 2019), <https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days>.

69. Letter from Thomas A. Turco III, Sec’y of The Commonwealth of Mass. Exec. Off. of Pub. Safety & Sec., to Rachael Rollins, District Att’y for the Suffolk Cty. District Att’y Off. (Apr. 4, 2019), [https://d279m997dpfogl.cloudfront.net/wp/2019/04/0404\\_turco.pdf](https://d279m997dpfogl.cloudfront.net/wp/2019/04/0404_turco.pdf). There are voters who do not support stopping prosecutions such as thefts, shopliftings, and farebeating and are more supportive of tough-on-crime policies. District Attorneys such as Creuzot and Rollins, however, campaigned and won office explicitly on the missions to roll back the prosecution of low-level offenses as a strategy to address mass incarceration. *See Rollins Policy Memo*, *supra* note 67; *Policy*, JOHN CREUZOT DEMOCRAT FOR DISTRICT ATT’Y, <https://hardworkheartwork.com> (last visited Nov. 10, 2019).

70. *See* LOCKED IN, *supra* note 36, at 185 (“Any significant reduction in the US prison population is going to require states and counties to rethink how they punish people convicted of violent crimes, where ‘rethink’ means ‘think about how to punish less.’”).

71. *See* Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1133 (2012) (noting that despite a chief prosecutor setting policies that restrict line prosecutors’ discretion,

### III. WHY PROSECUTORS BECOME MORE PUNITIVE OVER TIME

An author of this article, Seema Gajwani, came to work at the Office of the Attorney General for the District of Columbia (OAG), the exclusive prosecutor for all juvenile crime in D.C., seeking to address the issue of prosecutorial culture change.<sup>72</sup> A few years before, while supporting prosecution reform efforts at a national foundation, Gajwani spoke to Timothy Silard, who described his experience in the San Francisco District Attorney's Office observing how prosecutors became more punitive over time. Ensnared among juvenile prosecutors in D.C., Gajwani saw this phenomenon happen firsthand.

Gajwani was hired in 2015 to help advance the juvenile justice reform vision of the newly elected Attorney General for the District, Karl Racine. Many of the law-and-order-minded legacy prosecutors left the office or moved to other legal divisions. The office began to hire new prosecutors with an eye toward diversity and sought individuals with prior experience working with vulnerable populations in a social services environment. The theory was that people with a closer connection to communities affected by over-criminalization would better understand the structural barriers to success faced by many juveniles in the justice system and treat them with more compassion. A new training protocol at the office included ongoing lectures about implicit bias and sessions on trauma, adolescent brain development, and racial disparities in the justice system.

One new prosecutor at the OAG came from a nonprofit organization that helped families access education and health care resources. She had previously been an advocate against school systems quick to suspend and expel juveniles for minor transgressions, such as classroom disobedience, disrespectful behavior, or fighting. This prosecutor is also a woman of color who lives and volunteers in a predominantly African-American neighborhood in the District, and regularly mentors minors involved in the justice system. One day, upon returning from court and frustrated with a juvenile respondent's continued noncompliance with the terms of his supervision,<sup>73</sup> she confessed to Gajwani that she thought the juvenile needed to be incarcerated for his own good—something she thought she would never say.

This prosecutor had a background in educational advocacy<sup>74</sup> and knew that involvement in the justice system was not likely to help the minor. She understood the body of evidence showing that a minor's involvement in the juvenile justice system was correlated with negative life outcomes, including a greater likelihood of

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"bureaucratic life gives an employee plenty of ways to evade the commands of the boss").

72. Many of the assertions in this portion of the piece are from Seema Gajwani's personal recollections.

73. After an offender has been granted probation or parole, an officer is expected to supervise the offender in the community. See Edward J. Latessa, *Probation and Parole: Supervision*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/legal-and-political-magazines/probation-and-parole-supervision> (last visited Nov. 24, 2019). Supervision can encompass surveillance, imposing rules and curfews, and providing services for an offender. *Id.*

74. Educational advocates typically seek to empower families, youth, and the community to be effective advocates to ensure that children and youth, particularly those who have special needs, receive access to appropriate education and health services in schools.

school suspension or expulsion,<sup>75</sup> and recidivism.<sup>76</sup> Yet in the courtroom, faced with a juvenile who refused to follow the basic rules of his court order, she felt there was nothing left to do to deter him from his continued misbehavior short of incarceration. Her proximity to, and connection with, similarly situated juveniles did not inoculate her against punitiveness as hoped. Hours of training and enlightened leadership were not enough to reverse the pattern.

Individuals have a bias toward action, meaning, people want to act.<sup>77</sup> If the allowable actions are limited to one—to punish—there will be an overuse of the action of punishment. For a progressive line prosecutor, even one who understands the criminogenic effects of justice system involvement, the best option in the current system is to forebear prosecution or hold off on punishment. The structure of our justice system, and the cultural phenomenon this design often produces in prosecutors' offices, makes even "progressive" line prosecutors more punitive. Over time, their forbearance of punishment will dwindle. While hiring progressive prosecutors may slow the rate of punishment at the beginning, it will not change the trajectory. With time, three phenomena—salience, reductionism, and transference—all work to erode a prosecutor's tolerance for forbearance and make them more punitive.

#### *A. Salience*

Another progressive-minded prosecutor hired at the OAG was wavering about offering a juvenile respondent a restorative justice diversion opportunity. When pressed about why she hesitated, she noted that in the previous weeks three juveniles for whom she had recommended diversion had gone on to commit new crimes. She explained that this experience made her nervous about offering a different juvenile an opportunity to do the diversion program in lieu of prosecution. Of course, as an intellectual matter she knew that this juvenile was not the same person as the others who had recidivated. However, her experiences with the juveniles who did recidivate influenced how she expected others to perform. Behavioral scientists term this phenomenon salience.<sup>78</sup>

Salience occurs when recent or vivid events inordinately hold a person's attention and become more readily accessible in that person's cognition than other events.<sup>79</sup> Our brains have limited cognitive resources to process situational complexity, and

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75. Libby Nelson & Dara Lind, *The School to Prison Pipeline, Explained*, JUST. POL'Y INST. (Feb. 24, 2015), <http://www.justicepolicy.org/news/8775>.

76. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUST. POL'Y INST. 1, 4 (2006), [http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers\\_of\\_detention.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf) [hereinafter *Dangers*].

77. See Anthony Patt & Richard Zeckhauser, *Action Bias and Environmental Decisions*, 21 J. OF RISK & UNCERTAINTY 45, 45–72 (2000) ("People like to take actions that have a positive impact.").

78. See generally SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 133–68 (E. Tory Higgins & Arie W. Kruglanski eds., 1st ed. 1996) (referencing the chapter titled "Knowledge Activation: Accessibility, Application, and Salience").

79. See generally *id.*

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salience is a function of natural efforts to shortcut the process.<sup>80</sup> Over time, salient events are subconsciously weighted more strongly than others, and they influence what a person expects to happen in the future—changing behavior in the present.<sup>81</sup> Research has shown that the most salient information is not always the most accurate, and that people are not fully conscious of the extent to which salience affects them.<sup>82</sup> This prosecutor's experience with juveniles who had been rearrested for new crimes inordinately influenced her expectations that future juveniles would do the same thing. This influence, potentially coupled with a natural consciousness of her prosecutorial record, made her reluctant to offer diversion for fear of similar results.

The salience effect becomes even more problematic with prosecutors because their experiences are heavily weighted toward failure and are not balanced out with a proportionate amount of success. Simply put, prosecutors essentially only see failure, and almost never see success. And because of a lack of any countervailing salience of recent successes, prosecutors often can become hardened and actually come to expect failure.<sup>83</sup> This prosecutor likely had made decisions on dozens of juvenile cases over the previous several weeks. Yet, there was no mechanism for her to know about the many cases in which those juveniles who touched the system, did not reoffend, and went on to live successful lives. She only knew about those who failed<sup>84</sup> because they landed back on her prosecution caseload. With incidents in her caseload of juveniles who reoffended at the forefront of her mind, her expectation of failure in future cases increased, along with her caution.

### *B. Reductionism*

Reductionism also plays a role in hardening prosecutors over time. Given the structure of the adversarial system, prosecutors have virtually no contact with the accused, and understand them only through the complaints of victims, police documentation of the crime, and information about their criminal history.<sup>85</sup>

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80. *See Why Do We Focus on More Prominent Things and Ignore Those That Are Less So?*, THE DECISION LAB, <https://thedecisionlab.com/biases/salience-bias> (last visited Nov. 10, 2019) (“The salience bias (also known as perceptual salience) refers to the fact that individuals are more likely to focus on items or information that are more prominent and ignore those that are less so.”).

81. *See id.*

82. *See* Shelley E. Taylor & Susan T. Fiske, *Salience, Attention, and Attribution: Top of the Head Phenomena*, 11(c) *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 249, 251–88 (1978).

83. If prosecutors have racial malice or assume that poor people, people of color, or those who live in certain areas are more likely to be criminals, then being a prosecutor and observing a steady flow of arrests of people who fit those racist stereotypes will undoubtedly lead to confirmation bias. *See* Kirsten Weir, *Policing in Black & White*, *AM. PSYCHOL. ASS'N* (Dec. 2016), <https://www.apa.org/monitor/2016/12/cover-policing>. The prosecutors described have none of this animus. But the salience effect nonetheless encourages this kind of cynical thinking.

84. The prosecutor would have only known about youths who committed new offenses and were caught, though it is possible that other youths prosecuted by this prosecutor recidivated and were not caught.

85. There are constitutional and ethical limitations on a prosecutor's ability to engage directly with a represented defendant in the absence of counsel. As a result, most of a prosecutor's understanding of the

Naturally, this reduces those accused of crimes to a fraction of their lives—their crime and criminal history. A longtime prosecutor at the OAG started as a public defender and recalls his shift to prosecution. He remembers noticing that he missed the robust and nuanced relationship with his clients, but that as a prosecutor he was surprised to find a deep emotional connection with victims of crime. This makes sense. Most prosecutors engage with victims and police officers daily but never personally get to know defendants. The lack of human connection with one side of the story about a crime fuels the “good guy versus bad guy” dichotomy and reduces defendants to a single, negative event. Not only does this dehumanize defendants, but reductionism also prevents prosecutors from gaining a more nuanced and complete understanding of their background and environment, and how these factors may have contributed to their crime. This kind of information is crucial for developing dispositions that address root causes of crime, prevent recidivism, and promote long-term public safety.<sup>86</sup>

### C. Transference

Prosecutors are not allowed to communicate directly with defendants and are instead required to negotiate with their defense counsel, creating the problem of transference of negative assumptions. In the adversarial system, defense attorneys are expected to zealously represent the interests of their clients—regardless of a client’s guilt or innocence. As a result, defense attorneys regularly, and rightfully, take advantage of court rules and the rules of evidence and procedure to maximally advantage their clients.<sup>87</sup> As an intellectual matter, prosecutors understand such

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accused comes through documentation focused on their crime and provides limited surrounding context. See generally Paul Messner, *The Prosecutor’s Dilemma: Can a Criminal Defendant be Interviewed Outside the Presence of His Attorney?*, 6 THE J. OF THE LEGAL PROF. 347, 347–55 (1981).

86. See Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1652 (2000).

Restorative justice programs can help facilitate the paradigm shift from the “trail ‘em, nail ‘em, jail ‘em” mentality that pervades the traditional criminal justice system, to the restorative justice mindset that considers every case in light of what outcome best addresses the needs of the victim, community and offender. The restorative justice concept provides another path to pursue, one that addresses public safety demands while meeting the needs of the victim and the community far better than the traditional system.

*Id.*

87. Utilizing the rules for strategic advantage reflects the principle of “zealous defense,” which is the idea that “once a client contracts the services of an attorney, the attorney must then do everything necessary to win the case, so long as it does not violate other ethical principles for the profession.” Michael Gottlieb, *What is Zealous Defense?*, MEDIUM (Aug. 10, 2018), <https://medium.com/@MichaelGottlieb/what-is-zealous-defense-db301e57884b>. The Model Rules of Professional Conduct state that:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.

MODEL RULES OF PROF’L CONDUCT r. 1.3 cmt. 1 (AM. BAR. ASS’N 2019).

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maneuvering tactics by defense counsel. Over time, however, they grow to mistrust defense attorneys, which impacts how they view defendants.

Transference is a phenomenon in psychology characterized by unconscious redirection of feelings about one person to another.<sup>88</sup> It is a natural occurrence that leads to the unconscious inference that a person has traits similar to another.<sup>89</sup> Due in part to the adversarial nature of the criminal justice system, prosecutors eventually develop a growing sense of mistrust toward defense attorneys and transfer those negative feelings to the accused, ascribing to them nefarious behaviors. Transference compounds the negative outlook prosecutors have toward defendants. So not only do prosecutors have no access to defendants, knowing them only for their crimes, but they also transfer to those defendants traits of untrustworthiness and manipulation based on their interactions with defense attorneys.

Indeed, the relationships of prosecutors with defense counsel are often wrought. At the OAG, a seasoned juvenile prosecutor described a toxic relationship with a zealous defense attorney, whom she characterized as disrespectful and unscrupulous. Other prosecutors in the office have recounted stories of defense attorneys calling them racist, with one saying that prosecutors “enjoyed putting black children in cages.” Such personal attacks are not the norm, but these stories spread like wildfire among prosecutors, and help confirm a sense that prosecutors and defense attorneys have fundamentally different worldviews—with each believing that the other is misguided.

The combination of salience, reductionism, and transference work to shift prosecutors into a more punitive mindset, regardless of where they start. The structure of the adversarial system encourages these forces and even well-intentioned, progressive line prosecutors become more punitive. If these forces are not properly addressed, they will confound progressive district attorneys and stall efforts to change the prosecutorial culture.

### IV. STRUCTURAL ISSUES AND POLICY CONSEQUENCES

#### A. Structural Issues

At an even more fundamental level, the structure of the criminal justice system is ill-suited for providing accountability in criminal and juvenile cases and inhibits progressive reform. The system’s adversarial design was built for the purposes of fact-finding and litigation.<sup>90</sup> It was designed to pit the prosecution against the defense, with the judge acting as referee to ensure fairness. For these purposes, due process

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88. See Susan M. Andersen & Michele S. Berk, *The Social-Cognitive Model of Transference: Experiencing Past Relationships in the Present*, 7 CURRENT DIRECTIONS IN PSYCHOL. SCI. 109, 110 (1998).

89. *Id.*

90. The adversarial system entails a “competitive process to determine the facts and application of the law accurately,” which is justified on the basis that these procedures are the best way to find the truth of a matter between contesting parties. *Adversarial Versus Inquisitorial Legal Systems Module 9: Prosecution Strategies*, U.N. OFF. ON DRUGS & CRIME (May 2018), <https://www.unodc.org/e4j/en/organized-crime/module-9/key-issues/adversarial-vs-inquisitorial-legal-systems.html>.

protections are critical, including the right to remain silent,<sup>91</sup> to call and to confront witnesses,<sup>92</sup> and to require the government to prove guilt beyond a reasonable doubt<sup>93</sup> without the use of compelled self-incrimination.<sup>94</sup> Where guilt is contested, these protections make sense, and confer “democratic legitimacy on our legal system.”<sup>95</sup>

However, the problem with the adversarial system in practice is that most cases do not go to trial. Less than 3 percent of state and federal criminal cases go to trial, compared with 20 percent of cases thirty years ago.<sup>96</sup> For the vast majority of cases where the accused pleads guilty, or is willing to accept responsibility, the system is woefully inadequate and ineffective for all parties involved—defendants, victims of crime, the public, and prosecutors. Defendants do not build the empathy and remorse that predicts behavior change, victims are seldom the recipients of a sincere apology or repair, the public often questions the fairness of the system, and prosecutors feel there is no real accountability for misdeeds.

#### *B. Victims Are Poorly Served by the Adversarial System*

Victims of crime get very little from the justice system, even when there is a trial.<sup>97</sup> Some victims feel deeply that their aggressor should be incarcerated, and seek that out through the justice process. However, victims play a minimal role in a trial and, if called to testify, can become the target of aggressive cross-examination by defense attorneys.<sup>98</sup> These experiences can be re-traumatizing and re-victimizing for victims.<sup>99</sup> This dynamic is a reflection of how little control victims have over their own cases.<sup>100</sup> In *Until We Reckon*, Danielle Sered argues that in order to heal, survivors of violent crime need a sense of control relative to what happened to them.

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91. See U.S. CONST. amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966).

92. See U.S. CONST. amend. VI.

93. See U.S. CONST. amend. V; U.S. CONST. amend. XIV; *Miles v. United States*, 103 U.S. 304 (1880) (holding that in a criminal case a person’s guilt must be established beyond a reasonable doubt).

94. See U.S. CONST. amend. V; see also Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57–58 (1998).

95. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1410 (2008).

96. See Innocence Staff, *supra* note 20.

97. The focus of adversarial proceedings on punishing the offender for a violation against the state often means that the harm to the victim is “ignored or exacerbated.” Hon. T. Bennett Burkemper, Jr. et al., *Restorative Justice In Missouri’s Juvenile System*, 63 J. Mo. B. 128, 128–29 (2007).

98. *Id.* See also Kyle Richard Chaney, *Increasing Victim Satisfaction with Traditional Criminal Justice Systems: Lessons Learned From Restorative Justice* 19 (June 2016) (unpublished M.A. thesis, University of Oregon) (on file with the University of Oregon Graduate School). While an offender may end up facing punishment for the crime, “the victim’s harm is ignored and the offender does not take responsibility for the crime, nor does he/she help heal the harm to the victim.” Burkemper, *supra* note 97, at 128.

99. See Chaney, *supra* note 98, at 19.

100. Robert C. Davis et al., *Expanding the Victim’s Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 492 (1984).



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They should be able to speak for themselves and be heard, they need answers to their questions regarding what happened, they need safety, and most importantly, victims need the person who hurt them to repair the harm as much as possible.<sup>101</sup> Given that the adversarial system often cannot deliver on any of these needs,<sup>102</sup> it should come as no surprise that victims have been described as the “forgotten person in criminal proceedings”<sup>103</sup> and that their rates of satisfaction with traditional criminal process are comparatively low.<sup>104</sup> The traditional adversarial justice system fails to provide victims an opportunity to ask questions of the accused and get answers, assess the sincerity of an apology, or have a say about what the responsible party needs to do to repair the harm caused to the greatest extent possible.

### *C. Lack of Accountability from Defendants*

Another problem with the adversarial system is a lack of accountability by defendants for their actions, especially within juvenile justice. In juvenile proceedings, the punitive nature of criminal justice is tempered—at least in part—by a commitment to rehabilitation. This model emphasizes the need for treatment and services for juveniles charged with crimes,<sup>105</sup> regardless of the severity or nature of the crime. Even if well-funded treatment services and diversion programs<sup>106</sup> could succeed at rehabilitation, support for these services is often limited because of the perception by

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101. Sered reconsiders the purposes of incarceration and argues that the needs of survivors of violent crime are better met by asking people who commit violence to accept responsibility for their actions and make amends in ways that are meaningful to those they have hurt. See DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND THE ROAD TO REPAIR* 24–28 (2019).

102. It should be noted that incapacitation, certainly in the most serious cases, can offer victims and the public some level of safety from the responsible party. See Alana Barton, *Incapacitation Theory*, in *ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES* 463–64 (Mary Bosworth ed., 2005) (“Proponents of the incapacitation theory of punishment advocate that offenders should be prevented from committing further crimes either by their (temporary or permanent) removal from society or by some other method that restricts their physical ability to reoffend in some other way.”).

103. Davis, *supra* note 100, at 492.

104. Victims’ rates of satisfaction with the traditional criminal justice process are comparatively low to those who participate in restorative justice. One study found that restorative justice participants were significantly more likely to believe that the process was fair, that the offender had been held accountable, and satisfied with their case as compared with traditional adjudication. See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 180–98 (2003).

105. See Gordon Bazemore, *Restorative Justice, Earned Redemption and Communitarian Response to Crime*, 41 AM. BEHAV. SCIENTIST 768, 768–813 (1998) (explaining the treatment model of rehabilitation) [hereinafter *Restorative Justice*].

106. The OAG refers low-level juvenile cases to the Alternatives to the Court Experience Diversion Program housed at the D.C. Department of Human Services. See *Alternatives to the Court Experience (ACE) Diversion Program*, DEP’T OF HUM. SERVS., <https://dhs.dc.gov/page/alternatives-court-experience-ace-diversion-program> (last visited Nov. 10, 2019). Prosecution is suspended in the cases that are referred to the ACE Diversion Program. *Id.* Furthermore, the ACE Diversion Program is voluntary for those accused of a crime and offers them, and their families, services such as therapy, mentoring, tutoring, and other social activities over a six-month period. *Id.*

the public and prosecutors that the juveniles referred to these programs are not held accountable for their actions.<sup>107</sup> Most rehabilitative programs fail to communicate to the juvenile that “he or she has harmed someone and should take action to repair damages wreaked upon the victim(s).”<sup>108</sup> When prosecutors explain the concept of a services-focused rehabilitative diversion program, many victims express frustration that the person responsible for committing the crime does not have to take responsibility for it, regardless of whether the victim is fully willing to engage with that person directly.

Community members will note that there are other juveniles with challenging socioeconomic backgrounds and similar histories of trauma who do not commit crimes and do not have access to treatment programs. For example, a child who has suffered from abuse or been the victim of violence but who has not committed a crime may never receive services to address the trauma, while a child who commits a crime may have access—which can feel perverse. Prosecutors will express sympathy for juveniles who lack educational support or have dysfunctional families but still have to deal with the fact that the juvenile committed a crime. The public may feel sympathy for a child with little parental supervision who goes to a failing school but still not be willing to allow those circumstances to excuse criminal behavior. There is even a nagging feeling among supporters of services for juveniles in the justice system that those services are typically unrelated to the nature of the crime committed, requiring nothing more of the juvenile beyond participation.

This lack of accountability is one reason why punitive responses have retained traction—since punishment, at the very least, “serve[s] to affirm community disapproval of proscribed behavior, denounce crime, and provide consequences to the lawbreaker.”<sup>109</sup> As a practical matter, however, punishment has proven ineffective in actually deterring crime or changing offender behavior. For example, research shows that juvenile detention interventions can increase recidivism,<sup>110</sup> that congregating delinquent juveniles together can negatively affect their behavior,<sup>111</sup> and that such policies can

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107. *See Restorative Justice*, *supra* note 105, at 768 (“It is difficult to convince most citizens that treatment programs provide anything other than benefits to offenders (e.g., services, educational and recreational activities).”).

108. *Id.*

109. *Id.*

110. *See Dangers*, *supra* note 76, at 4. “A recent evaluation of secure detention in Wisconsin, conducted by the state’s Joint Legislative Audit Committee reported that, in the four counties studied, 70 percent of youth held in secure detention were arrested or returned to secure detention within one year of release.” *Id.* In addition, “studies on Arkansas’ incarcerated youth found not only a high recidivism rate for incarcerated young people, but that the experience of incarceration is the most significant factor in increasing the odds of recidivism.” *Id.*

111. *Id.* at 5 (“Behavioral scientists are finding that bringing youth together for treatment or services may make it more likely that they will become engaged in delinquent behavior. Nowhere are deviant youth brought together in greater numbers and density than in detention centers, training schools, and other confined congregate ‘care’ institutions.”).

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delay “aging out of delinquency.”<sup>112</sup> Furthermore, admitting guilt in court rarely satisfies the victim or the public’s need for accountability, since simply accepting punishment does not meaningfully address the harm caused. In this way, our juvenile justice system neither provides accountability nor serves the goals of long-term public safety. A similar pattern is seen on the adult side in the criminal justice system. Adult incarceration has been shown to be criminogenic, increasing the chances that an individual will commit more crime upon release.<sup>113</sup> Despite these observations, society insists that punishment through incarceration is the proper response to crime.

### V. THE SOLUTION: RESTORATIVE JUSTICE

One way to counteract the problems in the current criminal justice system is to use restorative justice as an alternative to prosecution, not only in some cases worthy of diversion, but in all cases in which defendants are willing to accept responsibility for their actions and the victims are amenable. In those cases, restorative justice can deliver agency and healing for victims, and accountability and redemption for the accused.<sup>114</sup>

Unlike the adversarial process, restorative justice encourages offenders to take responsibility for their actions and facilitates an in-person process that shows them the real, human impact of their actions.<sup>115</sup> In a restorative justice conference, the person who committed the crime must recount what he did and why it was wrong to the person whom he hurt, in front of that person’s family and supporters, and his own family and supporters. Then, he must listen as each person who was hurt describes how he was affected by the crime. This part of the process is extremely

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112. *Id.* at 6–7. For example, research has shown that “whether a youth is detained or not for minor delinquency has lasting ramifications for that youth’s future behavior and opportunities.” *Id.* Furthermore, “researchers have shown that incarcerating juveniles may actually interrupt and delay the normal pattern of ‘aging out’ since detention disrupts their natural engagement with families, school, and work.” *Id.* at 7.

113. See generally José Cid, *Is Imprisonment Criminogenic?: A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions*, 6 EUR. J. ON CRIMINOLOGY 459, 459–480 (2009) (discussing how specific deterrence theories are contradictory to the effects of imprisonment in reality). Cid’s analysis revealed that “offenders given suspended sentences had a lower risk of reconviction than those given custodial sentences,” and “the risk of recidivism increases when the offender is imprisoned.” *Id.*

114. See generally *Restorative Justice*, *supra* note 105, at 770. Gordon Bazemore has described how restorative justice can transcend the limitations of the punishment and treatment paradigms, encapsulated in the following elucidating analysis:

It is easy to get offenders to “take the punishment,” but it is much more difficult—and more important—to get them to take responsibility. It is equally easy to get many offenders to submit passively to the requirements of treatment programs, but it is much more difficult—and more important—to get them to actively earn their way back into the community and involve themselves in meaningful, productive roles that can potentially change their image from liability to community asset. It is easy to routinely lock up offenders in the name of public safety. But it is more difficult and more important to promote genuine public safety by building community capacity to control and prevent crime.

*Id.* at 797–98.

115. See generally *id.*

difficult for the person who committed the crime—far more difficult than answering affirmatively to a proffer of facts in court to plead guilty for an offense.<sup>116</sup> It is also more likely to change behavior, as it has been shown to demonstrably increase offender empathy and remorse, which are “key variables in the prediction of re-offending.”<sup>117</sup> Furthermore, having the victim and the person who committed the crime decide the appropriate sanction together allows for “active accountability”<sup>118</sup> because it involves the accused in developing an appropriate restitution plan, creates a set of expectations that he is capable of meeting these obligations, and then holds him accountable for “making good by doing good.”<sup>119</sup> This process of empathy building, ownership, and active restitution is in many ways a prerequisite for behavioral change, which is reflected in numerous studies showing restorative justice’s ability to decrease recidivism.<sup>120</sup> At the end of OAG restorative justice conferences, all the participants contribute to a consensus “agreement” about what the person who committed the crime needs to do to make the situation right to the

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116. While it is possible that a defendant or respondent would testify about the offense in a way that is meaningful to a victim at trial, it is extremely unlikely. The vast majority of cases in the American criminal justice system are resolved through guilty pleas, with only a fraction of cases going to trial. An accused has the right not to testify at trial and, as a strategic matter, most defense attorneys are loath to have their clients testify. Finally, if a defendant were to go to trial and choose to testify in his defense, the purpose of the testimony would be to contest his guilt, not to admit it.

117. Gordon Bazemore & Jeanne Stinchcomb, *A Civic Engagement Model of Reentry: Involving Community Through Service and Restorative Justice*, 68 FED. PROB. 14, 20 (Sept. 2004).

118. *Id.*

119. Gordon Bazemore & David Karp, *A Civic Justice Corps: Community Service as a Means of Reintegration*, 1 JUST. POL’Y J. 3, 17 (2007).

120. Burkemper, *supra* note 97, at 129 (citing Mark S. Umbreit, et al., *The Impact of Restorative Justice Conferencing: A Review of 63 Empirical Studies in 5 Countries*, U. MINN. CTR. FOR RESTORATIVE JUST. & PEACEMAKING 12 (May 1, 2002)). “In comparison to incarceration, many restorative justice practices have produced lower recidivism rates and costs. In a meta-analysis of 63 VOD programs [“victim offender dialogue,” a restorative justice program] spanning five countries, researchers found a 9 percent to 27 percent decrease in recidivism rates, suggesting a clear relationship between VOD participation and subsequent delinquent behavior.” *Id.* (citing William R. Nugent, et al., *Participation in Victim-Offender Mediation and the Reoffense: Successful Replications?*, 11 J. OF RES. ON SOC. WORK PRACT. 5, 5 (2001)). See also Lorenn Walker & Janet Davidson, *Restorative Justice Reentry Planning for the Imprisoned: An Evidence-Based Approach to Recidivism Reduction*, THE ROUTLEDGE INT’L HANDBOOK OF RESTORATIVE JUST. 18 (May 10, 2018) (“Outcome analyses reveal that the circle participants performed significantly better than the control group in terms of post-prison adjustment. The Huikahi circle participants [a restorative justice program in Hawaii] demonstrated a significantly lower recidivism rate of 43.1%, compared to 58.3% for the control group.”); *Reoffending Analysis for Restorative Justice Cases 2008-2013: Summary Results*, N.Z. MINISTRY OF JUST., <https://www.justice.govt.nz/assets/Documents/Publications/rj-Reoffending-Analysis-for-Restorative-Justice-Cases-2008-2013-Summary-Results.pdf> (last visited Nov. 12, 2019). The New Zealand Ministry of Justice states:

The reoffending rate for offenders who participated in restorative justice was 15% lower over the following 12 month period than comparable offenders and 7.5% lower over three years. Offenders who participated in restorative justice committed 26% fewer offences per offender within the following 12 month period than comparable offenders (20% fewer offences within three years).

*Id.*

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extent possible and ensure that the behavior does not happen again. This agreement is captured in writing, signed by all participants, and monitored for compliance by the restorative justice facilitator. Agreements often include restitution, community service, written and oral apologies, and conditions for future contact between parties.<sup>121</sup> If the terms of the agreement are not met, the case is then returned to the prosecutor for prosecution.

### VI. RESTORATIVE JUSTICE AND PROSECUTORIAL CULTURE

#### *A. Restorative Justice Addresses Salience, Reductionism, and Transference*

Importantly, restorative justice can counteract the pernicious problem of prosecutors becoming more punitive over time. One way to do this is to weave a restorative justice program into the fabric of the prosecutor's office, exposing prosecutors to the restorative justice conferences between victims and offenders, and their families and supporters. Indeed, for most cases, prosecutors will find that restorative justice better accomplishes the goals of providing accountability, bringing about behavioral change, and reducing recidivism. Furthermore, restorative justice can also make the work of prosecutors more fulfilling. Restorative conferences allow prosecutors to better meet the needs of victims, witness accountability in action from the person who committed the crime, and learn about the human realities and underlying causes of crime.

Attorney General Racine launched the OAG's Restorative Justice Program in 2016. The program's six full-time restorative justice facilitators sit alongside prosecutors and work directly with them on cases.<sup>122</sup> The OAG does not prosecute most adult crime in the District, and therefore almost all restorative justice cases have been for juveniles.<sup>123</sup> With permission from the participants,<sup>124</sup> and with prosecutors firewalled from any future action on the case, the OAG restorative justice facilitators often invite prosecutors to participate in the restorative justice conferences. Participants in a restorative justice conference not only speak to one another, but also build connections by sharing personal experiences and stories. At the OAG, the first phase of the restorative justice conference is called the "community-building" phase.<sup>125</sup> This

121. The entire restorative justice process is confidential and the terms of the agreement are not disclosed to the prosecutor in the event that the case is returned for noncompliance.

122. Working directly with restorative justice facilitators in the office helps prosecutors establish trust in the process. It also allows prosecutors to observe restorative justice facilitators interact with victims and explain the process to victims and their supporters.

123. However, restorative justice has been utilized effectively for violent adult cases, as an alternative to incarceration, in Brooklyn, New York, for over a decade by the nonprofit organization Common Justice. See *Common Justice Model*, COMMON JUST., [https://www.commonjustice.org/common\\_justice\\_model](https://www.commonjustice.org/common_justice_model) (last visited Nov. 18, 2019).

124. Participants in the restorative justice conference include: the victim and his supporters, the accused and his parents or guardians and supporters, the facilitator, the co-facilitator, and, with permission, an observer. Often, mentors, coaches, teachers, faith leaders, and other supporters also attend.

125. In a restorative justice conference, the community-building phase leads into the next phase, the conversation about the crime that was committed, how each individual was affected, and what needs to

phase allows the participants to connect with one another on a human level in order to create a space that allows for difficult conversations about the crime, empathy, remorse, and sometimes, redemption.

During the community-building phase the facilitator invites those participating in the restorative justice conference to answer questions about their life experiences—such as recounting a challenge they have overcome in the past or describing a person they look up to and why. Participants have a chance to show vulnerability and listen respectfully as others do the same. The experience allows individuals, often strangers, to see the humanity in one another and connect on an emotional level. Prosecutors who participate in these conferences, ones not assigned to the case, experience a level of intimacy with defendants and their family members that they would rarely see otherwise. Watching a restorative justice conference also allows prosecutors to hear a more complex accounting of the crime than what appears on the pages of a police affidavit. Prosecutors have an opportunity to observe a discussion about the nuances and history of the interaction, especially in situations in which the parties are known to one another, or culpability is not entirely one-sided. Even in clear cases, the restorative justice conference conversation often unearths underlying issues that provide context to the behavior, such as past trauma, unaddressed mental health issues, educational deficits, and poverty. By providing a facilitated and supported space for these difficult conversations, conferences help uncover and verbalize these issues so juveniles and their families can pinpoint what work needs to be done to progress. In this way, restorative justice conferences can provide a foundation for a plan for a juvenile to move forward, and restorative justice facilitators can assist their families in connecting the juveniles to the appropriate services.

For instance, several cases referred to the Restorative Justice Program at the OAG have involved a police officer as the victim. These types of restorative justice conferences delve into issues of race, distrust of law enforcement, and oppression. In some cases, the juveniles who committed the crime discussed what it felt like to be harassed by law enforcement or handcuffed in front of peers and passersby. Police officers often discuss the difficulty of the job or why they became a police officer. One police officer acknowledged that aggressive policing has made it hard for certain communities to trust law enforcement. Another police officer discussed how hurtful it is for him to hear young people in the community accuse him of wanting to shoot black children. At the conclusion of one restorative justice conference, the juvenile who committed the crime stated he had never had a police officer as a friend before. A parent of a juvenile said she saw police officers in a different light after the restorative justice conference.

Prosecutors who participate in restorative justice conferences are given the chance to see crime and conflict in a more nuanced way, and to understand the root causes of crime, through more open, collaborative conversations about why the crime occurred. In many cases, prosecutors who observe restorative justice conferences

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happen to resolve the matter to the extent possible. The final phase—the agreement phase—involves discussion regarding what the person who committed the crime needs to do to make things as right as possible. The entire restorative justice conference can last anywhere from two to three hours.

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develop an understanding of what victims gain from restorative justice in contrast to what they receive in the criminal justice system. An OAG prosecutor observed a restorative justice conference in which the victim, an African immigrant who sold oils on the street, was robbed of electronics from his vehicle, and feared being targeted in the future. Along with the victim and other participants, the prosecutor observing the restorative justice conference learned about the life circumstances of the young man who broke the victim's car window and stole his electronic tablet. He was homeless and had not eaten for two days. His girlfriend talked about how he had since turned the corner and he described a job-training program he was completing. The older African man recounted to the young man his own struggles as a poor immigrant in this country and the hurdles he faced living hand-to-mouth. At the conclusion of the emotional restorative justice conference, the victim declined the opportunity to seek restitution, and instead required that the young man complete a certain number of job interviews, despite his fears and insecurities. At one point, the defendant offered to make payments to the victim after he obtained employment, but the victim demurred, instead only requesting confirmation when the young man obtained gainful employment.

This prosecutor observed that the victim seemed to be empowered by the ability to show grace to the person who harmed him. This experience stuck with her, and months later, she said that ever since, she viewed restitution differently, and routinely questioned her assumptions about what would make a victim whole. Restorative justice transfers the significant power currently held by prosecutors, to determine the terms of sanction, to the parties directly harmed.<sup>126</sup> In this way, the restorative justice conference is an antidote to the reductionism of the criminal justice system and provides a prosecutor with a vivid and salient example of a person who takes responsibility for his actions, redeems himself in the eyes of the victim and his supporters, and ultimately, succeeds. It also changes the way prosecutors interact with victims of crime throughout the justice process.

### *B. A Superior Tool for Addressing the Needs of Victims*

When a prosecutor has few tools with which to respond to the needs of victims, the interactions with them prove to be highly unsatisfying, even uncomfortable. At the OAG, victims of crime often say they are fearful of riding public transportation if they were victimized on a bus or train, or they worry about seeing the person who harmed them again in the community. A traditional prosecutor has no tools with which to ease the fear of victims; even if a prosecutor asks for a stay-away order for the accused, the order lapses when the case ends, leaving the victim to fend for himself. In addition, many victims of crime have questions they want answered in order to understand their victimization, such as: What did I do to make myself a vulnerable target? What did you do with my property after the crime? What would you have done had I fought back? Traditional prosecutors have virtually no way of satisfying a

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126. *See Paradox, supra* note 2, at 759 (discussing the power imbalance between prosecutors and the prosecuted and calling for reforms to change the power imbalance).

victim's natural need for answers to such questions.<sup>127</sup> Many victims are hurt by people they know and with whom they may have had conflict in the past. Prosecutors typically cannot offer assistance in conflict resolution, even if they know that without such assistance there is a chance of future violence. Traditional prosecutors can offer only two paths of action to victims of crime—prosecution or no prosecution.<sup>128</sup>

However, offering restorative justice as an option for victims allows prosecutors to become problem-solvers and enjoy more robust and fulfilling interactions with victims. Through restorative justice, prosecutors can address what victims desire from the criminal justice system: information, participation, emotional restoration and apology, material reparation, fairness, and respect.<sup>129</sup> After participating in restorative justice conferences, several prosecutors at the OAG have started asking every victim, “what does justice mean to you?” Prosecutors in the office now listen for cues in their conversations with victims in order to determine when to engage a restorative justice facilitator. One prosecutor listens for victims who are baffled about why the crime occurred to them and seem to want answers. Another prosecutor makes referrals to the Restorative Justice Program in every case that involves parties who know each other. Others recognize that a victim who experiences restorative justice is less likely to feel fearful of the place where they were victimized or by individuals who look like the person who hurt them. One victim told a prosecutor that he wanted to talk to the person who hurt him in order to gauge the authenticity of his apology; another wanted to talk to the parents of the juvenile. The traditional justice system offers none of these solutions for victims or the prosecutors who seek to support them.

After prosecutors at the OAG participate in a restorative justice conference, they are more likely to refer cases to the program—even serious cases. OAG prosecutors routinely refer felony robbery cases and assaults with serious injuries. Burglary, stabbing, carjacking, and non-penetrative sexual touching cases are some of the over 120 cases that have been successfully resolved using restorative justice at the OAG.<sup>130</sup> The OAG is currently conducting a recidivism study; surveys of participants to date show high satisfaction with the process.<sup>131</sup>

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127. SERED, *supra* note 101, at 24.

128. In the best-case scenario, a prosecutor's office has dedicated victim specialists who can offer victims access to resources such as therapy, compensation for lost wages, and temporary housing. However, even these services may not address a victim's need for basic safety and security.

129. See Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 20–25 (2003).

130. OAG policy prohibits restorative justice referrals in cases involving guns, homicide, and intimate partner domestic violence. See D.C. Office of the Attorney General: *Restorative Justice Program Slides*, OFF. OF THE ATT'Y GEN. OF D.C., <http://www.njln.org/uploads/digital-library/DC%20OAG%20slides.pdf> (last visited Nov. 18, 2019).

131. The ongoing study has found that of over two hundred restorative justice conference participants surveyed, including victims, juveniles, and their respective family members and supporters, 89 percent reported that they would use the process again and 94 percent reported that they would recommend the process to others.



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### VII. CONCLUSION

A “playbook” of sorts has emerged for a new generation of progressive prosecutors: hire better people, prosecute less crime, and change the culture of prosecution offices. However, three fundamental challenges stand in the way of this kind of prosecutorial reform. First, no matter how progressive, prosecutors become more punitive over time. Second, prosecution offices will never be able to forbear prosecuting violent crime—the crux of addressing mass incarceration—without replacing prosecution with a credible and meaningful alternative. And finally, the adversarial system of justice, built to ensure fairness in fact-finding through trial, is too narrow a tool to provide fairness and accountability in the vast majority of cases where guilt is not contested. In this context, restorative justice can play a crucial role in not only addressing these three challenges, but in actualizing truly progressive, paradigm shifting prosecution.

Restorative justice addresses the issues of salience, reductionism, and transference, humanizing people who commit crime and giving prosecutors better insight into the root causes of criminal acts. It provides an alternative and meaningful accountability tool, creating a restorative process that fills the unmet needs of victims while providing an opportunity for defendants to build empathy and take responsibility. In doing so, restorative justice enhances public safety and—importantly—meaningfully shifts the culture of American prosecution. We are at an inflection point in criminal justice, with an unprecedented consensus that old criminal justice paradigms are broken and that new approaches are needed.<sup>132</sup> Restorative justice can help ensure that the aspirations of “progressive prosecution” are not undone by the limitations inherent in the punitive design of our criminal justice system, so that a new generation of reformers can make the fundamental change they seek.

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132. The First Step Act is comprehensive criminal justice legislation that reforms the federal prison system. *First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/> (last visited Nov. 12, 2019). The Act includes provisions that aim to reduce recidivism, create incentives for the success of federal inmates through good-time credits, limit restrictive confinement, implement correctional and sentencing reforms, and improve oversight of the Bureau of Prisons. *See id.* The Act was passed by Congress with broad bipartisan support and was signed into law by President Donald Trump. *See Bipartisan Support for Criminal Justice Reform Still Strong*, EQUAL JUST. INITIATIVE (Dec. 20, 2018), <https://eji.org/news/bipartisan-support-criminal-justice-reform-still-strong>. Enactment of this law reflects a “growing consensus among progressives and conservatives has emerged that over-reliance on incarceration is misguided.” *Id.*