

BRENNAN
CENTER
FOR JUSTICE

FEDERAL PROSECUTION
FOR THE 21ST CENTURY

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Foreword by the Honorable Janet Reno

Introductory Letter by G. Douglas Jones and James E. Johnson

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FOREWORD

Hon. Janet Reno

As a former United States Attorney General, I care deeply and passionately about our country's criminal justice system. The Department of Justice should be justifiably proud of the sharp decrease in crime that has occurred over the last 20 years. The United States is safer than it has been in decades. Violent crime is down. Property crime is down. And abuse of crack cocaine is down.¹ What was once seen as a plague, especially in urban areas, is now at least manageable in most places.

To bring about these decreases, we employed a number of strategies, from putting more police on streets to supporting and working with groups like the Partnership for a Drug-Free America and Crime Stoppers.² While programs like these played an important role in reducing crime, one unfortunate side effect was an explosion in incarceration. To be sure, there are a great many people who are in prison for very good reasons. But many are behind bars for sentences that are too long or for offenses that may not warrant prison.

Those laws were passed and implemented with the best of intentions. But we now know that it is possible to decrease crime without drastically increasing incarceration. In a rare moment of bipartisan agreement, policymakers from the left and the right are joining together to create new, smart policies that will ensure continued public safety while also preventing unnecessary incarceration. These policies range from making sure that we have a sound, predictable, tough yet rational sentencing structure to diverting more people to innovative programs, such as drug courts.³

These reforms will require changes in laws, both in Washington and in state capitals around the country. But many reforms can be implemented on the front line of the criminal justice system by the thousands of men and women I had the privilege of leading: America's prosecutors.

Prosecutors play a distinct and important role in criminal justice. They go to work each day determined to protect the public, armed with three basic qualities: ability, integrity, and courage. They can lead the way to advance thoughtful, sensible approaches that have a real impact on violence and crime, while also reducing unnecessary prosecution and incarceration. Many are already doing so.

This report provides a blueprint for federal prosecutors to establish a new set of priorities to better reduce crime and reduce incarceration, while modernizing criminal justice. It also puts forth practical recommendations to create incentives to drive practices toward these priorities. Federal prosecutors, in particular, are uniquely positioned to lead the country toward this shift. Prosecutors and law enforcement across the country should be encouraged to give strong consideration to this approach.

Reno is the former U.S. Attorney General under President Bill Clinton.

EXECUTIVE SUMMARY

This report recommends concrete reforms to federal prosecution practices to support 21st century criminal justice policies. This new approach would reorient prosecutor incentives and practices toward the twin goals of reducing crime and reducing mass incarceration. The Brennan Center convened a Blue Ribbon Panel of leading current and former federal prosecutors to inform the recommendations of this report.

Federal Prosecutor Priorities for the 21st Century

Prosecutors drive critical decisions in the criminal justice system. They make decisions about when, whether and against whom to bring criminal charges, as well as make recommendations for sentencing and set the terms of plea negotiations. As such, they are in a uniquely powerful position to bring change to the criminal justice system. Historically, prosecutors have focused their role on enforcing the law. Many prosecutors, however, are beginning to see their role more broadly. They are increasingly exploring how to define their work to converge with the growing consensus that the country can simultaneously protect public safety and reduce incarceration.

Part I of this report explains how federal prosecutors can help lead the way toward change. Because the 94 U.S. Attorneys' Offices span the nation, they can help shift practices in states and localities as well. Part II puts forth recommended 21st century priorities for federal prosecutors. Setting clear priorities for success can encourage prosecutors to move toward more effective and just practices. The report recommends three core priority goals, which were discussed with enthusiasm at the Blue Ribbon Panel:

- Reducing violence and serious crime;
- Reducing prison populations; and
- Reducing recidivism.

Though critical, these priorities are not exhaustive. There are other considerations as prosecutors continue efforts to improve the communities they serve. U.S. Attorneys may choose to pursue additional priorities that hinge on the unique challenges of each district. To that end, this report puts forth several optional priorities:

- Reducing pretrial detention;
- Reducing public corruption; and
- Increasing coordination.

Once priorities are established, success measures can help prosecutors target their progress toward these goals and keep their offices on target. Success measures are clear, concrete data points about performance outcomes that quantify progress toward goals. This report provides optimal success measures for each recommended priority, which can be implemented at the office level or the individual attorney level.

Figure 1: Success Measures for Core Priorities for Federal Prosecutors

	U.S. Attorneys' Offices	Individual Attorneys
Reducing Violence and Serious Crime	<ul style="list-style-type: none"> • Change in violent crime rate • Percent of violent (and serious) crime cases on docket, compared to last year • Percent of community reporting feeling safe (optional) 	<ul style="list-style-type: none"> • Percent of violent (and serious) crime cases on docket • Conviction rate for violent crime cases
Reducing Prison Populations	<ul style="list-style-type: none"> • Percent of defendants sentenced to incarceration, compared to last year • Percent of sentenced defendants for whom downward guideline departures were recommended, compared to last year • Number of federal prisoners that originated from district, compared to last year • Percent of national federal prison population originating from district 	<ul style="list-style-type: none"> • Percent of defendants sentenced to incarceration • Percent of sentenced defendants for whom downward guideline departures were recommended
Reducing Recidivism	<ul style="list-style-type: none"> • Percent of prisoners convicted of a new crime within three years of release, compared to last year • Percent of prisoners convicted and sentenced to incarceration for a new crime within three years of release, compared to last year 	<ul style="list-style-type: none"> • Percent of prisoners convicted of new crime within three years of release • Percent of prisoners sentenced to incarceration for new crime within three years of release

Creating Incentives to Drive Toward Priorities

There are several ways to implement new priorities. Part III of this report provides one powerful method that would shift office-wide and individual incentives to drive practices toward priorities: Success-Oriented Funding. As explained in previous Brennan Center reports, Success-Oriented Funding is a policy model that ties government funding as tightly as possible to clear priorities that drive toward the twin goals of reducing crime and reducing mass incarceration.⁴ Grounded in basic principles of economics and management, Success-Oriented Funding provides incentives to achieve these priorities, thereby changing practices and outcomes. It can be applied to all criminal justice agencies, actors, and funding streams.

The model first requires priorities that underscore the goals of reducing crime and reducing mass incarceration. These priorities for federal prosecutors are explained in Figure 1. The model then requires clear, concrete success measures that show whether progress has been made toward achieving those priorities.

Success-Oriented Funding can apply specifically to federal prosecutors by linking new priorities and success measures to dollars, including budgets, salaries, and financial rewards at the office or individual level. Notably, it can also apply indirectly, through office or individual evaluations even without direct financial rewards or consequences. This more subtle form of Success-Oriented Funding can often be the most potent.

U.S. Attorneys' Offices can apply this approach as a best practice within their own offices. The Department of Justice can also implement this approach, making priorities and success measures consistent across U.S. Attorneys' Offices.

This report recommends:

- U.S. Attorneys implement, as a best practice, self-evaluations of their offices using success measures for priorities;
- U.S. Attorneys change individual prosecutor evaluations to include similar success measures;
- The Justice Department adds success measures for core priorities when evaluating U.S. Attorneys' Offices;
- The Justice Department modifies the model individual prosecutor evaluation form to include similar success measures;
- The Justice Department provides additional funding for U.S. Attorneys' Offices that achieve certain success measures; and
- Additional reforms, such as using the bully pulpit, expanding training and interview practices, expanding access to data, and increasing coordination for federal grant dollars.

By implementing these recommendations, federal prosecutors can shift outcomes to better reduce crime, dispense justice, and reduce incarceration. This shift in practices can help spur momentum for a similar shift in state and local practices in these districts, as explained in Part IV.

A LETTER FROM BLUE RIBBON PANEL CHAIRS

G. Douglas Jones and James E. Johnson

As former federal prosecutors, we care deeply about our country's justice system. With almost one in 108 American adults behind bars, our incarceration rate is the world's highest — four to 10 times that of many European countries.⁵ This adds up to an overwhelming 2.2 million people in prisons and jails today, nearly 40 percent of whom are African American.⁶ There are both moral and economic consequences. We spend \$260 billion annually on law enforcement, incarceration, and corrections.⁷ To put this into perspective, since 1980, federal corrections spending grew five-fold compared to federal education spending.⁸

To some, this is surprising as crime has fallen over the past two decades. Violent crime has decreased almost by half since its peak in 1991.⁹ With this reduction in crime, there has been a marked shift in view from both sides of the political spectrum. Americans see the need to make vast reforms to our justice system. But that is not easy.

To promote further momentum for reform, we convened a Blue Ribbon Panel of the nation's leading current and former federal prosecutors in July 2014. We asked tough questions about the state of our criminal justice system and what we, as federal prosecutors, can do to improve our nation's neighborhoods without incarcerating so many of our fellow citizens. As chairs of the panel, we left with a strong sense that many thought that we can, and should, do more to turn back practices and policies that resulted in today's unprecedented incarceration levels. We were struck by the passion for prosecutors to play a more vital role in reconnecting with communities while preventing violence, recidivism, and unnecessary incarceration in those communities.

When we served as prosecutors, there was an underlying drive to focus almost exclusively on the enforcement of federal laws without engaging in crime prevention. In our offices, we focused on reporting increases in convictions and sentence lengths. And, we were implicitly judged on how many convictions we could obtain and how severe they were. U.S. Attorneys — and federal law enforcement bureaus — received resources based in part on these or similar statistics. The consequence: federal law enforcement did not focus resources on priorities relating to prevention and reducing unnecessary punishment as much as they should have.

The demands for law enforcement have changed dramatically. Yet this incentive structure remains focused on strategies that have outlived their usefulness.

Today, more federal prosecutors are beginning to focus their efforts not only on enforcing the nation's criminal and civil laws, but also on efforts to ensure that the causes of violence are directly addressed. They are also rethinking how and when to prosecute or bring charges that result in incarceration. Many state and federal prosecutors have been working to change practices.

Given that lawmakers from all sides, as well as researchers and criminal justice practitioners, are coming to agree that the large spike in our levels of incarceration is unnecessary, what role can federal prosecutors

play in this reform effort? Traditionally, the criminal justice system has been segmented, with police, prosecutors, judges, corrections officers, and treatment providers working in silos. To make an impact to reduce mass incarceration, how can we change law enforcement paradigms?

Federal prosecutors have many tools to create this change. They can use their resources to change prosecutorial practices; their bully pulpit and convening power to change hearts and minds; and their leverage in hiring young prosecutors to pick not only the best and the brightest, but also those with a nuanced view of justice.

This report from the Brennan Center lays out concrete, practical recommendations to shift priorities and incentives within U.S. Attorneys' Offices. These recommendations encourage prosecutors to keep in mind the larger purposes of the justice system when recommending sentences, choosing what charges to bring and whom to prosecute, and deciding the terms of plea negotiations. Federal prosecutors make dozens of decisions each day that can affect crime, recidivism, and prison growth, as well as the practices of their local law enforcement colleagues.

This report is a critical contribution to the effort to make our system of crime and punishment more effective and just. We hope that U.S. Attorneys across the country and the Justice Department will give these recommendations thoughtful consideration. Though vast change can be difficult to create, these recommendations can help lead the way toward a sweeping transformation in law enforcement practices throughout the country.

Jones is the former U.S. Attorney for the Northern District of Alabama. Johnson is the former Undersecretary for Enforcement for the U.S. Department of Treasury, former Deputy Chief of the Criminal Division for the U.S. Attorney's Office for the Southern District of New York, and sits on the Brennan Center Board of Directors, which he directed from 2004 to 2011. They served as co-chairs of the Brennan Center's Blue Ribbon Panel for Federal Prosecutors.

BLUE RIBBON PANEL AND METHODOLOGY

In July 2014, the Brennan Center convened a Blue Ribbon Panel of several of the nation's leading current and former federal prosecutors to inform the recommendations of this report. U.S. Attorney General Eric Holder participated in a portion of this discussion.

The Panel explored how federal prosecutor priorities have changed in light of the emerging consensus that we cannot prosecute and incarcerate our way to a safer nation, and which goals federal prosecutors should prioritize in the 21st century. There was overwhelming agreement that prosecutors are in a unique position to help effect a shift away from an unnecessarily punitive model that over-relies on incarceration toward an approach that focuses on reducing crime and using effective, well-calibrated responses to crime.

The group discussed one significant hurdle in recasting the role of prosecutors: changing the mindset of prosecutors themselves, as well as the public they serve. They noted the value of U.S. Attorneys, as leaders of criminal justice agencies, to change perceptions that longer sentences are always better. Many of the leaders at the discussion spoke about the need for more robust anti-violence initiatives to repair communities most affected by violent crime, and many highlighted the need for prosecutors to keep recidivism reduction in mind when making decisions. Panelists agreed that federal prosecutors can develop new priorities to help lead their districts — and the country — toward more effective, efficient, and just law enforcement. After the meeting, the authors held multiple follow-up interviews with panelists.

The findings of this report are wholly those of the Brennan Center and should not necessarily be ascribed to any individual panelists. The Panel served as a resource to inform and provide feedback on the authors' research and recommendations.

Blue Ribbon Panelists include:*

- **Hon. James E. Johnson**, Co-Chair, Brennan Center Blue Ribbon Panel for Federal Prosecutors; Partner, Debevoise & Plimpton LLP; Member and former Chair, Brennan Center for Justice Board of Directors; former Undersecretary for Enforcement, U.S. Department of the Treasury; former Assistant U.S. Attorney and Deputy Chief of the Criminal Division, Southern District of New York.
- **Hon. G. Douglas Jones**, Co-Chair, Brennan Center Blue Ribbon Panel for Federal Prosecutors; Attorney, Jones & Hawley P.C.; former U.S. Attorney for the Northern District of Alabama.
- **Hon. Lanny A. Breuer**, Vice Chairman, Covington & Burling LLP; former Assistant Attorney General, Criminal Division, U.S. Department of Justice.
- **Hon. Zachary W. Carter**, Corporation Counsel, New York City; former U.S. Attorney, Eastern District of New York.
- **Hon. Paul J. Fishman**, U.S. Attorney, District of New Jersey; former Chair, Attorney General's Advisory Committee; former Associate Deputy Attorney General, U.S. Department of Justice.

- **Hon. Barry Grissom**, U.S. Attorney, District of Kansas.
- **Hon. Walter C. Holton, Jr.**, Principal, Holton Law Firm; former U.S. Attorney, Middle District of North Carolina; former Member, Attorney General's Advisory Committee.
- **David Patton**, Executive Director and Attorney-in-Chief, Federal Defenders of New York.
- **Hon. Kenneth A. Polite, Jr.**, U.S. Attorney, Eastern District of Louisiana; former Assistant U.S. Attorney, Southern District of New York.
- **Hon. Timothy Q. Purdon**, U.S. Attorney, District of North Dakota; Member, Attorney General's Advisory Committee.
- **Hon. Stephen C. Robinson**, Partner, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates; former Judge, U.S. District Court for the Southern District of New York; former U.S. Attorney, District of Connecticut; former Principal Deputy General Counsel and Special Assistant to the Director, U.S. Federal Bureau of Investigation.
- **Paul Shechtman**, Attorney, Zuckerman Spaeder LLP; former Director of Criminal Justice, State of New York; former Assistant U.S. Attorney, Southern District of New York.
- **Jeremy Travis**, President, John Jay College of Criminal Justice; former Director, National Institute of Justice, U.S. Department of Justice; former Chief Counsel, U.S. House Judiciary Subcommittee on Criminal Justice; former Deputy Commissioner for Legal Matters, New York City Police Department.
- **Hon. William D. Wilmoth**, Member, Steptoe & Johnson PLLC; former U.S. Attorney, Northern District of West Virginia.
- **Norman Wong**, Deputy Director and Counsel to the Director, Executive Office for U.S. Attorneys, U.S. Department of Justice; former Assistant U.S. Attorney, Eastern District of California.

The authors also interviewed additional experts to inform this report's research and recommendations. The findings of this report should not necessarily be ascribed these experts. Interviews served as a resource to inform the authors' research.

These additional experts include:*

- **Hon. B. Todd Jones**, Director, U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives; former U. S. Attorney, District of Minnesota.
- **H. Marshall Jarrett**, former Director, Executive Office for U.S. Attorneys U.S. Department of Justice; former Associate Deputy Attorney General and former Deputy Chief of Public Integrity Section, U.S. Department of Justice.
- **David LeBahn**, President, Association of Prosecuting Attorneys; former Deputy District Attorney, Orange and Humboldt Counties, California.
- **Hon. Robert Mueller**, former Director, Federal Bureau of Investigation; former U.S. Attorney, Northern District of California; former Assistant U.S. Attorney, District of Massachusetts.
- **Hon. Matthew D. Orwig**, President-elect, National Association of Former U.S. Attorneys; former U.S. Attorney, Eastern District of Texas.

Over the past two years, the authors also completed more than 100 informal interviews with criminal justice experts to devise success measures for criminal justice agencies across the nation, including prosecutor's offices. This research is compiled in two previous Brennan Center reports, *Reforming Funding to Reduce Mass Incarceration* and *Success-Oriented Funding: Reforming Federal Criminal Justice Grants*. The success measures for federal prosecutors proposed in this report are informed by this previous research. They were further refined during research and interviews conducted for this report.

* Organizational affiliations are included for identification purposes only.

I. INTRODUCTION

“The prosecutor has more control over life, liberty, and reputation than any other person in America.”
— Robert H. Jackson, former U.S. Attorney General, 1940¹⁰

Federal prosecutors play a distinct and significant role in combating crime. They are the protectors of federal criminal and civil law, charged with investigating cases and seeking justice in challenging circumstances. They handle cases large and small, complex and simple, violent and petty. And they ensure that offenders are held accountable for crimes committed. They are charged with serving justice and keeping the public safe.

Federal prosecutors, along with other criminal justice agencies, have contributed to the drastic drop in crime over the past 20 years. Among other things, violent crime has fallen by almost half since its peak in 1991, and property crime is down 44 percent. It is truly remarkable how much safer the country has become since the crime wave of the 1980s and 1990s.¹¹

But the policy response to the crime epidemic has yielded an unintended consequence. The United States has more than tripled its incarceration rate over the past four decades.¹² Thirty percent of Americans now have a criminal record.¹³ One in 35 adults is in jail, prison, or on probation or parole.¹⁴ The current rate of incarceration places the United States far outside those of other Western democracies.¹⁵ And the price of this overreliance on incarceration has had dramatic and far-reaching costs, both social and economic. Total criminal justice spending is more than \$260 billion.¹⁶

It is becoming clear to a broadening array of Americans that mass incarceration is unnecessary and harmful. Conservatives and progressives alike have come to see that the country has passed the point where its number of prisoners can be justified by the potential benefits. Senator Rand Paul recently said, “Our current system is broken and has trapped tens of thousands of young men and women in a cycle of poverty and incarceration.” New Jersey Governor Chris Christie criticized the idea that “incarceration is the cure of every ill caused by drug abuse.” California Attorney General Kamala Harris has advocated for “a third way forward: smart on crime.”¹⁷ Similarly, in September 2014, New York City Police Department Commissioner William Bratton acknowledged that the “culture” of his department focused too much on “the numbers of stops, summonses and arrests,” and not enough on “collaborative problem-solving with the community.”¹⁸

This growing bipartisan consensus has led to genuine change. Since 2009, 40 states have acted to ease their drug laws.¹⁹ Seventeen states invested in evidence-based programs projected to save about \$4.6 billion over 11 years.²⁰ Due to these and other reforms across the country, both crime and incarceration have fallen by about ten percent since 2008. This marks the first time these two measures have gone down together in over 40 years.²¹ This shift is heartening — and spreading. But more can be done.

In 2013, U.S. Attorney General Eric Holder announced the U.S. Department of Justice’s Smart on Crime Initiative. The Initiative aims to improve the criminal justice system by reducing recidivism, deterring crime, and reducing unnecessary imprisonment.²² Holder stated, “While the aggressive

enforcement of federal criminal statutes remains necessary, we cannot simply prosecute or incarcerate our way to becoming a safer nation.”²³ His words were similar to those expressed by former Attorney General John Ashcroft a decade earlier: “The Department of Justice has to be more than the department of prosecution.”²⁴ As a step toward that goal, Attorney General Holder encouraged the nation’s U.S. Attorneys to refrain from using mandatory minimum sentences for certain low-level, nonviolent drug offenses, because, in his words, “[t]oo many people go to too many prisons for far too long for no good law enforcement reason.”²⁵

Traditionally, the nation’s federal prosecutors have focused on the enforcement of federal statutes. However, there has been a gradual shift toward prosecutors working to address the root causes of violence or unethical behavior. This change asks prosecutors to focus on prevention strategies to influence the complex causes leading to violent crime, in an attempt to prevent crimes rather than just punish offenders after they commit them.²⁶

Prosecutors are well-positioned to create opportunities to improve public safety while also reducing the nation’s incarceration footprint. They are granted unique authority to make charging decisions, enter cooperation agreements, accept pleas, and frequently dictate sentences or sentencing ranges. Occupying a respected place in the legal profession and seen as prestigious attorneys with a dedication to justice, federal prosecutors are poised to lead the way toward an improved criminal justice system. The time is ripe for a new set of 21st century priorities for federal prosecutors. U.S. Attorneys can play a leading role in recalibrating prosecutorial practices. They can determine what priorities they should support to aid the nation’s larger reform efforts.

There are several ways prosecutors can shift practices toward 21st century goals. One method, identified by the Brennan Center in previous reports, is a policy model known as Success-Oriented Funding. This approach ties government dollars as tightly as possible to clear, concrete objectives that drive toward the twin goals of reducing crime *and* reducing mass incarceration. It creates clear priorities and then creates clear incentives to shift practices toward those priorities.

There are many factors beyond the control of criminal justice actors that contribute to changes in crime, violence, and incarceration. Yet those most deeply involved in criminal justice recognize that well-crafted success measures can move outcomes toward priorities.²⁷ As is often the case, what gets measured gets done. Setting clear, quantifiable goals for success can encourage agencies and individuals to use their discretion to achieve priorities.

Built on input from the nation’s current and former leading federal prosecutors, this report recommends a way for federal prosecutors to move toward 21st century priorities. By shifting their own practices, federal prosecutors spread throughout the country can help incentivize a similar shift in state and local practices. The United States is coming to a realization that we can keep down crime and violence without perpetuating mass incarceration. This report sets forth a concrete method for law enforcement to create a shift that can reverberate across the country.

II. 21ST CENTURY FEDERAL PROSECUTOR PRIORITIES

A. A Role for Prosecutors in Reducing Mass Incarceration

Federal prosecutors possess significant discretion to carry out their duties. They choose whom to charge, what to charge, whether to enter cooperation agreements, and whether to offer plea bargains. This discretion grants U.S. Attorneys' Offices — and Assistant U.S. Attorneys, federal prosecutors who assist the U.S. Attorney in their judicial district — a pivotal role in criminal investigations, cases, and outcomes.

There are 94 U.S. Attorneys' Offices throughout the country, led by 93 U.S. Attorneys. (One U.S. Attorney is assigned to both Guam and the Northern Mariana Islands.) The President appoints each U.S. Attorney, and the Attorney General oversees them. Each U.S. Attorney serves as the chief federal law enforcement officer within the judicial district and exercises wide discretion over directing federal resources to further local priorities.²⁸

Traditionally, a prosecutor's role has been to enforce laws by prosecuting offenders and ensuring they receive punishment. Many prosecutors, however, are beginning to see their role as broader than enforcement. In addition to their goal of prosecuting crimes, they also work to ensure safer communities and maintain reductions in crime. Federal prosecutors are increasingly exploring how to define their role to support the growing consensus that we can protect public safety, dispense justice, and reduce unnecessary incarceration.

Today, this question is more important than in the past as the U.S. Sentencing Guidelines (“the guidelines”) now offer more discretion. The U.S. Sentencing Commission issues guidelines to help federal judges issue uniform sentences across districts. Using a 256-box grid measuring offense level and criminal history, the guidelines provide a recommended sentencing range for a defendant.²⁹ These guidelines are restrictive and often enhance sentences unnecessarily, contributing to overly harsh prison sentences.³⁰ In 2005, the U.S. Supreme Court held that these guidelines are “effectively advisory” and are not mandatory. Nonetheless, the federal guidelines still play an influential role in judicial sentencing determinations.³¹ Federal judges must calculate the recommended sentence range under the guidelines as a starting point in their analysis.³² Judges then use their discretion to decide whether the defendant should be sentenced within this range or outside of it. According to the U.S. Sentencing Commission, federal judges continue to sentence according to the guidelines in the vast majority of cases, usually departing only when a prosecutor brings a motion to do so.³³

Prosecutors play an important role in shaping the ultimate sentence for a defendant, despite the guidelines. Prosecutorial charging decisions determine the “base offense level” for guideline calculations. For example, a prosecutor may charge an individual for possession of drugs in lieu of charging a defendant for possession of drugs with intent to distribute. This charging decision can play a significant role regarding where on the scale a defendant's sentence starts.³⁴ Additionally, at sentencing hearings, a prosecutor can introduce a motion to the court to reduce a defendant's sentence if the prosecutor deems that the defendant substantially assisted the government in other criminal investigations.³⁵ When prosecutors decide to bring such motions, defendants can avoid mandatory minimum penalties and receive shorter sentences.³⁶ These are just a few of the many ways that prosecutors can affect case outcomes.

In recent years, the Justice Department has attempted to redefine the role of federal prosecutors. As noted previously, on August 12, 2013, Attorney General Holder announced the Smart on Crime Initiative.³⁷ This initiative builds upon his goals of eliminating unfair disparities and reducing imprisonment. To that end, the Justice Department has directed all U.S. Attorneys to:³⁸

- Prioritize prosecutions to focus on the most serious cases;
- Pursue alternatives to incarceration for low-level, non-violent crimes;
- Improve reentry efforts to curb recidivism; and
- Focus resources on preventing violence and protecting vulnerable populations.

The Justice Department's policy directly impacts how prosecutors exercise discretion and most recently, the trend has been to use discretion to decrease the number of offenders serving severe mandatory minimum sentences. The policy still leaves great discretion to U.S. Attorneys' Offices in determining how to implement the broad guiding principles of the Initiative (e.g., what constitutes a "non-violent offense"?).

Given their enormous power and discretion over charging and sentencing decisions, U.S. Attorneys possess a unique lever to spread change. Because the 94 offices span the country, a change in federal prosecution practices can help spread throughout jurisdictions, helping shift state and local practices in districts.

B. New Prosecutorial Priorities and Success Measures

The time is ripe for federal prosecutors to adopt a reformed set of priorities that reflect 21st century criminal justice goals.

Given the incarceration epidemic, it is important to ask a handful of key questions: How can prosecutors' role be re-envisioned? How can federal prosecutors help reform our nation's justice system? What should they prioritize to create this change? Should they prioritize reducing violence? Should they focus on prosecuting serious cases, such as those involving violent crimes, high victim impacts, or public corruption? Should federal prosecutors serve as national leaders on reducing recidivism? Should they seek to reduce the number of people unnecessarily sentenced to prison or unnecessarily held pretrial?

Once these priorities are established, what success measures can best help prosecutors track their progress toward these goals? As in many fields, it can be challenging to craft effective success measures that create clear incentives. Nevertheless, setting clear targets for success — even if imperfect — can encourage more effective and just practices.

Of course, many factors beyond the control of prosecutors contribute to changes in crime, violence, recidivism, and incarceration. Limited budgets require prosecutors to do more with fewer resources. And the causes of crime and violence are complex. Yet, those who work in the criminal justice system

recognize that decisions by all actors across different agencies contribute to the system's outcomes. All criminal justice agencies — federal, state, and local — share responsibility for achieving these system-wide outcomes.

This Part puts forth recommended priorities and success measures for federal prosecutors based on the Blue Ribbon Panel discussion, follow-up conversations with the panelists, and research on prosecutorial practices. This report strongly recommends three core priorities for federal prosecutors, each of which was discussed with enthusiasm at the Blue Ribbon Panel. It also provides three optional priorities that a U.S. Attorney could choose to prioritize depending on the unique circumstances of a district.

Core Priorities

This report recommends the following core priorities and success measures for federal prosecutors.

1. Reducing Violence and Serious Crime

A Prosecutor's Role in Reducing Violence

While state and local police and federal agents have traditionally played the largest role in crime prevention, several jurisdictions have begun to recognize that partnerships with other law enforcement agencies, such as prosecutors, can bolster these efforts.

In 2013, the Justice Department asked U.S. Attorneys to implement “anti-violence strategies” in their districts. Each U.S. Attorney is now required to work with state and local officials to devise strategies in communities with the greatest potential to reduce violence.³⁹ The Department also provides funds to U.S. Attorneys’ Offices, as well as grants to local police and community organizations, to focus on crime prevention.⁴⁰

Though crime has fallen steeply across the country, violent crime remains an intractable problem in many cities.⁴¹ For example, in Bismarck, North Dakota, the violent crime rate more than tripled from 2005 to 2012, and Flint, Michigan, has a murder rate 13 times the national average.⁴² Law enforcement, both prosecutors and police, feel an increased responsibility to target and reduce violence.

Many U.S. Attorneys at the Blue Ribbon Panel said, with great force and conviction, that they thought preventing violent crime ought to be a priority for U.S. Attorneys’ Offices. One former U.S. Attorney stated that when he took office, “The question was no longer how many prosecutions we had; it was how many communities we made safer.”⁴³ These attorneys recognized the need to move from a standard “enforcement” model of prosecuting those who commit violent crimes — such as firearms offenses, high-level narcotics trafficking, gang activity, or bombings — to one of trying to reduce or eliminate the causes of violence. Emphasizing the joint sentiment of other U.S. Attorneys not present at the event, panelists suggested that a new model requires working with community organizations, faith-based organizations, youth groups, those with prior criminal justice contacts, and schools to identify and address the issues which drive the problem of violence. This sentiment reflects an evolving vision of the prosecutor’s role.

Three U.S. Attorneys at the Panel discussed their similar methodologies to reduce crime in their districts. Former U.S. Attorney of Connecticut Stephen Robinson, former U.S. Attorney for the Middle District of North Carolina Walter Holton, and current U.S. Attorney for the Eastern District of Louisiana Kenneth Polite made reducing violent crime explicit priorities in their districts and shifted the culture in their offices. Connecticut and North Carolina achieved measurable results, while Louisiana's efforts are more recent (See box: *Eastern District of Louisiana: Reducing Violence as a Priority*). These three offices created coalitions with local law enforcement officials to identify small groups of offenders responsible for a disproportionate amount of violent crime. Each office engaged those individuals in conversations with law enforcement, community members, and service providers, and used tactics to incentivize them to decrease violence — a strategy called “focused deterrence.”⁴⁴

This strategy can create a powerful role for U.S. Attorneys in reducing violence because it leverages the federal prosecutorial power to work in conjunction with a larger coalition, as part of a larger strategy. Today's U.S. Attorneys are building upon a concept employed in the 1990s by the Justice Department's Strategic Approaches to Community Safety Initiative (SACSI). Implemented in 1998 under former U.S. Attorney General Janet Reno, SACSI launched a series of pilot programs in select U.S. Attorneys' Offices aimed at reducing gun violence.⁴⁵ As part of this collaborative approach, U.S. Attorneys convened federal, state, and local law enforcement to execute coordinated strategies involving data-collection and problem-solving to reduce homicide, youth violence, and gun violence in specific neighborhoods with a high incidence of violence. A 2000 National Institute of Justice evaluation found that SACSI reduced violence in targeted communities, in some areas by as much as 50 percent.⁴⁶ These pilot sites had certain commonalities that proved instrumental in reducing violence: significant leadership by local U.S. Attorneys' Offices as part of a collaborative, multiagency partnership, integration of researchers into planning and implementation of intervention strategies, and targeted implementation of interventions that incorporate proven tactics to reduce illegal gun possession and use.⁴⁷

U.S. Attorney for the Southern District of Florida Wifredo Ferrer has employed a community-based strategy to reduce violence. In 2011, Ferrer established the Violence Reduction Partnership (VRP), which targets South Florida's “hot spots” of violent crime.⁴⁸ Ferrer believes federal prosecutors can play a large role in keeping the region's inner city communities safe. The initiatives introduced under VRP include: assigning 10 federal prosecutors (out of approximately 240 in the district) to work with community schools, leaders, and nonprofits; requiring prosecutors to act as mentors; and requiring prosecutors to conduct workshops in schools on preventing bullying and protecting against Internet predators.⁴⁹

Another strategy utilized to ensure closer ties to the community and prevent crime before it occurs is community prosecution. Community prosecution places prosecutors outside the office and physically relocates them into the community.⁵⁰ It often entails opening up a neighborhood prosecutor's office in a storefront. Prosecutors speak with neighborhood residents to better understand their concerns regarding crime. They use that information to choose which crimes to prosecute and which charges to bring. They also develop solutions to problems that do not involve prosecutions, such as mediating disputes and participating in school intervention programs. Through community prosecution, prosecutors can gain the trust of police and residents, and address what residents experience as the greatest threats to neighborhood safety.

Nearly half of state prosecutors' offices in the country use some form of community prosecution.⁵¹ For example, the State's Attorney in Cook County, Illinois, set up storefront offices in five communities in the late 1990s. Although a budget crisis led to the closure of these offices from 2007 to 2009, four offices served 37 percent of the Chicago population by 2011.⁵² A study from the University of Chicago Crime Lab indicates that parts of Chicago where community prosecution was employed experienced a reduction of 8 to 11 percent in murder, rape, and aggravated assault more than areas where the tactic was not employed.⁵³

U.S. Attorney for North Dakota Timothy Purdon has focused office resources on combating violent crime and fostering safe communities in Native American reservations by engaging with communities. His office has also achieved measureable results (See box: *North Dakota: Reducing Violence as a Priority*).

One may ask how prosecutors can be held responsible for preventing violence when their role typically commences only after a crime is committed. But prosecutors play an instrumental role in the complex criminal justice process. They are present from arrest to indictment to plea bargaining to trial, all the while interacting with investigators, law enforcement and other agencies. Their involvement in these stages and access to case files often provides them with a comprehensive view of cases, neighborhood dynamics, and hotspots. Federal prosecutors can effectively address violent crime by expanding their efforts to include both prosecution of cases and preventative work. And many federal prosecutors have already done so. As noted in the Smart on Crime Initiative, "To be effective, federal efforts must also focus on prevention and reentry."⁵⁴

A focus on reducing violence includes not only preventing violence before it starts but also focusing scarce resources on prosecuting violent crimes. Only 2.4 percent of federal prosecutions in 2010 were catalogued as prosecutions of violent offenses.⁵⁵ It should be noted that federal jurisdiction over violent crimes may be limited because states have almost exclusive jurisdiction over violent crime.⁵⁶ Nevertheless less than 10 percent of federal prisoners are incarcerated for violent offenses.⁵⁷ There is room for U.S. Attorneys to play a role in combatting violent crime by shifting prosecutorial resources to this area.

Several prosecutors have explicitly shifted case enforcement away from low-level crimes and toward violent and serious crimes. District Attorney Kenneth Thompson has applied this approach in Brooklyn, New York. In July 2014, Thompson announced that his office, in order to better focus limited resources, would no longer prosecute first-time offenders arrested for low-level misdemeanor marijuana possession charges.⁵⁸ Thompson made this decision after examining data indicating that his office processed more than 8,500 cases in 2013 where the highest charge was a low-level misdemeanor marijuana offense.⁵⁹ Of those cases, judges dismissed over two-thirds.⁶⁰ Thompson has now redirected his office's resources away from petty marijuana possession crimes to more serious crimes.⁶¹

Focusing on violent crime is one of the most tangible means of enhancing public safety. Violent crime inherently involves a direct criminal act with a discrete and knowable victim. It is also the type of crime that most concerns citizens and most affects a community's sense of safety. Accordingly, it is an excellent use of law enforcement resources.

Blue Ribbon panelists discussed focusing resources on serious crimes as well. These include crimes that may not be violent but have high financial impacts on victims, such as: securities fraud, insider trading, or health care fraud. Pursuing such large scale financial crimes can play an important role in deterring criminal conduct. Equally important is the goal of imposing punishment on those who have acted wrongfully and caused harm in the financial sector, not just in neighborhood streets.

One example of a serious financial crime with a significant impact on its many victims is the notorious Ponzi scheme masterminded by Bernard Madoff. Madoff pleaded guilty to 11 felony counts including securities and investment adviser fraud, and was sentenced to 150 years in prison in June 2009.⁶² The full extent of the financial damage he created is unknown, but it is believed that he lost at least \$50 billion of investors' money.⁶³

Focusing on serious and violent crimes ensures that scarce prosecutorial resources are spent on high impact cases. This approach lines up with the Smart on Crime Initiative's tactic of focusing resources on fewer but more significant cases, as opposed to fixating on sheer volume.⁶⁴

What are "Success Measures"?

Once priorities are established, success measures help track progress over time toward these goals. Success measures are clear, concrete data points about performance outcomes which quantify progress toward goals. Performance results can reveal challenges, indicating where an office may need to change practices or where a measure may need to be refined. Success measures seek to create incentives that focus an office on a specific goal and encourage individuals in each office to shift their practices and decision making to achieve that goal. Shifting practices can be a potent method to change outcomes.⁶⁵ They can be applied to any individual, office, or agency.

As is the case with any data-collection, success measures can never create perfect incentives and numbers can always be "fudged." The success measures in this report are designed to minimize these concerns and create the best incentives possible for prosecutors to maintain focus on stated priorities. Success measures are generally tracked from year to year so that offices' progress toward goals over time can be seen. In this way, offices are primarily measured against themselves and not against other offices, which may have more resources or different criminal justice challenges. In many instances, federal prosecutors may not have complete control over these outcomes. Nevertheless, they contribute significantly to outcomes. Ideally, success measures would be implemented for all criminal justice agencies so that all priorities and resources are aligned toward the same outcomes.

Success measures are a component of Success-Oriented Funding, a policy model explained in Part III. The measures in this report are the product of two years of research and interviews compiled in two previous Brennan Center reports,⁶⁶ further refined during research and interviews conducted for this report. The following measures are ideal for federal prosecutors because the data needed is either already collected or relatively easy to begin collecting. These success measures are intended to serve as well-researched starting points that can and should be refined over time.

Success Measures

If federal prosecutors are to prioritize reducing violence and serious crime, how can they measure progress toward that goal? What types of statistics or measurements can they use to gauge success?

Success Measures for Reducing Violence and Serious Crime

- Change in violent crime rate.
- Percent of violent crime cases on docket, compared to previous year.
- Percent of serious crime cases on docket, compared to previous year.
- Percent of community reporting feeling safe (optional).

Change in violent crime rate.

By measuring the violent crime rate year to year, U.S. Attorneys can monitor whether the amount of violent crime in their district is increasing or decreasing. This success measure encourages prosecutors to consider how to spend resources and efforts to prevent violent crime in their districts. For example, prosecutors could work with the community to identify troubling crime trends and focus additional resources there. Most importantly, because the violent crime rate is affected by the efforts of all law enforcement in the area, this measure encourages collaboration between U.S. Attorneys, other federal law enforcement agencies, and state and local law enforcement agencies. By working together, these actors can reduce violence in their community.

The Federal Bureau of Investigation (FBI) administers the Uniform Crime Reporting Program (UCR), which gathers data on crimes reported to law enforcement agencies across the country. This data is collected at the city and county level.⁶⁷ UCR data is widely used in empirical research on crime. However, this data has its drawbacks. Namely, crime data in the UCR reflects only those crimes known to police departments, and then reported by departments to the FBI. As a result, certain crimes, especially those underreported to police, may not be accurately reflected in the data.⁶⁸

Despite these limitations, the UCR provides the most nationally relied upon and most accessible crime data for U.S. Attorneys. U.S. Attorneys can aggregate crime data for counties in their district directly from the UCR to determine the violent crime rate in their districts. As more sophisticated tools for crime collection develop, U.S. Attorneys may consider accessing data from those tools.

North Dakota: Reducing Violence as a Priority

Since taking office in 2010, U.S. Attorney Timothy Purdon has emphasized combating violent crime and fostering safety on Native American reservations in North Dakota.⁷¹ Native Americans nationally are far more likely to die a violent death than the U.S. population at large. The murder rate on reservations is 61 percent higher and suicide rates are 62 percent higher than the rest of the nation.⁷²

Upon entering office, Purdon hoped to make life better for these communities. He implemented several anti-violence strategies combining enhanced enforcement with viable crime prevention and reentry programs. His key goal was to remove the most violent individuals from North Dakota's tribal communities.⁷³

In 2011, the U.S. Attorney's Office of North Dakota (USAOND) established the Anti-Violence Strategy for Tribal Communities. USAOND worked extensively with federal, state and local law enforcement agencies, as well as the four reservations in North Dakota — Fort Berthold, Spirit Lake, Standing Rock, and Turtle Mountain — to identify and tailor specific violence-reduction strategies.⁷⁴

The first step was to commit additional prosecutorial resources to the reservations. Purdon assigned one federal prosecutor to pursue violent crime prosecutions in each of the four reservations. Prior to that, reservations did not have their own assigned Assistant U.S. Attorney.⁷⁵ Second, USAOND implemented a community prosecution model on all reservations. Prosecutors frequently visited their assigned reservations with the purpose of increasing direct communications with tribal law enforcement agencies and courts, opening lines of communication that did not previously exist.⁷⁶ The office also conducted special trainings with tribal police officers to increase effective enforcement, investigation, and prosecution of federal crimes and tribal laws.⁷⁷ It also launched an annual Tribal Listening Conference, which brings together tribal, federal, and state law enforcement officials.⁷⁸ The conference allowed USAOND to gather information on the major violence problems facing the reservations.

The program has already produced a remarkable shift in practices on reservations:

- Communication noticeably improved between USAOND and its tribal partners.⁷⁹
- The Standing Rock Sioux Tribe's Chief Prosecutor was appointed as a Special Assistant U.S. Attorney, allowing the tribal prosecutor to appear in U.S. District Court with Assistant U.S. Attorneys when prosecuting violent crimes on reservations.⁸⁰ This partnership increased the ability to prosecute violent crimes.

- Criminal case filings increased approximately 84 percent between 2009 and 2011.⁸¹ This increase was accompanied by a decreasing number of “declination” or “non-prosecution” decisions by Assistant U.S. Attorneys.⁸² The allocation of additional prosecutorial resources and the closer working relationship between USAOND and the Native American law enforcement agencies helped improve the quality of investigations presented to the U.S. Attorney’s Office, allowing more cases to be more effectively prosecuted.⁸³

How did North Dakota achieve this shift in such a short time?

To incentivize the prosecutors in his office, Purdon selected prosecutors he believed could effectively implement this violence prevention strategy and required them to spend a specific number of hours with the community on the reservations. He specifically noted that forging these relationships was a priority, even if it sometimes meant prosecutors had to set aside other, more traditional work.

Purdon embedded this priority into each attorney’s annual performance evaluations. Referred to as the Performance Work Plan (PWP), these evaluations set goals for the following year. Purdon creatively added a performance element called “Indian Country Outreach and Liaison” into the PWP as part of annual evaluations.⁸⁴ He then explained that prosecutors could achieve an “outstanding” rating if they travelled to reservations at least 10 times a year and helped develop a crime prevention initiative. Purdon also made meeting these benchmarks necessary to receive a salary increase.⁸⁵ Embedding benchmarks in PWPs to incentivize prosecutors to shift practices is a common practice of many U.S. Attorneys.

North Dakota’s experience indicates that clear priorities and incentives can in fact shift outcomes and can do so quickly.

Percent of violent crime cases on docket, compared to previous year.

Measuring the percent of active violent crime cases on a district’s docket allows the district to understand its caseload balance between violent and nonviolent crimes. As noted, the national average for violent crime cases on federal dockets is only 2.4 percent. This measure seeks to explicitly incentivize prosecutors to devote a large share of their time and resources to prosecuting violent crimes. It aims to encourage prosecutors to focus resources on launching investigations, bringing charges, or pursuing trials that address violent crimes. It can also encourage prosecutors to closely evaluate the large volume of federal drug cases and focus resources on those that involve violence, could lead to violence, or have a significant impact on victims. This measure allows districts to approximate whether their resources are more focused, or less focused, on prosecuting violent crimes over time.

Each U.S. Attorney’s Office retains yearly dockets, which contain information on the office’s charges in active cases allowing prosecutors to calculate the number of active violent crimes on their dockets.

Of course, this measure has its challenges. Violent crime cases are more resource intensive, and offices could therefore show fewer violent crime cases on their docket yet those cases may absorb a larger share of office resources. To better refine this measure, offices could collect data on the number of office hours or percent of budget spent on violent crime cases. Such a measure may be slightly more difficult to track, but would more accurately reflect whether resources were focused on violent cases.

Percent of serious crime cases on docket, compared to previous year.

Similarly, offices can measure their active caseload of serious crimes. The Justice Department would need to define “serious crime” for federal districts to ensure uniform data collection. Alternatively, individual offices can define what entails a serious crime in their own districts. Possible serious crimes could include corporate fraud, securities and commodities fraud, or money laundering.

Percent of community reporting feeling safe (optional).

Since federal prosecutors strive to be responsive to community concerns, another helpful measure could include administering a survey to the community in the district inquiring whether they feel safe.

Since the movement toward community policing and problem-solving in the mid- and late 1990s, many police departments now use community surveys to gauge citizen sentiment about safety and performance of local police. Surveys are administered to a subset of the community and can be conducted in person, by telephone, by mail, or online. They are a useful tool to identify the concerns of citizens.⁶⁹ Scottsdale, Arizona and Reno, Nevada, among other cities, have successfully administered such surveys. The Justice Department has noted that, “any complete measure of success would have to include asking the members of the community themselves.”⁷⁰

U.S. Attorneys’ Offices can similarly administer these surveys. They can partner with state and local law enforcement agencies in their district to administer a single survey to the community and share results across agencies. Or, they could partner with local universities or research organizations. Though useful, because these surveys may be costly to create, conduct, and analyze — and many jurisdictions may not have such resources — this report recommends this measure as optional.

Eastern District of Louisiana: Reducing Violence as a Priority

Kenneth Polite, Jr. was sworn in as the U.S. Attorney for the Eastern District of Louisiana on September 20, 2013.⁸⁶ In a speech to the New Orleans Chamber of Commerce, Polite noted, “Louisiana incarcerates a greater percentage of its residents than any place in the entire world, and yet it remains one of the most violent places in the country.”⁸⁷ Instead of simply adding to the state’s reliance on incarceration, he made reducing violence one of his top priorities.

Polite has been instrumental in encouraging the Louisiana business community to participate in a program known as “30-2-2.” Under the program, 30 local businesses commit to hiring two formerly incarcerated individuals for two years. Each employer assists in monitoring the employment experience over those two years. The initiative is intended to create better reentry opportunities, helping both combat recidivism and improve job prospects for former inmates.⁸⁸

Polite has also started to implement another program, called Crescent City Keepers. Assistant U.S. Attorneys are encouraged to work with local police and investigators to identify young people aged 14 to 16 most likely to die as a result of gun violence. Federal prosecutors and police work together to examine witness reports, police reports, and 911 calls to identify these people, all of whom have had no or low-level criminal justice contacts, such as minor criminal infractions or misdemeanor arrests. These young people — predominantly men of color — have a 60 percent greater likelihood of dying by gunshot than the population at large.⁸⁹

The purpose is to intervene before these youth become a target of a crime or commit a crime themselves. Each child is paired with an organization which provides intensive mentoring services to reduce violence and increase their economic prosperity. These support services include assigning the young person three mentors and helping him through high school and into college.⁹⁰

Polite also used creative performance incentives to encourage and reinforce his priorities. Each year, the Justice Department grants U.S. Attorneys a number of paid time-off hours to reward their prosecutors for exceptional performance, to be defined by each U.S. Attorney. Polite offers these hours for participation in community outreach and violence reduction programs.⁹¹ For example, if a prosecutor gives a speech on reducing gun violence at a local school, Polite will offer them a specific number of hours of paid time-off.

Through the use of the bully pulpit, incentivizing Assistant U.S. Attorneys to participate in anti-violence projects, and increasing community and law enforcement outreach, Polite is making reducing violence a priority for his office.

2. Reducing Prison Populations

A Prosecutor's Role in Reducing Imprisonment

Although about 10 percent of the nationwide prison population is housed at the federal level,⁹² the Federal Bureau of Prisons is operating at 38 percent over capacity.⁹³ The Bureau of Prisons now comprises one-third of the Justice Department's budget.⁹⁴ The Bureau has managed crowding, in part, by double and triple bunking inmates.⁹⁵ Today, about 60 percent of federal inmates are sentenced under mandatory sentencing provisions.⁹⁶ Ninety-one percent of felonies charged in U.S. District Courts are disposed of by a guilty plea, and of those defendants convicted, about 80 percent received prison sentences.⁹⁷

States have taken the lead in reducing their correctional populations through many means such as: releasing inmates from prison earlier if they participate in programming; utilizing social science tools called "risk assessments," which assess an offender's probability of future crime or dangerousness, to target programming and treatment for individuals in lieu of prison; and experimenting with a wide range of non-prison sanctions such mandatory programming instead of revocation to prison for violations of parole or parole conditions.⁹⁸

Alternatives to incarceration are rarer at the federal level. This is partly due to sentencing guidelines and mandatory minimums that remove discretion from judges, and partly because there are fewer alternatives used for defendants.

The Department of Justice, however, has recently indicated that reducing prison populations is a priority for federal prosecutors. In August 2013, Attorney General Holder announced, "We must never stop being tough on crime. But we must also be smarter on crime. Although incarceration has a role to play in our justice system, widespread incarceration at the federal, state and local levels is both ineffective and unsustainable."⁹⁹ The Justice Department's Smart on Crime Initiative explicitly encourages prosecutors to consider alternatives to incarceration. It also states, "for many non-violent, low-level offenses, prison may not be the most sensible method of punishment," and incarceration is not the answer in all criminal cases. The Initiative encourages, in appropriate instances involving non-violent offenses, that prosecutors consider alternatives to incarceration. Alternatives to incarceration available at the federal level include probation, home confinement, or treatment programs.¹⁰⁰

There are many individuals in the federal criminal justice system for whom an alternative sanction may be appropriate. In 2011, nearly half of inmates in federal prison were serving time for drug offenses, while more than a third were incarcerated for public-order crimes.¹⁰¹ And in 2012, almost 7,000 people were convicted in federal courts for marijuana offenses, more than for any other type of drug.¹⁰²

Rigorous studies have shown that drug treatment programs and close supervision, such as federal probation, can both reduce recidivism rates and costs. For example, research shows that out-of-prison treatment programs reduce recidivism by 12 percent, increasing to 22 percent if intensive supervision is added.¹⁰³ The American public's attitude toward prosecuting drug offenders has also shifted. According to a recent survey by the Pew Research Center, Americans favor treating those who use drugs instead of prosecuting them by an overwhelming margin: 67 percent to 26 percent.¹⁰⁴

Although prosecutors traditionally have not concerned themselves with reducing incarceration, some are beginning to focus on this goal. Members of the Blue Ribbon Panel overwhelmingly believed prosecutors could play a leading role in rethinking prisons as the central tool for fighting crime, either through the bully pulpit or through other means such as alternatives to incarceration.

Local district attorneys, including San Francisco's George Gascón and Philadelphia's Seth Williams, have made policy choices to increase alternatives to incarceration without compromising public safety.¹⁰⁵

Outside the sentencing judge, no actor in the criminal justice system wields more influence than the prosecutor over whether an individual spends time in prison. Prosecutors are granted unique authority to make charging decisions, enter cooperation agreements, accept pleas, and frequently dictate sentences or sentencing ranges. Today, more than 90 percent of cases are resolved via the plea bargaining process, making the prosecutor that much more influential.¹⁰⁶ Although recent Supreme Court decisions have reshaped federal sentencing law to reduce the effect of the sentencing guidelines, in the vast majority of cases judges continue to sentence according to the guidelines or depart only when a prosecutor brings a motion to do so.¹⁰⁷

Shifting prosecutorial priorities to include focusing on reducing the numbers of people sent to prisons could have a dramatic impact. Not accepting certain types of drug cases, altering charging decisions, or recommending diversion or alternative sentences for drug offenders would reduce the number of drug offenders entering the Federal Bureau of Prisons and are well within a prosecutor's discretion.

Success Measures

Success Measures for Reducing Prison Populations

- Percent of defendants sentenced to incarceration, compared to previous year.
- Percent of sentenced defendants for whom prosecutors recommended downward departures from the federal sentencing guidelines, compared to previous year.
- Number of federal prisoners that originated from district, compared to previous year.
- Percent of national federal prison population originating from district.

While it is understood that the onus on reducing prison populations cannot fall solely to prosecutors, it is clear that they can play a role in ratcheting back today's teeming prison population.

Percent of defendants sentenced to incarceration, compared to previous year.

One success measure that prosecutors could use to track this outcome is the percent of defendants who were convicted and sentenced in the last year who received prison sentences, as opposed to other forms

of punishment and remediation. By measuring this year to year, the district can understand whether it is increasing or decreasing the number of people it sends to prison each year. This success measure encourages prosecutors to opt, whenever appropriate, for lower charges or incarceration alternatives. Given most cases are resolved through plea deals, such a measure can encourage prosecutors to seek terms that would be fair and proportionate to the crimes committed, and also reduce incarceration sentences when appropriate.

U.S. Attorneys' Office dockets contain information on how offenders are sentenced. Data for this measure can be collected from those dockets.

Of course, this statistic only measures whether an offender is sent to prison or not sent to prison; it does not reveal which alternatives were used. Over time offices could refine this question to better measure the various means of punishment allocated to defendants. For example, it could ask the proportion of other non-prison sentences.

Percent of sentenced defendants for whom prosecutors recommended a downward departure from the federal sentencing guidelines, compared to previous year.

Another powerful measure captures the percent of cases in which prosecutors recommended a downward departure from the federal sentencing guidelines during sentencing proceedings. This measure aligns with the emerging consensus and plethora of research indicating that these guidelines often recommend unnecessarily punitive sentences. Data should also be collected on defendants for whom an upward departure or adherence to the guidelines was recommended. Tracking these three statistics would provide data as to what prosecutors are recommending related to the guidelines. These outcomes are also ones over which prosecutors retain a significant amount of control and accountability.

Information on prosecutors' sentencing recommendations in cases is usually contained in U.S. Attorneys' Office dockets. If not, offices can begin collecting this information relatively easily.

To further add depth to this measure, offices could also track for which types of cases these downward departures were recommended or not. This added detail would help offices understand whether there may be a challenge in recommending departures in certain types of cases.

Number of total federal prisoners that originated from district, compared to previous year.

A second success measure would focus on the number of total federal prisoners that originated from the district *overall*, and how that number fluctuates over time. This measure allows the district to determine whether it is increasing or decreasing its prison population over time. It also allows a district to discern how it fares against other districts. Notably, the size of the prison population is affected not only by the number of sentences to prison but also by the *length* of sentences of these prisoners. Therefore, this second measure captures broader information than the first measure.

This second measure can also influence decisions prosecutors make in their cases, encouraging them to reduce charges or recommend whenever appropriate for less (or even no) incarceration time. While plea bargaining, for example, prosecutors would consider how much incarceration is appropriate and increasingly

offer a plea to a lesser charge or recommend a lower guideline range for the defendant's sentence.

The Bureau of Justice Statistics (BJS), an agency within the Justice Department, publishes the Federal Justice Statistics Series annual report, which includes data on outcomes in federal criminal cases collected on September 30th of each year. This report includes the total federal prison population for the year and the percent of that population that were committed originally from each district.¹⁰⁸ U.S. Attorneys can access this data directly from BJS.¹⁰⁹

Percent of national federal prison population originating from district.

A final success measure would capture the percent of the national federal prison population originating from the district, which can also be found in BJS's Federal Justice Statistics Series.¹¹⁰ This proportion allows a district to understand its overall impact on the federal prison population and understand how it fares against other districts. When a U.S. Attorney is able to see that he or she has a greater proportion of federal prisoners than other districts, he or she may determine to alter district policy or practice to reduce incarceration.

3. Reducing Recidivism

A Prosecutor's Role in Reducing Recidivism

More than 95 percent of federal prisoners will be released after serving their sentences.¹¹¹ Altogether, 700,000 federal and state prisoners are released every year, along with millions more who stream through local jails.¹¹² Studies show that approximately two-thirds of prisoners who are released will likely be rearrested within three years of release.¹¹³

It has become clear that the criminal justice system cannot simply incapacitate and then ignore those who are imprisoned. The country's policies should focus on reducing recidivism — which will contribute to both reducing crime and reducing mass incarceration. Lawmakers from both sides of the aisle have also noted the importance of reducing recidivism. Upon announcing new reentry programs in Louisiana, Governor Bobby Jindal noted, "Without education, job skills, and other basic services, offenders are likely to repeat the same steps that brought them to jail in the first place. This not only affects the offender, but families and our communities as well." Providing individuals help to "find housing, jobs, and handle their substance abuse problems" is essential "to keep our communities and our families safe."¹¹⁴

The U.S. Attorney's Manual notes that a key purpose when making sentencing recommendations is to "promote the correction and rehabilitation of the defendant."¹¹⁵ As the Justice Department has noted in its Smart on Crime Initiative Memo, "[a] reduction in the recidivism rate of even one or two percentage points could create long-lasting benefits for formerly incarcerated individuals and their communities."¹¹⁶ One key component of the Initiative calls for U.S. Attorneys to designate a reentry coordinator in each of their offices to focus on prevention and reentry efforts.¹¹⁷ While this position varies from office to office, the coordinator would ideally provide assistance and coordination between the U.S. Attorney's Office and agencies regarding prisoners' reentry to the community from correctional institutions.

Those at the Blue Ribbon Panel championed the need for federal prosecutors to play a role in attempting to lower recidivism rates. Some prosecutors advocated for defendants to be incarcerated closer to home

in order to stay near families, while others spoke about the need to use the bully pulpit to advocate for more reentry programs in their districts. Some prosecutors articulated the need for additional funding so that reentry coordinators can focus solely on developing reentry plans and reducing recidivism among offenders. Currently many offices have re-designated portions of current prosecutors' time to reentry in order to fulfill Attorney General Holder's directive.¹¹⁸ Instead, they need a full-time position to adequately address reentry issues.

Some U.S. Attorneys' Offices have begun to play significant roles in convening groups in their districts to think about reentry. For example, the Northern District of Alabama recently sponsored a reentry summit focusing on ways to reduce prison populations and reduce recidivism.¹¹⁹ State policymakers, academics, local law enforcement officials, and federal prosecutors spoke about the need to coordinate resources to focus on reducing recidivism. The U.S. Attorney's Office for the Northern District of Illinois recently hosted a full day conference for potential employers and prosecutors instructing attendees how to understand a criminal background check.¹²⁰ And, in the Western District of New York, the U.S. Attorney's Office connects reentry court participants with free legal services to help them address their fines and fees.¹²¹

Other offices have also prioritized reducing recidivism. For example, the District of Massachusetts implemented a program called Court Assisted Recovery Effort (CARE), which offers defendants with drug addiction issues up to a one-year reduction in the length of their probation sentences if they successfully complete a drug treatment program. Forty-three percent of individuals who participated in CARE were rearrested compared to 63 percent of the control group.¹²²

New Jersey's U.S. Attorney, Paul Fishman, has similarly urged prosecutors to focus on reentry. "Any smart law enforcement model prevents crime by supporting ex-offenders," he recently wrote. "That is why my U.S. Attorney's Office — along with federal judges, the federal public defender, and the U.S. Probation Office — began the ReNew program, a federal re-entry court in Newark."¹²³ ReNew offers reentry services to individuals exiting federal prison who are at high risk of reoffending. It requires them to attend 52 court sessions to graduate from the program. In court, they are called in front of a judge to provide updates on their personal and professional progress. Participants are also offered assistance finding a job, information about employers willing to hire those who are formerly incarcerated, securing housing and furniture, and even restoring driver's licenses, all with the hope of successfully reintegrating the participants into their communities.¹²⁴

Success Measures

Success Measures for Reducing Recidivism

- Percent of prisoners convicted of a new crime within three years of release, compared to previous year.
- Percent of prisoners convicted and sentenced to incarceration for a new crime within three years of release, compared to previous year.

Clearly, federal prosecutors should not bear the brunt of the responsibility to reduce recidivism. Prisons, probation departments, and treatment programs can more directly affect recidivism rates. Nevertheless, as one former U.S. Attorney on the Blue Ribbon Panel noted: “Reentry starts on day one — when you are arrested. Prosecutors should keep this in mind when they make decisions.”¹²⁵

Recidivism data is often difficult to track as it must be collected from federal and state criminal history documents, which often do not provide a complete record of every instance where a person was arrested or prosecuted. For example, juvenile and petty offense prosecutions are generally not included.¹²⁶ And many jurisdictions do not share this information; if a person is reconvicted in another state, the jurisdiction where the person was previously convicted may not receive that information.¹²⁷ The Justice Department has, however, begun to collect data on a handful of relevant recidivism measures. Given the critical role of recidivism, this report recommends that the justice Department collect these data more regularly and systemically as explained below.

Percent of prisoners convicted of a new crime within three years of release, compared to previous year.

One measure would capture the percent of federal prisoners originally convicted by the district that are later reconvicted by the federal government within three years of release from prison. By measuring this year-to-year, U.S. Attorneys can understand whether the individuals they sent to prison are increasing or decreasing their recidivism.

Since 1984, BJS has sporadically measured state prisoner recidivism in its *Recidivism of Prisoners Released* reports.¹²⁸ BJS tracks a sampling of released state prisoners to see whether they were rearrested, reconvicted, or re-incarcerated for a new crime within three years of release, based on state and federal criminal records. Given the importance of reducing recidivism to the justice system, the Justice Department should ensure that BJS regularly collects this information for all state and federal prisoners every three years. Alternatively, U.S. Attorneys can urge their office reentry coordinators to begin to collect this data for a sampling of defendants convicted in their district and sentenced to incarceration.

Percent of prisoners convicted and sentenced to incarceration for a new crime within three years of release, compared to previous year.

It is also important to capture whether released prisoners are re-incarcerated in federal prisons within three years of release.

This data is also collected by the BJS *Recidivism of Prisoners Released* reports.¹²⁹ BJS should similarly track this data every three years for federal and state prisoners. This data would be useful to state and federal criminal justice agencies as well as to researchers.

Many prosecutorial decisions can affect the likelihood that a federal prisoner will commit a new crime and return to prison. These measures encourage prosecutors to keep recidivism in mind when making decisions at each stage of their work. For example, prosecutors can recommend alternatives to incarceration or advocate that defendants are incarcerated near family, as research indicates these play roles in reducing recidivism. Prosecutors could also explore hiring additional reentry coordinators who could support greater access to reentry programs in the district.

San Francisco and Philadelphia: Reducing Crime, Recidivism, and Imprisonment

Several state district attorneys have also shifted the priorities of their offices.

California State Attorney General Kamala Harris launched many innovative programs to reduce recidivism rates when she was San Francisco's district attorney. Harris targeted her efforts on being "Smart on Crime." She recently wrote: "The most crucial step in the criminal justice process is the most often ignored — what happens after the conviction and prison sentence, when the prisoner comes home."¹³⁰ Harris focused on truancy and dropout rates, holding parents responsible for children's school attendance in order to divert youth away from the criminal justice system.¹³¹ In 2005, she oversaw the creation of the Back on Track program, which aims to significantly reduce recidivism among nonviolent, first-time drug offenders.¹³² In that program, defendants charged with felonies are given the option to either: enter a year-long program requiring them to "get educated, stay employed, be responsible parents, drug test, and transition to a crime-free life;" or, instead, go to prison for a year.¹³³ If a participant meets the program's requirements, his felony charge is erased from his record.

After only four years, the re-offense rate for Back on Track graduates was less than 10 percent, compared with California's typical recidivism of 50 percent or higher.¹³⁴ The program costs \$5,000 per participant, compared to \$50,000 per year for prison.¹³⁵

Similarly, Philadelphia District Attorney Seth Williams has also reformed practices. He launched a suite of innovative efforts such as: community-based prosecution; alternatives for first-time, nonviolent offenders; and increased partnerships between his office, police, courts, and the community.¹³⁶ As one sign of his priorities, in 2012, Williams created The Choice is Yours program. The program aims to give nonviolent offenders a second chance to avoid prison sentences and decrease recidivism.¹³⁷ At sentencing, prosecutors are encouraged to recommend that mostly nonviolent, felony drug offenders are diverted to the program — where they receive education, workforce training, and social services support — in lieu of prison time.¹³⁸

As of 2013, the program has been markedly successful with a high participant completion rate. Additionally, compared with the annual cost of housing a prisoner in Pennsylvania (\$40,000), the cost of a The Choice is Yours participant is a mere \$5,000.¹³⁹

Williams continues to make transformational changes that both improve public safety and save taxpayer dollars while engaging directly with the community, allowing prosecutors to "build bridges with the neighborhoods, so that the assistant district attorneys learn about the needs of the neighborhoods and the characteristics of the community."¹⁴⁰

Optional Priorities

Though critical, the priorities and measures set forth above are not exhaustive. There are other considerations for prosecutors as they continue efforts to improve the lives of the communities they serve. U.S. Attorneys may choose to pursue additional priorities that hinge on the unique challenges of each district. To that end, this report puts forth several optional priorities for consideration below.

The first optional priority is strongly recommended by this report but was not discussed by the Blue Ribbon Panel due to time constraints. The second and third areas were discussed by the Blue Ribbon Panel as challenges faced by many districts.

4. Reducing Pretrial Detention

A Prosecutor's Role in Reducing Pretrial Detention

In 2010, 99.6 percent of federal defendants awaiting trial were charged with nonviolent crimes.¹⁴¹ Further, 58 percent of federal defendants detained pretrial had nonviolent charges.¹⁴² Studies show that 66 percent of federal defendants are incarcerated pretrial, regardless of their likelihood to reoffend.¹⁴³ The Federal Bureau of Prisons houses both sentenced defendants and pretrial detainees.

While experts at the Blue Ribbon Panel did not have the opportunity to discuss how federal prosecutors can reduce pretrial populations, in follow-up conversations many favored a prosecutorial priority to lower pretrial populations. Many noted that low-risk, non-violent defendants are frequently detained pretrial while higher risk individuals are often released because they can meet bail requirements.¹⁴⁴

Most important, there is a strong correlation between pretrial detention and *increased* prison time and recidivism.¹⁴⁵ A recent study drawing on 1,798 cases from two federal districts found that pretrial release reduced sentence length for defendants, even if release was ultimately revoked due to a defendant's failure to adhere to conditions of release. The study also found that defendants detained pretrial faced prison sentences almost twice as long as those released pretrial — even after controlling for type of crime, criminal history, risk level, and other factors.¹⁴⁶ Researchers have found that those held pretrial are more likely to plead to higher charges and longer sentences than those who are released before trial. They are also less able to contribute to their own defense at trial or hearings.¹⁴⁷ These dynamics contribute to this correlation between pretrial detention and increased prison time.

This unnecessary incarceration also comes with large costs. Pretrial detention costs approximately \$26,000 per prisoner per year, while pretrial supervision costs only \$2,600 per year.¹⁴⁸ The total cost to incarcerate state and federal defendants pretrial has been estimated at more than \$9 billion per year.¹⁴⁹ With more than 110,000 defendants cycling through the federal court system per year, 86 percent of whom are sentenced to federal prison for an average sentence of almost 5½ years, reducing pretrial detention can make a significant impact on reducing the federal prison population.¹⁵⁰

In determining whether to release or detain a defendant before trial, the court must weigh risk of flight, threat of crime commission, and weight of evidence.¹⁵¹ The American Bar Association advocates

expanded use of pretrial release and specifically recommends that detention be “an exception to policy favoring release.”¹⁵² The presumption of innocence is one of the most familiar maxims in criminal law.

Given the recent attention to reducing incarceration and associated costs, there is an increased emphasis on alternatives to pretrial detention that also mitigate the risk of flight and danger. One example is the increasing use of pretrial risk assessments to predict the likelihood of a defendant returning to court or posing a risk to community safety while awaiting trial. The first pretrial risk assessment was used in 1961, when the Vera Institute of Justice successfully tested a hypothesis in New York City that defendants could be categorized by the degree of risk they posed to fail to appear in court, and that such categorizations could inform pretrial detention decisions.¹⁵³ If individuals are low or medium risk, prosecutors are often encouraged to recommend release on recognizance. If they are high risk, they can recommend pretrial detention.

Pretrial risk assessments are increasingly relied upon by judges, prosecutors, and pretrial services in jurisdictions across the country. Some pretrial risk assessments were created and tested on populations in counties or cities, whereas other states, including Virginia, Ohio and Kentucky, created and tested risk assessments for use statewide.¹⁵⁴

Federal courts are following suit. As of 2011, all federal districts had adopted a standard pretrial risk assessment tool to assist in determining a defendant’s risk of flight and danger to the community upon release.¹⁵⁵

Additionally, some U.S. Attorneys’ Offices have begun to work on initiatives to reduce their pretrial detention populations. For example, the U.S. Attorney’s Office for the Central District of California, along with the District Court, Federal Public Defender, and Pretrial Services Agency created a post-plea diversion program. Known as the Conviction and Sentence Alternatives (CASA) program, participants selected by cross-agency teams plead guilty to low-level offenses in exchange for admission into an intensive pretrial supervision program. Successful completion of the program results in varying benefits specified in the plea agreement, such as dismissal of a charge, a reduced sentence, or a non-incarceration sentence.¹⁵⁶ The supervision program provides a variety of services for defendants. Those with minimal criminal histories receive supervision, restitution, and community service. Defendants with more serious criminal histories whose criminal conduct appears motivated by substance abuse issues receive intensive drug treatment. Those who successfully complete the program receive the benefit promised in the plea agreement. Defendants who do not successfully complete the program face being sentenced to the original charges for which they entered guilty pleas.¹⁵⁷

Prosecutors play a critical role in pretrial release and bail recommendations. By prioritizing reducing pretrial detention, U.S. Attorneys can encourage their offices to recommend release on recognizance when appropriate. Further, given the correlation between pretrial detention and longer prison sentences, such a shift can also reduce the number of people held in federal prisons post-conviction.

Success Measures

Success Measures for Reducing Pretrial Detention

- Percent of defendants held in pretrial detention, compared to previous year.

Percent of defendants held in pretrial detention, compared to previous year.

The percent of defendants held in pretrial detention, compared to the previous year, provides a clear measure of pretrial detention practices. It can incentivize prosecutors to reserve pretrial detention for defendants who pose a high public safety risk.

BJS's Federal Justice Statistics Series report includes data on the federal pretrial detention population collected for each year, according to the districts prosecuting them.¹⁵⁸ U.S. Attorneys can access data on these success measures directly from BJS.¹⁵⁹ U.S. Attorneys can also likely access this information from their own dockets.

To further enhance this measure, U.S. Attorneys can also report on the percent of defendants released pretrial who do not violate terms of release. This information will likely also be contained in dockets tracking pretrial defendants.

5. Reducing Public Corruption

A Prosecutor's Role in Reducing Public Corruption

Public corruption is a breach of the public's trust by government officials who use their offices for illegal gain. The FBI estimates that public corruption cases cost taxpayers billions of dollars annually.¹⁶⁰ These cases involve a number of different offenses, including: fraud, bribery, stealing public funds, theft of government property, and tax violations. Public corruption cases often involve complex investigations that can last months or years. In 2012, 98 percent of the 1,078 federal defendants charged with public corruption were convicted.¹⁶¹

Experts at the Blue Ribbon Panel spoke about the need for U.S. Attorneys to work to enhance the public's trust in government, and how trust can be improved by a commitment to prioritizing public corruption cases. Because public corruption cases tend to involve substantial financial harm to taxpayers and can undermine the public's trust in the government, many federal prosecutors are prioritizing resources to prosecute serious public corruption cases in lieu of devoting resources to lower level prosecutions.

The U.S. Attorney's Office for the Eastern District of Louisiana has prioritized public corruption cases. The office prosecuted former New Orleans Mayor C. Ray Nagin for taking bribes of cash, expensive cross-country trips, and assistance for his family-run company from city businessmen seeking preferential

treatment in city contracts, for everything from software supplies to sidewalk repair.¹⁶² Most of the bribes occurred when New Orleans was most vulnerable — when it was trying to rebuild itself after Hurricane Katrina. In June 2014, Nagin was sentenced to 10 years in prison,¹⁶³ which many in the community viewed as a sentence disproportionately low compared to the harm he caused to the city. Federal prosecutors on the Blue Ribbon Panel stressed the importance of prosecuting the corruption cases while also communicating to the public that a lengthy sentence is not the definition of a successful public corruption prosecution.

The U.S. Attorney for the Southern District of New York has also made fighting public corruption a priority for his office. U.S. Attorney Preet Bharara recently announced strict policies regarding how his office will meet this priority. They include: seeking appropriate fines that take into account the money a corrupt official might derive from a publicly-funded pension and bringing forfeiture actions against the pensions of defendants who have failed to satisfy the financial obligations of their sentences.¹⁶⁴ The U.S. Attorney's Office for the Southern District of New York office is targeting defendants' pocketbooks for punishment when crimes have financial or ethical impacts on citizens.

While many U.S. Attorneys' Offices have already prioritized combatting public corruption, it can be useful in other districts where corruption issues are widespread or have attained public visibility.

Success Measures

Success Measures for Reducing Public Corruption

- Percent of public corruption cases on docket, compared to previous year.
- Increase in community trust in government (optional).

Percent of public corruption cases on docket, compared to previous year.

Similar to the success measure for violent crimes, federal prosecutors could measure the percent of active public corruption cases on their office dockets. This measure would allow the district to ascertain whether prosecutions of these cases are increasing, especially if there are widespread complaints from the community that public corruption is rampant.

U.S. Attorneys could define what constitutes a public corruption case for their own offices given the unique challenges in their districts, or look to the Justice Department for a uniform definition. Any definition should focus on the most serious public corruption crimes, such as those that violate core government functions such as policing, tax collection, education, health care or safety.

Once defined, this data can be collected from U.S. Attorneys' Offices' dockets.

Increase in community trust in government (optional).

Districts could also implement community surveys to discern whether the community trusts that the federal, state, and local government serving their community is legitimate, transparent, trustworthy, and competent. As explained above, administering and analyzing these surveys can be resource intensive. This measure is therefore recommended as optional.

6. Increasing Coordination

Violence and serious crimes are affected by a complex set of factors, which may in turn be addressed by a network of federal, state and local resources. Some of these resources are found within classically defined law enforcement organizations — prosecuting offices, law enforcement agencies, and regulatory agencies. Others may be found in federal and state agencies that have primary missions in education, physical and mental health or social welfare. One important resource that could benefit from further coordination is federal grant dollars. There is little infrastructure ensuring that these expenditures are coordinated, not duplicative, and not in conflict.

Prosecutors can assist with such coordination, both with other agencies and with the community. Increased coordination of law enforcement can have a dramatic impact on achieving substantive outcomes, such as reducing violence, incarceration, and recidivism.

A Prosecutor's Role in Helping Coordinate Law Enforcement

Another aspect of coordination entails synchronization between U.S. Attorneys' Offices and other law enforcement agencies — federal, state, and local. Traditionally, law enforcement agencies have operated in silos, but there is now widespread agreement that agencies should, and can, be more coordinated.

One specific challenge many U.S. Attorneys at the Blue Ribbon Panel discussed: federal resources flowing from Washington to different federal and state agencies are not coordinated. Increased coordination of grants can ensure that federal dollars sent to districts for the same purpose are synchronized, or that dollars sent for disparate purposes are better aligned.

There was consensus among Blue Ribbon panelists that law enforcement coordination should be a priority, but oftentimes the offices lack the resources to ensure close collaboration. Increased coordination between agencies can dramatically improve the ability of U.S. Attorneys' Offices and other agencies to achieve their priorities. For example, sharing information can increase the success of criminal investigations by disseminating pertinent data more widely. It can also increase efficiency by reducing duplication. Information sharing and collaboration can ensure that law enforcement agencies working in the same jurisdiction are not working at cross purposes. This coordination can also extend to other agencies that play a role in the criminal justice system — such as departments of education, physical and mental health or social welfare. This coordination can be cross-jurisdictional — involving federal, state, and local agencies and leadership.

More than a decade ago, former Chief of Crime Control Strategies in the U.S. Attorney's Office for the Southern District of New York, Elizabeth Glazer, wrote that federal prosecutors "sit at the center" with "a panoramic view of the agencies' often overlapping investigative efforts," and moreover, "prosecutors are familiar with the array of laws . . . that could be used in a strategic attempt to reduce crime."¹⁶⁵

There have been significant attempts to increase U.S. Attorneys' Offices collaboration with other law enforcement agencies. In 1981, Congress created the Law Enforcement Coordinator (LEC) within U.S. Attorneys' Offices to facilitate greater multijurisdictional coordination.¹⁶⁶ The LEC is charged with "develop[ing] training and informational programs for law enforcement officers and prosecutors; act[ing] as an information resource on federal laws and programs; and function[ing] as a liaison between components of the Justice Department . . . other federal agencies. . . and local law enforcement agencies."¹⁶⁷ Each U.S. Attorney's Office has one LEC, and the specifics of their focus can vary by district. For example, the U.S. Attorney's Office in the Western District of North Carolina has directed its LEC to play "an important role in helping state and local law enforcement agencies gain access to federal resources," including federal grants.¹⁶⁸

Another successful initiative is SACSI. As discussed above, SACSI provided U.S. Attorneys a powerful role in coordinating federal, state, and local law enforcement efforts and achieved measurable results in reducing violence. SACSI is also the precursor to Project Safe Neighborhoods (PSN).¹⁶⁹ In 2001, the Justice Department developed PSN and implemented it in all U.S. Attorneys' Offices as a national response to gun violence.¹⁷⁰ PSN reflects a nationwide commitment to reduce gun and gang crime in the U.S. by coordinating existing local programs that target gun crime. The Justice Department allocated approximately \$3 billion through 2008 to fund local and federal prosecutors, local law enforcement, support research and community outreach, and fund a national media campaign.¹⁷¹ Results have varied depending on how each district implemented the program. In areas in Chicago where PSN was implemented, there was an approximate 37 percent decrease in monthly homicides compared to the preceding three years before PSN.¹⁷² Notably, the core SACSI components of U.S. Attorney leadership, cross-agency partnerships, data-driven strategies, and local research partners remain central to today's 10 PSN sites.¹⁷³

The "High Point" strategy has also gained national attention.¹⁷⁴ In 2003, researcher David Kennedy convinced the police chief and an Assistant U.S. Attorney in High Point, North Carolina to implement an anti-violence strategy.¹⁷⁵ Kennedy believed that the "most severe problems with violence and disorder" were "a function of drug *markets*, and particular *forms* of drug markets, rather than with drugs as such."¹⁷⁶ He saw one of the fundamental problems of conventional enforcement and prevention efforts as the lack of trust between the police and the community.¹⁷⁷ He therefore pushed for a different strategy. Rather than "arrest-everyone" policing, he advocated for "certain and swift sanctions" for gang members in the program. Any indication that gang members were dealing drugs would lead to their immediate arrest. In cases where there was already enough evidence for an arrest, a warrant was prepared but not signed and held as an immediate possible sanction for further crimes.¹⁷⁸ After only three years, "overt drug activity in High Point was almost entirely eliminated . . . Citywide, as the four markets closed, overall violent crime fell 20 percent, driven by the reductions in drug market areas."¹⁷⁹

A Prosecutor's Role in Community Partnerships

Some of the members of the Blue Ribbon Panel have instituted requirements that the attorneys who serve in their office work to improve the community. For example, some U.S. Attorneys require prosecutors to participate in community outreach outside of work, such as coaching Little League teams, mentoring at-risk youths, or speaking at local elementary schools about preventing violence. To quote one former U.S. Attorney at the Blue Ribbon Panel, “I pulled people out and told them that we needed to be involved in our communities and that interacting with the community wasn’t just for social workers.”¹⁸⁰

Outreach activities can include: participating in town hall meetings, partnering with schools, developing relationships with churches and faith-based organizations, and engaging with underrepresented populations, such as Native Americans and many urban neighborhoods. As explained earlier, the U.S. Attorney’s Office in North Dakota implemented such a strategy. North Dakota is not an outlier. Many U.S. Attorneys’ Offices have increased community outreach.

Additionally, citizens who feel they have access to law enforcement officials are more likely to report crimes and cooperate with investigations. Many violent crime efforts have been strengthened by involving family members, clergy, and others who can be positive influences on youth and the formerly incarcerated. Recent studies show that half of all young men of color have at least one arrest by age 23,¹⁸¹ and African Americans are substantially more likely to be the victims of violent crimes than whites, Asians, or Latinos.¹⁸² Each contact is a potential opportunity for prosecutors to build personal and public confidence in the justice system.¹⁸³

An increased prioritization of coordination and outreach, to other government agencies and to the community, can help ensure that core priorities to reduce crime, imprisonment, and recidivism are achieved.

Success Measures

Success Measures for Increasing Coordination

- Cross-agency coordination strategy in place and previous year’s goals achieved.
- Office leadership participated in quarterly meetings with federal, state, or local criminal justice agency leadership.
- Community coordination strategy in place and previous year’s goals achieved.
- Office leadership participated in quarterly meetings with community leadership.

Although it is difficult to measure coordination, there are ways to incentivize outreach and coordination efforts.

Cross-agency coordination strategy in place and previous year's goals achieved.

One starting point to measure whether coordination is occurring in a U.S. Attorney's Office is the presence of a coordination strategy. Such a strategy would focus on the office's priority goals and how it plans to engage federal, state, and local law enforcement, criminal justice, and other agencies or actors to help achieve its goals. Such a strategy could also focus on other agencies and how the U.S. Attorney's Office plans to assist these agencies.

Successful execution of a well-developed plan is key to achieving results. Offices could also measure whether the goals in their cross-agency coordination strategies from the previous year were achieved.

Office leadership participated in quarterly meetings with federal, state, or local criminal justice agency leadership.

Some U.S. Attorneys have changed their attorney Performance Work Plans (which evaluate and set goals for prosecutors) to ask how many community meetings prosecutors have attended to speak about anti-violence initiatives or how many trips they have made to speak to underserved communities.

Many have used a benchmark of engaging in a specific number of meetings a year, in an attempt to encourage specific behavior. Of course, offices can change the number of meetings recommended.

Though counting the number of meetings cannot ensure coordination, it is a good starting point to ensure that prosecutors are encouraged to engage with other agencies. One primary focus should be to coordinate with federal, state, and local law enforcement agencies. These can include: Drug Enforcement Agency personnel, FBI personnel, Homeland Security personnel, U.S. Attorneys from other districts, local district attorneys, representatives from the state Attorney General's Office, or local police, among others. These meetings may eventually expand to include other agencies that affect law enforcement needs, such as prison officials, parole agencies, health and human services agencies, or schools.

Community coordination strategy in place and previous year's goals achieved.

Similarly, offices could track whether they have a strategy in place to engage the community. They could also track whether they achieved the goals laid out in that strategy.

Office leadership participated in quarterly meetings with community leadership.

The same measure of quarterly meetings with community leadership could also be used to measure community engagement. Such meetings could include interactions with: schools, faith-based groups, victim advocates groups, health and human service agencies, or other neighborhood organizations.

Newark, New Jersey: The Value of Coordinating Federal Funding

The federal government assists states and localities in subsidizing their criminal justice costs through grant funding. In 2013, the federal government sent \$3.8 billion across the country in criminal justice grants. These dollars flow to agencies for a variety of purposes, including law enforcement, prosecution, and reentry.¹⁸⁵

Federal grants are critical resources for states and cities, often supplementing dwindling resources within agency budgets. The federal grant dollars' influence is far greater than may be expected. Grants can shape policy across the country because any available funds help states struggling to fiscally support their own systems, and test new policies for crime control and prevention. Recipients often shape their practices to meet federal grant criteria. In this way, federal grants have an outsize impact on state and local criminal justice practices.¹⁸⁶ Even beyond grants, federal dollars travel in the form of budgets to federal agencies within districts, including U.S. Attorney, FBI, and Drug Enforcement Agency offices.

Federal grant dollars however are not fully coordinated when they flow into states and counties. For example, in 2013, federal agencies sent almost \$9.5 million in criminal justice grants to Newark police, courts, firefighters, reentry programs, and other services.¹⁸⁷ Further, agencies within Newark have prioritized different goals. The police and mayor are working to implement community policing.¹⁸⁸ Local prosecutors have focused on reducing gun violence, specifically asking state troopers to target defendants who use firearms when committing crimes.¹⁸⁹ Simultaneously, the U.S. Attorney has prioritized reentry, prevention, disrupting the most violent drug trafficking organizations, and providing victim and witness services.¹⁹⁰

These dollars serve critical public safety purposes. However, there is a risk that a large number of priorities could strain limited resources, making it more difficult to achieve desired results. A coordinated strategy, with federal grants and budget dollars flowing toward the same agreed upon priorities, could be more effective at addressing specific challenges in districts. The National Criminal Justice Association, an organization that works with states on criminal justice funding, advocates that federal grant recipients increase coordination and encourages coordinated statewide strategic planning.¹⁹¹

U.S. Attorneys' Offices can play a more substantial role in increasing coordination for federal dollars in their districts by helping ensure that recipients stay in touch and coordinate their priorities.

III. IMPLEMENTING NEW PRIORITIES AND INCENTIVES

The priorities and success measures created are only as good as their implementation. There are several ways to implement priorities and success measures.

This Part details a concrete, practical, and effective way that the federal government can implement these priorities. It does not require congressional action, and the Justice Department and U.S. Attorneys can spearhead this wholly within their authority.

They can take action by implementing Success-Oriented Funding for federal prosecutors. Notably, priorities and success measures should align so that they are consistent across the different modes of implementation. Alignment ensures that U.S. Attorneys' Offices and individual prosecutors are receiving similar signals. Notably, U.S. Attorneys have the power to shift priorities even without a mandate from the Justice Department. They can tailor these recommendations to their own unique challenges. The Justice Department can also supplement these efforts by implementing Success-Oriented Funding, ensuring consistency of priorities across U.S. Attorneys' Offices while also giving individual offices autonomy to decide how to best achieve these outcomes or modify them as appropriate for their offices.

Recommendations to implement Success-Oriented Funding include:

- U.S. Attorneys implement, as a best practice, self-evaluations of their offices based on success measures for priorities;
- U.S. Attorneys change individual prosecutor evaluations in their offices to include success measures for priorities;
- The Justice Department adds success measures for core priorities to its evaluations of U.S. Attorneys' Offices;
- The Justice Department changes the model individual prosecutor evaluation form to include measures for core priorities; and
- The Justice Department provides additional funding for U.S. Attorneys' Offices that meet certain targets on success measures.

Additional recommendations include:

- U.S. Attorneys use the bully pulpit to publicly advocate for statewide and national changes to prosecution practices and the value of a such a shift;
- U.S. Attorneys improve training and interview practices;
- The Justice Department provides U.S. Attorneys' Offices with more data; and
- U.S. Attorneys help coordinate federal grant streams within districts.

A. Success-Oriented Funding for Federal Prosecutors

The Brennan Center put forth a policy model called Success-Oriented Funding in a 2013 report, *Reforming Funding to Reduce Mass Incarceration*.¹⁹² Success-Oriented Funding ties government dollars as tightly as possible to clear priorities that drive toward the twin goals of reducing crime and reducing mass incarceration. It provides a way to establish powerful incentives for the criminal justice system to move toward these priorities. Building on principles of economics, social science, and management, Success-Oriented Funding can be applied to *all* government dollars used for criminal justice: whether federal, state, or local; through grants, budgets, or salaries; or distributed to public agencies or private companies. A report released last month, *Success-Oriented Funding: Reforming Federal Criminal Justice Grants*, further explains how Success-Oriented Funding can be applied to these funding streams.¹⁹³

Success-Oriented Funding first requires priorities that underscore the goals of reducing crime and reducing mass incarceration. Given the overarching principles of the justice system, core priorities usually include reducing violence and serious crime, reducing unnecessary incarceration, and reducing recidivism. In order to ensure that resources are focused so that outcomes can be best achieved, each recipient should only receive one to three priorities. Too many priorities will decrease the likelihood of successfully achieving outcomes.

Second, the model requires clear, concrete success measures that provide specific data allowing the government — and recipients — to determine whether recipients are meeting these priorities. Success measures may vary depending on the agency or program funded. For example, funds for police could be tied to reducing violent crime, whereas funds for reentry programs could be tied to reducing recidivism. Success measures transparently show progress or lack of progress toward priorities.

There are three ways the government can implement Success-Oriented Funding. Legal and practical considerations will drive which form may be most appropriate for specific funding streams.

- **Conditioned Success-Oriented Funding.** Government dollars would only be available for agencies that have achieved specific priorities in past performance, such as reducing violent crime. This reserves scarce dollars for agencies that make progress toward priorities.
- **Bonus Success-Oriented Funding.** The government would provide additional dollars to agencies or individuals if they achieve specific progress targets on meeting priorities.
- **Indirect Success-Oriented Funding.** Often, instead of mandating priorities, the government can “nudge” actors toward goals in a more subtle manner in a way that is more indirectly tied to funding. This form can often be implemented through reporting requirements or evaluations for offices, or through employee management techniques, including performance evaluations. A plethora of research shows that the mere act of measuring can instigate change: what gets measured gets done.¹⁹⁴

By changing incentives, Success-Oriented Funding can change outcomes. With clear priorities and success measures acting as sign-posts toward progress, actors receiving funding — be they agencies or employees — can more effectively focus on specific outcomes. This encourages actors to change decision making to better drive toward priorities, thereby changing outcomes.

This model can also apply to federal prosecutors by embedding 21st century priorities and success measures in budgets, salaries, financial rewards, and office and individual evaluations. Bonus and Indirect Success-Oriented Funding are optimal funding models for federal prosecutors: neither creates direct consequences for failing to meet priorities, but both provide powerful incentives to achieve the stated outcomes. Indirect Success-Oriented Funding, in particular, can affect behavior by clarifying expected outcomes in performance evaluations for offices and individuals, yet there are no direct positive or negative consequences for failing to meet these. There is, however, a strong implication that a supervisor may take further action based on a positive or negative evaluation that would result in direct consequences, such as promotion or discharge or a budget cut. Offices and the Justice Department could take these evaluations a step further and provide additional dollars when attorneys or offices meet certain targets, a form of Bonus Success-Oriented Funding.

Implementing Success-Oriented Funding for federal prosecutors that span across the country can help create a nationwide shift, including in state and local practices.

B. Recommendations for U.S. Attorneys' Offices

U.S. Attorneys can play a large and immediate part in reshaping the role of the federal prosecutor in the 21st century. As noted by the Blue Ribbon Panel, U.S. Attorneys can help move the country away from overreliance on punishment and incarceration. They should begin with implementing Success-Oriented Funding in their own offices, turning inward to evaluate their own policies and their staff's performance.

1. Measure Success Through Office Self-Evaluations

In order to implement and shift priorities, each U.S. Attorney can establish annual self-evaluations on his or her office's performance as a best practice. Because self-evaluations provide incentives to advance toward priorities, but there are no consequences (such as losing funding) for poor outcomes, office self-evaluations are a form of Indirect Success-Oriented Funding.

In these self-evaluations, each office should include the success measures for core priorities listed in Figure 2 for U.S. Attorneys' Offices. They can also adopt success measures for optional priorities depending on the individual needs of their jurisdiction. As explained in Part II, data to respond to these success measures is largely available through U.S. Attorneys' Offices themselves or through different parts of the Justice Department. By collecting this information, U.S. Attorneys' Offices can measure how they are progressing toward their own priorities, and refine measures and priorities as needs change.

2. Measure Success in Individual Prosecutor Performance Evaluations

U.S. Attorneys can also reform their performance evaluations for individual prosecutors in their offices.

Under Justice Department policy, U.S. Attorneys must create a Performance Work Plan (PWP) for each attorney in the office.¹⁹⁵ PWPs can vary widely from district to district and even within a district's office.¹⁹⁶ These plans set performance expectations for prosecutors. Supervising attorneys rate individuals on various performance elements, and provide annual "outstanding," "successful," or "unacceptable" ratings for each element and for their overall performance.¹⁹⁷

These ratings play an important role in federal prosecutor reward and incentive systems. U.S. Attorneys may award any Assistant U.S. Attorney who receives an overall "outstanding" rating by increasing them by a step on the pay scale or with a cash performance bonus.¹⁹⁸ On average, federal employee cash bonuses range from \$700 to \$1000, and pay scale bumps can be significant.¹⁹⁹ For a new attorney, a step increase can bring a 3 percent increase in his salary, from approximately \$50,800 to \$52,500.²⁰⁰ For attorneys with more experience, the step increase can range from \$2,000 to \$3,354.²⁰¹

U.S. Attorneys should add success measures for priorities into PWPs and reward attorneys based on their progress toward priorities as a best practice in their offices. Offices should strongly consider implementing success measures for individual attorneys listed for core priorities in Figure 2, and include measures for optional priorities as needed. Success measures for individual attorneys largely track success measures for U.S. Attorneys' Offices. When individuals cannot be held accountable at the same level as the office, measures differ slightly or have been eliminated. For example, the violent crime success measures ask an office to report on the crime rate but would not ask that of an individual prosecutor.

By changing PWPs to include these new elements, U.S. Attorneys would clearly communicate the goals they expect all their prosecutors to achieve. By merely doing this and no more, U.S. Attorneys would incentivize prosecutors to meet these goals — a form of Indirect Success-Oriented Funding. U.S. Attorneys can go a step further and provide financial bonuses and salary step increases based on success measures — a form of Bonus Success-Oriented Funding. This report recommends that offices institute both these practices.

Figure 2: Success Measures for Federal Prosecutors

	U.S. Attorneys' Offices	Individual Attorneys
Core Priorities		
Reducing Violence and Serious Crime	<ul style="list-style-type: none"> Change in violent crime rate Percent of violent (and serious) crime cases on docket, compared to last year Percent of community reporting feeling safe (optional) 	<ul style="list-style-type: none"> Percent of violent (and serious) crime cases on docket Conviction rate for violent crime cases
Reducing Prison Populations	<ul style="list-style-type: none"> Percent of defendants sentenced to incarceration, compared to last year Percent of sentenced defendants for whom downward guidelines departures were recommended, compared to last year Number of federal prisoners that originated from district, compared to last year Percent of national federal prison population originating from district 	<ul style="list-style-type: none"> Percent of defendants sentenced to incarceration Percent of sentenced defendants for whom downward guideline departures were recommended
Reducing Recidivism	<ul style="list-style-type: none"> Percent of prisoners convicted of a new crime within three years of release, compared to last year Percent of prisoners convicted and sentenced to incarceration for a new crime within three years of release, compared to last year 	<ul style="list-style-type: none"> Percent of prisoners convicted of a new crime within three years of release Percent of prisoners sentenced to incarceration for new crime within three years of release
Optional Priorities		
Reducing Pretrial Detention	<ul style="list-style-type: none"> Percent of defendants held in pretrial detention, compared to last year 	<ul style="list-style-type: none"> Percent of defendants on docket held in pretrial detention
Reducing Public Corruption	<ul style="list-style-type: none"> Percent of public corruption cases on docket, compared to last year Increase in community trust in government (optional) 	<ul style="list-style-type: none"> Percent of public corruption cases on docket
Increasing Coordination	<ul style="list-style-type: none"> Cross-agency coordination strategy in place and last year's goals met Quarterly meetings with federal, state, or local criminal justice agency leadership Community coordination strategy in place and last year's goals met Quarterly meetings with community leadership 	<ul style="list-style-type: none"> Quarterly meetings with federal, state, or local criminal justice agency leadership Quarterly meetings with community leadership

C. Recommendations for the Justice Department

The Justice Department can also play a significant role in supporting U.S. Attorneys as they shift their practices.

1. Add Success Measures to Evaluations of U.S. Attorneys' Offices

One tool at the Justice Department's disposal is to include success measures in its performance evaluation processes for U.S. Attorneys' Offices.

As noted, research has shown that the mere act of measuring can affect the practices of actors.²⁰² This recommendation is an example of Indirect Success-Oriented Funding as there would be no financial penalty or benefit for failing to achieve goals, yet offices implicitly understand that their budgets could be affected by repeated excellent or poor evaluations by the Justice Department.

Under federal regulation, the Justice Department is required to evaluate the performance of each U.S. Attorney's Office and take corrective actions if necessary.²⁰³ This is conducted through the Department's Evaluation and Review Staff (EARS) program. Every three to four years, the Executive Office of the U.S. Attorneys (an office in the Justice Department that supports U.S. Attorneys' Offices), dispatches a team of EARS evaluators to each office. The EARS Guideline determines what information to collect and evaluate. Currently, the guideline focuses on evaluation of strategic planning, district priorities, and office caseload.²⁰⁴ The EARS team submits a final report to the Justice Department evaluating how each office fared and noting any findings that require corrective action.²⁰⁵

The Justice Department should include success measures for U.S. Attorneys' Offices for core priorities in the EARS Guideline. These measures could fit under a new "Smart on Crime" section of the guideline. The results should be reported to the Justice Department and to U.S. Attorneys' Offices themselves. The Department can also ensure EARS evaluations are conducted consistently every three years so that offices know when and how they will be evaluated and can obtain regular information on their performance. An office could see if, for example, it decreased its prison population by 5 percent over the three-year period or whether recidivism among its former prisoners increased by 5 percent. This allows the U.S. Attorney's Office to take action as it sees fit, or for the Justice Department to do so for any severe problems.

By adding success measures to the EARS evaluation, the Justice Department would nudge all U.S. Attorneys' Offices across the country toward 21st century, data-driven priorities that effectively control crime while helping shrink the overgrown corrections system.

2. Add Success Measures to the Model Individual Prosecutor Evaluation Form

While U.S. Attorneys hold great discretion to determine which elements to include for each employee's review and how to rate these elements, the Justice Department may also issue elements to include in employee performance plans.²⁰⁶

The Justice Department provides U.S. Attorneys with a model PWP to adapt for each U.S. Attorney's Office's annual review of its attorneys.²⁰⁷ The model PWP includes "critical elements," which the Justice

Department defines as: case handling; advocacy; ethics and professionalism; productivity; writing; and any other performance elements where deemed appropriate.²⁰⁸ U.S. Attorneys use this model form as a starting point when drafting each employee's individualized PWP.

The Justice Department should add success measures for core priorities into the model PWP for Assistant U.S. Attorneys. This could be called a "Smart on Crime" or "outcome" element. The Justice Department can include the success measures for core priorities listed for individual attorneys in Figure 2. This would set new, consistent internal benchmarks for all Assistant U.S. Attorneys across the country and serve as a powerful step toward implementing new priorities for federal prosecution.

Because there is no direct consequence for progress or lack of progress toward measures in the PWP, this is a form of Indirect Success-Oriented Funding. Again, individual offices could go a step further and provide financial bonuses or step increases for meeting these measures. Both of these practices are recommended by this report.

3. Provide Additional Funding for U.S. Attorneys' Offices Meeting Targets

Each year, the Justice Department puts forth a budget for U.S. Attorneys' Offices that Congress approves. In 2014, Congress appropriated \$27.3 billion to the Justice Department.²⁰⁹ The Department retains discretion over how to allocate most of these funds.²¹⁰

In 2014, the Department proposed reserving about \$2 billion of its budget for U.S. Attorneys' Offices, and Congress approved nearly that amount.²¹¹ This amount supports criminal investigations and prosecutions, as well as salaries and benefits for the nearly 11,000 employees of U.S. Attorneys' Offices.²¹² Congress specifically approved \$7,200 for programs to promote goodwill toward the Department and its missions.²¹³ And \$25 million of the budget was reserved to remain available until used (instead of expiring at the end of the fiscal year).²¹⁴ Because these budgetary funds largely support office salaries and expenditures, DOJ likely has authority to carve out a pool of office bonus funding from this budget. For added flexibility, the Department can request an amount for this bonus funding from Congress.

The Justice Department should reserve a portion of the U.S. Attorney budget — perhaps 5 percent (this would amount to, for example, \$97.2 million in 2014) — for these "bonus" funds. The Justice Department can determine which offices should receive bonus funding by requiring each U.S. Attorney's Office to report back to the Justice Department on success measures annually or by basing awards on the periodic EARS evaluations (after including success measures in them).

Building from the success measures in Figure 2, the Justice Department can provide specific target goals for U.S. Attorneys' Offices to meet to secure the additional funding. For example, the Justice Department could set a target of reducing the federal prisoners in U.S. Attorneys' Office districts by 5 percent over three years. By providing additional funds for reducing prison populations, the Justice Department will be saving more money in the long run on prison costs. The Justice Department can devise a formula to determine how many offices will receive additional funding and how much funding they would receive.²¹⁵

The practice of implementing bonus funding for meeting clear targets on success measures has successful models in states. California offers a portion of its incarceration savings to probation offices that successfully reduce the number of people they revoke to prison for violating supervision conditions.²¹⁶ In its first year alone, California probation officers sent 23 percent fewer felony offenders back to prison, which saved the state nearly \$180 million.²¹⁷ In return, the state government awarded the counties \$88 million from these savings.²¹⁸

The federal government is slowly moving toward the same type of incentive funding structure in its federal grants. The President's 2014 budget proposed a new program, called Byrne Incentive Grants, which would provide bonus dollars for federal grant recipients using funding for evidence-based purposes.²¹⁹

DOJ should strongly consider offering U.S. Attorneys' Offices additional funds to incentivize reducing unnecessary incarceration. This practice can save DOJ billions in unnecessary incarceration costs over time. It can also offer a powerful incentive to shift practices, decision-making, and ultimately outcomes across the country.

D. Additional Recommendations

In addition to implementing Success-Oriented Funding, federal prosecutors can take additional steps to drive toward new priorities. Blue Ribbon panelists discussed these additional ways. They include:

- **Using the Bully Pulpit.** U.S. Attorneys are appointed to serve as the highest federal law enforcement official in their districts, some of which encompass entire states. They garner great respect, have access to the media, and frequently speak publicly to community and other law enforcement groups. One former U.S. Attorney stated that the bully pulpit was one of the greatest tools he had and related a powerful story. "When I spoke at graduation ceremonies, I would pick out a person, give them a nickel, ask what it was, and then tell them that that much crack cocaine would put them in prison for five years. Though simple, this analogy got people thinking about the need to shift prosecution and prison policies. It was a simple, direct message that people understood."²²⁰ Many U.S. Attorneys are also speaking out to the media and in opinion pieces. Former U.S. Attorneys can play an even greater role in being spokespeople for shifting prosecution practices. Using the bully pulpit to chart a new way of thinking about federal prosecution is a powerful lever that current and former U.S. Attorneys can use more frequently.
- **Expanding Training and Interviews for Assistant U.S. Attorneys.** U.S. Attorneys have traditionally focused on enforcement and many career prosecutors may need encouragement to exercise discretion to make decisions toward lower charging decisions and lower sentencing recommendations when appropriate. Mandatory trainings for current Assistant U.S. Attorneys may be helpful. Additionally, discussing these issues with job applicants in the interview process and considering applicants who have a more expansive view of prosecution and justice may also help shift norms.

- **Providing U.S. Attorneys More Comprehensive Access to Crime Data.** In order to effectively secure public safety, U.S. Attorneys must understand the nature of crime issues facing their communities. Access to crime data allows prosecutors to develop innovative strategies that focus their resources and efforts on the community's most pressing crime issues. Though most local and federal law enforcement agencies regularly collect this information, U.S. Attorneys do not have readily available access to this intelligence.²²¹ Federal prosecutors can partner with law enforcement agencies in their districts to better understand the crime their communities are facing. With more access to data, prosecutors can develop and implement new approaches to keep their streets safe. The Department of Justice can also help ensure U.S. Attorneys receive access to necessary data that other federal law enforcement agencies compile.
- **Increasing Coordination of Federal Grant Dollars.** Many of today's federal criminal justice funds support various activities and goals throughout the country, but rarely coordinate with other federal grant streams. Federal prosecutors can help further coordination by convening federal, state, and local law enforcement agencies in their districts to participate in annual federal grant taskforces. Currently, state administering agencies oversee distribution of some federal grants to state and local agencies. However, these taskforces could be broader, including all the criminal justice agencies working in a district or state. Taskforces can coordinate how to leverage and spend federal grant dollars to focus on specific priority areas important to the district. With coordinated dollars, more resources can better target a community's crime and justice challenges.

IV. MORE PATHS FOR REFORM

The time is ripe to update federal prosecution to ensure practices fit today's problems, and more importantly, that they promote effective, efficient, and just policies. Success-Oriented Funding offers a way for federal prosecutors to move away from mass incarceration while also ensuring a reduction in violence and recidivism. It helps institutionalize this shift.

Success-Oriented Funding can also apply broadly to criminal justice agencies to help all agencies and actors drive toward the priorities of reducing crime and reducing incarceration. The Brennan Center has suggested success measures for these agencies in previous reports.

Applying this model to local prosecutors, for example, would encourage a shift in local prosecution. For instance, state and local governments can provide additional funding to local prosecutors' offices that meet target success measures. Additionally, district attorneys could set their own new priorities for their offices and incentivize their prosecutors to shift practices through evaluations, or even bonuses and promotions.

Success-Oriented Funding can also apply more broadly to law enforcement agencies — such as federal law enforcement agencies or local police forces — by tying additional funds to agencies that prioritize thoughtful criminal justice approaches. For local police such measures could include the use of citations in lieu of arrests for petty offenses or targets for reductions in violence. Law enforcement agencies can also set their own 21st century priorities, and tie promotions and raises to whether officers or agents achieve success measures driving toward these priorities.

For the first time in 40 years, policymakers of all ideological persuasions are in agreement that this country is locking up too many individuals for too long. Implementing Success-Oriented Funding for federal prosecutors would be one powerful lever to help shift the country toward a more effective and fair criminal justice system. Due to the unique role of U.S. Attorneys, such a change can also spur federal, state, and local agencies in additional jurisdictions to shift their priorities.

ENDNOTES

- 1 In the twenty years from its peak in 1991, the violent crime rate has fallen from an annual 759 crimes per 100,000 people to 387 crimes per 100,000 people. Property crime has fallen from 5140 to 2905 per 100,000 people. *See Uniform Crime Reporting Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov> (last visited Sept. 10, 2014) (providing crime statistics from 1960 to 2012); Solomon Moore, *Decline in Blacks in State Prisons for Drugs*, N.Y. Times, Apr. 14, 2009, at A12; *see also* Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not* 18 J. Econ. Persp. 163 (2004).
- 2 U.S. OFFICE OF NAT'L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: PROGRESS IN THE WAR ON DRUGS 1989-1992 7 (1993), *available at* <https://www.ncjrs.gov/pdffiles1/ondcp/140556.pdf> (stating that “through the leadership of President Bush, former President and Mrs. Reagan, the Partnership for a Drug-Free America, and many others, the Nation finally made up its mind. We’ve come to understand that drug use not only is dangerous, it is wrong, and that drug use makes bad parents, unreliable co-workers, poor students, and erratic citizens.”).
- 3 *See, e.g.*, N.J. Rev. Stat. § 2C:35-14.2 (2013).
- 4 *See* INIMAI CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION app. A (2013), *available at* http://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf; *see also* NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, SUCCESS-ORIENTED FUNDING: REFORMING FEDERAL CRIMINAL JUSTICE GRANTS (2014), *available at* http://www.brennancenter.org/sites/default/files/publications/SuccessOrientedFunding_ReformingFederalCriminalJusticeGrants.pdf
- 5 LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 2, tbl.1, *available at* <http://www.bjs.gov/content/pub/pdf/cpus12.pdf> (providing 2012 incarceration rate as 1 in 108); *see also* *States of Incarceration: The Global Context*, PRISON POL'Y INITIATIVE, www.prisonpolicy.org/global (last visited Sept. 9, 2014) (showing the United States as the highest incarceration rate for the world, second only to Seychelles which has far less total people behind bars); *see also* *Highest To Lowest*, INTERNATIONAL CENTRE FOR PRISON STUDIES, <http://www.prisonstudies.org/highest-to-lowest> (last visited Sept. 9, 2014) (showing the world's prison population rates, including the U.S. incarceration rate of 707 per 100,000; of the 57 European countries listed, 42 have rates 4 to 10 times lower than the U.S.).
- 6 LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 3, tbl.2 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>; E.ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012 – ADVANCE COUNTS 10, tbl. 9 (2013) <http://www.bjs.gov/content/pub/pdf/p12ac.pdf#20> (showing that 38% of total sentenced state prisoners are black).
- 7 *See* TRACEY KYCKELHAHN & TARA MARTIN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2010 – PRELIMINARY, *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=4679 (showing that the correctional costs amount to \$80 billion). The Brennan Center estimates the \$260.5 billion number by adding the estimated judicial and legal costs (\$56.1 billion), police protection costs (\$124.2 billion), and corrections costs (\$80 billion). *See id.* The authors calculated the percent increase of appropriations to the Department of Education by comparing the 1980 appropriation of \$14,011,052,000 to the 2010 appropriation of \$64,144,856,000. *See* U.S. DEP'T OF EDUC., EDUCATION DEPARTMENT BUDGET HISTORY TABLE: FY 1980 – FY 2014 PRESIDENT'S BUDGET, *available at* <http://www2.ed.gov/about/overview/budget/history/index.html>.
- 8 *See* TRACEY KYCKELHAHN & TARA MARTIN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2010 – PRELIMINARY, *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=4679 (showing that the correctional costs amount to \$80 billion, including prisons, jails, probation, and parole); *see also* BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 1980 AND 1981: DATA FROM THE ANNUAL GENERAL FINANCE AND EMPLOYMENT SURVEYS 2 (1985), *available at* <http://www.bjs.gov/content/pub/pdf/jeece-8081dagfes.pdf> (\$436 million for corrections in 1981).

- 9 Of course, crime has not fallen equally across neighborhoods, and a handful of cities continue to struggle with crime problems. Cities with high and increasing violent crime rates in 2012 include Flint City, Mich. (2,729 per 100,000 population), Oakland, Calif. (1,993), Memphis, Tenn. (1,750), and Stockton, Calif. (1,548). *See Uniform Crime Reporting Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov> (last visited Sept. 10, 2014) (providing crime statistics from 1960 to 2012).
- 10 Robert Jackson, Att’y Gen. of the United States, Address at the Second Annual Conference of U.S. Attorneys: The Federal Prosecutor (Apr. 1, 1940) (transcript available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor>).
- 11 Violent crime is down 35 percent since 1980 and 49 percent since the rate peaked in 1991, and property crime is down 47 percent since 1980 and 44 percent since the rate peaked in 1991. *See Uniform Crime Reporting Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.ucrdatatool.gov> (last visited Sept. 10, 2014) (providing crime statistics from 1960 to 2012).
- 12 Four decades ago, in 1970, 176 per 100,000, less than 0.2 percent, of U.S. adult residents were incarcerated, and by 2012, that rate had more than tripled, to 920 per 100,000 U.S. adult residents or 0.7 percent. In 1970, 357,292 people were incarcerated, representing 176 per 100,000 U.S. adult residents (196,429 sentenced to prison and 160,863 in jail). *See* CHET BOWIE, BUREAU OF JUSTICE STATISTICS, PRISONERS 1925-81 2 tbl.1 (1982), *available at* <http://www.bjs.gov/content/pub/pdf/p2581.pdf>; *see also* JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, THE 1983 CENSUS 1, tbl.1 (1984), *available at* <http://www.bjs.gov/content/pub/pdf/83jc.pdf>. In comparison, there were 2,306,383 people incarcerated in 2012, representing 920 per 100,000 U.S. adult residents (1,570,400 prisoners and a daily average of 735,983 in jails). LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 1 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>; TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2012 – STATISTICAL TABLES 1 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.
- 13 The authors calculated this estimate following the methodology used by the National Employment Law Project (NELP) in 2008. *See* MICHELLE N. RODRIGUEZ & MAURICE Emsellem, NAT’L EMPLOYMENT LAW PROJECT, 65 MILLION ‘NEED NOT APPLY’: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27, n. 2 (2011), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf (estimating that 65 million adults have criminal records in the United States). According to a 2010 survey of states, there were 97.9 million people with criminal records on file in the states, including those individuals fingerprinted for serious misdemeanors and felony arrests. BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS tbl.1 2010 (2011), *available at* <https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf>. According to NELP, misdemeanor arrests for less serious crimes do not require fingerprinting in some states, thus this figure is likely an undercount of people with criminal records. To account for individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, NELP reduced the 2008 BJS 92.3 million figure by 30 percent (64.6 million). Consistent with the NELP methodology, the authors reduced the 2010 BJS 97.9 million figure by 30 percent (68.5 million). Thus, as a percent of the U.S. population over the age of 18 (237,657,645 in 2011 according to the U.S. Census Bureau), an estimated 28.8 percent of the U.S. adult population has a criminal record on file with states. *See* U.S. CENSUS BUREAU, POPULATION ESTIMATES: NATIONAL CHARACTERISTICS VINTAGE 2011, <http://www.census.gov/popest/data/national/asrh/2011>.
- 14 LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 2 & tbl. 1 (2013), *available at* <http://www.bjs.gov/content/pub/pdf/cpus12.pdf>.
- 15 *States of Incarceration: The Global Context*, PRISON POL’Y INITIATIVE, www.prisonpolicy.org/global (last visited Sept. 9, 2014); *see also Highest to Lowest*, INTERNATIONAL CENTRE FOR PRISON STUDIES, <http://www.prisonstudies.org/highest-to-lowest> (last visited Sept. 9, 2014) (showing the world’s prison population rates).
- 16 *See* TRACEY KYCKELHAHN & TARA MARTIN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2010 – PRELIMINARY, *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=4679 (showing that the correctional costs amount to \$80 billion). The Brennan Center estimates the \$260.5 billion number by adding the estimated judicial and legal costs (\$56.1 billion), police protection costs (\$124.2 billion), and corrections costs (\$80 billion). *See id.*

- 17 Press Release, Rand Paul, Sens. Paul and Booker Introduce Criminal Justice Reform Legislation (July 8, 2014), *available at* http://www.paul.senate.gov/?p=press_release&id=1192; Chris Christie, N.J. Gov., State of the State Address (Jan. 14, 2014) (transcript available at http://www.washingtonpost.com/politics/full-text-of-new-jersey-gov-chris-christies-2014-state-of-the-state-speech/2014/01/14/8fd12f08-7d55-11e3-9556-4a4bf7bcbd84_story.html); Sharon Driscoll, *California Attorney General Kamala Harris Gives Public Talk at Stanford Law School*, STANFORD REPORT, Oct. 31, 2011, <http://news.stanford.edu/news/2011/october/kamala-harris-law-103111.html>.
- 18 Editorial, *Mr. Bratton Reverses to Go Forward*, N.Y. TIMES, Sept. 12, 2014, *available at* http://www.nytimes.com/2014/09/13/opinion/mr-bratton-reverses-to-go-forward.html?_r=0.
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- 211 In 2014, DOJ requested that Congress provide a budget of \$2,007,717,000 for U.S. Attorneys. UNITED STATES ATTORNEYS, U.S. DEP'T OF JUSTICE, FY 2014 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 1 (2014), available at <http://www.justice.gov/jmd/2014justification/pdf/usa-justification.pdf>. Congress appropriated \$1,944,000,000 for "necessary expenses of the Offices of the United States Attorneys, including inter-governmental and cooperative agreements." Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 (2013).
- 212 See generally UNITED STATES ATTORNEYS, U.S. DEP'T OF JUSTICE, FY 2014 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 1 (2014), available at <http://www.justice.gov/jmd/2014justification/pdf/usa-justification.pdf>.
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