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State Prosecutors at the Center of Mass Imprisonment and Criminal Justice Reform

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I. Introduction

In this Issue of the *Federal Sentencing Reporter* we turn to the role of state prosecutors in sentencing. In recent years, both the scholarly discourse and the advocacy community have increasingly focused on the impact prosecutors have had on mass imprisonment and the expansion of the supervision regime.¹ A new cohort of “progressive prosecutors” have campaigned on the promise of less imprisonment and greater racial equality. Some have captured the head prosecutor positions in large U.S. jurisdictions, including Chicago, Brooklyn, Boston, Philadelphia, and San Francisco. They have instituted a host of often dramatic changes. To date, smaller jurisdictions and less urban areas of the country have been little impacted by this prosecutorially driven move toward criminal justice reform.

This Issue highlights the different levels of decision making that are in the hands of prosecutors throughout the criminal justice process. From the allocation of resources and charging policies to the explicit refusal to ever ask for a death sentence, prosecutorial choices impact the sentences the criminal justice system imposes. With the ever-growing expansion of the prosecutorial toolbox and impact, increasingly the decisions of district attorneys have repercussions for other aspects of communities, such as the mental health system. Prosecutor elections can have a vast impact on communities, but Carissa Hessick’s study on prosecutor elections in this Issue highlights how they can be undemocratic and how their importance can be underestimated.²

The ongoing crisis surrounding COVID-19, the novel coronavirus that has brought countries, including our own, virtually to a standstill, vividly displays the role prosecutors play in our communities and the impact their decisions have on the welfare and life of those involved in the criminal justice system. There may be no more powerful indicator of prosecutors’ influence than their ability to prioritize public health concerns during this crisis in order to help thin out jail populations and thereby create greater means to “social distance” behind bars. Even though local prosecutors play an active role in populating state prisons, their role in decreasing the prison population is more limited, especially when prisons preclude front-end entry through jail transfers.

Part II of this article highlights the different levels of decision making that allow prosecutors virtually unsurpassed—and little supervised—influence over the size and growth of the criminal justice system. Many decisions, such as which cases to prosecute or whether to agree to diversion, are made long before the case arrives at sentencing but directly impact the growth of detention and supervision. In many jurisdictions, mandatory minimums and guideline sentences, together with the abolition of parole, have increased prosecutorial clout.

Part III reviews, as a case study, prosecutorial actions to decrease jail admissions and allow for early releases in the wake of the COVID-19 crisis. The goal of the package of measures that prosecutors have advanced has been to flatten the curve of infections.³ The emergency situation highlights the tools prosecutors have at their disposal and how they can directly impact the size of the criminal justice system.

Part IV focuses on limits to prosecutorial authority. Although judges often follow prosecutors’ sentence recommendations, many times they do not. Other actors within the criminal justice system or the state legislative and executive regime may similarly act as backstops or reviewers of prosecutorial

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choices. Even though voters have only sporadic opportunities to impact prosecutor elections—given that the incumbent, especially in rural jurisdictions, frequently runs unopposed⁴—their vote can herald a new era. State legislatures might also seek to level the playing field between defenders and prosecutors in various ways and to give judges greater authority to check prosecutorial power.

Part V considers the ways in which prosecutorial choices shape communities. Despite the limits on prosecutorial impact on sentences, at this point prosecutors appear generally more eager and more likely to expand rather than contract their power. Yet there has been little discussion of that feature of new strategies that extend ever farther into areas beyond the criminal justice system. In addition, prosecutorial thinking may increasingly influence other branches of government. Prosecutors go through a powerful socialization process that appears to shape their mindset throughout their career. As many of them later become judges, and as some join state legislatures, they embrace a focus on public safety and champion an expansive notion of prosecutorial power even after their departure from the prosecutor's office. Overall, it becomes increasingly clear that even with—or perhaps especially with—the advent of the “progressive prosecutor,” the role of prosecutors will continue to expand, not only in our criminal justice system but in our communities. Whether that is a positive development remains an open question.

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II. From Start to Finish: State Prosecutors' Impact on Sentencing

Prosecutorial decisions have a dramatic impact on the number of cases filed, the number of convictions, and ultimately the types and length of sentences imposed. Because prosecutors operate in a world of limited resources—albeit not as limited as the resources of defenders—their first decision is to set systemic priorities and then decide on charges in individual cases. Next, prosecutors determine whether to offer to divert the case or propose a plea bargain. Once the offender has admitted guilt, the prosecutor will frequently make a sentence recommendation. Beyond sentencing, prosecutors assess innocence claims and weigh in on parole and clemency decisions. Their authority is broad and extensive.⁵

A. Resource Allocation and the Decision to Charge

No prosecutor's resources are unlimited. Yet the scope of criminal codes is so broad that any prosecutor has more potential crimes to prosecute than available staff. Difficult decisions are thus inevitable.

Some prosecutors have publicly declared what low-level offenses they do not plan to prosecute or those for which they plan to limit prosecution to select situations, such as repeat offending. In election campaigns, such declarations may be the reason a prosecutor gets elected. Yet sometimes these publicly announced decisions attract criticism and legal challenges. For example, a number of recently elected prosecutors in states that had not (yet) legalized marijuana declared publicly that they would no longer criminally prosecute low-level marijuana possession.⁶ In some jurisdictions, those decisions generated pushback from law enforcement, and sometimes even from the judiciary. One such ruling, from Virginia's Supreme Court, is reprinted in this Issue.⁷

Some prosecutors have also made categorical sentence pronouncements, usually ruling out the death penalty under any circumstances. In at least two states, when prosecutors had to confront the question whether to seek capital punishment in specific cases, governors acted to replace them.⁸

In both types of situations, these prosecutorial decisions have been challenged as abdications of the responsibility to enforce laws—and demand sentences—that have been lawfully passed. Critics object that prosecutors cannot and should not be allowed to thwart legislative decisions on the basis of their personal preference. Less transparency shields prosecutors from such challenges—after all, they may make similarly broad decisions but camouflage them as merely administrative resource allocations.

Newly elected prosecutors who consider themselves progressive and pursue unorthodox policies have also run into conflict with other authorities. Philadelphia District Attorney Larry Krasner, who was elected on a law reform platform, has attracted opposition not only from law enforcement and the state's Attorney General, but especially from the local U.S. Attorney, who blamed him for violent crime because of Krasner's evidence-based but novel approach to diverting gun possession cases.⁹ In fact, bail, diversion, and plea policies are largely left to district attorneys and often predetermine the sentence that will ultimately be imposed.

B. Bail, Diversion, and Plea-Bargaining

After the decision to prosecute, the case outcome continues to rest largely in the hands of the prosecutor. The first decision that correlates directly with case outcome is bail. If prosecutors argue for pretrial detention based on the defendant presenting either a flight risk or a danger to others, judges tend to follow that demand. In many cases, however, prosecutors request cash bail, often despite the absence of

a public safety argument. In many jurisdictions, pretrial detention appears to be more a function of the accused's financial resources than a matter of public safety. Pretrial detention serves both as a powerful bargaining tool for the prosecution and as a strong indicator of conviction, likely because defendants are less able to assist in preparing their case or because they are more susceptible to pleading guilty.¹⁰

Plea decisions are prosecutorially driven and often are a reward for relieving case pressures, as much as for a defendant's expression of remorse and admission of guilt. After all, a plea saves the generally overburdened prosecutor's office from having to prepare for trial.¹¹ Plea decisions may include sentence decisions. Prosecutors can recommend sentences, which often provide an anchoring point for judicial decision making. Alternatively, in some jurisdictions prosecutors and defenders effectively engage in bargaining not just over a guilty plea, but also over the sentence. In some jurisdictions sentence pleas are not acceptable, while in others judges heed such agreements as a matter of course.

With the proliferation of alternative dockets, prosecutors have increased opportunities to divert cases from the traditional criminal court. As indicated by Anne Metz's findings, published in this Issue, Virginia judges tend to follow prosecutorial recommendations to divert a case or to impose a custodial sentence.¹² Alternative dispositions allow for courts and, indirectly, the prosecution to continue monitoring offenders whose sentences often include addiction treatment, job training, employment, and other rehabilitation-focused measures. When an offender successfully concludes these often strenuous requirements, the court usually expunges the conviction so that the defendant will not be saddled with a criminal record.

Even though disagreement continues about the general effectiveness of alternative dockets and their contribution to public safety, they cannot exist without prosecutorial assent and support. They increase a prosecutor's tools in case disposition and therefore enhance prosecutorial authority and discretion.

All of these steps foretell the sentence outcome long before the sentencing hearing and judicial imposition of punishment.

C. Sentencing

Sentence options may drive charging decisions from the back end. In joint federal-state investigations, they may, for example, lead prosecutors to bring federal rather than state charges because of federal drug and gun mandatory minimums. Often the threat of mandatory or long sentences increases the likelihood a defendant will enter into a plea bargain and cooperate with authorities pursuing broader investigations. Even though the power of state prosecutors may be less pronounced than that of federal prosecutors, they can sometimes wield lengthy sentences—up to life-without-parole or the death penalty—as a sword.

States sentencing is a “garden full of variety.”¹³ Fewer than half of the states have guideline systems, which vary widely in many respects. Many of the others have retained discretionary and indeterminate regimes, though also with broad differences in judicial sentencing authority. In many guideline states, judges tend to follow the prescribed ranges; in others, they seek to fall along averages. In both regimes, they frequently follow prosecutorial recommendations on sentences and can be influenced by the number of charges a prosecutor has decided to pursue. Metz's research indicates that judges will disregard guideline recommendations and risk assessments if the prosecutor agrees with the other court actors on a different sanction.

The alignment of prosecutors and judges may perhaps be even less surprising when one considers that a substantial percentage of state judges served at some point in their career as prosecutors. Prosecutorial experience appears to have a powerful hold on the thinking and approaches of former prosecutors, and their strong representation on the bench makes judicial assent more likely. Most of the current judges appointed or elected to the state judiciary were trained during the tough-on-crime era of mass incarceration. If they bring this outlook to the bench, they are likely to champion similar prosecutorial approaches.

Because prosecutors often are the first to argue for a specific sentence, independent of a judge's philosophy, it is their suggestion that becomes the baseline and sets the framework for later sentencing arguments. Low-level offenses, which tend to escape searching analysis, often lead directly to the sentence the prosecutor recommends. Prosecutorial impact on sentencing continues past the judicial imposition of punishment.

D. Post-sentencing

Prosecutorial oversight past the imposition of the sentence is most blatant in alternative dockets where the defendant continues to be under the court's supervision. Failure will mean the imposition of the criminal justice sanction, and even slip-ups can trigger prosecutorial demands for some punishment.

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In states that have retained parole, prosecutors frequently submit recommendations to the board.¹⁴ Parole boards appear to interpret non-release recommendations as highly persuasive.

Similarly, many prosecutors weigh in on gubernatorial clemency decisions. Prosecutorial support strengthens the likelihood that the governor will issue a pardon or commute a sentence. Public opposition, however, may lead risk-averse governors in the opposite direction. Only governors at the end of their term tend to be willing to exercise this unregulated power without consideration of prosecutorial wishes.¹⁵

In the wake of countless exonerations, many large urban prosecutor offices have set up conviction review units, including New York County (Manhattan), as noted by Sabrina Bierer in this Issue.¹⁶ Some of these focus solely on claims of innocence, while others also review lengthy sentences that may no longer appear appropriate in light of changed societal concerns or new research-based insights. In rare cases, a prosecutor may also consider outside events in arguing for sentence reviews, as Rory Fleming shows in this Issue.¹⁷

Yet states do not generally have second-look provisions. That means prosecutors can only bring cases of innocence for judicial review. In some jurisdictions, prosecutors and other criminal justice actors can ask for early release of prison inmates on compassionate grounds. As Bierer discusses, some district attorneys, such as New York County DA Cy Vance, Jr., support state legislation that would allow for broader reconsideration of long sentences based on the offender's rehabilitation. Yet some of these proposals grant only prosecutors the authority to bring such cases to the court's attention. In the absence of such broad provisions, prosecutors have used other venues to achieve sentence reductions, as noted by Fleming. This scattershot approach, however, will likely miss a host of deserving offenders. It is already obvious that differences between prosecutors in availing themselves of these new tools will be marked, leading to greater inequality between local jurisdictions.

Legal changes in the wake of broad marijuana legalization in eleven states have also required prior records to be sealed, destroyed, or expunged.¹⁸ The provisions are frequently intricate and differ substantially.¹⁹ In California, some prosecutors from large urban jurisdictions have set up special review units to undo these past convictions. As Fleming describes, different models have evolved, with some prosecutors casting a much broader net than others to find these past convictions. In Illinois, however, the state legislature declared all prior convictions for possession of small amounts of cannabis automatically expunged. Depending on the way these provisions are set up, state prosecutors may have a say in which convictions may be retained.

As all of these developments continue, the country faces an urgent health crisis with COVID-19. Prosecutors therefore have to address a wide variety of issues, including having staff work remotely and operating when many courts are effectively closed. Many of them also moved quickly to address a potential public health crisis in local jails.

III. Prosecutors Meet COVID-19

COVID-19 brings unprecedented challenges to our country and our criminal justice system. The World Health Organization (WHO) has weighed in on state responsibility toward inmates in this unprecedented health crisis. Even though the WHO's European office issued the guidance document, the specific prescriptions below are equally applicable to the United States.

In response to a host of health-care-related issues, the WHO suggests giving "enhanced consideration" to noncustodial measures "at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages." It proceeds to recommend noncustodial sentences for the pretrial detained, inmates with low-crime-risk profiles and responsibilities to care for others, pregnant women, and women with dependent children.²⁰ In the United States, differences between state criminal justice and jail systems have dictated different approaches. Generally, highly cooperative jurisdictions in which prosecutors have spearheaded release efforts seem to have made more progress in bringing jail populations down quickly in response to COVID-19. In order to limit the spread of this infectious virus, many prison systems around the country no longer accept transfers. Without intervention, this policy will quickly lead to additional overcrowding in jail facilities. Since COVID-19 is highly contagious, close quarters could result in rapid transmission throughout jails. Therefore, one of the primary goals is to create a less dense environment that will allow for greater physical separation between inmates.²¹

Broadly, jails hold people in three different types of status: pretrial detainees; those serving short prison terms, generally less than one year; and those who are to be transferred to state prisons for longer sentences.²² For pretrial detainees, states have instructed law enforcement officers to delay arrests unless the person constitutes an imminent threat. Defenders have argued for release of pretrial detainees who

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are considered to be in a high-risk group for COVID-19 health complications. Prosecutorial acquiescence or support for such requests appears to vary around the country, depending on whether the virus has been detected in detention facilities, on whether the state has been heavily impacted, and on the prosecutor's attitude toward bail and pretrial release. In some jurisdictions, prosecutors have agreed to pretrial release unless they deem the arrested a threat to public safety.

As of this writing, New Jersey has taken the most comprehensive statewide approach for those convicted of minor offenses. By judicial order entered by a Supreme Court Justice on March 22, 2020, all inmates jailed for probation violations or convicted for low-level offenses have been released. Prosecutors who are concerned about the public safety implications of a specific individual's release have the right to object.²³ Even though objections have been numerous, prosecutors have supported a much larger number of releases.

New Jersey's strategy remains singular at this point. In jurisdictions that have proactively approached decreasing jail populations, prosecutors have been at the center of activity. Those most effective have built broad buy-in, coopting defenders, courts, and wardens.²⁴ The practices employed encompass a range of limits on the convicted jail population. The statements of prosecutors from around the country, reprinted in this Issue, indicate the array of different issues to be addressed. Weekend jail admissions have been halted and short sentences postponed or cut short. To mention but one example, a local Virginia jail released everyone who had less than thirty days remaining on their sentence. These early releases are crucial, as they are the primary venue for jails to decrease population numbers in light of the halt of prison transfers.

On one hand, these activities highlight the broad authority of prosecutors and their discretionary power; on the other hand, they highlight prosecutors' limitations and dependence on other criminal justice actors. Even though defenders will collaborate on early releases, judges and even wardens may be more reluctant. Prosecutors who have built a collaborative network and are widely deemed protective of public safety should be more able to bring those groups along with them. In one regional jail in Virginia, a criminal justice collaborative venture achieved a 25% decline in the detained population, bringing the jail to its lowest head count in over twenty years.²⁵

Still, in parts of the country less impacted by the virus, detractors of such policy approaches continue to invoke public safety concerns in their opposition to jail population shrinkage. Questions of public safety, however, appear in a substantially different light as of March 24, 2020, when over a quarter of the country's population was ordered to stay at home to help halt the spread of COVID-19. That said, current policies are unlikely to survive a reopening of public life, although the tools used by prosecutors during this public health crisis may be instructive. Certainly, one lesson to take away is the realization that prosecutors are at the hub of the criminal justice system. While Bierer considers that appropriate in light of prosecutors' responsibility for public safety, some greater balance and restraints may be salutary. Currently those are limited.

In the discussion about jail releases, the limits on criminal justice reform are powerfully on display. When public officials refuse to release—even under electronic monitoring—those sentenced to short sentences, long sentences may still be far from ripe for reform. However, Lauren-Brooke Eisen and Courtney Oliva argue in this Issue that it is time to reconsider the number of lengthy prison terms and the number of "person years" we impose.²⁶ To do so, they prescribe a host of broad steps that require collaboration by various criminal justice actors.

IV. Systemic and Community Limitations on Prosecutors

The focus on prosecutorial authority and discretion may distract from the fact that systemic features and other criminal justice players restrain that power, directly and indirectly. Among the most important are legislative decisions, judicial rulings, and select officials, such as jail superintendents, sheriffs, law enforcement, and probation officers.

Many states amended their criminal codes a half century ago, in the wake of the American Law Institute's promulgation of the Model Penal Code (MPC). The MPC was a monumental achievement that rationalized American criminal law. The rehabilitative ideal undergirded its structure. As states replaced the focus on rehabilitation with an emphasis on retribution and other utilitarian principles such as deterrence and incapacitation, MPC doctrines, incorporated into states codes, allowed for the criminalization of a broader group of individuals. Legislative sentencing enhancements provided prosecutors with powerful tools. The ongoing legislative addition of ever more criminal statutes has further enhanced the prosecutor's toolbox.²⁷ The sheer range of criminal statutes allows and requires prosecutorial choices, leading often to the prosecution of offenses that are easily provable and carry high sentences. This disconnect may make it more challenging for prosecutors to critically assess their own

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powers. It may also stymie broader criminal justice reform. Rethinking sentencing goals, and perhaps the goals of our criminal codes, should therefore be high on the priority list. Eisen and Oliva argue that only such systemic analysis and change will fundamentally impact sentencing practices.

In some cases, judicial doctrines have further expanded the scope of the criminal justice system, and have even added inequality and unfairness. Sheldon Evans's discussion, in this Issue, of federal court choices to define "violent felonies" presents such an example from the federal system.²⁸ On the other hand, some state courts have found ways to restrict prosecutorial power. In *People v. Superior Court (Romero)*²⁹ and later in *People v. Garcia*,³⁰ the California Supreme Court sanctioned expanded judicial discretion to mitigate the harshness of the state's particularly severe three-strikes statute. In a limited way, those cases restricted prosecutorial discretion.

Broader social and community sentiment and opportunities often limit prosecutorial—and judicial—sentencing options. The ongoing, almost singular, focus on prosecutors in large jurisdictions detracts from the special problems and challenges of rural prosecutors. Even though the jurisdictions of large urban prosecutors cover a large population and, therefore, the impact of their policy changes is more dramatic, currently much prison growth is driven by smaller jurisdictions. In more rural areas, long-standing prosecutorial choices, for example, may be under less scrutiny, with prosecutors continuing existing policies even as other parts of the country undergo change. But other factors may also be responsible. Metz's research, for example, documents how resource constraints drive sentence selection, often toward incarceration. Drug courts can function effectively only when treatment opportunities exist; mental health needs require those providers to serve communities. Educational and employment opportunities are often more limited in rural areas, leaving even those judges inclined to impose a non-carceral sentence without choices. Metz reports that Virginia judges often sentence even low-risk offenders to imprisonment rather than diverting them because of the absence of effective alternatives in their communities.

Public safety is the lodestar for most prosecutor offices. High recidivism rates, however, thwart that aim and undermine criminal justice reform.³¹ Large urban prosecutor offices have acknowledged that challenge. Given that reoffending is most acute within a short time of release from imprisonment, urban prosecutor offices, as Bierer shows, have created reentry dockets.³² In some cases, they have supported the courts in their creation of such dockets; in others, they have spearheaded the efforts. The effectiveness of such efforts correlates not only with other community resources but also with the preparation for release jails and prisons provide. Treatment opportunities, pre-release connection to community resources, and skills training, especially at a high level, help prepare inmates for life upon release and their responsibilities during supervision. Prosecutors, therefore, often depend on jail superintendents and state correction leaders in improving community safety. Those important dependencies drive prosecutors ever more into the role of central public officials, with a purview well beyond the narrow confines of the criminal justice system. A powerful example is DA Vance's funding of state prison college programs for the incarcerated, which Bierer notes.

V. The Prosecutor as Convener and Social Policy Maker

Prosecutorial choices have dramatically reshaped U.S. communities over the last few decades. Large urban prosecutor offices, in particular, have filled state prisons and jails with offenders, ranging from technical probation violators to torture-murderers. Even though incarceration has had only a limited impact on public safety,³³ it has reshaped communities and states. The cost of state prisons skyrocketed, surpassed only by K-12 expenses and Medicaid costs. Local jails imposed heavy fiscal burdens on communities. Following the financial crisis of 2008, state and local corrections decreed inmates to be an effective revenue source, charging them with the costs of supervision, prosecution, and even public defense. While that practice has a long history, it became more pronounced in the wake of the 2008 downturn, with criminal justice fees escalating.³⁴

Removal of offenders from communities, just to have them return a few months or years later with the same (or worse) challenges as before, brought those communities most impacted by criminal justice enforcement yet greater instability. Easy convictions for relatively low-level crimes fueled the belief that a conviction and a prison sentence is a win for a prosecutor. The so-called progressive prosecutors have come to realize that mass incarceration does not reflect the public safety mission the offices espouse and instead inflicts a criminal record with its long-lasting collateral sanctions on a broad swath of the population.

As prosecutors have come to understand the broader challenges experienced by the communities from which most of those involved in the criminal justice system hail, they have taken on some of these issues. After all, community safety cannot be improved unless offenders have housing, health care,

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employment, access to healthy food, and good education. Many of the new models and changes our commentators espouse focus on public safety and the decrease in recidivism. That emphasis, however, is likely to increase rather than narrow the role of prosecutors.

This prosecutorial model deems prosecutors the hub of a system that reshapes not just law enforcement but entire communities. Prosecutors have the community standing and the authority to convene multiple stakeholders. Yet the model that drives such conversations remains steeped in criminal law and its enforcement rather than in public health or urban renewal. The lens of other policy makers at the center of these conversations, focused on reshaping society more broadly, would bring a different emphasis.

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Notes

- ¹ Wendy Sawyer & Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.htm> (displaying the magnitude and components of mass incarceration). Some examples of the literature on prosecutorial impact on imprisonment include Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* (2019); Nora V. Demleitner, *Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment*, 30 Fed. Sent'g Rep. 165 (2018); Brennan Center for Justice, Prosecutorial Reform Project, <https://www.brennancenter.org/issues/end-mass-incarceration/changing-incentives/prosecutorial-reform>; Vera Institute of Justice, *Promoting Racial Equity in Prosecution*, <https://www.vera.org/ending-mass-incarceration/reducing-the-use-of-jails/promoting-racial-equity-in-prosecution>.
- ² Carissa Hessick, *Local Prosecutor Elections: Results of a National Study*, 32 Fed. Sent'g Rep. 202 (2020).
- ³ See, e.g., Daniel A. Gross, "It Spreads Like Wildfire": *The Coronavirus Comes to New York's Prisons*, New Yorker (Mar. 24, 2020), <https://www.newyorker.com/news/news-desk/it-spreads-like-wildfire-covid-19-comes-to-new-yorks-prisons>.
- ⁴ See Hessick, *supra* note 2.
- ⁵ For a longer and more detailed discussion of the role of prosecutors in sentencing, see Nora V. Demleitner, *Prosecutors and Sentencing*, in *The Oxford Handbook of Prosecutors and Prosecution* (Kay Levine, Russell Gold & Ronald F. Wright, eds., forthcoming 2020); Nora V. Demleitner, *The Imperial Prosecutor: Increased Prosecutorial Power Accompanies Criminal Justice Reforms*, in *Can They Do That? Demystifying Prosecutorial Discretion* (Melba Pearson ed., forthcoming 2020).
- ⁶ Even before Virginia's legislature decriminalized small amounts of marijuana possession (effective July 1, 2020), a number of state prosecutors had already declared they would address possession in that manner. Among them were James M. Hingeley, Albemarle County, Virginia; Joseph D. Platania, Charlottesville, Virginia; and Gregory D. Underwood, Norfolk, Virginia. Similarly, long before the State of New York decriminalized the possession and use of marijuana, New York County DA Cy Vance allowed for diversion and noncriminal treatment of such activity (as Sabrina Bierer explains in this Issue).
- ⁷ See *In re: Underwood*, Nos. 190497 & 190498 (Va. May 2, 2019).
- ⁸ See, e.g., Death Penalty Information Center, *Florida Supreme Court Upholds Removal of Prosecutor from Death-Eligible Cases* (Aug. 31, 2017), <https://deathpenaltyinfo.org/news/florida-supreme-court-upholds-removal-of-prosecutor-from-death-eligible-cases>.
- ⁹ See, e.g., Alex Yablon, *America's Gun Problem*, Trace (Jan. 29, 2020), <https://www.thetrace.org/2020/01/larry-krasner-gun-violence-reform-philadelphia-district-attorney/>.
- ¹⁰ See, e.g., Jacqueline G. Lee, *To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship between Pretrial Detention and Conviction*, 30(1) Crim. Just. Pol'y Rev. 128 (2019). See also Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* (NCJ 243777, Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>, at 22.
- ¹¹ Generally, between 90% and 95% of adjudicated felony cases result from a plea. Detailed statistics from felony defendants in the seventy-five largest counties in 2009 show trial rates in the 1–2% range for a select set of offenses. The low trial rate may be a function of the prior conviction history of many of the defendants. See Reaves, *supra* note 10, at 24, tbl.21.
- ¹² Anne Metz, *A Qualitative Perspective on Alternative Sentencing Practices in Virginia*, 32 Fed. Sent'g Rep. 221 (2020).
- ¹³ Kelly Lyn Mitchell, *State Sentencing Guidelines: A Garden Full of Variety*, 82(2) Fed. Probation 28, 28 (Sept. 2017) (discussing only differences between state guideline systems).
- ¹⁴ Kathryne M. Young, Debbie A. Mukamal & Thomas Favre-Bulle, *Predicting Parole Grants: An Analysis of Suitability Hearings for California's Lifer Inmates*, 28 Fed. Sent'g Rep. 268, 269, 275–76 (2016) (a district attorney's recommendation against release has a substantial negative impact, though support for release does not show a significant positive effect).
- ¹⁵ See, e.g., Mark Berman, Kayla Epstein, Justin Jouvenal & Tim Craig, *Kentucky's Governor Granted Clemency to More Than 600 People. Then Came a Firestorm*, Wash. Post. (Dec. 21, 2019), https://www.washingtonpost.com/national/kentuckys-governor-issued-more-than-600-pardons-then-came-a-firestorm/2019/12/21/33e09ce4-2342-11ea-a153-dce4b94e4249_story.html.
- ¹⁶ Sabrina Bierer, *Bettering Prosecutorial Engagement to Reduce Crime, Prosecutions, and the Criminal Justice Footprint*, 32 Fed. Sent'g Rep. 212 (2020).
- ¹⁷ Rory Fleming, *Prosecutor-Driven "Second-Look" Policies Are Encouraging, but Not a Panacea*, 32 Fed. Sent'g Rep. 205 (2020).

- ¹⁸ For an overview of the status of marijuana—legalized; decriminalized; medically permitted; fully illegal—see, e.g., Marijuana SEO, *Marijuana Legal States* (updated Feb. 11, 2020), <https://www.marijuanaseo.com/marijuana-legal-states/>; DISA Global Solutions, *Map of Marijuana Legality by State*, <https://disa.com/map-of-marijuana-legality-by-state>.
- ¹⁹ See Restoration of Rights Project, *50-State Comparison: Marijuana Legalization, Decriminalization, Expungement, and Clemency* (Mar. 2020), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-marijuana-legalization-expungement/>.
- ²⁰ World Health Organization, Regional Office for Europe, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention: Interim Guidance* (Mar. 15, 2020), https://www.ncchc.org/filebin/news/WHO_Preparedness-prevention-and-control-of-COVID-19-in-prisons_002.pdf.
- ²¹ For a compilation of measures taken around the country in response to Covid-19, see Prison Policy Initiative, *Responses to the COVID-19 Pandemic*, <https://www.prisonpolicy.org/virus/virusresponse.html>.
- ²² For a discussion of the special vulnerability of jails, even as compared to prisons, see, e.g., Amanda Klonsky, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, N.Y. Times (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>.
- ²³ In the Matter of the Request to Commute or Suspend County Jail Sentences, No. 084230 (NJ Mar. 22 2020), amended March 23, 2020. For a set of materials related to the developments in New Jersey, see ABA Civil Rights and Social Justice Section, *New Jersey COVID-10 Jail Release Agreement* (Mar. 27, 2020), https://www.americanbar.org/groups/crsj/events_cle/program-archive/covid-nj-jail-release/. See also Tracey Tully, *1,000 Inmates Will Be Released from N.J. Jails to Curb Coronavirus Risk*, N.Y. Times (Mar. 23, 2020), <https://www.nytimes.com/2020/03/23/nyregion/coronavirus-nj-inmates-release.html>.
- ²⁴ Jails are governed differently around the country, and their wardens also carry different titles, including sheriff or superintendent.
- ²⁵ Email correspondence with Jim Hingeley, Albemarle County Commonwealth Attorney, Mar. 26, 2020 (on file with the author). See also Ben Hitchcock, *Get out of Jail Virus-Free: Coronavirus Crisis Sees Local Justice System Adopt Progressive Reforms, for Now*, C-ville Weekly (Apr. 7, 2020), https://www.c-ville.com/get-out-of-jail-virus-free-coronavirus-crisis-sees-local-justice-system-adopt-progressive-reforms-for-now/?mc_cid=54157effb5&mc_eid=d222f5f4fd.
- ²⁶ Lauren-Brooke Eisen & Courtney Olivia, *Reimagining a Prosecutor's Role in Sentencing*, 32 Fed. Sent'g Rep. 195 (2020).
- ²⁷ For a discussion of the connection between subjective criminality, racism, and mass incarceration, see Luis Chiesa, *The Model Penal Code, Mass Incarceration, and the Racialization of American Criminal Law*, 25 Geo. Mason L. Rev. 605 (2019).
- ²⁸ Sheldon Evans, *In the Shadow of Shular: Conduct Can Unify the Disjointed Categorical Approaches*, 32 Fed. Sent'g Rep. 231 (2020).
- ²⁹ 928 P.2d 1171 (Cal. 1996).
- ³⁰ 976 P.2d 831 (Cal. 1999).
- ³¹ Recidivism can be measured in many different ways. The focus is frequently on arrests (for any offense) rather than convictions. While arrests correlate with criminal recidivism, using this measure, which is preferred in the United States, makes it more difficult to compare recidivism rates across different countries.
- ³² Philadelphia DA Krasner has similarly championed reentry courts. See National Academies of Sciences, Engineering, and Medicine, *The Effects of Incarceration and Reentry on Community Health and Well-Being: Proceedings of a Workshop 55–59* (2020), reprinted in this Issue.
- ³³ National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014), <https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>.
- ³⁴ These criminal justice costs impede rehabilitation and reintegration. They are also ineffective as a revenue tool. See, e.g., Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen & Noah Atchison, Brennan Center for Justice, *The Steep Costs of Criminal Justice Fees and Fines* (Nov. 21, 2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf.