

# BETWEEN COOPERATION AND CONFLICT IN SECOND LOOK SENTENCE REVIEW

*Kay L. Levine & Ronald F. Wright\**

## I. INTRODUCTION

In the United States, many people subscribe to a mythical vision of the adversary system,<sup>1</sup> where the prosecutor files charges against the accused after a careful review of the case file, the defense attorney challenges the evidence at trial, and both argue before a judge who serves as a disinterested umpire.<sup>2</sup> According to this model, the prosecutor and the defense attorney reflexively and consistently adopt positions that are adverse to each other. The prosecutor represents “The People,” shorthand for a unified community<sup>3</sup> that presumably wants to see all offenders held accountable for wrongdoing, a community that defines public safety using an “us-versus-them” mentality.<sup>4</sup> The defense attorney represents the accused, who wants to force the government to jump through procedural hoops, to escape (or minimize) accountability

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\* Professor of Law and Associate Dean for Research, Emory University School of Law; Needham Yancey Gulley Professor of Criminal Law, Wake Forest University School of Law. We are indebted to Hillary Blout, the staff at For the People, Miriam Krinsky, the staff at Fair and Just Prosecution, and our interviewees in Burlington, St. Paul, and Seattle for sharing with us their important work in this arena. We received excellent research assistance from Celie Anderson, Caleb Coffelt, Jack Dew, Tobias Jeung, and Griffin Hayes. We received perceptive and invaluable comments on earlier drafts from Cynthia Alkon, Emmanuel Arnaud, Amanda Berman, Bennett Capers, Erin Collins, Malcolm Feeley, Arthur Hopkirk, Kathryn Miller, Justin Murray, Michael O’Hear, Jessica Roth, Amy Schmitz, and Andrea Schneider. This research is supported by a generous grant from the Wilson Center for Science and Justice.

<sup>1</sup> See MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL 7–14 (1983) (describing the components of a mythical vision of the adversary system). Even trials that do occur “bear scant resemblance to the popular image of a vigorous duel between skilled adversaries.” *Id.* at 13.

<sup>2</sup> See Malcolm M. Feeley & Kay Levine, *Assaults on the Adversarial Process: Rethinking American Criminal Justice*, 3 PUNISHMENT & SOC’Y 537 (2001) (reviewing RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996) and WILLIAM PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL JUSTICE HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT (1998)).

<sup>3</sup> See Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (arguing that prosecutors ought not to claim this role because many people in the community are more aligned with interests represented by a strong defense, and because the defendant is himself a member of the community).

<sup>4</sup> See HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-163 (1968) (defining the crime control advocate’s agenda).

for wrongdoing, or to be set free after the prosecution fails to prove the allegations.<sup>5</sup> Both sides claim to pursue justice as they advance these contradictory objectives, and both recognize the trial as the main theater for verbal combat.<sup>6</sup>

While the adversarial model prevails in fictional media portrayals of the justice system, in real courthouses, conflict takes a backseat to cooperation as a preferred technique for managing the criminal docket.<sup>7</sup> Negotiated plea deals rather than trials are the dominant mode of conviction.<sup>8</sup> Diversion programs,<sup>9</sup> accountability courts,<sup>10</sup> and post-conviction petitions<sup>11</sup> also occupy space in the courthouse workspace. This variety of jobs complicates how prosecutors and defense attorneys think about their professional roles. Courthouse regulars may even come to regard as cartoonish the adversarial portrayal of two sides engaged in combat because they recognize that cooperation and persuasion are often more useful devices than oppositional presentation of a case.

Against this backdrop of diverse roles and functions in the criminal courthouse, we spotlight a new and previously unexamined practice: prosecutor-initiated second look sentencing review.<sup>12</sup> Also

<sup>5</sup> *Id.* at 163–73 (defining the due process advocate’s agenda).

<sup>6</sup> See JEROME FRANK, *COURTS ON TRIAL* 80–93 (1963) (observing that the “fight theory of justice” traces its origins to actual physical combat).

<sup>7</sup> See Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52 (1967); Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate: Multiple Intermediary Roles of the Criminal Defense Attorney*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN PRACTICE* 299 (Leslie C. Levin & Lynn M. Mather eds., 2012); Abraham Blumberg, *The Practice of Law as a Confidence Game*, 1 L. & SOC. REV. 15 (1967).

<sup>8</sup> Most felony convictions are obtained by guilty plea rather than trial. See BUREAU OF JUSTICE STATISTICS, *FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES*, table 4.1 (2009). For classic research about plea bargaining practices in various jurisdictions, see generally DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* (1984); JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 19–38 (1977); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 L. & SOC’Y REV. 247, 248–52 (1998); MILTON HEUMANN, *PLEA BARGAINING* (1978). More recent works include Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004); Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008); and Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325 (2016).

<sup>9</sup> See Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331 (2021).

<sup>10</sup> See Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 UNIV. CAL. DAVIS L. REV. 1573 (2021).

<sup>11</sup> See Elizabeth Webster, *The Postconviction Workgroup: Cooperation Between Adversaries in Exoneration Cases*, 33 CRIM. JUST. POL’Y REV. 870 (2022).

<sup>12</sup> While this is the first published academic analysis of this phenomenon, the state of California has engaged RAND to conduct a program evaluation in nine counties. LOIS M. DAVIS, LOUIS T. MARIANO, MELISSA M. LABRIOLA, SUSAN TURNER & MATT STRAWN, *EVALUATION OF THE CALIFORNIA COUNTY RESENTENCING PILOT PROGRAM: YEAR 1 FINDINGS* (2022) (ebook) [hereinafter RAND Report 1].

called “resentencing initiatives,”<sup>13</sup> prosecutors and defense attorneys engaged in this practice revisit the sentences of people who long ago were convicted of crimes and are still serving time in state prison. This bold new initiative emerged just a few years ago, to correct for the excesses and injustices of the mass incarceration era.

Mass incarceration in the United States is familiar to many readers. A combination of legislative increases in available penalties,<sup>14</sup> prosecutor charge selection,<sup>15</sup> and judicial sentencing practices<sup>16</sup> increased prison admissions and the length of prison terms. These policies—jointly and severally—led to a huge growth in prison populations over the final decades of the twentieth century, all across the country. The racialized impact on prison populations was part and parcel of this shift.<sup>17</sup>

To counter the abuses of this late twentieth-century penal smorgasbord, in the second decade of the twenty-first century some state jurisdictions began to experiment with resentencing initiatives.<sup>18</sup> Important sentence reforms emerged in the federal arena as well, to

<sup>13</sup> In this work we use “second look” and “resentencing” interchangeably to refer to the range of techniques prosecutors employ to revisit the sentences of people convicted of crime in years past.

<sup>14</sup> See Michael Tonry, *Fifty Years of American Sentencing Reform: Nine Lessons*, 48 CRIME & JUST. 1 (2019); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

<sup>15</sup> See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

<sup>16</sup> See Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019); NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 31 FED. SENT’G REP. 331 (2018); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 225–26 (2007) (noting that the trial penalty can be as much as 500%).

<sup>17</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Traci Schlesinger, *The Failure of Race-Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Racialized Mass Incarceration*, 57 CRIME & DELINQ. 56 (2011); ASHLEY NELLIS, PH.D., *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* (2021).

<sup>18</sup> See, e.g., D.C. CODE § 24-403.03 (allowing any person who was under age 25 at the time of the crime, and who has served at least 15 years, to petition the court for a reduced sentence). The National Association of Criminal Defense Lawyers has developed a Model “Second Look Sentencing Act” for state legislatures. See *Second Look Sentencing Act*, NACDL, <https://www.nacdl.org/getattachment/4b6c1a49-f5e9-4db8-974b-a90110a6c429/nacdl-model-second-look-legislation.pdf> [<https://perma.cc/Q6Q4-D55R>] (last visited Jan. 27, 2024). Even the most recent version of the ALI’s Model Penal Code (adopted in 2017) contains a second look provision, encouraging state legislatures to authorize resentencing consideration for anyone who has served at least 15 years imprisonment for adult crimes and ten years imprisonment for crimes committed before the eighteenth birthday. For a comprehensive look at trends around the country, see Debra Cassens Weiss, *Momentum Builds for ‘Second Look’ Legislation That Allows Inmates to Get Their Sentences Cut*, A.B.A. J. (May 19, 2021), <https://www.abajournal.com/news/article/momentum-builds-for-second-look-legislation-that-allows-inmates-to-get-their-sentences-cut> [<https://perma.cc/RR9P-KR3J>]; see NAZGOL GHANDNOOSH, PH.D., *A SECOND LOOK AT INJUSTICE* (2021).

provide early release to federal prisoners.<sup>19</sup> This is a promising but largely under-the-radar initiative that, if fully embraced, could have a profound impact on the nation's prisons.

This Article offers the first scholarly assessment of new resentencing practices initiated by state prosecutors in the United States.<sup>20</sup> Unlike the conviction integrity units that have become institutional fixtures in many prosecutors' offices over the past two decades,<sup>21</sup> attorneys working on resentencing matters rarely address concerns about the legal integrity or factual accuracy of the conviction itself.<sup>22</sup> Prosecutors and defense attorneys instead consider the *continuing* integrity of the sentence imposed on the defendant. Perhaps a second look is necessary because the sentence imposed for the crime no longer appears necessary to serve public safety goals, because the prisoner has aged out of (or grown out of) criminal tendencies. Maybe the original sentence now appears disproportionate due to a shift in values and priorities for punishment. Or maybe the prisoner is now very expensive to house, due to illness and infirmity. Given the number of lengthy prison sentences being served in the United States, this expanded prosecutor function has transformative potential.

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<sup>19</sup> In the federal system, compassionate release provisions already existed to allow for the early release of prisoners with very serious health conditions. See 18 U.S.C. § 3582(c)(1)(a). Additionally, the First Step Act became law during the Trump Administration, allowing relief for certain drug offenders convicted and sentenced during the era when crack cocaine was punished at a 100:1 ratio over powder cocaine. First Step Act of 2018, Pub. L. No. 115–391, § 603(b), 132 Stat. 5194, 5239. In the fall of 2023, the United States Sentencing Commission made compassionate release available to prisoners whose crime of conviction had been subject to legislative amendment with regard to sentencing range. These prisoners can now apply to have their sentence adjusted to comport with the new (lower) legislative standards. U.S. SENT'G GUIDELINES, § 814 (U.S. SENT'G COMM'N 2023). For a proposal to enact legislation creating prosecutor-initiated resentencing in the federal courts, see Lydia Tonozzi, *When Further Incarceration Is No Longer in the Interest of Justice: Instituting a Federal Prosecutor-Initiated Resentencing Framework*, 74 HASTINGS L. J. 935 (2023).

<sup>20</sup> Various academic proposals have focused generally on the need for second-look sentencing, and some have proposed various roles for prosecutors and judges in this review. See, e.g., Douglas Berman, *Encouraging (and Even Requiring) Prosecutors to be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 435 (2010); Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT'G REP. 211 (2009); Michael Serota, *Second Looks and Criminal Legislation*, 17 OHIO ST. J. CRIM. L. 495 (2020). To our knowledge, our essay is the first piece to examine how these practices are actually operating in jurisdictions across the United States. In a related work, we rely on our oral history resources to analyze the institutional home within which these initiatives take place (the prosecutor's office), to compare this home to other existing and potential channels for resentencing. See Ronald F. Wright & Kay L. Levine, *Institutional Channels for Second Look Sentencing* (working manuscript).

<sup>21</sup> See generally John Hollway, *Conviction Review Units: A National Perspective*, QUATRONE CTR. FAIR ADMIN. JUST., U. PA. L. SCH. (2016).

<sup>22</sup> Note, though, that in one of our research sites—Chittenden County, Vermont—defense attorneys must first file a post-conviction relief petition alleging error in the record below, as there is no mechanism for resentencing outside of a finding of error that unwinds the conviction. We discuss this pattern in more detail in Part II.

Both defense attorneys and prosecutors get involved in second look efforts. But we hesitate to say that these courtroom actors *work together* to achieve resentencing goals. The degree of cooperation on these matters varies by case and by jurisdiction, sometimes driven by the legal framework in which resentencing happens.

In some locations, local prosecutors and defense attorneys rely on existing statutory structures; resentencing occurs through loopholes left open in the formal law or by creative lawyering to simulate the appearance of loopholes. Elsewhere, prosecutors have lobbied their state legislature for explicit statutory authority to conduct second look review “in the interests of justice,” distinct from any parole release system or post-conviction motions related to factual or legal errors in the original convictions.

Important advocacy groups and professional associations—most notably a California-based non-profit organization called “For the People”—have developed standard legislative models, provided logistical support to interested prosecutors, and promoted best practices.<sup>23</sup> Their work has given local prosecutors who are interested in resentencing reforms a common language—a set of talking points to use with employees, constituents, and politicians—as well as a tool kit to get their units up and running once the legislative work is complete. The legal framework in the jurisdiction shapes not only the amount and type(s) of resentencing available for consideration, but also the expectations of prosecutors and defense attorneys about what roles are realistic and desirable to pursue.

Whatever the formal legal architecture of the jurisdiction, resentencing starts from a noteworthy point of consensus among system actors. The chief prosecutor recognizes that second look concerns apply to some prisoners in the jurisdiction. Prosecutors set formal or informal criteria to determine which cases are eligible for a second look. Defense attorneys, while they might prefer more generous eligibility criteria, concede that prosecutors are open to second looks in some cases and help clients apply for consideration.

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<sup>23</sup> See FOR THE PEOPLE, PROSECUTOR-INITIATED RESENTENCING: CALIFORNIA’S OPPORTUNITY TO EXPAND JUSTICE AND REPAIR HARM (2021). The organization’s website describes their work across many jurisdictions. See *Our Work*, FOR THE PEOPLE, <https://www.fortheppl.org/work> [<https://perma.cc/46BR-QYMG>] (last visited Jan. 26, 2024). Professional associations for prosecutors, such as the National District Attorneys Association and Fair and Just Prosecution, have also sponsored programming to introduce chief prosecutors to emerging models in resentencing. See Miriam Krinsky, *Prosecutors Announce Groundbreaking Resentencing Efforts to Reduce U.S. Mass Incarceration Epidemic*, FAIR & JUST PROSECUTION (Dec. 7, 2020), <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2020/12/FJP-Sentencing-Review-Press-Release.pdf> [<https://perma.cc/JR5H-JYT3>]; see also *PART 1: Prosecutor-Initiated Resentencing: An Introduction to the Emerging Area of Law*, NAT’L DIST. ATT’Y ASS’N (Aug. 16, 2022), <https://ndaa.org/training/part-1-prosecutor-initiated-resentencing-an-introduction-to-the-emerging-area-of-law/> [<https://perma.cc/2V79-N7R7>].

Judges can only consider cases for resentencing if the prosecution files a motion; the defense has no power to initiate these proceedings. Judges are typically willing to endorse the sentence reductions the parties jointly present to them. Prosecutorial open-mindedness, in tandem with defense endorsement of a new forum to reduce some sentences, lead the groups to *work alongside* each other, to identify candidates for resentencing, and to present those candidates to judges for review.

But this early consensus does not always produce quick or transformative results. Even when prosecutors and defense lawyers agree on the larger objectives of resentencing, they can get stuck on many details of implementation. Defense attorneys must adjust their attitudes about transparency, develop patience, accept the dispositive role of prosecutor choices, and exercise restraint on behalf of clients who desperately need the prosecutor's help. And there are gaps (both real and perceived) between the lofty aspirations of prosecutorial rhetoric in the beginning and the more limited reality that emerges when prosecutors start making case-level decisions, subject to resource and political limits. These sorts of gaps are not unique to the resentencing context; as Malcolm Feeley has observed, consensus often breaks down when real people administer programs that grow out of reformers' visions.<sup>24</sup> Value conflicts, time constraints, and misunderstandings can plague even the most well-intentioned efforts. In the pages that follow, we trace the origins of resentencing in three jurisdictions and explain the ways in which the vision diverges from the reality.

Our examination of resentencing practices—and their importance for the multi-door criminal courthouse at the core of this Symposium—proceeds in four parts. In Part I we take a quick tour of the literature about prosecutor and defense attorney roles in the state criminal courts. We compare the standard adversarial model of the criminal trial to the ways that criminal attorneys behave toward each other in two more common activities: bargaining to resolve a case short of trial and assessing the likelihood that a past defendant was wrongfully convicted.

In Part II we introduce our ongoing field study of sites engaged in second look sentencing, concentrating here on Chittenden County (Burlington), Vermont; Ramsey County (St. Paul), Minnesota; and King County (Seattle), Washington. We explain our research methodology and summarize the techniques of resentencing we

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<sup>24</sup> See FEELEY, *supra* note 1 at 125 (discussing problems of implementation). “Promises must be translated into actions, and different people—usually with their own agendas—enter the picture. The complexity of joint actions and multiple perspectives makes implementation of even the most simple public effort incredibly difficult.” *Id.*

observed in each location. Although their origin stories, developmental pathways, and legal frameworks differ, we believe there is value in considering these jurisdictions together, to highlight themes that give us an on-the-ground view of how resentencing has been conceived and implemented.<sup>25</sup>

The analytical heart of the Article begins in Part III, as we reveal the patterns gleaned from our original interviews with participants. We address the spectrum of attorney roles (from adversarial to persuasive to cooperative) that characterize resentencing efforts. Defense attorneys seeking second-look sentencing for a client typically abandon adversarial posturing in favor of persuasive and cooperative techniques. They highlight for the prosecutor the amount of time the client has already spent in custody, the rehabilitative efforts the client has undertaken, and the re-entry plan. But the cooperative posture of defense attorneys in prosecutor-initiated resentencing cases is structural, rather than an individual choice. The relevant audience for the defense attorney's argument is the prosecutor—not the judge—because in all the legal frameworks in our study, the judge only considers petitions first endorsed by the prosecutor's office. The defense and prosecutor roles in resentencing initiatives thus incorporate a power asymmetry more extreme than the ones that prevail in other state courthouse settings.

Part IV moves from cooperation into the points of conflict that arise between prosecutors and defenders who handle resentencing matters. We describe misaligned expectations about how many prisoners ought to be eligible for resentencing, the operation of selection criteria and other barriers to success, and the persistent threat of redirecting cases into alternative procedures when prosecutor-initiated resentencing no longer produces results that both parties find acceptable. Despite the prosecutors' frequent use of the word "collaborative" to describe how they conduct second look reviews, defense attorneys believe that prosecutors are quite stingy, supporting defense petitions in only the easiest cases. In their view, the rhetoric prosecutors use to describe their resentencing program far outstrips the reality of their practices. Faced with this frustrating disconnect, some defenders are reluctant to fully put aside their traditional adversarial role as a critic of the prosecutor's work.

In sum, prosecutor resentencing initiatives establish an important and long-overdue pathway to correct for sentencing excesses of prior generations. Implementation roadblocks and power imbalances,

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<sup>25</sup> As we add further study sites to this oral history project, we expect to discuss thematic similarities between different locations with more confidence and in more detail. It may also be possible at that point to compare our observations with those of program evaluators in nine counties in California. FOR THE PEOPLE, *supra* note 23.

however, may send prosecutors and defenders back into their customary adversarial roles. Those attitudes and behaviors among veteran courtroom actors—combined with resource limits, political constraints, and boundaries built into some legal structures—could delay the spread of this innovative device and blunt its potential.

## II. ATTORNEY ROLES IN CONVENTIONAL CRIMINAL COURT SETTINGS

We briefly describe here prosecution and defense attorney interactions when they engage in adversarial proceedings, conduct plea negotiations, and review post-conviction wrongful conviction petitions. These more conventional roles provide a comparison point for readers to consider alongside new roles for attorneys in resentencing matters.

*Adversarial Proceedings:* In classic and cinematic portraits of the American criminal legal system, the prosecutor and the defense attorney appear as fierce adversaries, verbally sparring with each other during a trial in a packed courtroom.<sup>26</sup> “[T]ruth is most likely to emerge through active combat between partisans, through attack and counterattack. The intensity of self-interest . . . maximizes the likelihood that truth will emerge.”<sup>27</sup> The adversary role extends beyond criminal trials to shape the professional relationships between prosecutors and defense attorneys in pre-trial matters, bail hearings, sentencing hearings, and more generally.<sup>28</sup> Those relationships sometimes involve charged rhetoric and inflammatory, derogatory imagery about opponents.<sup>29</sup> Nonetheless, criminal court attorneys must operate within the boundaries of ethical rules and

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<sup>26</sup> See FRANK, *supra* note 6; MARVIN FRANKEL, *PARTISAN JUSTICE* (1980); Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations*, 91 MARQ. L. REV. 145, 145 (2007) (describing television show Perry Mason as the dominant but utterly fictional portrayal of trial work).

<sup>27</sup> FEELEY, *supra* note 1, at 11. Others have imagined the court as a competitive marketplace in which the judge is a consumer, “forced to decide between similar goods of two fiercely determined salesmen.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 321 (1973).

<sup>28</sup> FEELEY, *supra* note 1, at 11 (describing the gamesmanship that characterizes the courts and asserting that criminal procedure, rules of evidence, and threat of trial are “used instrumentally.”).

<sup>29</sup> Researchers have documented that inexperienced lawyers are more prone than experienced attorneys to use this extreme imagery to describe their counterparts, whichever role they hold. On the prosecution side, see Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors’ Syndrome*, 56 ARIZ. L. REV. 1065 (2014). On the defense side, see Elizabeth Webster et al., “*Satan’s Minions*” and “*True Believers*”: *How Criminal Defense Attorneys Employ Quasi-Religious Rhetoric and What It Suggests About Lawyering Culture*, 43 JUST. SYS. J. 53 (2022).



norms relating to civility<sup>30</sup> and candor to the tribunal.<sup>31</sup> And both sides temper advocacy to preserve working group relationships, even when conducting hearings that are formally adversarial.<sup>32</sup>

*Plea Bargaining:* Because adversary proceedings represent just a small fraction of the business of the courts,<sup>33</sup> we turn our attention now to plea bargaining, which is, and has long been, the mainstay of the criminal justice system.<sup>34</sup> In the felony docket, more than 95% of convictions are obtained by guilty pleas, most of them negotiated; in the misdemeanor docket, the percentage is even higher.<sup>35</sup> During negotiations, each side postures about the strength or weakness of the case, making predictions about how well witnesses will perform on the stand and what sort of evidentiary rulings the judge might make. The goal is to settle on some charge or set of charges that the defendant will admit in return for reduced punishment. If they reach an agreement, the prosecutor and defense attorney together present the deal to the judge, who usually accepts it with few questions asked.<sup>36</sup> In some instances negotiated agreements occur even before charges are filed, to keep cases off the court's docket and to keep defendants from having convictions on their records.<sup>37</sup>

The back-and-forth between trial advocates who are publicly sparring in a courtroom is a far cry from the world of plea bargaining. Much has been written about the leverage prosecutors exert during

<sup>30</sup> “[T]he norms of professionalism remain as the primary constraints on and guides to the conduct of courthouse officials.” FEELEY, *supra* note 1, at 10; *see also* BRUCE A. GREEN, *Bar Authorities and Prosecutors*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 309, 310 (Ronald Wright et al., ed. 2021) (observing that prosecutors in decentralized court systems are regulated by both judges and bar authorities).

<sup>31</sup> *See* Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversariness: Endorsing Candor, Cooperation and Civility in Relationships Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L. Q. 845 (2011) (reviewing proposed changes to ABA Standards for Criminal Justice, embodying a more cooperative model of interaction between prosecution and defense); Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1108–10 (2016) (in this work Green emphasizes that the duty of candor is related to the duty of truthfulness, but they are not co-extensive).

<sup>32</sup> *See* Esther Nir & Siya Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 518–19 (2021).

<sup>33</sup> Skolnick, *supra* note 7; EISENSTEIN & JACOB, *supra* note 8.

<sup>34</sup> *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

<sup>35</sup> *See* BRIAN A. REAVES, BUREAU OF JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 24 (2013); William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 462 (2021) (demonstrating that 97% of federal convictions and 94% of state convictions result from guilty pleas, often pursuant to an agreement with the prosecutor's office).

<sup>36</sup> *See* Martin Marcus, *Above the Fray or Into the Breach: The Judge's Role in NY's Adversarial System of Criminal Justice*, 57 BROOK. L. REV. 1193 (1992); King & Wright, *supra* note 8 (showing that sometimes judges actively participate in helping the parties reach a deal).

<sup>37</sup> This is a form of diversion, as discussed in Wright & Levine, *supra* note 9.

plea negotiations,<sup>38</sup> sanctioned and encouraged by Supreme Court precedents that immunize most negotiation techniques from due process challenges.<sup>39</sup> Courts have also allowed prosecutors to play fast and loose with their constitutional discovery obligations during plea negotiations, holding that *Brady* disclosures concerning impeachment are not required before plea,<sup>40</sup> and that even exculpatory disclosures could still be timely on the eve of trial.<sup>41</sup> Legal doctrines permitting gamesmanship during negotiations are compounded by cognitive biases that weaken prosecutors' ability to honor the obligations they do have,<sup>42</sup> and by the pressures of pre-trial detention.<sup>43</sup> Putting the pieces together, scholars have criticized prosecutorial techniques during negotiations as a form of legally sanctioned extortion.<sup>44</sup>

Yet in sociolegal scholarship based on systematic interviews and ethnographic study, the story appears more textured. Prosecutorial charging and bargaining strategies vary considerably by jurisdiction,<sup>45</sup> as does willingness to share *Brady* material in advance (and in

<sup>38</sup> Three of the most comprehensive recent pieces are Andrew M. Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303 (2018), Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 28 n. 121 (2010), and Jordan A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016). Older works include a pair of articles by William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004), and *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

<sup>39</sup> See *United States v. Goodwin*, 457 U.S. 368, 381 (1982); *Corbitt v. N.J.*, 439 U.S. 212, 219 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

<sup>40</sup> See *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (finding no due process violation when a judge accepts a guilty plea from a defendant who has been forced, as part of the plea, to give up her right to receive impeachment information about government witnesses).

<sup>41</sup> See Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 11 (2015) (noting that lower courts have held that exculpatory evidence need only be disclosed "in time for its effective use at trial."). Delayed disclosures conflict with the ABA's interpretation of Model Rule 3.8, which requires prosecutors to turn over exculpatory material in a timely fashion, meaning as soon as they learn of it. See MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2023).

<sup>42</sup> See Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009).

<sup>43</sup> See Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

<sup>44</sup> See PHILIP HAMBURGER, *PURCHASING SUBMISSION: CONDITIONS, POWER AND FREEDOM* 223 (2021) ("the basic danger of extortion is familiar from prosecutors. They frequently overstate charges, and then offer accommodations, allowing the defendant to escape further litigation and the risk of a high fine—as long as they agree to conditions, including regulatory limits not required by law"); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007); John G. Douglass, *Can Prosecutors Bluff? Brady v. Maryland and Plea Bargaining*, 57 CASE W. RES. L. REV. 581 (2007).

<sup>45</sup> See generally Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2013) (describing the influence of office culture on prosecutor relations with defense counsel); PAMELA J. UTZ, *SETTLING THE FACTS* 6–7 (1978) (same for plea bargaining); EISENSTEIN AND JACOB, *supra* note 8; Johnson, *supra* note 8; HEUMANN, *supra* note 8, at 12.

excess) of constitutional requirements.<sup>46</sup> An increasing number of prosecutors who describe their philosophy as “progressive” tend to designate certain crimes as low priorities and to bargain accordingly.<sup>47</sup> And some scholars contend that even traditional prosecutors aren’t as adversarial as they could be, because concerns about political accountability keep them from taking full advantage of the tools given to them.<sup>48</sup>

Defense practice varies too. The literature certainly documents defense attorneys with high volume practices who accept plea offers despite substandard investigation and minimal advocacy.<sup>49</sup> But other works emphasize the latent power of defense attorneys:<sup>50</sup> Defenders can exert counter-leverage by making threats to crash the system<sup>51</sup> or advocating publicly for changes to budgets and systemwide policies.<sup>52</sup> Defenders have also been praised as highly competent

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<sup>46</sup> See Ellen Yaroshefsky & Bruce A. Green, *Prosecutors’ Ethics in Practice: Influences on Prosecutorial Disclosure*, in *LAWYERS IN CONTEXT: ETHICAL DECISION MAKING IN PRACTICE* 269 (Leslie C. Levin & Lynne Mather, eds. 2012). The adoption of open file policies by some offices has further lessened the defense’s perceived disadvantage in plea bargaining, at least by some accounts. Compare Jenia Turner & Allison E. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Examination*, 73 *WASH. & LEE L. REV.* 285 (2016) with Ben Grunwald, *The Fragile Promise of Open File Discovery*, 49 *CONN. L. REV.* 771 (2017).

<sup>47</sup> See Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era*, 109 *CORNELL L. REV.* (forthcoming 2024) (evaluating changes to defense attorney’s role before charging and during plea bargaining in jurisdictions with progressive prosecutor offices).

<sup>48</sup> See Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 *N.Y.U. L. REV.* 762 (2016) (describing forms of prosecutor restraint caused by political accountability); Jeffrey Bellin, *The Power of Prosecutors*, 94 *N.Y.U. L. REV.* 171 (2019) (arguing that scholars far too often overlook the powerful forces that can and do constrain prosecutors in their jobs).

<sup>49</sup> See Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 *YALE L. J.* 1179 (1975).

<sup>50</sup> See LISA MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987) (describing various techniques used by defense attorneys to make headway).

<sup>51</sup> See Jenny Roberts, *Crashing the Misdemeanor System*, 70 *WASH. & LEE L. REV.* 1089 (2013). This is not just an empty theoretical move suggested by academics; one of the authors of this Essay worked in a jurisdiction where the public defenders “crashed the system” in the misdemeanor courts approximately once a year.

<sup>52</sup> See Russell M. Gold & Kay L. Levine, *The Public Voice of the Defender*, 75 *ALA. L. REV.* 158 (2023) (profiling the work of certain defenders and defender organizations that engage in public advocacy through social media); Roberts, *supra* note 47 (describing defense practices in jurisdictions led by prosecutors who self-identify as progressive). These practices are not new. In the 1970s, for example, the Los Angeles County Defender Organization launched a campaign to improve the position of indigent defendants across the board. The organization filed lawsuits “attack[ing] policies concerning attorney-client communication in the county jail, pretrial detention of juveniles, and jury selection.” FEELEY, *supra* note 1, at 136. According to Feeley, these actions “caused a great deal of furor ... [but] won mixed victories in the courts.” *Id.*

problem-solvers, in the negotiation setting and elsewhere.<sup>53</sup> Moreover, the balance of power between defenders and prosecutors can shift when judges take charge, such as by offering concessions to defendants who plead guilty directly to the court or by actively intervening during negotiations to comment on the strength of the prosecution's evidence or the likely sentence.<sup>54</sup>

*Post-Conviction and Wrongful Conviction Petitions:* Other departures from the classic adversarial model of attorney behavior arise in the post-conviction setting. Jurisdictions are experimenting with how best to assess the likelihood of wrongful conviction, and some of those experiments include new roles for prosecutors—such as the use of conviction integrity units in the prosecutor's office.<sup>55</sup> While exoneration protocols vary across place, they usually begin when someone aligned with the defendant raises the possibility of new evidence, prior police misconduct, witness recantation, or some other legal or factual basis on which to challenge the integrity of the conviction. When defense attorneys flag these concerns, prosecutors in conviction integrity units are called upon to review the files and to make recommendations in support of (or against) vacating the conviction.<sup>56</sup> In many instances in the past two decades, prosecutors have supported the defense request.<sup>57</sup>

In this post-conviction context, scholars have noted a variety of behaviors among prosecutors and defense attorneys. In some offices, prosecutors “circle the wagons,” adopting an intensely adversarial

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<sup>53</sup> See Schneider, *supra* note 26, at 155–56 (describing the results of surveys with attorneys working in different fields). This problem-solving role for defense attorneys is also prominent in accountability or “problem-solving” courts such as drug courts and domestic violence courts. In these proceedings, the court imposes and monitors ongoing treatment-oriented consequences for defendants. The prosecutor's job in these settings is to identify which defendants are eligible and seem suitable for treatment, and the defense attorney's objective is to advocate for the client's admission to the program (if the prosecutor seems reluctant) and to explain to the client how treatment is a better deal than custody, if that's the case. See Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1618 (2003).

<sup>54</sup> See Kay L. Levine et al., *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653 (2019). In making these points we do not mean to suggest that the balance of power in the criminal courtroom is equal, but rather to encourage observers to remain attuned the variety of practices that exist in state criminal courts across the country, some of which lessen the prosecutor's tight grip on the reins of justice. See Bellin, *supra* note 48.

<sup>55</sup> See generally Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 706 (2017).

<sup>56</sup> See Hollway, *supra* note 21; Mallory Emma Garvin, *In the Interest of Justice: The Gold Standard for Conviction Integrity Units*, SETON HALL L. (STUDENT WORKS) 4 (2023) available at [https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2313&context=student\\_scholarship](https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2313&context=student_scholarship) [<https://perma.cc/7YNN-3KJ5>] (“[c]onviction integrity came onto the scene in the mid-2000s.”).

<sup>57</sup> See Elizabeth Webster, *The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. CRIM. L. & CRIMINOLOGY 245 (2020).

posture toward any challenges to past convictions.<sup>58</sup> Their advocacy takes on an extra edge because they also perceive themselves as defending the professional reputations of their colleagues who prosecuted the original case.<sup>59</sup> The reduced presence of a judge and the lack of discovery or other procedural mechanisms that force some cooperation between the parties may contribute to this high-conflict environment.<sup>60</sup> In other prosecutor offices, however, the conviction integrity unit steps back from adversarial conflict. Prosecutors aim for open communication and transparency with defense counsel, and they enlist the defense in media strategies surrounding their cases.<sup>61</sup> The range of coordinated strategies in post-conviction review includes “communicat[ing] with defense about joint case reinvestigations, ordering forensic testing, sharing case files, and scheduling court appearances.”<sup>62</sup> Defense attorneys might even coach prosecutors on certain skills they lack, such as identifying specialized forensic experts and dealing with the public fallout after evidence of misconduct emerges.<sup>63</sup>

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As these models show, modern prosecutors and defense attorneys are regularly called upon to step outside of their classic adversarial roles to handle matters that fall within the criminal court’s jurisdiction. Laurie Levenson has memorably referred to this transition as “cross[ing] the great adversarial divide.”<sup>64</sup> Sometimes the parties cross this divide in stages. Prosecutors retain a lot of

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<sup>58</sup> See Dana Carver Boehm, *The New Prosecutor’s Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 3 UTAH L. REV. 613 (2014).

<sup>59</sup> See Laurie L. Levenson, *The Problem with Cynical Prosecutor’s Syndrome: Rethinking a Prosecutor’s Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) (describing prosecutors in Los Angeles who responded with hostility when her clinic filed exoneration requests and were uninterested in distinguishing between defendants’ claims; loyalty to comrades and finality of prosecution were the ruling values).

<sup>60</sup> See Ronald F. Wright & Kay L. Levine, *Place Matters in Prosecution Research*, 14 OHIO ST. J. CRIM. L. 675 n.6 (2017) (discussing that conviction integrity cases “are handled in a practice setting that is based on the presumption of guilt, rather than the presumption of innocence.”).

<sup>61</sup> See Webster, *supra* note 11.

<sup>62</sup> *Id.* at 873 (citing Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2008) and Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2016)). Green and Yaroshefsky argue that in the post-conviction context, the prosecutor should be more of a neutral, objective administrator than an adversary. Yaroshefsky & Green, *supra* note 46, at 506.

<sup>63</sup> See Webster, *supra* note 11, at 4 (citing Keith A. Findley, *Flawed Science and the New Wave of Innocents*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* 184 (Daniel Medwed, ed. 2017); Laurie L. Levenson, *Searching for Injustice: The Challenge of Post-conviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545 (2014); Levenson, *supra* note 59.

<sup>64</sup> Levenson, *supra* note 59, at 372.

discretion to decide how to respond to a defense motion, whether in an ongoing case or in an exoneration appeal: they can resist, do nothing, or actively support the defense in its claim. Resistance leads to an adversarial model; support reflects a measure of cooperation. Silence lies somewhere in between.

### III. METHODOLOGY AND LEGAL STRUCTURES IN OUR SITES

This project aspires to construct an oral history of second-look sentence review efforts in a range of counties across the United States. Our aim is to document through interviews and other sources how practices got to be the way they are. Although it is possible to note similar developments across different jurisdictions, oral histories do not produce qualitative evidence of trends and themes that are generalizable to many other places.<sup>65</sup>

At this point, we have conducted thirty-four interviews and reviewed sources in three jurisdictions: Chittenden County, Vermont; Ramsey County, Minnesota; and King County, Washington. Ultimately, we will create oral histories for ten jurisdictions, varied by size, location, and underlying political orientation. The study sites also vary in terms of the legal scaffolding that enables sentence reviews by the prosecutor's office and the state court.<sup>66</sup> One advantage of our first three sites is that they already offer some variety in terms of population size and the complexity of the institutions involved in the work. The amount of local experience with the new practice and the formality of the legal structure that supports resentencing differs too.

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<sup>65</sup> Because we conducted oral history interviews rather than data collection, many (but not all) of our participants agreed to be referenced by name. We are not making generalizable claims outside the sites we are studying and remain aware that we draw our interview candidates from a non-random sample. We also subscribe to the adage that place matters in criminal justice research, which constrains our ability to draw universal lessons from our selected sites. *See generally* Wright and Levine, *supra* note 60. For further discussion of the strengths and weaknesses of this research methodology, see PETER DREIER, JOHN H. MOLLENKOPF & TODD SWANSTROM, *PLACE MATTERS: METROPOLITICS IN THE TWENTY-FIRST CENTURY* (2014); JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* (1987); ROBERT E. PARK, ERNEST W. BURGESS & RODERICK D. MCKENZIE, *THE CITY: SUGGESTIONS FOR INVESTIGATION OF HUMAN BEHAVIOR IN THE URBAN ENVIRONMENT* (1925); ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* (2012); Thomas F. Gieryn, *A Space for Place in Sociology*, 26 *ANN. REV. SOCIOLOGY* 463 (2000).

<sup>66</sup> The invitation to participate in this Symposium created a forum for us to present preliminary findings from our ongoing research, relating to one subtopic of interest: the distinctive interactions among prosecutors and defense attorneys. Negotiations are ongoing for interview access in the remaining jurisdictions in our study.

Although the various types of statutory support for resentencing are responsible for some of the differences between our three study sites, other factors also seem relevant. The nature of the workgroup relationships, the caseloads, political constraints on prosecutors and judges, the pre-existing community organizations available to support re-entry, and professional networks among prosecutors and defense attorneys all combine to shape the second look practices in any given county.

### A. *Chittenden County, Vermont*

Chittenden County is the smallest of the three study sites and has no formal legal mechanism to conduct resentencing inquiries. Resentencing efforts occur on a more ad hoc basis and are conducted through creative loopholes. Legislation is currently pending in the state senate to create a formal pathway, but its passage is far from assured.<sup>67</sup>

#### i. Demographics and Political Environment

Chittenden County sits in northern Vermont; the county seat is the city of Burlington, where the University of Vermont is located. In the 2020 census its population was just over 168,000 people, making it the largest county in the state.<sup>68</sup> According to the State's Attorney, Chittenden is responsible for approximately one-third of Vermont's criminal cases and is home to both a men's prison and the only women's carceral facility in the state.

Sarah George has been the State's Attorney in Chittenden since 2017. She was last re-elected in 2022 by a twenty-point margin and will face re-election again in 2026. She embraces a platform of progressive ideals, including reducing the use of jail and probation for those convicted of crimes in favor of providing services. In addition to reducing the number of people coming into the criminal legal system, State's Attorney George aims to address two kinds of back-end sentencing problems, both of which stemmed from the harsh policies of the 1980s and 1990s—the use of life without parole, which renders a prisoner ineligible for release for the duration of his natural life; and the use of very long sentences with high minimum terms.

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<sup>67</sup> See Zoom Interview with Tanya Vyhofsky, St. Senator Vt. (Sept. 29, 2023); Zoom Interview with Alexandra Bailey of The Sent'g Project (Sept. 21, 2023) [hereinafter Bailey Interview]. The bill is currently de-noted S.155 (2023).

<sup>68</sup> See *Chittenden County, Vermont*, WIKIPEDIA [https://en.wikipedia.org/wiki/Chittenden\\_County,\\_Vermont](https://en.wikipedia.org/wiki/Chittenden_County,_Vermont) [https://perma.cc/6ZD6-6UGW] (last visited Feb. 24, 2024).

## ii. Legal Frameworks for Resentencing

People serving time for offenses committed in Chittenden have benefitted from two kinds of resentencing. In the first, a prisoner sentenced to serve life without parole is resentenced to a term with a minimum, which makes him or her eligible for release on furlough at some point. For some of these prisoners, the minimum term has already been reached by the time the resentencing process takes place, which means they are eligible for furlough immediately; for others, the minimum term will be reached in the very near future. In either instance, the decision about whether to grant furlough rests with the Department of Corrections.<sup>69</sup> In the second kind of resentencing, a prisoner sentenced to a fixed minimum term is resentenced to a “split,” so that once the minimum term is reached, the person receives probation. Unlike furlough, the Department of Corrections does not control the timing of release on probation; the person benefitting from this kind of resentencing goes home immediately.<sup>70</sup>

Our Chittenden County interviewees described two distinct methods to initiate resentencing. Neither approach is grounded in clear statutory authority; they both stem from creative lawyering and cooperative relationships between the defense and prosecution. Approximately twenty to twenty-five people have been resentenced in Chittenden based on these efforts.<sup>71</sup>

First, early in the pandemic, when the courts had shut down and people were concerned about the rates of infection in carceral facilities, defense attorneys in Chittenden County brainstormed ways to get long-serving and/or elderly prisoners out of custody. Working in coordination with the State’s Attorney’s office, they crafted a legal argument that wove together a state resentencing statute and a local rule about judicial authority.<sup>72</sup> While the statute allowed for resentencing only within 90 days of the original sentence, the rule expressed a broader sense of judicial authority over sentencing. In a series of petitions to the local criminal court judges, defense attorneys argued that the flexible language in the rule ought to trump the time limit delineated in the statute. The State’s Attorney agreed with this interpretation of the rule and shared the goal of trying to get elderly

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<sup>69</sup> Interview with Prosecutor 5, in Vermont (Sep. 28, 2023), [hereinafter Prosecutor 5 Interview].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Interview with Defender 4, in Vermont (Sept. 29, 2023) [hereinafter Defender 4 Interview]. We note that Defender 4 seems to be referring to two parts of Vermont Rule of Criminal Procedure 35; the rule contains both a time-restricted resentencing clause and a more general clause describing the court’s resentencing authority. She was not able to give us a statutory citation, and we were not able to independently find one.



and long-serving prisoners out of custody; she therefore supported the petitions filed by the public defender's office. Some judges were convinced and used their authority to resentence the prisoners identified by defense attorneys; others were not and denied the petitions out of hand. Approximately ten people were resentenced and released from custody because of this initiative.<sup>73</sup>

Second, the Prisoner's Rights section of the statewide Defender General's Office files post-conviction relief ("PCR") petitions on behalf of convicted prisoners, alleging legal and constitutional errors that occurred during trial or sentencing.<sup>74</sup> A person in the State's Attorney's Office reviews those petitions and decides whether to oppose or go along with them. In the past four years, the State's Attorney's Office has decided to use these PCRs as an opportunity to offer resentencing. If they agree with the defense that a legal or constitutional error may have occurred below, they try to mitigate the risk of losing the PCR fight and then having to retry the case. In these instances, they work with the defense to craft a compromise: the State's Attorney will go along with the PCR petition, the court will vacate the underlying conviction, and the defendant will plead guilty to a new charge with a shorter sentence. If after an independent review of the file the State's Attorney can no find legally plausible error, they contest the PCR.<sup>75</sup> The State's Attorney's Office estimates that approximately fifty such petitions have been filed in the past four years, and they have opposed only five to ten of them. They have actively supported ten to fifteen of them, and the remainder were dismissed by the defense attorney. In every PCR petition supported by the State's Attorney, the judge hearing the motion has gone along with the parties' request for resolution.<sup>76</sup>

### B. Ramsey County, Minnesota

Ramsey County is the second largest of our three study sites. Courtroom actors there have limited experience with ad hoc resentencing but are now transitioning to a new statutory basis for "interests of justice" resentencing. The prosecutor's office has not yet considered any cases for resentencing under the new statutory

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<sup>73</sup> That initiative has ended, as of this writing. *Id.*

<sup>74</sup> Vermont prisoners are legally entitled to counsel in all PCR proceedings. Zoom Interview with Kelly Green, defense attorney (Sept. 27, 2023) [hereinafter Green Interview].

<sup>75</sup> Green interview, *supra* note 74; Defender 4 interview, *supra* note 72; Zoom Interview with Prosecutor 6 (Sept. 29, 2023) [hereinafter Prosecutor 6 Interview].

<sup>76</sup> Prosecutor 5 Interview, *supra* note 69; Prosecutor 6 Interview, *supra* note 75. This initiative is on-going, as of this writing. *Id.*

framework. Interviewees spoke to us about past practices in the ad hoc regime, the design of an entire new suite of resentencing statutes, and what the actors anticipate will happen once this new channel opens.

### i. Demographics and Political Environment

St. Paul and Minneapolis together form the “Twin Cities,” the largest population center in Minnesota. Minneapolis sits entirely within Hennepin County, which has a population of 1,270,000; St. Paul is in Ramsey County, which has a population of 540,000.

John Choi was first elected County Attorney—the official responsible for prosecution of felonies and some misdemeanor charges—in 2011. Before then, he served as the City Attorney of St. Paul for four years, supervising the prosecution of lower-level offenses, including violations of city ordinances, domestic abuse, and DWI. Choi ran for office as a Democrat. Defense attorneys perceive him as a centrist and an “affable” public figure who maintains strong relationships with law enforcement and victim advocacy groups.<sup>77</sup> Like Sarah George of Chittenden, he has become active with national groups that promote a progressive or reformist vision of prosecution.<sup>78</sup>

### ii. Early Resentencing

After a few years in office, Choi started to hear from local defense attorneys and community groups about people in Ramsey County who had been convicted of crimes, had served their full term of incarceration, and had returned to the community. After their return, these people faced collateral consequences, such as removal proceedings in the immigration system or inability to renew a professional license, making it difficult for them to resume settled and productive lives in their communities.<sup>79</sup> Choi understood

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<sup>77</sup> See Interview with Perry Moriarty, Associate Professor of Law, University of Minnesota, in Minneapolis, Minnesota (Oct. 13, 2023), at 1:03:32 (“John is generally more affable”) [hereinafter Moriarty Interview]; Interview with John Choi, Ramsey County Attorney, in St. Paul, Minnesota (Oct. 12, 2023) (describing relationships with police and victim organizations) [hereinafter Choi Interview].

<sup>78</sup> See Press Release, Fair & Just Prosecution, Prosecutors Announce Groundbreaking Resentencing Efforts to Reduce U.S. Mass Incarceration Epidemic (Dec. 7, 2020), <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2020/12/FJP-Sentencing-Review-Press-Release.pdf> [<https://perma.cc/J49W-3Z5S>] (discussing prosecutor-initiated resentencing, letters, and meeting attendance); *Prosecutor Statement Responding to AG Barr*, FAIR & JUST PROSECUTION (Feb. 13, 2020), <https://www.fairandjustprosecution.org/staging/wp-content/uploads/2020/02/Prosecutor-Statement-Responding-to-AG-Barr.pdf> [<https://perma.cc/S6BJ-LWZQ>] (signed by John Choi and others).

<sup>79</sup> See Choi Interview, *supra* note 77.

these cases as providing an opportunity for him to “do justice” by considering the rehabilitation efforts of former defendants.<sup>80</sup>

In a few of the collateral consequences cases, Choi joined with defense counsel to file post-conviction motions to revise the sentence to new terms that would not trigger the collateral consequence. For instance, the parties might move to revise the maximum incarceration term from 365 to 364 days.<sup>81</sup> Outside the context of post-conviction allegations of legal or factual error, Choi did not ask for resentencing in any cases involving people still serving a term of incarceration.<sup>82</sup>

These cases remained low visibility and proceeded on a creative reading of existing statutes. But when a judge in neighboring Hennepin County ruled that he did not have legal authority under the existing statute to revise a sentence as requested by the prosecutor there, Choi stopped the practice in Ramsey County and turned his efforts to strengthening the legal basis for resentencing.<sup>83</sup>

### iii. Recent Legislation and Implementation

During professional association meetings, Choi learned from Dan Satterberg, the former Prosecuting Attorney of King County, about new statutes in Washington and California that created explicit authority for prosecutors to request resentencing in prior cases, based on the “interests of justice” rather than on legal or factual error in the original conviction.<sup>84</sup> He learned more about the California model during webinars and conversations with the leaders of For the People.<sup>85</sup>

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<sup>80</sup> See Marco Poggio, *Minnesota Joins Prosecutor-Led Resentencing Law Movement*, LAW360 (June 23, 2023, 7:00 PM), <https://www.law360.com/articles/1680599/minnesota-joins-prosecutor-led-resentencing-law-movement> [<https://perma.cc/AM92-T7BF>].

<sup>81</sup> See Choi Interview, *supra* note 77.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*; CAL. ASSEMBLY B. 2942, approved Sept. 30, 2018 (amending CAL. PENAL CODE §1170(b) to authorize resentencing, initiated by District Attorney and approved by the court to serve “the interests of justice.”).

<sup>85</sup> See Choi Interview, *supra* note 77. For a description of lobbying in state legislatures by For the People, see Hillary M. Blout & Jeff Reisig, *Understanding Prosecutor-Initiated Resentencing: How and Why Prosecutors Are Using a New Tool to Expand Justice*, A.B.A.: CRIM. JUST. (Jan. 10, 2023), [https://www.americanbar.org/groups/criminal\\_justice/publications/criminal-justice-magazine/2023/winter/understanding-prosecutor-initiated-resentencing-how-why-prosecutors-are-using-new-tool-expand-justice/](https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2023/winter/understanding-prosecutor-initiated-resentencing-how-why-prosecutors-are-using-new-tool-expand-justice/) [<https://perma.cc/R7SD-J8U9>] (enactment of PIR in California, Illinois, Louisiana, Oregon, and Washington; legislation proposed in Florida, Georgia, Maryland, Massachusetts, Minnesota, New York, and Texas). Other organizations also started advocating for second-look sentencing in the late 2010s. See James Forman Jr. & Sarah Lustbader, *Every D.A. in America Should Open a Sentence Review Unit*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/mass-incarceration-prosecutors-sentencing.html> [<https://perma.cc/W6UX-KHC4>]; *Model District Attorney Sentence Review Guidelines*, JUST. COLLABORATIVE (2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/01/Model-Sentencing-Review-Guidelines-FINAL.pdf> [<https://perma.cc/L9DA-9WTC>]; KYLE C. BARRY ET AL., MODEL PROSECUTOR GUIDELINES: SENTENCING REVIEW (2020).

At that point, Choi contacted other interested groups in Minnesota, enlisted expert advice from For the People, and lobbied the state legislature in 2021 for new legislation along the lines of the statutes in Washington and California.<sup>86</sup> The concept found support in the House of Representatives but could not attract the necessary votes in the Republican-controlled Senate.<sup>87</sup> After the failure of the bill in 2021, a group of prosecutors, judges, and others from the Twin Cities met several times to consider possible revisions to the statewide rules of criminal procedure that might provide a sounder legal basis for resentencing in the absence of legal or factual error.<sup>88</sup>

The political landscape changed profoundly after the November 2022 elections, when the Democratic party won control of both chambers in the legislature. The governor was also a Democrat. During the 2023 session, the legislature passed a rich and varied package of new procedural devices to open old sentences for reconsideration.<sup>89</sup> The package included changes in voting rules and staff support to reinvigorate the dormant process for pardons and clemency.<sup>90</sup> Limitations on the felony murder rule and reduced punishments for drug possession were made retroactive.<sup>91</sup> Juvenile defendants received several new procedural avenues to obtain reconsideration of their sentences.<sup>92</sup> And the statute empowered the

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<sup>86</sup> See Jim Maurice, *Sentencing Reform Bill Introduced in Minnesota Legislature*, WJON (Feb. 24, 2021), <https://wjon.com/sentencing-reform-bill-introduced-in-minnesota-legislature/> [<https://perma.cc/Z32D-PFS7>]; *Ramsey County Attorney's Office Creates Sentencing Review Unit: Q&A with Michelle Monteiro, Assistant Ramsey County Attorney*, RAMSEY CNTY. BAR ASS'N (July 6, 2021), <https://www.mnbar.org/ramsey-county-bar-association/news/announcements/2021/07/06/ramsey-county-attorney-s-office-creates-sentencing-review-unit-q-a-with-michelle-monteiro-assistant-ramsey-county-attorney> [<https://perma.cc/9Z9M-LDDD>]; Tim Walker, *Prosecutors Would Have More Leeway to Request Reduced Sentences Under Bill Headed to House Floor*, SESSION DAILY (Mar. 4, 2021, 3:57 PM), <https://www.house.mn.gov/sessiondaily/Story/15731> [<https://perma.cc/2EWY-NCHU>].

<sup>87</sup> See MINN. STAT. § 359 (2021); Choi Interview, *supra* note 77.

<sup>88</sup> See Choi interview, *supra* note 77.

<sup>89</sup> See Kaitlin Menza, *With a Broad Coalition, Minnesota Overhauls Its Criminal Justice System*, ARNOLD VENTURES (July 19, 2023), <https://www.arnoldventures.org/stories/minnesota-overhauls-its-criminal-justice-system> [<https://perma.cc/W2UK-4TXD>]; *2023 Legislative Session DOC Impact Brief*, MINN. DEP'T CORR., <https://mn.gov/doc/about/legislative-info/impact-brief.jsp> [<https://perma.cc/G3WZ-JNCN>] (last visited Feb. 24, 2024).

<sup>90</sup> MINN. STAT. § 1507 (2023); see generally Dan Barry, *'I Want to Be Forgiven. I Just Want to Be Forgiven.'* N.Y. TIMES (Oct. 17, 2023), <https://www.nytimes.com/2023/10/15/us/minnesota-board-of-pardons.html> [<https://perma.cc/DM7S-RW9L>].

<sup>91</sup> Minn. Sess. Law H.F. 1406 (felony murder); Chapter 63, H.F. 100 (marijuana).

<sup>92</sup> Some of the sentence reductions occur automatically through an administrative process, while others require individualized judicial hearings. Interview with Judge 3, in Minnesota (Oct. 12, 2023) [hereinafter Judge 3 Interview]; Minn. Sess. Law S.F. 2909; see also Benjamin Boateng, *Minnesota's New Law Could Transform the Landscape of Juvenile Life without Parole Sentencing*, URB. INST. (Aug. 11, 2023), <https://www.urban.org/urban-wire/minnesotas-new-law-could-transform-landscape-juvenile-life-without-parole-sentencing> [<https://perma.cc/UW2J-LYYP>].

Department of Corrections to move up the release date for some defendants sentenced under a guidelines system.<sup>93</sup>

One additional component of the package was prosecutor-initiated resentencing, to further the interests of justice.<sup>94</sup> When the new law took effect in August 2023, the Ramsey County Attorney's office began planning for its implementation. Choi appointed a citizens' advisory panel who would meet regularly to consider potential priorities for cases to select for second-look sentencing.<sup>95</sup> The office also obtained data analysis from For the People to estimate the number of incarcerated people in various categories who might become eligible over time.<sup>96</sup> The advisory panel started meeting on a quarterly basis but the office did not publicize its membership or functions.<sup>97</sup> In the meantime, the office website asked defense attorneys and people in prison to wait before sending letters or otherwise filing requests under the new law. The website declared that the office would begin accepting those requests after they formulated their initial criteria and procedures.<sup>98</sup>

Planning on the defense side has been less definitive, perhaps because the affected organizations want to hear the prosecutors' plans before they respond in a concrete way. At this point, it is not clear whether representation of the applicants will come from the State Appellate Defender, county public defender offices, law school clinics, established non-profit providers of legal services, the private bar, or some combination of these groups.<sup>99</sup>

### C. King County, Washington

King County is the largest of our three study sites. The many organizations that now participate in resentencing have more

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<sup>93</sup> See Judge 3 Interview, *supra* note 92; Minn. Sess. Law H.F. 1319, §7 (moving release eligibility back from 67% of announced sentence to 50%).

<sup>94</sup> See MINN. STAT. § 609.133 (2023); Rochelle Olson, *Minnesota Prosecutors Can Soon Seek Resentencing for Prisoners*, STAR TRIB. (July 15, 2023, 2:00 PM), <https://www.startribune.com/minnesota-prosecutors-can-soon-seek-resentencing-for-prisoners/600289948/> [<https://perma.cc/PU24-XHZJ>].

<sup>95</sup> The office had not yet formulated the criteria at the time of our interviews. See Choi Interview, *supra* note 77.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; *Prosecutor-Initiated Sentence Adjustment*, RAMSEY CNTY., <https://www.ramseycounty.us/your-government/leadership/county-attorneys-office/news-updates/prosecutor-initiated-sentence-adjustment> [<https://perma.cc/5TQ7-VQKC>] (last visited Mar. 9, 2024).

<sup>99</sup> Interview with Defender 6 (Oct. 12, 2023) [hereinafter Defender 6 Interview]; Moriarty Interview, *supra* note 77; Interview with Jon Geffen in St. Paul, Minnesota (Oct. 13, 2023) [hereinafter Geffen Interview]; Zoom Interview with Cullen Smith, Director, Neighborhood Justice Center (Oct. 18, 2023) [hereinafter Smith Interview].

experience than actors in the other two sites. King County moved three years ago from ad hoc resentencing to more publicized and programmatic resentencing under explicit statutory authority. Washington State's resentencing law was passed in 2020, following a model previously adopted in California. Since its enactment, King County has resentenced dozens of people.<sup>100</sup>

### i. Demographics and Political Environment

Seattle is located in King County, Washington, with a population of about 2.3 million. The King County Prosecuting Attorney's Office handles all felony matters, along with some misdemeanors.

Dan Satterberg became the Prosecuting Attorney for King County in 2007, after working for many years as a line attorney and unit supervisor in the office. He served in that capacity until 2023. Satterberg began his tenure as a Republican but announced during his 2018 re-election campaign that he had changed his affiliation to the Democratic Party.<sup>101</sup> During the 2010s he became active with national groups that supported the work of reform-oriented prosecutors, like his counterparts in Chittenden and Ramsey.<sup>102</sup>

When Satterberg announced his planned retirement in 2022, longtime deputy Leesa Manion announced her candidacy for the position. She affirmed her support for resentencing initiatives during the campaign.<sup>103</sup> Manion faced a challenge from a former prosecutor, Jim Ferrell, who argued that Satterberg had moved too far in some instances from a traditional philosophy of prosecution and punishment. Manion won the general election with 58% of the vote.<sup>104</sup>

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<sup>100</sup> See Interview with Carla Lee, Chief of Staff, King County Prosecuting Attorney's Office, in Seattle, Washington (Sept. 21, 2023) [hereinafter Lee Interview 1] at 28:54 (estimating the office had completed forty to forty-five resentencing proceedings).

<sup>101</sup> See Jim Brunner, *King County Prosecutor Dan Satterberg Says He's Now a Democrat*, SEATTLE TIMES (May 29, 2018, 12:01 PM), <https://www.seattletimes.com/seattle-news/politics/king-county-prosecutor-dan-satterberg-says-hes-now-a-democrat/> [https://perma.cc/6WY2-UDVZ] (the position of Prosecuting Attorney in Washington is officially non-partisan, but voters are generally aware of the partisan affiliation of the candidates).

<sup>102</sup> See *Meet the Movement: Dan Satterberg*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/meet-the-movement/dan-satterberg/> [https://perma.cc/5QVF-Y5UU] (last visited Mar. 9, 2024).

<sup>103</sup> See Zoom Interview with Carla Lee, Chief of Staff, King County Prosecuting Attorney's Office (Oct. 5, 2023) [hereinafter Lee Interview 2].

<sup>104</sup> See Sara Jean Green, *Leesa Manion Sworn in as King County Prosecuting Attorney*, SEATTLE TIMES (Jan. 9, 2023, 6:56 AM), <https://www.seattletimes.com/seattle-news/law-justice/leesa-manion-sworn-in-as-king-county-prosecuting-attorney/> [https://perma.cc/B9KU-B9YZ].

## ii. Resentencing Before and After the Statute

During Satterberg’s tenure as Prosecuting Attorney, he took the initiative to revisit some cases that, in his view, had resulted in overly long prison terms. The cases involved relatively young defendants or those who received long prison terms under Washington’s three-strikes law.<sup>105</sup> As in Chittenden and Ramsey Counties, the earliest resentencing cases proceeded on murky statutory authority. When a judge ruled that the post-conviction statutes in Washington did not authorize a judge to reset a finalized sentence in the absence of legal or factual error in the original conviction, Satterberg sought a new statute that would authorize his office to request such a resentencing from a judge.<sup>106</sup> The legislature enacted the new law in 2020, inspired by a similar law enacted recently in California.<sup>107</sup> The statute, known colloquially as “6164,” broadly authorizes resentencing in “the interest of justice.”<sup>108</sup>

Shortly after the new statute became law, the Washington Supreme Court issued a series of decisions that mandated resentencing for certain juvenile defendants, defendants convicted of drug possession offenses, and other categories of prisoners.<sup>109</sup> Swamped with petitions to resentence in the mandatory cases, the King County office did not conduct discretionary sentence reviews at the pace it had anticipated. But once the office worked through the stack of mandatory review cases, it shifted focus and resources over to discretionary review.<sup>110</sup>

Resentencing matters based on legal error are handled by multiple attorneys in a “post-conviction” unit in the King County office; the discretionary resentencing matters go to the “Sentencing Review Unit,” or “SRU.”<sup>111</sup> The SRU is staffed by two paralegals, a victim services coordinator, and one attorney—the Chief Deputy in the office. The SRU maintains a website that describes the

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<sup>105</sup> See Zoom Interview with Dan Satterberg, Prosecuting Attorney, King County, Washington (Aug. 26, 2021) [hereinafter Satterberg Interview]; Zoom Interview with Jeffrey Erwin Ellis, Defense Attorney (Sept. 28, 2023), at 14:12 [hereinafter Ellis Interview].

<sup>106</sup> See Satterberg Interview, *supra* note 105.

<sup>107</sup> WASH. REV. CODE ANN. § 36.27.130 (West 2020); Cal. Assembly Bill No. 2942, approved Sept. 30, 2018 (amending CAL. PENAL CODE § 1170(b)). For the People was instrumental in the California legislative process and consulted with legislators and lobbyists in Washington.

<sup>108</sup> See S.B. 6164, codified at WASH. REV. CODE ANN. § 36.27.130 (West 2020); Satterberg Interview, *supra* note 105; Zoom Interview with Leesa Manion, Prosecuting Attorney, King County, Washington (Feb. 27, 2023) [hereinafter Manion Interview]; Lee Interview 1, *supra* note 100.

<sup>109</sup> See *State v. Blake*, 197 Wash.2d 170 (Wash. 2021) (holding that possession of controlled substance statute was unconstitutional because it did not contain a “knowledge” element); *In re Monschke*, 482 P.3d 276 (Wash. 2021) (ruling unconstitutional Washington’s statute requiring all aggravated murderers to be sentenced to life without parole; the statute did not allow enough discretion for a judge to proportionally sentence a youthful offender).

<sup>110</sup> See Lee Interview 1, *supra* note 100.

<sup>111</sup> See Interview with Prosecutor 2 in Seattle, Washington (Sept. 21, 2023) [hereinafter Prosecutor 2 Interview].

application process, including the types of materials necessary to support a request.<sup>112</sup> It also lists “priority” categories for review—such as crimes committed by relatively young people, sentences extended by firearms enhancements, or sentences extended by upward departures under the sentencing guidelines—and “non-priority” categories, such as homicide cases.<sup>113</sup> Close consultation with victims and their families is a necessary part of every sentence review. The SRU asks whether restorative justice measures have allowed the victims to learn about the current attitudes and changed behavior of the person who committed the crime.<sup>114</sup>

The SRU often consults other units in the prosecutor’s office (such as the Violent Crimes unit) to determine whether charging practices in the office have changed since the time of the original conviction. They use a “de-identified” version of the applicant’s file to pose this question to the prosecutors in the other unit, although in some cases it is obvious to the other attorneys which historical case is under review.<sup>115</sup>

During the early days of sentence review, two people released early from prison committed serious and salient crimes, attracting media attention. After these “Willie Horton” moments, the office decided to invest more heavily in re-entry support.<sup>116</sup> In some cases, prosecutors contact pre-existing non-governmental organizations, such as the Freedom Project, that specialize in re-entry work. In other cases, the applicants or their defense attorneys have contacted NGOs to develop a detailed re-entry plan.<sup>117</sup>

Defense attorneys for the applicants come from several organizations. Originally, local non-profit groups involved in clemency petitions, such as the Seattle Clemency Project, expanded their coverage to include resentencing cases.<sup>118</sup> These groups recruited attorneys from non-criminal practices to provide pro bono services (with support from more experienced attorneys), but sometimes

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<sup>112</sup> See *Sentence Review Unit*, KING CNTY., <https://kingcounty.gov/es-es/dept/pao/about-king-county/about-pao/team-leadership/organizational-structure/purpose-strategy-performance/sentence-review-unit> [<https://perma.cc/EMA3-PRXK>] (last visited Mar. 9, 2024).

<sup>113</sup> See Interview with Tristan Nelson Sentence Review Unit, Office of the King County Prosecuting Attorney, in Seattle, Washington (Sept. 21, 2023) [hereinafter Nelson Interview]; *Sentence Review Process*, KING CNTY., <https://kingcounty.gov/es-es/dept/pao/courts-jails-legal-system/adult-defendant-resources/sentence-review> [<https://perma.cc/J3NZ-LV89>] (last visited Feb. 25, 2024).

<sup>114</sup> See Lee Interview 1, *supra* note 100.

<sup>115</sup> See Interview with Prosecutor 3 in Washington (Sept. 21, 2023); Interview with Prosecutor 4 in Washington (Sept. 21, 2023).

<sup>116</sup> See Lee Interview 1, *supra* note 100; Satterberg Interview, *supra* note 105.

<sup>117</sup> See Lee Interview 1, *supra* note 100.

<sup>118</sup> See Satterberg Interview, *supra* note 105; Interview with Community Advocate 1 in Washington (Sept. 22, 2023).



the non-profits simply matched applicants to staff attorneys with criminal practice experience.<sup>119</sup> Later, the Department of Public Defense started providing attorneys to handle resentencing cases, aiming to increase the impact of the resentencing program.<sup>120</sup>

Between 2021 and our interviews in the fall of 2023, the SRU requested a reduced sentence in approximately forty to forty-five cases. Judges have never denied the requests, and on a few occasions they have granted more generous reductions than the prosecutors requested.<sup>121</sup>

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As these accounts reveal, resentencing initiatives vary widely by jurisdiction. Statutory authority is a key driver of that variation, but other factors matter too—caseloads, politics, and professional networks all combine to shape the prosecutor’s second look approach in any given county. In the pages that follow, we describe how attorney relationships and attitudes begin from a point of consensus about high-level principles and objectives for second look sentencing. Then we show how the details of implementation shape (and are shaped by) the expectations and interactions of the attorneys in our three research sites.

#### IV. CONTINUUM FROM COLLABORATION TO PERSUASION TO ADVERSARIAL INTERACTIONS

In this part, we draw on our original field interviews to describe the interactions of defense attorneys and prosecutors in resentencing matters. Defense attorney and prosecutor behavior appear on a spectrum ranging from active collaboration between prosecutors and defense attorneys to modified “persuasion” activities to traditional adversarial interactions.

In prosecutor-initiated resentencing, persuasion in pursuit of a shared objective is more common than maximalist adversarial presentations. Defense attorneys in our research sites described the importance of persuading with facts and less often with legal arguments to get a petition seen and to secure an early release. The

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<sup>119</sup> See Ellis Interview, *supra* note 105; Interview with Community Advocate 2 in Washington (Sept. 22, 2023).

<sup>120</sup> See Zoom Interview with Defense Attorney 1 (Sept. 25, 2023) [hereinafter Defense Attorney 1 Interview].

<sup>121</sup> See Lee Interview 1, *supra* note 100.

audience for their persuasion differs from the judges and juries who evaluate attorney arguments in criminal courtrooms: defense attorneys handling resentencing matters must tailor their persuasive techniques to the prosecutor's office alone.

A. *Presenting Expansive Facts with Uncommon Transparency*

In the regular business of the criminal courthouse, the facts that lawyers treat as relevant start with the statutory elements of potential criminal charges. Attorneys in trial and pre-trial bureaus, for example, focus their time on finding evidence that is relevant to the charged offense(s) and admissible as defined by the rules of evidence and local court practice; they use this evidence to shape their approach to plea deals, pre-trial motions, and trial strategy (if the case does not resolve). Those legally-relevant facts expand to include equitable concerns—particularly any family or personal ties among the people involved in the incident—during plea negotiations<sup>122</sup> and sentencing hearings.<sup>123</sup> For attorneys doing appellate work, pursuit of new evidence gives way to scrutiny of the lower court record for procedural errors; information not contained in the official court transcript won't be considered.

Attorneys engaged in second-look sentencing consider many more facts than in the trial or appellate context. The larger sphere of relevance stems from the problems that resentencing is designed to address, and the challenges legal system actors face when attempting to predict future behavior from past actions. As one community advocate explained, “it is not like the trial level, front-end work at all. So much time has passed you know, twenty years in most of these cases. [We had to learn] about prison, about how people . . . rebuild their lives, how they heal.”<sup>124</sup> Resentencing is both backward-looking and forward-looking, as prosecutors scrutinize the defendant's past for signs of emotional growth, markers of maturity, and indicia that he is likely to stay out of trouble after re-entry.<sup>125</sup> To make this kind of prediction, prosecutors require a comprehensive accounting of behavior since the time of the original sentence: has the person behaved well under the stress of prison? Does he have personal health issues that make him expensive to house and suggest he

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<sup>122</sup> See Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 *CARDOZO L. REV.* 1295, 1299 (2021) (discussing the importance of equitable factors).

<sup>123</sup> See BRUCE FREDERICK & DON STEMEN, *VERA INST. JUST., THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING - SUMMARY REPORT 1*, 4 (2012).

<sup>124</sup> Community Advocate 2 Interview, *supra* note 119, at 26:43.

<sup>125</sup> Judges too. But as previously discussed, prosecutors are the primary gatekeepers.

deserves to be in the care of family? Has he taken advantage of educational and treatment programs while inside? What kind of support will be available on the outside? These questions and more form the basis of the resentencing inquiry. One prosecutor described it like this:

Do they get along with fellow incarcerated individuals? Do they get along with staff? Are there any kind of mental health issues? What are some of the pro-social behaviors they've been engaged in? Do they pose a public safety threat? Has there been a psychological evaluation? Is there a risk assessment?<sup>126</sup>

Attorneys for the defendant, along with their staff and cooperating community organizations, develop the full record of prison programming and behavior for the prosecutor to review.<sup>127</sup> This is a kind of reverse “open-file policy” (that term is typically used to convey broad prosecutor disclosure to the defense at the pre-trial stage.)<sup>128</sup> Sometimes the defendants have collected this information for themselves, in preparation for parole or pardon proceedings or some other case review that is unconnected to the resentencing process.<sup>129</sup> But more often than not, the defense team must compile it.<sup>130</sup>

Defense attorneys recognize that putting together this dossier is a distinctive, time-intensive role. It takes more hours per case than a plea negotiation. It can even occupy more hours than trial preparation. Prisoners' Rights attorney Kelly Green, who has worked on resentencing matters in Chittenden County, Vermont, describes working these cases as “resource intense.”<sup>131</sup> In King County, Washington, two defense attorneys told us they spend approximately 100 hours preparing the file in each case: “pretty extensive stuff, right?

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<sup>126</sup> Lee Interview 1, *supra* note 100, at 16:47; *see also* Community Advocate 2 Interview, *supra* note 119, at 21:06 (comparing defense attorney expansive concepts of relevance in pardon and commutation proceedings to those in prosecutor-initiated resentencing, “you’re really saying the same thing, which is, this is who my client is today, this is who they were when this happened 25 years ago. You know, this is how they grew up, how they got into a period of, you know, disruptive patterns. This is how they’ve changed.”).

<sup>127</sup> *See* Community Advocate 2 Interview, *supra* note 119, at 27:44 (“[s]o it’s not adversarial . . . there’s no discovery. There’s no rules of evidence. There’s no motion work.”).

<sup>128</sup> Webster, *supra* note 11, at 8. In this sense, it compares to the post-conviction setting, where Elizabeth Webster noted that prosecutors “expected an open file policy for both parties.”

<sup>129</sup> *See* Ellis Interview, *supra* note 105, at 18:05 (“there are guys in prison now who know what you’ve gotta collect, right? And so sometimes I will be gifted with, I won’t say the complete, but a near complete package.”).

<sup>130</sup> In jurisdictions with participatory defense hubs, some of this work could be accomplished by community members of the hub; in others it could be handled by law school clinic students or social workers. It need not be performed by lawyers. For information about community defense hubs, *see generally* JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE (2023).

<sup>131</sup> Green Interview, *supra* note 74, at 43:27.

Lifetime time history, prison history you know, really approaching a hundred or more hours of work.”<sup>132</sup>

The broad lens of resentencing also requires defense attorneys to take a significant step back from the adversarial posture that they (and their clients) are accustomed to using. They have to share everything to be “an open book,” in the words of King County defense attorney Jeffrey Ellis. “Anything [the prosecutor’s office] wanna know, they get to learn.”<sup>133</sup>

Aside from compiling the complete record of the defendant’s behavior while in prison, the defense attorney sometimes will develop a specific re-entry plan for her client who is seeking resentencing. In Chittenden, the insistence on thorough re-entry planning has been inconsistent, keeping with the ad hoc, informal nature of resentencing initiatives there generally. In some instances, a community group called Vermonters for Criminal Justice Reform (“VCJR”), led by Tom Dalton, puts together a package of re-entry services for prisoners whose resentencing and release they support.<sup>134</sup> While Mr. Dalton has a law degree, he is not the attorney of record on these matters; he works in partnership with an attorney from the Prisoners’ Rights section of the Defender General when VCJR is advocating on behalf of a specific prisoner. On the flip side, a defense attorney who secured resentencing and release for about ten people early in the pandemic did very little in the way of re-entry planning with her clients. Short of confirming that they would have somewhere to live, she presented scant information to the State’s Attorney or to the local judges about the post-release plans for her clients.<sup>135</sup> Neither the State’s Attorney nor the local judges asked for more information; the desperation that characterized the early months of the pandemic created a moment in which little else mattered.<sup>136</sup>

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<sup>132</sup> Ellis Interview, *supra* note 105, at 12:55; *see also* Defense Attorney 1 Interview, *supra* note 120.

<sup>133</sup> Ellis Interview, *supra* note 105, at 32:01: “I tell my clients when we enter this process, everything’s an open book. Anything they wanna know, they get to learn. And if that means they wanna come talk to you, we do that. If that means, you know, they wanna talk to your wife or, you know, a family member or whatever. So . . . it’s a cooperative process, right? Like I said earlier, I wish it wasn’t . . . so much like clemency.”

<sup>134</sup> Information about VCJR was provided by Prosecutor 5 and by Tom Dalton (in separate interviews). *See* Prosecutor 5 Interview, *supra* note 69; Interview with Tom Dalton, Executive Director, Vermonters for Criminal Justice Reform, in Burlington, Vermont (Sept. 28, 2023) [hereinafter Dalton Interview].

<sup>135</sup> Defender 4 Interview, *supra* note 72. The public defender’s office sometimes works with a woman named Crystal Barry, who coordinated wrap-around services for people returning to the community, but she did not provide this function for people the office helped through resentencing during the pandemic. *Id.*

<sup>136</sup> *Id.*

In King County, the re-entry plan request is routine. Carla Lee, head of the resentencing unit, explains:

Every case that we work on, we require that there's a comprehensive re-entry plan that's included in the packet that we get when they're requesting us to resentence, to petition a court. . . . We wanna make sure that there's going to be employment, there's housing, there's any kind of treatment for any kind of lingering substance abuse disorder issues or any other mental health issues that may have informed their behavior that led to the incarceration. We wanna understand if there's family support, what's their support system.<sup>137</sup>

The prosecutor's searching inquiry into the merits of the defendant's application also includes outreach to the victim. Prosecutors in all three jurisdictions contact victims (or the surviving family of the crime victim) to gauge how they feel about resentencing. Sometimes the victim's input will derail an otherwise forward-moving file.<sup>138</sup> In Washington and Minnesota, prosecutors also want to know if the defendant himself ever attempted to contact the victim to express remorse.<sup>139</sup>

All of the attorneys involved in these matters emphasized the uncertainty of the outcomes in the resentencing track, given the lack of guiding legal principles.<sup>140</sup> And that uncertain outcome represents the client's last hope. Defender Kelly Green of Vermont summed up the emotional roller coaster for the attorney:

I thought it would be easier [than] being a trial lawyer because I thought, like, well all these people before me screwed up and I'm just the cleanup crew. Right. It's worse, it's harder. It's mentally, emotionally . . . harder to be someone's last hope . . . It's emotionally difficult . . . to be at the end of the line to say to somebody like, "there's nothing else we can do. You're gonna serve thirty-five to life, you're going to die in prison."<sup>141</sup>

In Ramsey County, defense attorneys are anticipating a process that is still taking shape under the new statute; they have difficulty imagining it in specific terms. Nonetheless, they understand in abstract terms that their role should become something more

<sup>137</sup> Lee Interview 1, *supra* note 100, at 55:43.

<sup>138</sup> See Ellis Interview, *supra* note 105, at 21:34 ("[i]f they're getting significant pushback from victims, they're just not moving them into court"); Lee Interview, *supra* note 100; Community Advocate 2 Interview, *supra* note 119. Prosecutor 5 also discussed the challenges of working with family members of a homicide victim who don't agree on what should happen with a resentencing initiative. Prosecutor 5 Interview, *supra* note 69.

<sup>139</sup> See Choi Interview, *supra* note 77; Defender 6 Interview, *supra* note 99; Defense Attorney 1 Interview, *supra* note 120; Community Advocate 1 Interview, *supra* note 118.

<sup>140</sup> See Ellis Interview, *supra* note 105, at 12:55 ("more often than not getting no as an answer.").

<sup>141</sup> Green Interview, *supra* note 74, at 49:44.

than simply praising the prosecutor's decision. "It takes a level of education, unless we're just rubber stamping. And then are we just like, 'oh you filed, . . . you're such good and gracious people'? . . . That would be a horrible outcome as our function."<sup>142</sup>

In Ramsey, one defender speculated that a potential role for defense counsel, best served by a state appellate defender, would be to note inconsistent treatment of applicants within a county or across different counties.<sup>143</sup>

### B. *Collaborative Alliance or Troubling Asymmetry?*

When a case reaches the resentencing stage, the audience for defense argumentation is no longer the judge. The prosecutor is the principal gatekeeper of the resentencing channel, which makes her the person the defense must "get on board."<sup>144</sup> The petition must ultimately get the stamp of approval from the judge,<sup>145</sup> but judges in Vermont generally will not consider petitions that do not carry prosecutor approval.<sup>146</sup> Indeed, the statutes in Washington and Minnesota make the prosecutor's motion a legal precondition to the judge's involvement.<sup>147</sup>

This prosecutor gatekeeper role distinguishes resentencing from most other criminal court contexts, where the prosecutor's denial of a defense request is not the official end of the line. In most other settings, if the prosecutor refuses a defense request, another decisionmaker might offer a different (more favorable) result to the accused: the trial judge might dismiss charges or reduce bail, the jury might acquit, the sentencing judge might undercut the prosecutor's recommended sentence, or the appellate court might overturn a

<sup>142</sup> Defender 6 Interview, *supra* note 99, at 51:50.

<sup>143</sup> *Id.* at 50:28.

<sup>144</sup> Defender 4 Interview, *supra* note 72, at 25:22; *see also* Ellis Interview, *supra* note 105, at 16:43 ("It's a one-sided thing. I lobby the prosecutor. The prosecutor is the only person who has the authority under the statute to bring a motion.").

<sup>145</sup> Prosecutor 5 Interview, *supra* note 69, at 23:23. As one Chittenden County prosecutor explained, "[u]ltimately we felt like if the judge disagreed [with the legal argument], they'd reject it, right? We get a lot of the blame, but the judge made findings that he felt it . . . made sense and . . . accepted the agreement." *Id.*

<sup>146</sup> Occasionally there is a break in this pattern. In Chittenden we were told about a petition filed by the defense alleging ineffective assistance of counsel in the case below, which the prosecutor's office considered, but ultimately decided to oppose—thereby shutting down the path to resentencing for the defendant. The court held a hearing to determine the legitimacy of the Sixth Amendment claim and the defendant prevailed. His case is now back on the trial calendar; no resentencing efforts are underway. *See* Prosecutor 6 Interview, *supra* note 75.

<sup>147</sup> *See* WASH. REV. CODE §36.27130 (2023); MINN. STAT. § 609.133 (2023).

conviction or modify a sentence.<sup>148</sup> Prosecutor-initiated resentencing, however, leaves the defendant's hopes in the hands of the prosecutor alone.<sup>149</sup>

Despite this power asymmetry, the prosecutor thinks of resentencing as largely a collaborative process, where the parties share the same objectives. This is how Carla Lee of King County put it:

For us, it's important to work collaboratively with the other side so that we can present a stronger package to the court . . . . That process has been very *collaborative, collegial, and civil*. We did notice that when . . . a defense attorney was assigned to a re-sentencing case . . . they would come into it adversarial. And we would have to explain to them that our process was collaborative, that we had selected the case to be considered for re-sentencing. Therefore, we weren't in an adversarial posture.<sup>150</sup>

Lee focused during these comments on cases the prosecutor's office had already identified as strong candidates for resentencing by the time defense counsel became involved.

For the defense attorney, this claim of a "collaborative" process does not ring true in settings where the defense files an application with the prosecutor's office and is still waiting to hear about selection. A resentencing matter, at this earliest stage, brings to the forefront concerns about misuse of prosecutor power that have arisen in other prosecutor-dominated settings, such as the refusal to grant substantial assistance departures in

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<sup>148</sup> We recognize that these other channels can be more ephemeral than real in many courthouses, but our point concerns formal opportunities, rather than real-world patterns. The degree to which these other options exist shapes the contours of the shadow within which criminal attorneys' bargain. See Wright et al., *supra* note 122, at 1295.

<sup>149</sup> One important exception to the pattern involves pre-charge diversion programs, where prosecutors alone control access to the programming that would allow defendants to avoid criminal charges. Diversion programs typically require the defendant to get treatment and perform community service as part of the diversion contract, and successful completion results in the dismissal of charges. Other forms of diversion, which begin after the prosecutor files charges, are more likely to allow input from other actors on the question of entry into the program. See Wright & Levine, *supra* note 9, at 332.

<sup>150</sup> Lee Interview 1, *supra* note 100, at 39:28. Later Ms. Lee noted that public defenders seem to have a harder time making the adjustment than private attorneys. *Id.* at 44:29. Attorney Ellis suggested that his long experience made it easier for him to shift gears: "I've been an attorney since [nineteen] eighty-seven, and I guess I feel less combative now than I did previously. . . . I was a trial attorney for fifteen years, so I know how to do these [adversarial] things. I just choose not to do them anymore." Ellis Interview, *supra* note 105, at 30:27, 33:58.

federal court,<sup>151</sup> and refusal to offer diversion in state court.<sup>152</sup> As memorably recounted by Defender 1 in King County, for all that prosecutors say they are being collaborative, “‘collaborative’ means ‘what we say goes.’”<sup>153</sup>

Some defenders note similarities between the resentencing context and plea negotiations, where the prosecutor can refuse to offer a deal or threaten to increase the charges if the defendant rejects the offer on the table.<sup>154</sup> In both settings, the defense attorney often considers whether purely oppositional arguments—those that might be effective in a trial—ought to give way to a wider range of persuasive techniques.

An analogy might be in pretrial negotiations when the prosecutor just has all the leverage and, you know, the guys on video, and there is a confession and it is all there. And you are just really in there trying to pitch mitigation and anything you can. And *you are really just at their mercy*. That is very much how it feels in the 6164 realm.<sup>155</sup>

A forward-thinking defense attorney may try to convince the prosecutor that a defense-friendly outcome can also serve broader community interests. A defender in Vermont summed up the strategy: “In the post-conviction relief world . . . I’m always painting a compelling story.”<sup>156</sup> Then she continued:

Attorney George’s Office is not goofing around. I have to persuade them . . . it’s not a get out of jail free card by any stretch of the imagination. So . . . even when I have my post-conviction relief hat on, I’m still, gosh, doing a ton of litigation, a ton of investigation mitigation. You know . . . maybe more her office is my target, as opposed to a jury, or a judge.”<sup>157</sup>

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<sup>151</sup> See Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 463–65 (2004) (criticizing the fact that prosecutors sometimes deny defendants the substantial assistance point reduction if they engage in too much advocacy pretrial).

<sup>152</sup> See Wright and Levine, *supra* note 9, at 340.

<sup>153</sup> Defense Attorney 1 Interview, *supra* note 120, at 35:45.

<sup>154</sup> See *United States v. Goodwin*, 457 U.S. 368, 381 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 361 (1978).

<sup>155</sup> Defense Attorney 1 Interview, *supra* note 120, at 33:50. Developing facts and arguments in support of mitigation also prominently feature in the defense attorney’s role at a criminal sentencing hearing.

<sup>156</sup> Green Interview, *supra* note 74, at 41:31; see also Ellis Interview, *supra* note 105, at 29:18 (when prosecutor indicates hesitation about going forward with resentencing a case, “that puts me into a position, I don’t think necessarily being in an adversary, but you know, trying to state the best case for why they should do this thing.”).

<sup>157</sup> Green Interview, *supra* note 74, at 41:31.



Cooperation with prosecutors became easier during the pandemic of 2020 to 2022, defenders said, when the larger objectives of prosecutors and defense lawyers aligned. Both parties wanted to reduce jail and prison populations below customary levels. This was particularly acute in Vermont, as described by Defender 4:

[During the pandemic] I often sort of felt like we were all just sort of working for the same objective, which was to get people out of prisons when we could. . . . It definitely felt like a very collaborative process . . . I think everybody recognized that there was overall good public policy behind trying to reduce the prison population, especially at that point.<sup>158</sup>

The prosecutor's gatekeeping power also leads some attorneys to emphasize their long-term positive relationship with the prosecutors, and the significance of that relationship for getting their goals accomplished. Quoting Defender 4 again about Chittenden:

I do think the good working relationship I had with [the State's Attorney] was incredibly helpful. So, you know, less of being able to go into a courtroom and convince a judge of some legal argument or evidentiary argument, and more just the working relationships with [the State's Attorney's] office.<sup>159</sup>

Defender 1 in King County shared in some detail his frustration with this deferential relationship. His comments lay bare his understanding of the importance of persuading the prosecutor in the resentencing context, as well as his annoyance with having to do so. Seeking the mercy of the prosecutor is an uncomfortable ground, especially for experienced defenders.

I think if it were an argument about whether justice would be served by resentencing this person, I would win it. I would be able to get up and passionately defend it. And any judge would rule for me. But *unfortunately, the prosecutor is the judge in this case, and you sort of have to approach them in a really deferential way*. And very much in a, "*here's why this is going to suit you guys*."<sup>160</sup>

I think we have really, really sort of fiercely deserving clients who have done decades and who have rehabilitated themselves for no reason other than . . . they wanted to grow and be different. And we have some injustice we can point to, and we have a release

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<sup>158</sup> Defender 4 Interview, *supra* note 72, at 36:09; *see also* Ellis Interview, *supra* note 105, at 11:44 (noting greater cooperation from prosecutors during the pandemic).

<sup>159</sup> Defender 4 Interview, *supra* note 72, at 47:35. However, Defender 4 noted that ultimately it was up to the judge to accept the legal argument she put forth. Some judges did, and others did not. *Id.*

<sup>160</sup> Defense Attorney 1 Interview, *supra* note 120, at 33:50 (emphasis added).

plan that we think keeps everybody safe, and *they just get to say no*.<sup>161</sup>

The level of deference required in the resentencing process strikes some defenders as out of place—if not downright maddening—because prosecutors were responsible for imposing the original unjust sentence.<sup>162</sup> The sole power to correct injustices of their own making creates, in the defenders’ minds, a type of conflict of interest, or perhaps a form of hypocrisy: “[i]t strikes me just as sort of fundamentally odd that we’re asking the people who sort of imposed the injustice to identify it, tell on themselves and fix it.”<sup>163</sup>

This remark echoes a foundational abolitionist critique of legal system reforms: when new programs claim to benefit justice-involved people but actually enlarge the power of law enforcement or of the state more generally, they ought to be viewed skeptically.<sup>164</sup> Placing primary responsibility for resentencing decisions in the office of the prosecutor allows the prosecutor a chance to correct for past mistakes made by her office. But it is not, in fairness, a reform that limits the reach of already powerful system actors or that recalibrates the balance of power.<sup>165</sup> It’s a reform that increases the prosecutor’s leverage against the defense. Other jurisdictions have second look sentencing programs that follow a more standard adversary model: the defense files a petition, and the prosecutor can respond, but the ultimate decision is made by a judge.<sup>166</sup>

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<sup>161</sup> *Id.* at 38:45 (emphasis added).

<sup>162</sup> See Webster, *supra* note 11, at 15 (sometimes the same individual prosecutor is the decisionmaker in the original case and at resentencing, but far more often new office personnel handle the resentencing matter. This shift in personnel allows for more critical distance to examine the case file, although it also requires the new prosecutor to establish his or her own relationship with the victim, to get the victim to support resentencing for the offender.)

<sup>163</sup> Defense Attorney 1 Interview, *supra* note 120, at 8:30.

<sup>164</sup> See Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1 (2019); RUTH WILSON GILMORE, *GOLDEN GULAG* 242 (2007) (distinguishing “non-reformist reforms” from “reformist reforms” on the basis of whether the change unravels or widens the net of social control); Amna Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 *YALE L. J.* 2497 (2023); Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 *GEO. L. J.* 1587 (2012) (identifying a range of “reformist models” that problem-solving courts embrace but ultimately cause more harm than good).

<sup>165</sup> See Defense Attorney 1 Interview, *supra* note 120, at 8:30 (“[m]y thoughts on prosecutor-initiated resentencing are that it’s often a political tool and just a way to consolidate power, where power has started to slip away somewhat from prosecutors.”).

<sup>166</sup> See Love, *supra* note 20; Serota, *supra* note 20. Some of our defense attorney interviewees expressed a preference for this model. See Lee Interview 1, *supra* note 100, at 16:43. In future work we take up the question of which model better furthers the objectives of resentencing.

## V. CONFLICTS AROUND ROLE EXPECTATIONS

As the comments in Part III reveal, prosecutors and defense attorneys are not always on the same page about how second look sentencing is supposed to work. Defenders' optimism sometimes outpaces prosecutorial action. Prosecutors use broad rhetoric to describe their programs but implement the program with more prudential concerns in mind. Their concerns include possible objections from crime victims and lack of resources to develop promptly the full dossiers they require in resentencing matters. In this part we dig more deeply into this conflict to explain the fissures that eventually appear between legal system actors who start from a united position, aiming to correct for past injustices.

A. *Expectations About Volume*

Across all three of our study sites, prosecutors noted the importance of choosing cases carefully. Selecting the wrong cases for resentencing could spark loud objections from victims and from the voters more generally. This caution extends both to the type of cases selected and to the quantity of requests the prosecutors could comfortably support in a given year.<sup>167</sup>

In Chittenden County and King County, some defense attorneys told us they were disappointed by the number of petitions receiving favorable treatment from prosecutors. Consistent with their adversarial roles, defense attorneys contend that a greater percentage of their clients deserve a favorable response, and they complain that the prosecutor's office is being unreasonably tight-fisted when considering their petitions. While some recognized the political and practical constraints on the volume that prosecutors could generate, others treated those constraints as a distraction or as illegitimate.<sup>168</sup>

King County defense attorney Jeffrey Ellis had expected far more discretionary review cases than clemency cases when the resentencing law first went into effect: "I [thought] it should be fifty commutations and a thousand prosecutor-initiated re-sentencing cases, and it's just not that, it's more like fifty-fifty."<sup>169</sup> A different

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<sup>167</sup> See Lee Interview 1, *supra* note 100; Choi Interview, *supra* note 77; Prosecutor 5 Interview, *supra* note 69 (discussing victim outcry during a retention election).

<sup>168</sup> See Interview with Community Advocate 2, *supra* note 119; Defender 1 Interview, *supra* note 120.

<sup>169</sup> See Ellis Interview, *supra* note 105, at 32:01.

attorney in King County concurred, but he expressed the gap between expectation and reality in terms of emotional impact, rather than statistics:

There was, I think, a lot of hope when it came out that this is gonna be, you know, a real game changer for these folks who have really been hopeless for a long time . . . . And it just has not proven to be true. We're still getting the numbers, but I think they're gonna be fairly shocking in terms of how many requests and letters and petitions the prosecutors in King County and statewide have received. And how many have actually made their way to a judge for resentencing. I think it's in the one percent or something like that.<sup>170</sup>

Attorney Kelly Green felt the same way about the pattern in Vermont: "it's no walk in the park . . . . It's not like I'm like, 'hey, this guy's old and has asthma. Can he get out of prison?' No, that does not cut it."<sup>171</sup> She continued a minute later with a more forceful retort: "I mean, *do not leave this interview thinking like Sarah George is just, like, flipping convictions.*"<sup>172</sup>

A prosecutor in the State's Attorney office in Chittenden acknowledges that the office does not go along with every petition brought before them. Because they are working without an established legal framework for resentencing, they must fit their resentencing efforts into post-conviction relief petitions that allege underlying error.<sup>173</sup> This means that the office first assesses the plausibility of the claim of error, before considering "soft factors"<sup>174</sup> that support resentencing. If the office concludes there was no wrongdoing, no combination of "soft factors" will make a difference. Sometimes, the prosecutor says,

I would love to be able to do something for this person, but I can't go in front of a court and say that this argument they're making is legitimate. Because I don't think it is. So it's not like every time we're just being like, "oh yeah, that sounds good. Let's go with that."<sup>175</sup>

In Ramsey County, where the prosecutor has no track record yet, Defender 6 "dreams" of a "regular calendar" in the courts for resentencing matters "that is held like every two weeks, if not every

<sup>170</sup> Defender 1 Interview, *supra* note 120, at 37:03.

<sup>171</sup> Green Interview, *supra* note 74, at 14:06.

<sup>172</sup> *Id.* at 15:03.

<sup>173</sup> The Chittenden process is explained in more detail in Part II. The prior channel that emerged during the pandemic, to get people out of prison outside of the PCR context, is no longer operative.

<sup>174</sup> Prosecutor 6 Interview, *supra* note 75.

<sup>175</sup> Prosecutor 5 Interview, *supra* note 69, at 34:37.

week.”<sup>176</sup> On the other hand, a “worst-case scenario” prediction for this attorney was that the prosecutors would stop using this new power after filing for review in one or two cases.<sup>177</sup> Given the low number of cases that Choi approved for resentencing during the informal phase of this work,<sup>178</sup> defense attorneys in Ramsey County may end up disappointed, like their counterparts elsewhere.

### B. *Unanticipated Barriers to Success*

Aside from outright rejections, defense attorneys lamented that other kinds of barriers, both *de jure* and *de facto*, keep their clients in custody. In Vermont, for example, attorneys in the Prisoner’s Rights office lambasted the power of the Department of Corrections (“DOC”) to thwart their successful resentencing efforts. Attorney Green criticized the DOC’s refusal to grant furlough to her client after he was resentenced from life without parole to thirty-five years to life. She told us she felt “tricked”<sup>179</sup>—that “the joke was on [her] because the DOC is . . . never gonna release [her] client.”<sup>180</sup> No one in the State’s Attorney’s office agreed with the portrayal of DOC as an institution that is purposely trying to interfere with these efforts, although they did confirm that DOC had exclusive power to control furloughs.<sup>181</sup>

Unexplained delays in the review process also prove challenging for community advocates and defense attorneys. Long periods of silence feel like failure for the petitioner, even in cases where a resentencing ultimately happens. Because of the limited personnel hours that prosecutors devote to their Sentence Review Units, it typically takes more than a year for the office to respond to petitions, even those with extensive documentation attached.<sup>182</sup> This slow process makes it necessary for defense attorneys to exercise patience,<sup>183</sup> and to counsel their clients to remain hopeful during the

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<sup>176</sup> Defender 6 Interview, *supra* note 99, 48:56.

<sup>177</sup> *Id.*

<sup>178</sup> See Choi interview, *supra* note 77 (describing two or three cases resentenced under the informal process and discussing the need at the outset to choose cases carefully to preserve the political viability of the program).

<sup>179</sup> Green Interview, *supra* note 74, at 39:41.

<sup>180</sup> *Id.* at 14:06.

<sup>181</sup> Notably, Alexandra Bailey of the Sentencing Project, a non-profit that works on sentencing reform across the country, said that the leader of Vermont’s DOC has expressed openly his support of penal reform policies. Bailey Interview, *supra* note 67.

<sup>182</sup> See Nelson Interview, *supra* note 113.

<sup>183</sup> See Webster, *supra* note 11 (discussing the need for patience by attorneys working in the wrongful conviction context).

long wait.<sup>184</sup> Defense attorney Ellis described the waiting period like this:

Once I submit that petition, the conversation that happens is rare. I'm constantly saying, "hey, meet with me, meet with my guy's supporters." . . . [There is almost no exchange with prosecutors other than] "Hey, what's going on with my petition?" <laugh> "Well, you know, we have a long line. Get to you in six months," right?<sup>185</sup>

We also heard mixed reviews about the use of formal selection criteria to control eligibility for second look review. Attorneys in King County bristle at the selection criteria that the prosecutor's office developed, without seeking input from the defense bar.<sup>186</sup> They complain that the petitions supported by the office amount to little more than "low-hanging fruit,"<sup>187</sup> and they accuse the office of tackling only "the easy stuff around the edges."<sup>188</sup> They note that the cases most in need of attention—the homicides—are formally classified as low priority on the office's website.<sup>189</sup>

In contrast, attorneys in Chittenden County asserted that they were mostly in agreement with the State's Attorney's Office about which cases to pursue, and that the criteria in the jurisdiction had mostly developed organically.<sup>190</sup> Here's how Defender 4 described what happened, in response to a question about how the criteria developed:

Yeah, it was trial and error and . . . the pandemic hits and not knowing how long it was going to last. And yeah, I remember feeling very desperate to try to get anybody out that I could . . . sort of scouring who from our county was sitting in jail. And then going from there and starting a conversation with Sarah when it seemed like some of the rough criteria would, would be satisfied.<sup>191</sup>

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<sup>184</sup> See Community Advocate 1 Interview, *supra* note 118; Community Advocate 2 Interview, *supra* note 119.

<sup>185</sup> See Ellis Interview, *supra* note 105, at 19:24.

<sup>186</sup> See RAND Report 1, *supra* note 12, at 31–32 (interviewers from RAND heard similar observations from defense attorneys in California, in counties where the prosecutor initiated some sentencing reviews. Defense attorneys were disappointed that they did not participate in the development of selection criteria for resentencing candidates. They "can push the DA to expand" the criteria by submitting cases that do not initially appear to meet the announced criteria).

<sup>187</sup> Defender 1 Interview, *supra* note 120, at 9:36. ("These discretionary ones and the discretionary ones that I've seen them do, at least the ones that they've sent us so far you know, are like the low hanging fruit.").

<sup>188</sup> *Id.* at 13:09 ("it just seems nearly impossible to get a real foothold with the prosecutor to do anything more than sort of, you know, the easy stuff around the edges.").

<sup>189</sup> They also argue that articulated "non-priority" categories fundamentally redefine the statutory "interests of justice" standard and therefore are illegal.

<sup>190</sup> Defender 4 Interview, *supra* note 72; Prosecutor 5 Interview, *supra* note 69.

<sup>191</sup> Defender 4 Interview, *supra* note 72, at 14:40.

Attorney Kelly Green shared that the criteria used to consider resentencing requests in Chittenden (using the PCR track) emerged simultaneously from both sides. As she described it, “the threshold I don’t perceive as being Sarah George’s threshold. It’s my threshold.”<sup>192</sup>

The complaints about the creation (and the value) of selection criteria to guide the resentencing process tap into concerns about prosecutorial decision-making more generally. For nearly sixty years scholars have called for more guardrails to constrain choices made by prosecutors.<sup>193</sup> These selection criteria are a perfect example of such guardrails, but they haven’t made defense attorneys any happier with the results, at least in King County. They say the guardrails keep too many cases out, rather than expanding the range of what should be possible under the second look statute. Widening the lens a bit further, the use of such criteria—formalized and published—converts what was previously a standard into a rule. As with other such conversions, the rule increases certainty at the expense of flexibility.<sup>194</sup> Without published criteria the risk of arbitrary decisions, hidden from view, is high.<sup>195</sup> But where formal thresholds exist, prisoners who don’t meet them stand little to no chance of having their petitions considered. The implementation of a resentencing rulebook thus appears to elevate procedural justice over substantive justice, which strikes defenders as nonsensical in a process that is supposed to be about releasing people from unjust prison terms.

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<sup>192</sup> Green Interview, *supra* note 74, at 23:30. Green did admit that younger attorneys in her office were more willing to try “pie in the sky crazy pitch” arguments. *Id.* at 24:10. These are the factors considered by Green, *id.* at 16:04, in deciding which petitions she presents to the prosecutor: (1) citizenship (people who will be deported to a war zone); (2) young age at time of offense (“people who committed crimes when they were children.”); (3) old age now (“people who, gosh, are, you know, people when they’re incarcerated beyond a certain age become extremely expensive”); (4) No risk (“I’m looking for people who are absolutely no longer a threat of any risk, like people who are just in prison to punish them. For pure, purely for punishment at a huge cost to Vermonters. When I feel like the fulcrum, where it’s tipped that, you know, like . . . we want, we hated this person. We hate him for what he did, but how much do we hate him to the tune of . . . you know, Medicaid doesn’t reimburse prisoner healthcare. So the state of Vermont pays for healthcare for its prisoners”; and (5) disproportionate punishment (“someone who, where it feels like the penalty was disproportionate. Sometimes people are technically guilty or in fact guilty of a crime, but it’s like, I can’t believe the jury really didn’t understand the, you know, the diminished capacity defense or, you know, like all the lawyers agree, like, this feels like diminished capacity, but the jury, or insanity, but the jury’s like, ‘hell, no.’”).

<sup>193</sup> See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 188–89 (1969); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

<sup>194</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L. J.* 557, 559–60, 589–90 (1992).

<sup>195</sup> This was one of the chief complaints about prosecutor discretion discussed by DAVIS, *supra* note 194, at 98. Defenders in King County also complain that the declinations come back without any explanation, suggesting that even with formal criteria in place, the bases for prosecutorial decisions sometimes remain shrouded from view.

*C. The Threatened Use of Procedural Alternatives*

Attorneys in all three sites remain alert to their procedural alternatives. Where there are multiple routes to obtain a sentence reduction, defense attorneys use the alternatives as leverage in the discretionary channels. These alternatives give defense attorneys options in some cases when they believe that collaboration or cooperation does not serve their client's interest. The threat of conflict sometimes shapes the prosecutor's response, in terms of willingness to collaborate.

In King County, the prosecutor's office assigns different units to deal with the alternative channels. Some prosecutors manage juvenile resentencing matters, because the state courts and the legislature have recently created new grounds for petitioning the court for a reduced sentence.<sup>196</sup> The Sentencing Review Unit handles clemency petitions, resentencing motions under 6164, and parole proceedings for a few cases that fall outside the state's sentencing guideline system.<sup>197</sup> These channels are distinct but not unrelated; the defense can convert a discretionary sentence review case into a clemency case, for example. Depending on which procedural device has been invoked by the defense, the prosecutor can resist certain parts of a defense request or might share political responsibility for the ultimate release decision with the parole board or the judge.<sup>198</sup>

Community Advocate 2 values the range of alternatives, as she believes they "multiply the volume of potential relief" for her clients.<sup>199</sup> But some defense attorneys disagree; they believe the multiplicity of channels allows judges and prosecutors to evade responsibility through a game of legal hot potato. Defender 1 explains: "you know, the judges can say, even if we deny this motion, there's always this discretionary thing. And then 6164 can say there's always clemency. And really *nobody has to take ownership in the end.*"<sup>200</sup>

But the presence of procedural options also gives the defense attorneys some leverage in their requests for resentencing. In Chittenden County, the shadow of procedural alternatives available to the defense factors into the prosecutor's decision about whether to oppose or support the defense PCR petition. The prosecutor's

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<sup>196</sup> See Prosecutor 2 Interview, *supra* note 111.

<sup>197</sup> See Nelson Interview, *supra* note 113.

<sup>198</sup> Minnesota law offers a similar range of options for modifying a sentence. See Judge 3 Interview, *supra* note 92.

<sup>199</sup> Community Advocate 2 Interview, *supra* note 119.

<sup>200</sup> Defender 1 Interview, *supra* note 120, at 38:45.



office engages in a form of risk management, assessing the risk that it will lose the argument before the judge if the motion goes to a hearing. If the legal challenge raised by the defense seems plausible and a judge might agree, the case might end up back on the trial calendar—and retrying a twenty-year-old case is difficult, to say the least. To mitigate that risk, the office will support the defense’s petition in return for a new guilty plea plus resentencing. Where the office sees no merit to the defense petition and little risk of the defense prevailing at a hearing, opposition to the PCR motion is a sound strategy.

The same pattern can be observed in King County. Defender 1 shared his thoughts about how the prosecutor’s office responds to his petitions: “[P]robably the most motivating thing is if they think that we could litigate this and win. And either they will look bad politically, or this will be the next case that provides relief for lots of people. I think that’s gonna motivate them to settle with my person.”<sup>201</sup>

In using techniques of risk management to shape the future of law, the prosecutor’s office resembles organizational defendants in civil cases who choose which unfavorable verdicts to appeal and which to let go. As Marc Galanter argued, these strategies play a significant role in molding the law made at the appellate level—which ultimately redounds to the organizational defendant’s benefit in future litigation.<sup>202</sup> The prosecutor’s offices in Chittenden County and King County do much the same thing, picking which cases to contest and which to settle. Using resentencing as a carrot, an office can minimize the risk that a particular case will spark a negative finding that might affect the disposition of many future cases. In Chittenden, the desire for finality sometimes leads to one further step: the office will ask certain defendants, as part of the deal, to agree to stop all future appeals and habeas actions in both state and federal court, to accept the resentence as the end of the line.<sup>203</sup>

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<sup>201</sup> *Id.* at 22:38.

<sup>202</sup> Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y. REV.* 95 (1974). Webster’s interviews of post-conviction attorneys addressed this point as well. She noted that when prosecutors and defense attorneys come to some sort of agreement that involves NOT pursuing potential misconduct by state actors (agreeing to, in essence, sweep that possible misconduct under the rug in order to come to a favorable disposition for the defendant), they undermine the goal of seeking justice in a larger sense. And “these concessions mean less traction for defendants filing lawsuits [in the future] and less accountability for bad actors.” Webster, *supra* note 11, at 15.

<sup>203</sup> Prosecutor 6 Interview, *supra* note 75. Courts have validated plea deals in which defendants have waived their right to appellate review. *See, e.g.*, *People v. Seaberg*, 74 N.Y.2d 1 (N.Y. 1989) (holding that a defendant’s plea deal is not invalidated when he is required to waive his right to appeal).

## VI. CONCLUSION

This Article offers the first look at an innovative new program in state criminal legal systems: prosecutor-initiated resentencing. Motivated by concerns about carceral excess, the cost and care of elderly prisoners, and the role of rehabilitation and re-entry support in reducing public safety risks, prosecutors in some states work alongside defense attorneys to revisit sentences imposed during prior decades. Expanding the reach of substantive justice, prosecutors aspire to do more than simply exercise restraint in new cases; they also try to fix the mistakes of the past. Taking an active role in second look sentencing is one such fix.

But implementing this bold vision has proven tricky. Our interviews spotlight the distinctive attorney roles and misaligned expectations that sometimes emerge even among well-intentioned actors handling resentencing matters. In Chittenden County, both prosecutors and defense attorneys do what they can in the absence of formal law authorizing resentencing; both are frustrated by their inability to do more and remain hopeful that a legislative change will happen soon. Conflict in King County has arisen in the years since legislative enactment, as practices have settled into a disappointing set of outcomes that contradict the ambitious rhetoric that heralded the start of the program. In Ramsey County, on the other hand, lawyers' predictions about unmet expectations are present yet tentative, and considerably less common than their expressions of hope and optimism about the new procedural devices under construction.

Given the small set of interviews, we cannot draw firm conclusions about the connection between legal structures and the attitudes of attorneys about their proper roles in those structures. For now, we simply observe that expectations over attorney roles—and conflicts between legal actors—are likely to evolve over time, especially as the legal structure changes. When jurisdictions move from ad hoc resentencing, tied to legal devices that formally require factual or legal error, to a more explicit and open-ended “interests of justice” basis for second look sentencing, we should anticipate change in the parties' expectations for what the program will accomplish.

In Chittenden, where an informal ad hoc legal regime guides resentencing efforts, equitable principles prevail over formal rules. In this environment the prosecutor's office holds powerful tools to manage and moderate defense attorney expectations about the number and type of cases they will consider for resentencing, but there is general agreement about the “soft factors”<sup>204</sup> that ought to guide

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<sup>204</sup> Prosecutor 6 Interview, *supra* note 75.

second look consideration. In Ramsey, a recently enacted formal legal framework to enable second looks for unjust and unnecessary sentences makes anything seem possible, for the time being. Hopeful that prosecutor rhetoric about the importance of resentencing will become reality for their clients, defense attorneys have softened their adversarial posture. But after the legal regime matures a bit and reality takes hold, the balance of optimism and frustration might shift, as we see occurring in King. With prosecutors holding fast to selection criteria and practices that developed just a few years ago, defense attorney frustrations in King County simmer and sometimes bubble over. The criteria are not as expansive as the defense would like, and some restrictions contradict the prosecutor's office rhetoric about commitment to reform. Prosecutors in this context operate with powerful practical and political constraints on their work, such as the need for victim support and re-election prospects, but defense attorneys are sometimes dismissive of these concerns.

As Malcolm Feeley has argued, simple solutions to problems in the criminal legal system sometimes fail to achieve the impact that reformers envision, even when everyone is committed—in the abstract—to the need for change.<sup>205</sup> Individual histories, value conflicts, hubris, and unarticulated agendas can impede successful implementation of good ideas; even well-meaning institutional actors can be slow to yield to new ways of doing things. The line from innovation to disappointment thus runs through many efforts to reform court practices, as problems often turn out to be more entrenched than reformers anticipated when they pitched their bold visions for the future.<sup>206</sup>

These resentencing initiatives are at too early a stage to predict where on this line they are likely to settle. At the moment, numerous jurisdictions show a willingness to experiment with this idea, helped along by national advocacy groups and early success stories. We hope that in each of these jurisdictions, early frustrations will yield to dialogue and suggestions for improvement rather than retreat at the first sign of tension. Sustainable justice cannot happen without patience and productive communication among criminal court actors.

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<sup>205</sup> See generally FEELEY, *supra* note 1. Feeley further notes that uniform commitment to change is not always present; sometimes surface agreement masks deep conflict. *Id.* at 125.

<sup>206</sup> *Id.* at 40–190 (discussing problems implementing bail reform, pretrial diversion, sentence reform, and speedy trial rules).

