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## Ministers of Justice and Mass Incarceration

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# Ministers of Justice and Mass Incarceration

LISSA GRIFFIN\* & ELLEN YAROSHEFSKY†

## ABSTRACT

*Over the past few years, scholars, legislators, and politicians have come to recognize that our current state of “mass incarceration” is the result of serious dysfunction in our criminal justice system. As a consequence, there has been significant attention to the causes of mass incarceration. These include the war on drugs and political decisions based on a “law and order” perspective. Congressional and state legislative enactments increased the financing of the expansion of police powers and provided for severely punitive sentencing statutes, thereby giving prosecutors uniquely powerful weapons in securing guilty pleas. All of this occurred as crime rates dropped.*

*Where were the lawyers when our criminal justice system was evolving into a system of mass incarceration? Surprisingly, in looking for the causes and cures for the mass incarceration state, very little, if any, attention has been paid to the role of the most powerful actor in the criminal justice system: the prosecutor. It is the prosecutor who exercises virtually unreviewable discretion in seeking charges, determining bail, negotiating a resolution, and fixing the sentence. Now, however, there is data that identifies aggressive prosecutorial charging practices as the major cause of the explosion in our prison population. That is, over the past twenty years prosecutors have brought felony charges in more cases than ever before, resulting in a dramatic increase in prison admissions. If prosecutorial charging practices have been a major cause of the universally recognized mass incarceration problem, what should be done? How does the role of the prosecutor need to change to prevent a continuation, or a worsening, of our mass incarceration problem?*

*This Article examines the recognized role of the prosecutor as a “minister of justice,” and makes a range of suggested changes to the prosecution function. These include re-calibrating the minister of justice and advocacy role balance in recognition of the current mass incarceration crisis; enacting measures to ensure independence from law enforcement in the charging function; collecting currently non-existent, objective data that breaks down and memorializes available information on each decision to charge as well as its consequences; and drafting*

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*written charging procedures and policies based on the collection of that data-driven information.*

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## INTRODUCTION

In the last decade, scholars, lawyers, government officials, and policymakers have come to recognize that our criminal justice system is seriously dysfunctional.<sup>1</sup> Documented symptoms include the disproportionate punishment of

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1. See, e.g., Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 290, 300 (2014) [hereinafter Howell, *Prosecutorial Discretion*].

indigent people of color;<sup>2</sup> the lack of meaningful public defense funding;<sup>3</sup> the continuing identification of wrongful convictions;<sup>4</sup> the detention of defendants who do not have money to satisfy bail conditions;<sup>5</sup> internationally unprecedented, severe sentences, including the mandatory minimums that may result in questionable guilty pleas<sup>6</sup> and often require judges to impose excessively harsh sentences;<sup>7</sup> the “plea mill” system in misdemeanor courts;<sup>8</sup> and the destructive social impact of collateral consequences.<sup>9</sup> In recent years, particular attention has been paid to a larger issue: the problem of “mass incarceration.”<sup>10</sup> Repeatedly, we learn that the United States contains “five percent of the world’s population” and “houses over twenty percent of its prisoners.”<sup>11</sup> There is no shortage of explanations for this shocking condition. Some blame the war on drugs<sup>12</sup> or the

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2. See, e.g., Cassia Spohn, *The Effects of the Offender’s Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 92 (2013); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 726–27 (2005); William T. Pizzi et al., *Discrimination in Sentencing on the Basis of Afrocentric Features*, 10 MICH. J. RACE & L. 327, 328, 342 (2005); Joe Palazzolo, *Racial Gap in Men’s Sentencing*, WALL ST. J. (Feb. 14, 2013, 5:36 PM), <http://www.wsj.com/articles/SB10001424127887324432004578304463789858002> [https://perma.cc/3UW2-DD8P].

3. See generally Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013) [hereinafter Roberts, *Crashing the Misdemeanor System*].

4. See INNOCENCE PROJECT, <http://www.innocenceproject.org> [https://perma.cc/GSR5-5ZZF] (last visited Feb. 17, 2017); Univ. of Mich. Law Sch. et al., THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> [https://perma.cc/6J44-7CCH] (last visited Apr. 5, 2017); Daniel Denvir, *The Long Ugly History of “Law and Order” Candidates*, CITYLAB (Sept. 15, 2015), <http://www.citylab.com/politics/2015/09/the-long-ugly-history-of-law-and-order-candidates/405709/> [https://perma.cc/3MHS-7ZQJ].

5. See, e.g., Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1301 (2012); Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909 (2013); JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 3–4 (Sept. 2012), [http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail\\_executive\\_summary.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail_executive_summary.pdf) [https://perma.cc/SZ8Z-68FE]; *Bail: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 7, 2015), <https://www.youtube.com/watch?v=IS5mwywTlJU> [https://perma.cc/KC4Y-8U5P].

6. See, e.g., *Laffer v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (plea bargaining “effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”); Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 722–23 (2014); Jackelyn Klante, Current Development, *Guilty as Pleaded: How Appellate Waivers in Plea Bargaining Implicate Prosecutorial Ethics Concerns*, 28 GEO. J. LEGAL ETHICS 643, 646–47 (2015).

7. See Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 812 (2014).

8. See Roberts, *Crashing the Misdemeanor System*, *supra* note 3, at 1093–94.

9. See MARGARET COLGATE-LOVE, JENNY ROBERTS, & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013); David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. EDUC. 36, 38 (2013).

10. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); Howell, *Prosecutorial Discretion*, *supra* note 1.

11. E.g., John F. Pfaff, *The War on Drugs and Prison Growth: Limited Importance, Limited Legislative Options*, 52 HARV. J. ON LEGIS. 173, 173 (2015) [hereinafter Pfaff, *The War on Drugs*].

12. *Id.*

new Jim Crow.<sup>13</sup> Some blame the cultivated politics of fear, even as crime rates dropped.<sup>14</sup> Others, relying in part on the culture of fear, blame Congress and the state legislatures for enacting severe sentencing statutes—longer sentences, mandatory minimums—that increased the severity of our already punitive sentencing scheme and gave prosecutors uniquely powerful weapons in securing guilty pleas.<sup>15</sup> Some blame increased financing for the expansion of police powers and prisons.<sup>16</sup> Others blame outright over-criminalization.<sup>17</sup> Others blame the privatization of prisons<sup>18</sup> or increased parole violations.<sup>19</sup>

But surprisingly, in looking for the causes (and cures) for the mass incarceration state, very little, if any, attention has been paid to the role of the most powerful party in the criminal justice system: the prosecutor.<sup>20</sup> As is well known, prosecutors in the United States have dual roles, both constitutionally and ethically: prosecutors are ministers of justice and advocates. The prosecutor's role as minister of justice is well recognized, although not clearly described or defined.<sup>21</sup> But it is well accepted that the prosecutor is a fiduciary who represents the sovereign and must make decisions for society at large—not for any individual client.<sup>22</sup> As famously articulated in *Berger v. United States*,

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13. See ALEXANDER, *supra* note 10; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997) (discussing the implications of traffic stops of people of color); see also Rich Juzwiak & Aleksander Chan, *Unarmed People of Color Killed by Police, 1999–2014*, GAWKER (Dec. 18, 2014, 2:15 PM), <http://gawker.com/unarmed-people-of-color-killed-by-police-1999-2014-1666672349> [<https://perma.cc/YZ45-EVNS>] (documenting police shootings of unarmed people of color as evidence of continuing racism).

14. See, e.g., Michael C. Campbell & Heather Schoenfeld, *The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOC. 1375, 1380 n.7 (2013).

15. But see John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. UNIV. L. REV. 1239, 1242–44 (2012) [hereinafter Pfaff, *Causes of Prison Growth*].

16. See, e.g., Julia Bowling, *The Crime Bill's Legacy, Two Decades Later*, BRENNAN CTR. FOR JUST. (July 2, 2014), <https://www.brennancenter.org/blog/crime-bills-legacy-two-decades-later> [<https://perma.cc/RA4U-XFXJ>].

17. See CTR. FOR PROSECUTOR INTEGRITY, ROADMAP FOR PROSECUTOR REFORM 5 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/WhitePaper-RoadmapProsecutorReform.pdf> [<https://perma.cc/4DYF-UWRV>] (noting, in addition, that “[o]ne consequence of over-criminalization is over-prosecution, i.e., charging persons with a crime in the absence of probable cause”).

18. See generally PRISON PROFITEERS: WHO MAKES MONEY FROM MASS INCARCERATION (Tara Herivel & Paul Wright eds., 2007).

19. See generally DANIEL P. MEARS & JOSHUA C. COCHRAN, PRISON REENTRY IN THE ERA OF MASS INCARCERATION 31–40 (2015). But see Pfaff, *Causes of Prison Growth*, *supra* note 15, at 15–16.

20. Many scholars have described the prosecutor as the “most powerful actor[] in the criminal justice system.” Howell, *Prosecutorial Discretion*, *supra* note 1, at 286–87; see also Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 154–55 (2011) [hereinafter Gershman, *The Zealous Prosecutor*] (discussing the unique role of the prosecutor and advocating for explicit ethical guidelines); Daniel C. Richman, *Accounting for Prosecutors* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-506, 2016), <https://ssrn.com/abstract=2757811> [<https://perma.cc/8EVX-32Q7>] [hereinafter Richman, *Accounting for Prosecutors*].

21. Professor Bennett Gershman described it as “maddeningly vague and frustratingly amorphous.” Gershman, *The Zealous Prosecutor*, *supra* note 20, at 155.

22. Fred Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 57 (1991) (“The notion that a prosecutor sometimes should refrain from acting as a pure

[T]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>23</sup>

This fundamental concept is articulated in both case law and ethical codes in all jurisdictions.<sup>24</sup>

It is the prosecutor who exercises virtually unreviewable discretion in seeking charges, determining bail, negotiating a resolution, and, ultimately, fixing a sentence. What is the prosecutor's role in creating mass incarceration? Or, as some scholars have asked, where were the lawyers when our criminal justice system was evolving into a fast track to mass incarceration?<sup>25</sup> Where were the prosecutors when we became a mass incarceration state?

One study, demonstrably debunking other theories, has addressed this question, in part, by identifying a previously unexamined major cause of the explosion in our prison population: aggressive prosecutorial charging practices.<sup>26</sup> That study demonstrates that over the past twenty years, prosecutors have brought felony charges in a dramatically increased number of cases, resulting in a remarkable increase in prison admissions.<sup>27</sup> This Article moves forward from that information. We ask: if prosecutorial charging practices have been a major cause of the universally recognized mass incarceration problem, what should be done?

It is time to reflect on how this happened and to propose change. There is a substantial body of literature that argues that changes in the criminal justice process can best be achieved internally, by internal guidelines or by otherwise changing the cultures of the various players in the process—judiciary, defense,

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advocate stems from the fact that she has no single client. The prosecutor is simultaneously responsible for the community's protection, victims' desire for vengeance, defendants' entitlement to a fair opportunity for vindication, and the state's need for a criminal justice system that is efficient and appears fair. Described accurately, the prosecutor represents 'constituencies'—and several of them at one time.") (citations omitted) [hereinafter Zacharias, *Ethics of Prosecutorial Trial Practice*].

23. 295 U.S. 78, 88 (1935).

24. See, e.g., *id.*; MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2016) [hereinafter MODEL RULES] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

25. Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. 253 (2015).

26. Pfaff, *The War on Drugs*, *supra* note 11, at 198; Pfaff, *Causes of Prison Growth*, *supra* note 15, at 3, 13. *But cf.* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, MICH. L. REV. (forthcoming 2017) [hereinafter Bellin, *Reassessing Prosecutorial Power*] (critiquing Pfaff's data and arguing that legislators and judges have a greater responsibility for mass incarceration).

27. Pfaff, *Causes of Prison Growth*, *supra* note 15, at 3. Of course, felony charges did not uniformly increase in all jurisdictions. See, e.g., PREETI CHAUHAN ET AL., TRACKING ENFORCEMENT RATES IN NEW YORK CITY, 2003–2014, at 10 (2015) ("The number of felony arrests started at a low of 85,221 in 1980, increased to a peak of 147,543 in 1989, and then dipped back down to 89,306 by 2014, close to the 1980 level.") [hereinafter CHAUHAN ET AL., ENFORCEMENT RATES IN NEW YORK CITY].

and prosecution—rather than through external judicial or legislative directives.<sup>28</sup> In this Article, we take aim at the culture surrounding prosecutorial decisions to charge and argue that, in light of what we now know about the causes and possible cure of the problem of mass incarceration, that culture must change. In short, prosecutors should: (1) re-calibrate the minister of justice charging role in recognition of the current mass incarceration crisis; (2) ensure independence from and accountability from the police; (3) create charging procedures and policies based on objective, data-driven information; and (4) maintain accurate and complete data about the decision to charge and its consequences.

Part I of this Article describes the mass incarceration problem and the increase in felony charging, and addresses some of the possible causes of this charging pattern. Part II analyzes the prosecutor's role in charging, including the dimensions of the prosecutor's interests of justice role, both generally and specifically with respect to the exercise of charging discretion. Part III makes suggestions for change that would include: (1) a recalibration of the minister of justice role in the charging function, in recognition of the current mass incarceration crisis; (2) a requirement that prosecutors achieve greater independence from law enforcement in the charging function, in part through the use of written standards, checklists, and forms; (3) the collection of currently non-existent objective data; and (4) the creation of written charging procedures and policies based on that data.

## I. THE MASS INCARCERATION PROBLEM AND THE PROSECUTOR

There may be no better way to describe the problem of mass incarceration than to quote what has by now become a cliché: “with only 5 percent of the world's population, the United States is now home to nearly 25 percent of its prisoners.”<sup>29</sup> After fifty years of stability ending in the 1970s, the prison population quintupled from 100 per 100,000 in the 1970s to nearly 500 per 100,000 in 2008, with 1.6 million total prisoners.<sup>30</sup>

A most convincing empirical study about the causes of this prison explosion debunks the “standard story.”<sup>31</sup> While the war on drugs and increased severity of

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28. See, e.g., Ellen S. Podgor, *Department of Justice Guidelines: Balancing Discretionary Justice*, 13 CORNELL J.L. & PUB. POL'Y 167, 169, 196–97 (2004) [hereinafter Podgor, *Department of Justice Guidelines*]. See generally Richman, *Accounting for Prosecutors*, *supra* note 20, at 1–3 (discussing why the prosecutor is well-equipped to bring about institutional change and rejecting alternatives).

29. Pfaff, *The War on Drugs*, *supra* note 11, at 173.

30. *Id.*; see also K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 272 n.1 (2009) [hereinafter Howell, *Broken Lives from Broken Windows*].

31. Pfaff, *The War on Drugs*, *supra* note 11, at 179–84. Professor Pfaff has written several articles reflecting his findings. See John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go From Here*, 26 FED. SENT'G REP. 265, 265–67 (2014) [hereinafter Pfaff, *Escaping the Standard Story*]; see also John F. Pfaff, *The Empirics of Prison Growth: A Critical Review*

sentencing laws may have indirectly contributed,<sup>32</sup> the predominant cause of the prison explosion is that, despite the drop in crime, prosecutors have brought and are bringing felony charges in more cases than ever before.<sup>33</sup> That is, more people are being charged with felonies that result in prison admissions than in the past, notwithstanding a falling crime rate. This connection between prosecutorial charging practices and the explosion in prison admissions is corroborated by the fact that, over the same time period, and despite more severe sentencing options, the average prison stay has remained relatively constant while the number of prison admissions—people convicted of felonies—has exploded.<sup>34</sup> The conclusion is that the quintupling of the prison population over the last forty years has resulted from an increased number of felony filings per arrest.<sup>35</sup> This is also confirmed by data that demonstrates that had felony filings remained constant, prison admissions in 2008 would have been approximately thirty-six percent below their actual level.<sup>36</sup> In short, “[p]rison growth has been driven by admissions, and at least since the early 1990s admissions have been driven by prosecutorial filing decisions.”<sup>37</sup>

Determining why prosecutors have been so aggressive in bringing felony charges is much harder. There is no data that can pinpoint a single cause for this prosecutorial charging pattern, although it is definitely not the increase in crime, which stopped in the early 1990s.<sup>38</sup> But it is possible to identify several possible causes: the increase in violent and property crimes before 1991; the political and social upheaval of the 1960s and 1970s; broken windows policing strategies and the resulting misdemeanor crises; and increasingly punitive sentencing legislation, including the expansion of mandatory minimum sentences.

#### A. INCREASES IN VIOLENT AND PROPERTY CRIMES BEFORE 1991

There is no question that the crime rate rose from 1960 to 1991. During that period, violent crime grew by 371 percent and property crime by 198

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*and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008) (setting forth a comparative analysis of methodology used in empirical literature).

32. See Pfaff, *Escaping the Standard Story*, *supra* note 31, at 265, 267 (the percent of prisoners serving drug-related sentences peaked in 1990 at twenty-two percent; by 2010 the portion of state prisoners serving time for drug offenses was just over seventeen percent).

33. Pfaff, *Causes of Prison Growth*, *supra* note 15, at 1241.

34. *Id.* at 1241–42.

35. *Id.* at 1239, 1245.

36. *Id.* at 1251.

37. *Id.* at 1254. *But cf.* Bellin, *Reassessing Prosecutorial Power*, *supra* note 26 (critiquing this conclusion and arguing that legislators and judges have more responsibility for the prison explosion than prosecutors).

38. See Pfaff, *Causes of Prison Growth*, *supra* note 15, at 1254. Crime rates steadily declined from 1991 to 2010, with violent crime falling by forty-eight percent and property crime by forty-three percent. Nevertheless, as we suggest above, it may be that the increase in felony charges is due in part to the fact that as more individuals have prior misdemeanor convictions, prosecutors are more likely to charge a felony. This phenomenon could in turn be driven by policing policies that increased the number of misdemeanor arrests. See *infra* Part I.C.



percent.<sup>39</sup> At the same time, however, the effective incarceration rate declined.<sup>40</sup> This certainly could have led to a sense that the criminal justice process was not working, and thus could have contributed to a change in attitude toward punishment,<sup>41</sup> hardening attitudes, at least in the 1990s, about appropriate punishment. Nevertheless, twenty-five years have passed with a declining crime rate and without meaningful re-examination of the actual facts or of the punitive attitude or its consequences.

## B. POLITICAL AND SOCIAL FORCES

From an interdisciplinary perspective, experts who study the sociology of crime and crime control point to an increasingly punitive political and social trajectory that began in response to the social and cultural upheaval of the 1960s.<sup>42</sup> As traditional social controls seemed to be disintegrating, for example, through racial integration and the sexual revolution, anxiety led to a publicly and politically perceived need for greater social control.<sup>43</sup> That anxiety provided the impetus for the political rhetoric of crime control. And because the social anxiety rested in part on the perceived threat from the civil rights movement, that is, the perception that racial boundaries were breaking down, the new punitiveness had an implicit racial basis.<sup>44</sup> Then, as crime rates began to rise in the 1970s the perceived, or politically enhanced, need for stability was further exploited by “law and order” political platforms.<sup>45</sup>

Coincidentally, the women’s and victims’ rights movements of the time fed the call for increasing punishment by coalescing behind increasingly punitive solutions to perceived inequalities in the criminal justice system, as opposed to other more inclusive, less punitive approaches. Advocates thus supported measures that made it easier to convict, leading to the creation of new crimes, increasingly punitive sentencing legislation, and harsher sentencing practices. Other forces inadvertently contributing to the carceral state were the anti-death

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39. Pfaff, *Causes of Prison Growth*, *supra* note 15, at 1245–46.

40. *Id.* at 1264.

41. *See id.*

42. For a complete discussion of this phenomenon, see MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015) [hereinafter GOTTSCHALK, *CAUGHT*]; LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2010); VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* (2009); NICOLA LACEY, *THE PRISONERS’ DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006) [hereinafter GOTTSCHALK, *THE PRISON AND THE GALLOWES*].

43. *See generally People & Events: The Pill and the Sexual Revolution*, PBS, [http://www.pbs.org/wgbh/amex/pill/peoplevents/e\\_revolution.html](http://www.pbs.org/wgbh/amex/pill/peoplevents/e_revolution.html) [<https://perma.cc/ZM8A-QZVJ>] (last visited Feb. 17, 2017).

44. *See, e.g.*, GOTTSCHALK, *CAUGHT*, *supra* note 42, at 2–6.

45. *See* GOTTSCHALK, *THE PRISON AND THE GALLOWES*, *supra* note 42, at 9–12. Examples of other “law and order” platform planks include expanded use of the death penalty and “three strikes” laws mandatory minimum sentencing structures. *Id.* at 22–24.

penalty and prison reform movements, that each somehow made lengthy imprisonment seem like a reasonable—or even humane—sentencing alternative.<sup>46</sup>

Unfortunately, in the 1990s, as the crime rate began its twenty-five-year downward trajectory, the seeds of the carceral state were already sown. Then, of course, the “war on crime” dominated political discourse, with its underlying focus on cultural control, again with exclusionary, racially discriminatory results. Later, despite the drop in crime, politicians still played to fear of crime, the values of exclusion rather than inclusion, and the need for social control,<sup>47</sup> all of which continued to target minorities. This resulted in the legislation of new and more punitive tools—more crimes and more severe sentences. This increased the pressure upon prosecutors to charge more people with crimes and to request more severe sentences.

### C. BROKEN WINDOWS POLICING AND THE MISDEMEANOR CRISIS

One measure that arose during this period was “broken windows policing,” which was first described in 1982<sup>48</sup> and came into vogue shortly thereafter. It is a method of policing based on the premise that public disorder leads to a breakdown in informal social control mechanisms, which in turn results in more serious crime.<sup>49</sup> Pursuant to this policy, police focus on making arrests for minor crimes before serious crime has a chance to grow, through a policy called “zero tolerance policing.”<sup>50</sup> The result, of course, has been a major increase in arrests for less serious, victimless offenses, in particular, misdemeanors.<sup>51</sup> Ten million non-felony cases are filed each year and the vast majority of convictions in the United States are for misdemeanors.<sup>52</sup> Since the 1980s, zero tolerance policing has resulted in subjecting over ten million people to the lower criminal courts per year.<sup>53</sup>

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46. *See id.* at 9–12, 165–67, 231.

47. *See id.* at 74.

48. *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

49. *See id.* at 31–32.

50. *See generally id.* at 31–32, 34; *see also generally* Tim Newburn, *Atlantic Crossings: ‘Police Transfer’ and Crime Control in the USA and Britain*, 4 PUNISHMENT & SOC. 165, 167 (2002); Bill Dixon, *Zero-Tolerance: The Hard Edge of Community Policing*, AFR. SECURITY REV., July 2000, at 73 (describing the global growth of zero tolerance policing).

51. Howell, *Broken Lives from Broken Windows*, *supra* note 30, at 273 & n.5 (citing FED. BUREAU OF INVESTIGATION, US DEP’T OF JUSTICE, *Table 29: Estimated Number of Arrests*, in CRIME IN THE UNITED STATES, 2005 (2006)) (noting that of 14 million arrests reported nationally to the FBI in 2005, only about 2.2 million were for serious crimes).

52. *See* Roberts, *Crashing the Misdemeanor System*, *supra* note 3, at 1090 (77.5% of cases in study of courts in seventeen jurisdictions were misdemeanors); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 281 (2011).

53. *See* Howell, *Prosecutorial Discretion*, *supra* note 1, at 290.

First, in the face of this explosion in the numbers of filed cases, it is fair to say that the process for adjudicating misdemeanor charges has broken down to a largely administrative processing mechanism,<sup>54</sup> characterized, in large measure, by weak prosecutorial screening of police complaints.<sup>55</sup> Second, disturbing patterns of discrimination and of a lack of justice have emerged: eighty-five to ninety percent of the people processed in criminal courts are non-white,<sup>56</sup> and overburdened prosecutors are not able to properly exercise their ethical and constitutional responsibility to determine who and what to charge. More broadly, the sheer volume of cases has resulted in a lack of adjudication that is characterized by unreliable determinations of culpability and failures of procedural justice.<sup>57</sup> What has resulted is a police-dominated charging process followed by an administrative, not an adjudicative, process, which results not in administrative sanctions but in criminal penalties.<sup>58</sup> Third, while punishments for minor crimes are intended to be small, the collateral consequences of a misdemeanor conviction—“loss of home, income, employment, immigration status, or ability to pay for an education”—have resulted in well-documented, criminogenic effects.<sup>59</sup> And these serious consequences have disproportionately impacted minority communities.<sup>60</sup>

Finally, the misdemeanor crisis has had a serious impact on the innocent.<sup>61</sup> Given the breadth of prosecutorial discretion<sup>62</sup> and limited defense discovery,<sup>63</sup> the innocent are particularly vulnerable to the pressure to plead guilty, that is, to avoid coming back to court and risking a substantial sentence, even where they are not guilty. Those charged with misdemeanors are under tremendous pressure to plead guilty to secure their freedom—whether the charges are accurate or not.<sup>64</sup> This results in the defendant having a criminal record; even if arrested

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54. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2142 (1998) [hereinafter Lynch, *Our Administrative System*]; see Howell, *Prosecutorial Discretion*, *supra* note 1, at 290 nn.24–25.

55. See Howell, *Prosecutorial Discretion*, *supra* note 1, at 294.

56. *Id.* at 298.

57. See generally Lynch, *Our Administrative System*, *supra* note 54.

58. See generally *id.*

59. Howell, *Broken Lives from Broken Windows*, *supra* note 30, at 300, 322.

60. See *id.* at 291–92.

61. See Natapoff, *Misdemeanors*, *supra* note 1, at 1319. Indeed, as one commentator has noted, “Even prosecutors acknowledge that the likelihood of innocent individuals pleading guilty is substantial.” Howell, *Prosecutorial Discretion*, *supra* note 1 at 291 (citing Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463, 2506 (2004)).

62. See *infra* Part III.A.

63. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463, 2495 (2004) (“The result of inadequate discovery is that the parties bargain blindfolded . . . Prosecutorial bluffing is more likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants.”); see also Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043 (2013). See generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009).

64. See Natapoff, *Misdemeanors*, *supra* note 1; Roberts, *Crashing the Misdemeanor System*, *supra* note 3.

again for a misdemeanor, that record is likely to lead to higher charges, a reduced willingness of the prosecution to offer a good plea bargain, and a longer or harsher sentence. Ultimately, a record of misdemeanors will lead to felony charges, because people who already have a record of misdemeanor convictions are more likely to be charged with a felony in subsequent cases.

#### D. MORE SEVERE SENTENCING OPTIONS AND MANDATORY MINIMUM SENTENCES

As noted above, one of the consequences of the political and social changes was a call for tougher policies, including legislation that created mandatory minimum sentences and sentencing guidelines that imposed longer prison sentences.<sup>65</sup> In the federal system, there are now over 170 crimes that carry mandatory sentences, an increase of seventy-eight percent since 1991. At the state level, mandatory minimum sentences exist for crimes that include drug trafficking, assault on vulnerable victims, possession of a firearm during a felony, gang felonies, carjacking, hate crimes, rape, sex offenses involving minors, and habitual offender sentences.<sup>66</sup> Accordingly, the availability of mandatory minimum sentences increased the leverage provided to the prosecutor in charging and in plea negotiations.<sup>67</sup> And, of course, a prosecutor's decision to charge is not subject to judicial review, effectively depriving the courts of any role in limiting this use of the charging function. Indeed, available data shows that the proliferation of mandatory minimum sentencing and the exploding prison population coincide,<sup>68</sup> even as the average length of a prison stay has remained relatively constant.<sup>69</sup>

## II. THE MINISTER OF JUSTICE ROLE

Ultimately, the prosecutor is the party responsible for managing these social, political, and legislative changes in the context of the criminal process. In this context it is important to remember that the U.S. prosecutor is a quasi-judicial, fiduciary representative of the sovereign whose responsibility is to be “a minister of justice and not simply . . . an advocate.”<sup>70</sup> It is basic to the U.S. criminal process that the prosecutor's interest is to “see that the defendant is accorded

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65. For a complete discussion of the impact of mandatory minimum sentencing on the mass incarceration problem, see generally R. Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981 (2014) [hereinafter Cassidy, *(Ad)Ministering Justice*].

66. See *Recent State-Level Reforms to Mandatory Minimum Laws*, FAMM, <http://famm.org/wp-content/uploads/2013/08/FS-List-of-State-Reforms-2.25.pdf> [<https://perma.cc/NTJ3-JAN6>] (last visited Feb. 14, 2017).

67. See Cassidy, *(Ad)Ministering Justice*, *supra* note 65 at 1014 (noting that twenty-five percent of cases involving mandatory minimum penalties were ultimately disposed of under an alternative statute).

68. See *id.* at 985–87.

69. Pfaff, *Causes of Prison Growth*, *supra* note 15, at 1243–44.

70. MODEL RULES R. 3.8 cmt. 1.

procedural justice.”<sup>71</sup> The minister of justice role is not clearly defined: it has long been said to lack specificity, enforceability, and meaning.<sup>72</sup> It is well accepted, however, that the prosecutor is a fiduciary who represents the sovereign and must make decisions in the public interest, for society at large—not any individual client.<sup>73</sup> It is the unique role of both principal and agent that requires a prosecutor to pursue the public interest.<sup>74</sup> It is also important to recognize that the prosecutor is the gatekeeper of the system, uniquely positioned to mediate between the police and the judiciary and between the legislature and “the criminal law in action.”<sup>75</sup> In this posture, the prosecutor plays “an outsized role” in the U.S. criminal justice process.<sup>76</sup> That role requires that the prosecutor undertake prosecution in the public interest, ensure fair process, prevent conviction of the innocent, and provide equal treatment to all of the people.<sup>77</sup> In our system, the prosecutor must do this because the prosecutor has the unique power to ensure a just, equitable, and fair result.<sup>78</sup>

Of course, there often is a tension between the prosecutor’s role as an adversary bringing individuals charged with crimes before a court and that of the other “multidimensional roles” of the prosecutor. Beyond the courtroom, the prosecutor works “in community meetings, in consultations with the police, . . . in sentencing commission and legislative hearings, and in budget meetings.”<sup>79</sup> As Dan Medwed has observed, “institutional and professional incentives in most prosecutorial offices are steadfastly aligned with the goal of earning convictions—an ambition that does not invariably dovetail with the minister-of-justice concept.”<sup>80</sup>

A prosecutor’s commitment to procedural justice encompasses prosecutorial charging decisions, but despite the importance of this stage of the process, prosecutors have virtually unreviewable discretion to decide who and what to charge. Due process permits a prosecutor virtually unfettered discretion in charging, with the sole exceptions for a constitutionally prohibited basis for the

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71. *Id.*

72. Professor Bennett Gershman described it as “maddeningly vague and frustratingly amorphous.” Gershman, *The Zealous Prosecutor*, *supra* note 20, at 155.

73. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 633–34 (1999) [hereinafter Green, *Why Should Prosecutors Seek Justice*].

74. *Id.*

75. Richman, *Accounting for Prosecutors*, *supra* note 20, at 5.

76. *Id.* at 3.

77. See Green, *Why Should Prosecutors Seek Justice*, *supra* note 73, at 613–15; see also STANDARDS FOR CRIMINAL JUSTICE, *The Prosecution Function*, Standard 3-1.2(b) (Am. Bar Ass’n 4th ed. 2015) [hereinafter 2015 ABA PROSECUTION STANDARDS].

78. See Richman, *Accounting for Prosecutors*, *supra* note 20, at 12.

79. Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 *J. CRIM. L. & CRIMINOLOGY* 1119, 1121 (2013).

80. Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 *WASH. L. REV.* 35, 45 (2009) [hereinafter Medwed, *Prosecutor as Minister of Justice*].

charging decision such as race, religion, or the exercise of First Amendment rights.<sup>81</sup> The American Bar Association (ABA) *Standards for the Prosecution Function*<sup>82</sup> provide guidelines for considerations in charging—as well as for guilty pleas and sentences—but these remain guidelines.<sup>83</sup> Beyond articulating broad goals and standards, the U.S. criminal process leaves the job of defining the minister of justice role to the prosecutors themselves. Not surprisingly, one consequence of virtually unfettered discretion in charging has been a significant increase in indictments in an era when crime has decreased, thereby creating or at least contributing to conditions for mass incarceration.<sup>84</sup> Such a result undermines legitimacy and confidence in the criminal justice system and is in sharp contrast with a robust view of the role envisioned by the *Standards*.<sup>85</sup> Those standards, first adopted in 1971 under the leadership of Justice Lewis Powell, are the result of a lengthy deliberative process among many stakeholders in the criminal justice system, including state prosecutors, the U.S. Department of Justice, public and private criminal defense lawyers and organizations, law enforcement, and members of the judiciary. Repeatedly revised, these have served as a detailed guide to practice. The *Standards* have reflected a consensus of the views of representatives of all segments of the criminal justice system. “Balanced representation is the goal.”<sup>86</sup> The *Standards* have been cited by various courts, including the U.S. Supreme Court.<sup>87</sup>

Despite the *Standards* and the underlying fundamental notion of fair and ethical prosecution,<sup>88</sup> the relationship between the minister of justice role and the prosecutor’s advocacy role remains unclear. Are these roles to be balanced simultaneously? Or does the role of minister of justice dominate at certain stages of the prosecution while the role of advocate dominates at others? What is the appropriate role of the prosecutor at the charging stage?

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81. *Wayte v. United States*, 470 U.S. 598, 608 (1985).

82. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.1. *See generally* Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259 (2011).

83. *See* 2015 ABA PROSECUTION STANDARDS, Standards 3-4.2 to 3-4.4; *see also* H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1148–50 (1978) (explaining the purpose of old section 3-3.9).

84. *Supra* note 38 and accompanying text.

85. *See, e.g.*, 2015 ABA PROSECUTION STANDARDS, Standard 3-1.1.

86. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10, 14; Rory A. Little, *The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Function*, 62 HASTINGS L.J. 1111 (2010–2011).

87. Little, *supra* note 86, at 1113.

88. MODEL RULES R. 3.8 cmt. 1 (prosecutorial responsibility as minister of justice carries special obligations to see that defendant is afforded procedural justice and that guilt is decided on the basis of sufficient evidence); *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992), *rev’d on other grounds*, 27 F.3d 439 (“Given the significance of the prosecutor’s charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.”).

Most recently, it has been argued that part and parcel of the prosecutor's sovereign role as minister of justice is the obligation as an administrator of justice to "pursue the public interest by promoting a just system as a government official."<sup>89</sup> The obligation of administrator of justice would include (1) advocating for repeal of mandatory minimum sentencing provisions for most drug and non-violent offenses; and (2) creating and publishing plea bargaining guidelines to make sure that the discretion to bargain in the face of mandatory minimum sentences is consistent and even-handed.<sup>90</sup>

The central role of the prosecutor is reflected in the *Standards*, which define the prosecutor as a quasi-judicial "problem solver," who "serves the public," and has an obligation to "reform and improve the administration of criminal justice"<sup>91</sup> through "policies and procedures . . . [that] achieve fair, efficient, and effective enforcement of the criminal law within the prosecutor's jurisdiction."<sup>92</sup> As an administrator of justice, the prosecutor has the explicit duty to "seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."<sup>93</sup> Prosecutors cannot shrink from this responsibility by seeking justice in individual cases, while simply hoping or expecting that overall systemic justice will result.<sup>94</sup>

But even short of leading an effort at sentencing reform, the prosecutor's role as administrator of justice plays out in daily discretionary decision-making. With respect to charging, the *Standards* advise that the prosecutor "serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances."<sup>95</sup> Standard 3-1.2(e) specifically advises that the prosecutor

should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction . . . and . . . be

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89. Cassidy, (*Ad*)*Ministering Justice*, *supra* note 65, at 994.

90. *Id.*

91. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(f).

92. 2015 ABA PROSECUTION STANDARDS, Standard 3-2.4(a).

93. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(f).

94. As noted above, a variety of scholars have identified the fact that our system of criminal justice has become administrative rather than adjudicative. *See, e.g., supra* note 54. To the extent that this is true, of course, the role of the prosecutor as administrator of justice has taken on new importance. Certainly, as far as the criminal courts are concerned, the exercise of prosecutorial discretion should reflect more than the balancing of cost-benefit factors associated with an administrative state actor. To the extent that this is the case, administrative remedies—and not criminal sanctions—should be the appropriate result. *See, e.g.,* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009) (arguing for separation of investigative and adjudicative functions).

95. *See* Green, *Why Should Prosecutors Seek Justice*, *supra* note 73.

available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.<sup>96</sup>

Overall, the most recent focus upon the prosecutor's role is upon the need to examine systemic reform to uphold the minister of justice principle and, in administering justice, to look beyond the advocacy role.

### III. SUGGESTIONS FOR CHANGE

#### A. RECALIBRATING THE CHARGING FUNCTION

Increased attention to the prosecution's multiple roles, as well as its responsibility for the increase in incarceration, necessarily calls for suggestions for change. A primary area of focus is charging process where changes are both necessary and readily subject to implementation.

A prosecutor's charging decision lies at the core of the prosecution function. It has been described as "the most dangerous power of the prosecutor."<sup>97</sup> The prosecutor's decision whether to charge, whom to charge, and what to charge are characterized both by a uniquely broad discretion and by a discretion that is virtually unreviewable.<sup>98</sup> As long as a prosecutor's charging decision is based on probable cause and seemingly appropriate factors—such as weight of the evidence, prosecutorial crime priorities, and interests of the victim—the courts will not exercise any control.<sup>99</sup> Only if a decision is found to be based on improper criteria—for example, in a case of selective prosecution<sup>100</sup> or vindictive prosecution<sup>101</sup>—will the courts step in, and, then, with a tremendous amount of deference.<sup>102</sup>

To be sure, in approaching the exercise of charging discretion, the prosecutor must calibrate the balance between minister of justice and advocate, as must be done at every stage of the process. But how that balance plays out in daily practice depends on the stage of the process and what prosecutorial function is being performed. Thus, for example, because the prosecutor's role as advocate is

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96. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(e).

97. Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 4 (1940).

98. See *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.) ("Few subjects are less adopted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . ."); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)) ("So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.");

99. See *Wayte*, 470 U.S. at 608.

100. *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (noting that the decision to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification."); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

101. *Blackledge v. Perry*, 417 U.S. 21 (1974).

102. See *id.*



designed to make sure the adversary adjudication process yields a reliable result,<sup>103</sup> it may be more appropriate for the prosecutor to function in the advocacy role in the courtroom, where adjudication takes place.<sup>104</sup> There can be no question that the court's review of alleged prosecutorial misconduct in the courtroom reflects this approach.<sup>105</sup> But in exercising its charging discretion, the prosecutor acts primarily as a minister and administrator of justice, not as an advocate; the advocate role is not essential to the charging function. Indeed, several reasons support the conclusion that legally and ethically, in the role of gatekeeper, the prosecutor properly emphasizes the minister of justice role.

First, the tremendous power wielded by the prosecution as gatekeeper requires a focus on fairness and justice.<sup>106</sup> The role as representative of the sovereign is most acutely in play at this stage.<sup>107</sup> As others have noted,<sup>108</sup> at the charging stage, the prosecutor's decisions really determine the outcome of a criminal case and define what society considers to be criminal.<sup>109</sup> The prosecutor's role as gatekeeper also carries the power to worsen or mitigate the influence of racial, social, and political inequality on criminal justice outcomes.<sup>110</sup> And it is also the

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103. See Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 22, at 64.

104. See *id.* at 49 (noting that the advocacy role is principally for advocacy at trial).

105. See, e.g., BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 10, 11 (2d ed. 2016).

106. See Green, *Why Should Prosecutors Seek Justice*, *supra* note 73, at 625–29 (the prosecutor's "special power implies special responsibilities"); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016) (describing the unique and important role of the prosecution in mediating between police and the courts) [hereinafter Sklansky, *Nature and Function of Prosecutorial Power*].

107. See Green, *Why Should Prosecutors Seek Justice*, *supra* note 73, at 625–37.

108. See Richman, *Accounting for Prosecutors*, *supra* note 20, at 11 (discussing social consequences of the prosecutorial project). The effect of charging upon the individual is noted by Monroe Freedman and Abbe Smith:

The defendant's reputation is immediately damaged, frequently irreparably, regardless of an ultimate acquittal. Anguish and anxiety become a daily presence for the defendant and for the defendant's family and friends. The emotional strains of the criminal process have been known to destroy marriages and to cause alienation or emotional disturbance among the accused's children. Also, the financial burden can be enormous. A criminal charge may well result in loss of employment because of absenteeism due to pretrial detention, attendance at hearings and the trial, or simply because the accused has been named as a criminal defendant. The trial itself, building up to the terrible anxiety during jury deliberations, is a harrowing experience.

MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 10.04 (LexisNexis 4th ed. 2010).

109. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001) [hereinafter Gershman, *The Prosecutor's Duty to Truth*].

110. See generally Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2 (2013) (acknowledging racial disparities in sentencing); Richman, *Accounting for Prosecutors*, *supra* note 20, at 7 ("[W]hether prosecutors take ownership of the adjudicative process or are simply critical contributors to it, their work will have distributional effects they can either consider or ignore."). New ABA Standard 3-1.6 states that prosecutors should be proactive in detecting, investigating, and eliminating improper biases, like race, and should regularly assess the potential for biased or unfairly disparate impacts of their policies. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.6.

point at which the prosecutor's role as mediator between the police and the courts is most significant.<sup>111</sup> Moreover, the prosecutor has a "virtual monopoly of the fact finding process,"<sup>112</sup> based on a superior access to the crime scene and knowledge of the facts.<sup>113</sup> Third, the prosecutor has a duty to truth that arises from the constitutional obligation to protect the innocent and to not use false evidence or suppress material favorable evidence.<sup>114</sup> Indeed, assuming it can ever be proven, deliberately bringing charges simply for an adversarial advantage—that is, overcharging—would most likely be found to violate due process.<sup>115</sup>

In fact, the *Standards* specifically delineate non-adversarial considerations of justice in charging.<sup>116</sup> To be sure, some noted prosecutors argue that they must have confidence in the truth of the evidence before bringing or maintaining criminal charges.<sup>117</sup> Even though the ethics rules do not set forth such a standard and only require that the prosecutor "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause,"<sup>118</sup> a prosecutor is admonished that charges may not be brought if the prosecutor *believes* the defendant is innocent, regardless of the weight of the evidence.<sup>119</sup> As to when a charge may not be filed, Standard 3-4.4(d) implicitly addresses the non-adversarial nature of the charging function in stating that "the prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct."<sup>120</sup> The final subsection (f) advises that the prosecutor "should consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition" in

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111. See Sklansky, *Nature and Function of Prosecutorial Power*, *supra* note 106.

112. See Gershman, *The Prosecutor's Duty to Truth*, *supra* note 109, at 314.

113. See *id.* at 314–15. Of course, this may not be the case in many systems where the prosecution has only the information supplied by a police report prior to charging. This is especially the case in high volume misdemeanor practices.

114. See *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) (per curiam) (knowing use of perjured testimony by a prosecutor violates due process); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (failure to disclose material exculpatory evidence violates due process).

115. See *Bordenkircher v. Hayes*, 434 U.S. 357, 362–64 (1978).

116. See generally 2015 ABA PROSECUTION STANDARDS, Standard 3-4.4.

117. See Cyrus R. Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629, 635 (2013) (noting that the office did not choose to prosecute Dominique Strauss-Kahn because it did not believe that he was guilty "beyond a reasonable doubt") [hereinafter Vance, *Conscience and Culture of a Prosecutor*]. See generally MODEL RULES R. 3.8(a) (prosecutor must not bring a charge that is "not supported by probable cause"); 2015 ABA PROSECUTION STANDARDS, Standard 3-4.3(a) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.").

118. MODEL RULES R. 3.8(a); see 2015 ABA PROSECUTION STANDARDS, Standard 3-4.3(a).

119. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.3(d).

120. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.4(d).

deciding whether to initiate or continue charges.<sup>121</sup> Standard 3-4.3 states that once charges are brought they should only be maintained if the prosecutor continues to have the same reasonable belief and admonishes the prosecutor to bring “significant doubt[s] about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence” to a supervisor.<sup>122</sup> These are explicit non-adversarial requirements.

Aside from requiring a subjective belief in guilt, the *Standards* require the prosecutor to conclude that the decision to charge is made in the interests of justice. Standard 3-4.4(a) provides that a prosecutor should seek or file criminal charges only if “the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support the conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.”<sup>123</sup> The question of what constitutes the “interests of justice” here is addressed in Standard 3-4.4, which makes clear that the prosecutor “is not obliged to file or maintain all criminal charges” that might in fact be supported by the evidence. In fact, under Standard 3-1.2(e) the prosecutor must be “knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases.”<sup>124</sup> The *Standards* then list the factors that a prosecutor

may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets [the minimal charging requirements]:

- (i) the strength of the case;
- (ii) the prosecutor’s doubt that the accused is in fact guilty;
- (iii) the extent or absence of harm caused by the offense;
- (iv) the impact of prosecution or non-prosecution on the public welfare;
- (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
- (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- (vii) the views and motives of the victim or complainant;
- (viii) any improper conduct by law enforcement;
- (ix) unwarranted disparate treatment of similarly situated persons;

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121. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.4(f). Interestingly, the non-adversarial role of the prosecutor *pretrial*, is also reflected in Model Rule 3.8, “Special Responsibilities of a Prosecutor.” See MODEL RULES R. 3.8. Among other things, that rule explicitly requires prosecutors to take reasonable measures to assure that the accused knows of the right to obtain counsel and has an opportunity to do so. It also requires that a prosecutor *not* seek a waiver from the accused of important pretrial rights. See MODEL RULES R. 3.8(b), (c).

122. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.3.

123. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.3.

124. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(e).

- (x) potential collateral impact on third parties, including witnesses or victims;
- (xi) cooperation of the offender in the apprehension or conviction of others;
- (xii) the possible influence of any cultural, ethnic, socioeconomic or other improper biases;
- (xiii) changes in law or policy;
- (xiv) the fair and efficient distribution of limited prosecutorial resources;
- (xv) the likelihood of prosecution by another jurisdiction; and
- (xvi) whether the public's interests in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.<sup>125</sup>

At least seven of these sixteen enumerated criteria reflect non-adversarial considerations involving the harm caused by the mass incarceration state and that must be balanced in determining the public's interest in non-prosecution or diversion for minor crimes.

In fact, the revised *Standards* on the whole reflect a fulsome view of the prosecutor's minister of justice role that is consistent with the prosecutor's uniquely broad power to impact the criminal justice process. Like the listed criteria, the *Standards* as a whole reflect a responsibility to consider a wider notion of "public interest" beyond crime prevention, in the requirement that a prosecutor's office should be available to assist "community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system."<sup>126</sup> Mass incarceration certainly is a "problem . . . that result[s] from perceived flaws in the criminal justice system."<sup>127</sup> Prosecutors must also be active in eliminating policies and procedures that have a racial or other disparate impact on the communities they serve.<sup>128</sup> New Standard 3-1.6 prescribes that a prosecutor's office should be

proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work. A prosecutor's office should regularly assess the potential for biased or unfairly

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125. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.4. "The prosecutor should not enter into a disposition agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement. The prosecutor should consider factors listed in Standard 3-4.4(a)." 2015 ABA PROSECUTION STANDARDS, Standard 3-5.6. Standard 3-5.9 states that when criminal charges are dismissed, the prosecutor should make and retain an appropriate record of the reasons for the dismissal and note whether the dismissal was with or without prejudice. See 2015 ABA PROSECUTION STANDARDS, Standard 3-5.9. Another source for the substantive content of the "interests of justice" can be found in section 210.40 of the New York Criminal Procedure Law, which delineates the grounds for dismissal in the interests of justice. See N.Y. CRIM. PROC. LAW § 210.40 (McKinney 2016).

126. See 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(e).

127. See 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(e).

128. See 2015 ABA PROSECUTION STANDARDS, Standard 3-1.6.

disparate impacts of its policies on communities within the prosecutor's jurisdiction, and eliminate those impacts that cannot be properly justified.<sup>129</sup>

Finally, the *Standards* make clear that the prosecutor is not simply part of law enforcement or only the next stage of the process after the police. Standard 3-1.2(f) makes clear that the prosecutor is not merely a case-processor but also a “problem-solver” who is “responsible for considering broad goals of the criminal justice system.”<sup>130</sup>

The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and bar activities, public education, community service activities, and Bar leadership positions. A prosecutorial office should support such activities, and the office's budget should include funding and paid release time for such activities.<sup>131</sup>

Thus, while the police may be engaged in the “often competitive enterprise of ferreting out crime,”<sup>132</sup> the prosecutor's charging role is different.

If, as seems true, aggressive prosecutorial charging practices have, in great measure, caused the problem of mass incarceration, the culture of charging needs to change to both follow these ABA prescriptions more closely and to accurately reflect the real and very varied dimensions of the role of the prosecutor. First, it should be acknowledged that charging decisions have had a role in creating the current devastating social problem of mass incarceration, with its disproportionate racial impact, and that the prosecutor has a unique power to fix it. Then, as a minister and administer of justice, the prosecutor should establish systems and changes in practice—written ones, according to the *Standards*—to take these consequences into account. Such changes would include a broader view of the “public” (whose interest the prosecutor protects, including those whose liberty and lives are damaged) and of that public's “interests” that would include larger social justice issues—preventing the racially imbalanced, criminogenic effects of charging minor crimes—assuring that the choice of a felony charge is reflected in the factors listed in the revised standards. As set forth, *infra*, it would also include fulfilling the prosecution's unique position between the police and the courts, as mediator between these two institutions. Practices should (1) assure that the prosecutor's charging decision is independent and made on the basis of valid

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129. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.6.

130. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(f).

131. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.2(f). Section (f) is addressed, in great measure, to systemic reforms, but it is also applicable to individual cases.

132. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

prosecutor criteria, not on non-reflective or hurried acquiescence to police strategy; (2) be based on accurate data; and (3) require accountability from the police.<sup>133</sup> Cultural and institutional deterrents currently prevent prosecutors from engaging in these practices, even though most prosecutors probably want to implement them now. To a great extent, respect for and legitimacy of our criminal justice system depends upon these changes in prosecutorial culture.<sup>134</sup>

One practice that has gained traction in limited jurisdictions in the United States is to divert certain cases out of the criminal justice system or to decline to prosecute.<sup>135</sup> This is hardly a universal practice.<sup>136</sup> Unfortunately, the response of many jurisdictions in the United States seems to have been the worst of both worlds: keeping minor crimes within the criminal justice process, handling them in what can only be described as an administrative system, but imposing criminal sanctions.<sup>137</sup> This “plea mill” nature of misdemeanor practice and its dire social and racial consequences continues to undermine respect for the criminal justice system. As gatekeepers, prosecutors should focus more attention on declination to prosecute in the first instance, and diversion for certain cases that are prosecuted.<sup>138</sup>

The same renewed interest in adapting to similar criminal justice challenges is not limited to the United States. High workloads have created documented challenges in Poland, Sweden, the United Kingdom, Germany, France, and the

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133. For a discussion of the role of the prosecutor vis-a-vis the police, see *supra* Part I.C.

134. In the last decade, there has been increasing focus upon prosecutorial accountability, including prosecutor’s responsibility for wrongful convictions and improper exercise of discretion. Judge Alex Kozinski famously said that there is an “epidemic” of prosecutorial misconduct and that only judges could put a stop to it. Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 51, 53 (2016).

135. See, e.g., Kevin Flannery, *City Prosecutor Launches Felony Diversion Program, Federal Grant Will Fund Innovative Response to Select First-Time Gun Charges*, ST. LOUIS DISPATCH (Oct. 1, 2015), [http://www.stlamerican.com/news/local\\_news/article\\_e9bd3c84-6870-11e5-a227-0fc0bca44eea.html?mode=jqm](http://www.stlamerican.com/news/local_news/article_e9bd3c84-6870-11e5-a227-0fc0bca44eea.html?mode=jqm) [https://perma.cc/P2V2-38E7]; Jessica McDonald, *Three Years In: A Look at Philadelphia’s Drug Diversion Program*, NEWSWORKS.ORG (July 7, 2015), <http://www.newsworks.org/index.php/local/philadelphia/83824-three-years-in-a-look-at-philadelphias-drug-felony-diversion-program> [https://perma.cc/KW9H-KYE2].

136. See, e.g., Megan N. Krebbeks, *One Step at a Time: Reforming Drug Diversion Programs in California*, 13 CHAF. L. REV. 417 (2010); State Attorney’s Office, 18th Judicial Circuit, *Misdemeanor Pretrial Diversion Program*, <http://sa18.org/page/misdemeanor-diversion.html> [https://perma.cc/5W6D-B9EH] (last visited Mar. 14, 2017).

137. ROBERT C. BORUCHOWITZ, MALIA N. BRINK, & MAUREEN DIMINO, NAT’L ASS’N OF CRIMINAL DEFENSE LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* (Apr. 2009), <https://www.nacdl.org/reports/misdemeanor/> [https://perma.cc/J4NG-CEM5].

138. In 2014, the late Ken Thompson, District Attorney in Brooklyn, NY, announced that he would no longer prosecute minor marijuana possession cases. Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He’ll Target Marijuana*, N.Y. TIMES (July 8, 2014), [http://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html?\\_r=0](http://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html?_r=0) [https://perma.cc/S429-EEF9]. See Howell, *Prosecutorial Discretion*, *supra* note 1, at 288 (prosecutors should decline to prosecute whole “classes of minor offenses” where policing choices are marked by “racial disparities or overburden the system and compromise procedural justice”); CHAUHAN ET AL., *ENFORCEMENT RATES IN NEW YORK CITY*, *supra* note 27.

Netherlands, as well as other countries.<sup>139</sup> And the extent to which this has increased the focus on and power of prosecutors has been extensively discussed and analyzed.<sup>140</sup> Indeed, a recent study entitled *Coping with Overloaded Criminal Justice Systems* analyzes and compares the overloaded criminal justice systems in those six countries and the prosecutors' role in those systems.<sup>141</sup> The study analyzes how the criminal justice system and the role of the prosecution have been challenged by explosive growth in the work of their criminal courts. Clearly, as fewer cases can be adjudicated in the courts, the role of prosecutors has grown.<sup>142</sup> At the same time, among the comparative institutional responses to major increases in workload have been to (1) decriminalize certain behaviors and have them dealt with administratively, using administrative offenses and fines (to decrease the number of cases handled in the criminal justice system); (2) increase reliance on the police to make the charging decisions; (3) divert more cases out of the criminal justice system; and (4) expand the use of shortcuts in the process, such as plea bargaining.<sup>143</sup>

Overall, the authors of the study recommend that the best way to deal with systemic overload is by decriminalizing minor crimes, that is, to handle minor crimes administratively, outside the criminal justice process, rather than as crimes.<sup>144</sup> This process would, of course, permit only civil penalties, like fines.<sup>145</sup> The study suggests that to the extent that minor offenses remain in the criminal justice system because they are not decriminalized, greater discretion should exist for dismissals by prosecutors.<sup>146</sup> And for charges that are neither decriminalized nor dismissed, dispositions by prosecutors should bring administrative (e.g., fines) and not criminal penalties.<sup>147</sup> In such a system, the exercise of authority should be governed by clear rules or statutes and should be subject to examination by the court.<sup>148</sup> Thus, the least effective solution seems to be to cede charging decisions to the police or to insist on imposing criminal penalties for

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139. *Global Strategy on Occupational Health for All: The Way to Health at Work*, WORLD HEALTH ORG., [http://www.who.int/occupational\\_health/globstrategy/en/index4.html](http://www.who.int/occupational_health/globstrategy/en/index4.html) [<https://perma.cc/6JJQ-PRL2>] (last visited Jan. 17, 2017).

140. For domestic examples, see Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 N.W. U. L. REV. 261 (2011).

141. JORG-MARTIN JEHL & MARIANNE WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE* (2005) [hereinafter JEHL & WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS*].

142. See Sklansky, *Nature and Function of Prosecutorial Power*, *supra* note 106, at 17 and authorities cited therein.

143. JEHL & WADE, *COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS*, *supra* note 141, at 19–24.

144. *Id.* at 24–25.

145. *Id.* at 24.

146. *Id.*

147. *Id.*

148. *Id.* at 24–25.

minor, victimless conduct.<sup>149</sup> That, of course, is the current process in the United States.

#### B. ENSURING INDEPENDENCE FROM AND ACCOUNTABILITY OF THE POLICE

One aspect of the prosecution function that has received little attention is the prosecutor's role in relation to the police. In the federal system, there has been some attention to the interaction of U.S. prosecutors and law enforcement, specifically with respect to the relationship of federal prosecutors with the FBI<sup>150</sup> or with their informers.<sup>151</sup> Yet little attention has been paid to examining, much less regulating, the important relationship between state district attorneys and the police.<sup>152</sup>

As has been recognized, in a liberal democracy prosecutors play a unique and important mediating role between the police and the courts and between the legislature and the courts.<sup>153</sup> As gatekeepers with extensive discretion, they have the power to "modulate" the impact of criminal legislation on criminal justice outcomes; with their proximity to the courts, they have a special capacity to "reduce the punitive effects of police enforcement practices."<sup>154</sup> Yet as noted above, whether inadvertently, through haste, or purposely, prosecutors have abdicated this responsibility by deferring to the charging decisions of the police.<sup>155</sup> This has likely contributed both to the mass incarceration problem and to a sense of doubt about the legitimacy of the process.

One way to change the charging function in the face of mass incarceration would be to shed light on and formally shape the currently unstructured relationship of prosecutors and police; another way would be to more clearly define the prosecutor's role in that relationship. Indeed, a part of the current

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149. *Id.* at 19.

150. See Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

151. See *id.*; Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999).

152. One area that has received some attention is the prosecutor's duty to disclose favorable information under *Brady v. Maryland*, 373 U.S. 83 (1970). In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that the police failure to disclose would be imputed to the prosecution; that is, the prosecutor had an obligation to conduct a reasonable inquiry and search of police files to discover information that should be disclosed to the defense. In so holding, the Court assumed the prosecution has mechanisms for monitoring and ensuring police disclosure. Of course, that assumption is not universally true. Indeed, in an attempt to remedy the difficulty in holding police accountable for disclosure, prosecutors have begun to use checklists to ensure greater police compliance. See Darryl K. Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH. L. REV. 133, 146-47 (2012).

153. RICHMAN, *Accounting for Prosecutors*, *supra* note 20, at 6-7.

154. *Id.* at 7 (observing that "a lot of what prosecutors do is interstitial, dampening the zeal of some (units or individuals) and spurring others on").

155. See *supra* Part I.C.



interest in greater accountability of prosecutors includes a focus on the police-prosecution relationship.<sup>156</sup> This new interest is not surprising, given two recent phenomena: (1) the failure of prosecutors to indict police officers in the killing of unarmed black men in Ferguson, Missouri; Staten Island, New York; Tulsa, Oklahoma; San Diego, California; and other cities;<sup>157</sup> and (2) the recognition that broken-windows policing has had a significant negative impact on minority and poor communities and, ultimately, has led to mass incarceration.<sup>158</sup>

Again, the ABA *Standards* reflect the unique and powerful role of the prosecutor vis-à-vis the police, but they provide little structure. They certainly make clear that the prosecutor must both (1) act independently of the police; and (2) supervise the police. So, for example, Standard 3-4.2 specifically states that “while the decision to arrest is often the responsibility of law enforcement personnel, the decision to institute formal criminal proceedings is the responsibility of the prosecutor.”<sup>159</sup> Standard 3-3.2, “Relationships with Law Enforcement,” advises prosecutors, inter alia, to “maintain respectful yet independent judgment when interacting with law enforcement personnel,” to “become familiar with and respect the experience and specialized expertise of law enforcement personnel,” and to “provide independent legal advice to law enforcement.”<sup>160</sup> New Standard 3-1.3 contains the blunt reminder that the prosecutor “does not represent law enforcement personnel who have worked on the matter” and those law enforcement personnel are not the prosecutor’s clients.<sup>161</sup>

A supervisory, independent role is further prescribed by the *Standards*, which state that “in determining whether formal criminal charges should be filed, prosecutors should consider whether further investigation should be undertaken,”<sup>162</sup> and, after charges are filed “should oversee law enforcement investigative activity related to the case.”<sup>163</sup> The *Standards* also counsel prosecutors to

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156. RICHMAN, *Accounting for Prosecutors*, *supra* note 20, at 12.

157. See Chico Harlan, Wesley Lowery & Kimberly Kindy, *Ferguson Police Officer Won't Be Charged In Fatal Shooting*, WASH. POST (Nov. 25, 2014), [https://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340\\_story.html?utm\\_term=.0c1409b82149](https://www.washingtonpost.com/politics/grand-jury-reaches-decision-in-case-of-ferguson-officer/2014/11/24/de48e7e4-71d7-11e4-893f-86bd390a3340_story.html?utm_term=.0c1409b82149) [<https://perma.cc/CJL5-9HUM>]; Andrew Siff, Jonathan Dienst, & Jennifer Millman, *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec. 3, 2014), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html> [<https://perma.cc/LY99-GYC9>]; Alex Kueny, *San Diego's Elite Should Be Held Accountable*, SOCIALIST WORKER (Jan. 21, 2016), <https://socialistworker.org/2016/01/21/holding-san-diegos-elite-accountable> [<https://perma.cc/334C-ZFA6>].

158. See *supra* Part I. As discussed above, this connection is explored by K. Babe Howell in her seminal article, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, *supra* note 30.

159. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.2(a).

160. 2015 ABA PROSECUTION STANDARDS, Standard 3-3.2(b).

161. 2015 ABA PROSECUTION STANDARDS, Standard 3-1.3. This blunt admonition would appear unnecessary, were the reminder apparently not deemed so important.

162. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.2(c).

163. 2015 ABA PROSECUTION STANDARDS, Standard 3-4.2(c).

“keep law enforcement personnel informed of relevant legal and legal ethics issues and developments as they relate to prosecution matters, and advise law enforcement personnel of relevant prosecution policies and procedures.”<sup>164</sup> Under the *Standards*, prosecutors “should meet and confer regularly with law enforcement agencies regarding prosecution as well as law enforcement policies” and should assist in developing and administering training programs for law enforcement personnel on matters and cases being investigated, “matters submitted for charging, and the law related to law enforcement activities.”<sup>165</sup> If prosecutors are overwhelmed and forced to behave unethically because they rely too heavily on police charging policies, or are unable to effectively screen the basis for charging, the practice needs to change.

Again, lessons can be drawn from a comparative perspective. One need only look to the United Kingdom to realize that one way to ensure independence and supervision would be to increase the formality of the police-prosecutor relationship by (1) creating a more hierarchical police structure; and/or (2) requiring written guidelines and greater documentation. In England and Wales, levels of internal police authority often require that the investigating or arresting officer report in writing to and be supervised by a senior police officer.<sup>166</sup> This occurs, for example, with respect to discovery, where every case requires the appointment of a discovery officer to supervise the discovery process.<sup>167</sup> To be sure, this structure is based in the history and culture of UK policing, and would require cultural changes to be made by state police departments. But creating written guidelines and greater documentation requirements by the police could be done more easily, possibly by prosecutors’ offices themselves, and would improve the charging function while increasing its efficiency. So, for example, as in England, the police could be required to fill out checklists that document precisely what was done and what evidence supports an arrest, provide information about relevant locations, witnesses, and other suspects, and provide more detailed information about arrestees.<sup>168</sup>

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164. 2015 ABA PROSECUTION STANDARDS, Standard 3-3.2(c).

165. 2015 ABA PROSECUTION STANDARDS, Standard 3-3.2(d).

166. JEHL & WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS, *supra* note 141, at 41–44.

167. See generally Criminal Procedure and Investigations Act 1996, pt. I, <http://www.legislation.gov.uk/ukpga/1996/25/contents> [<https://perma.cc/8NGK-VLFG>]; Criminal Procedure and Investigations Act Code of Practice 1996, s. 23, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447967/code-of-practice-approved.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447967/code-of-practice-approved.pdf) [<https://perma.cc/J28L-82L7>] (prescribing different roles for Investigator (reporting officer); Officer in charge of an investigation; Disclosure officer; and Prosecutor); *id.* (disclosure officers or their deputies must inspect, view or listen to all relevant material that has been retained and the lead disclosure officer must provide a personal declaration to the effect that this task has been undertaken).

168. See the schedule for “Unused Evidence,” available from the authors, which is used in England and Wales to record and transmit exculpatory evidence from the police to the prosecutor.

Informal interviews with prosecutors reveal that they both welcome increased formality and fear it.<sup>169</sup> To the extent, for example, that written reports and checklists filled out by the police give the prosecutor more complete information about what has been done and thus greater police accountability, a prosecutor's relationship with the individual police officers with whom she works is likely to be affected by the formality of documentation. On the other hand, when it is difficult, but necessary, to challenge the police, the existence of such forms and checklists would take the onus and blame off of the prosecutor by showing the prosecutor's concerns are systemic, across-the-board requirements.

It is probably fair to say that, in the United States, the relationship between prosecutors and police remains a hidden "black box,"<sup>170</sup> where the exercise of prosecutorial discretion is insulated. The police-prosecutor relationship is as multi-dimensional and fundamental as it is informal, difficult, and unscrutinized. To be sure, it carries incentives for prosecutors to accept the police investigation and rubberstamp the charges both because prosecutors work with and rely on police in the long term and because prosecutors at this stage are overwhelmed by volume. A complicated set of other factors may affect the prosecutor's ready acceptance of the results of the police investigation. These include the personality of the individual prosecutor, her age and experience, the extent of supervision, office culture, and political pressures upon the chief elected prosecutor.<sup>171</sup>

But there seems to be an increasing recognition—both legal and ethical—that the two institutions do not always share the same goals or values and that the prosecutor has the power to perform an important and independent mediating role. Internal structures and procedures should be created that reflect these realities.

### C. DEVELOPING MEANINGFUL, EVIDENCE-BASED INTERNAL REGULATION

#### 1. THE IMPORTANCE OF INTERNAL REGULATION

In a variety of contexts, it has been argued that the best way to achieve change in the criminal justice process is to change internal office culture, rather than

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169. See Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1953–54 (2010) (introducing a *Brady* symposium on ensuring compliance with disclosure obligations).

170. See generally Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

171. See Kay L. Levine & Ronald F. Wright, *Prosecutorial Risk, Maturation, and Wrongful Conviction Practice*, LAW & SOC. INQUIRY (forthcoming 2017), <http://ssrn.com/abstract=2705553> [<https://perma.cc/H7X5-NAVC>] (discussing the effect of personality, experience, moral code, and organizational experiences upon prosecutorial discretionary decision-making; concerning the impact of inexperience, the authors note that "the newly hired prosecutor believes her role is simply to fit each case into the relevant statutory mold"). See generally Medwed, *Prosecutor as Minister of Justice*, *supra* note 80; Ellen Yaroshefsky & Bruce Green, *Prosecutors' Ethics in Context*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269 (Leslie C. Levin & Lynn Mather eds., 2012) [hereinafter Yaroshefsky & Green, *Prosecutors' Ethics in Context*].

imposing external legal requirements.<sup>172</sup> A significant step toward achieving such a goal would be the development of internal prosecutorial office guidelines and practices.<sup>173</sup> The U.S. Department of Justice Attorneys' Manual and its Guidelines are an example of such documents,<sup>174</sup> and some district attorney's offices have created similar ones.<sup>175</sup> Unfortunately, these office guidelines and practices are rare and exist in only some jurisdictions.

The ABA *Standards* call on prosecutors to establish internal guidelines and office policies to guide the substantial prosecutorial discretion their offices possess,<sup>176</sup> as well as to structure a better partnership with the police.<sup>177</sup> Standard 3-2.4 is clear on this requirement. Subsection (a) states explicitly that every prosecutor's office "should seek to develop general policies to guide the exercise of prosecutorial discretion, and standard operating procedures for the office."<sup>178</sup> These policies and procedures should be memorialized and available internally, and should be disclosed publicly where appropriate.<sup>179</sup>

Professor Michael Cassidy has amplified this duty with respect to charging. He proposes that prosecutors have an ethical duty to adopt office structures and policies that ensure that the substantial prosecutorial discretion in charge bargaining with respect to mandatory minimum sentences be conducted in the

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172. The importance of system-wide attention to cultural change has been explored in the context of securing compliance with prosecutorial disclosure obligations. *See, e.g.,* Yaroshefsky & Green, *Prosecutors' Ethics in Context*, *supra* note 171, at 289, 290; Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1, 5 (2013); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1154 (2005); Kathleen M. Ridolfi, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2031 (2010) (noting external as well as internal controls to change culture).

173. *See* Ridolfi, *supra* note 172, at 2031.

174. In addition, former Attorney General Eric Holder famously issued internal memoranda, at least one specifically on charging. *See Memorandum from the Office of the United States Attorneys and the Assistant Attorney General of the Criminal Division* (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [<https://perma.cc/ZZG4-3SDF>].

175. There are some counties in various states that have developed guidelines for specific practices and for handling certain types of cases, such as domestic violence and sexual assault cases. Unlike the federal government's U.S. Attorneys' Manual, these are often unpublished. The District Attorneys Association of New York has also published a guide for ethical decision-making. DISTRICT ATTORNEYS ASS'N OF THE STATE OF N.Y., *THE RIGHT THING: ETHICAL GUIDELINES FOR PROSECUTORS* (2015), <http://www.daasny.com/wp-content/uploads/2015/07/2015-Ethics-Handbook.pdf>. [<https://perma.cc/29GC-BPLW>]. The National District Attorneys Association has also published an aspirational guide. NAT'L DISTRICT ATTORNEYS ASS'N, *NATIONAL PROSECUTION STANDARDS* (3d. ed. 2009), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> [<https://perma.cc/25EW-RZ8X>].

176. 2015 ABA PROSECUTION STANDARDS, Standard 3-2.4(a).

177. 2015 ABA PROSECUTION STANDARDS, Standard 3-2.7.

178. 2015 ABA PROSECUTION STANDARDS, Standard 3-2.4(a).

179. 2015 ABA PROSECUTION STANDARDS, Standard 3-2.4(b).

public interest, i.e., fairly, consistently, and transparently.<sup>180</sup> Cassidy argues that such a regime requires written guidelines setting forth the factors prosecutors must consider before recommending reduction of any felony charge carrying a mandatory minimum sentence.<sup>181</sup> He also advocates establishing small committees to consider and approve written requests by prosecutors for reduction of such charges,<sup>182</sup> which would contain a checklist of the factors and a place for a narrative description of the reasons supporting the request.<sup>183</sup> Defense attorneys would also be allowed to petition the committee in writing for a charge reduction, if the individual prosecutor has opposed it.<sup>184</sup> Cassidy proposes that these committees should include a retired judge, lay citizen, or member of the staff with previous defense experience.<sup>185</sup> Professor Cassidy suggests that such procedures will enable prosecutors to collect the data they need to guide their policies and practices.<sup>186</sup> He also suggests that the need to obtain permission to dismiss will likely force prosecutors to be more realistic and proportional in their initial charging decisions.<sup>187</sup>

In addition to the U.S. Department of Justice, some other U.S. jurisdictions have begun experimenting with written prosecutorial guidelines for charging. For example, Florida and New Jersey recently adopted guidelines with respect to charging repeat offenders. In Florida, the Prosecuting Attorneys Association (PAA) adopted written guidelines that set forth criteria for determining whether to charge someone as a habitual offender.<sup>188</sup> Indictments that do not meet the criteria must be accompanied by a written explanation signed by the designated

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180. Cassidy, (*Ad*)*Ministering Justice*, *supra* note 65, at 984, 996–97. Scholars have begun to analyze internal regulation as a source of meaningful control of prosecutorial discretion. *See, e.g.*, Daniel Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 *VILL. L. REV.* 337 (2006); Podgor, *Department of Justice Guidelines*, *supra* note 28.

181. Cassidy, (*Ad*)*Ministering Justice*, *supra* note 65, at 1016–17.

182. *Id.* at 1013. Manhattan District Attorney Cyrus Vance created a similar practice where a committee decides upon prosecuting certain cases. *See* Vance, *Conscience and Culture of a Prosecutor*, *supra* note 117.

183. Cassidy, (*Ad*)*Ministering Justice*, *supra* note 65, at 1017.

184. *Id.* at 1013. Professor Cassidy notes that his recommendation is based on the procedures presently used when federal prosecutors want to offer substantial assistance departures (5K1.1 letters) in federal court. *See id.* at 1014–15. It also somewhat resembles the Correction Integrity Units currently being used by prosecutors to examine claims of innocence. *See id.* at 1017.

185. *Id.* at 1016 (stating that most prosecutors would object to inclusion of persons outside their employ exercising discretion in the prosecutorial function).

186. *See infra* Part III.C.2.

187. Cassidy, (*Ad*)*Ministering Justice*, *supra* note 65, at 1013–14; *see also* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *FORDHAM L. REV.* 723 (1999). Proposing proportionality in prosecutorial investigation by consideration of a range of factors including

not just monetary costs, but also significant intangible costs such as privacy intrusions, emotional stress, and stigma. They should balance such costs against factors such as the gravity of the offense, the likely benefit from the proposed investigative step, and whether any less costly (including less intrusive) steps might suffice.

*Id.* at 727.

188. Cassidy, (*Ad*)*Ministering Justice*, *supra* note 65, at 1021.

assistant prosecutor as well as the elected state's attorney for why deviating from the guidelines was appropriate. These statements must be filed with the court and the PAA.<sup>189</sup>

In New Jersey, the Supreme Court has mandated charging and plea-bargaining standards in cases involving mandatory drug sentences. These guidelines, the "Brimage Guidelines," govern when a prosecutor may waive or reduce an otherwise mandatory prison term.<sup>190</sup> Similar to the process in Florida, the guidelines require filling out a worksheet setting forth the reasons for and size of the deviation, aggravating and mitigating sentencing factors, and any other sentencing considerations.<sup>191</sup>

Another model for internal prosecutor guidelines is reflected in the recent report on District Attorney Conviction Review Units (CRUs).<sup>192</sup> This report examined the twenty-seven existing CRUs<sup>193</sup> with a view to making recommendations for best practices in these units. It concluded that such units should be "independent, flexible, and transparent in [their] work." To achieve these goals, the report sets forth a twenty-three-item list of standards to be met and procedures to be followed.<sup>194</sup> A similar list could be created for other prosecutorial functions, including charging decisions and interactions with the police. In addition, the best practices procedures include a requirement that the CRUs develop additional clear policies and procedures for various stakeholders, including applicants claiming to be innocent.<sup>195</sup>

It is worth pointing out that the U.S. system is unique among common law countries in its absence of meaningful written guidelines for prosecutors. Indeed, the United States may look to the United Kingdom as another model for meaningful written guidelines for prosecutors. In the United Kingdom, codes of practice, like the Code of Practice for Crown Prosecutors,<sup>196</sup> accompany legislation on criminal justice issues and share the authority of parliamentary

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189. *Id.* at 1021–22.

190. See Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087, 1098–1100 (2005).

191. These kinds of worksheets and checklists would greatly facilitate the kind of data collection necessary for policy-making and accountability. See *infra* Part III.C.2.

192. See John Holloway, *Conviction Review Units: A National Perspective*, in PENN LAW LEGAL SCHOLARSHIP REPOSITORY (Apr. 2016), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship) [<https://perma.cc/5MEW-3LTR>]. A CRU is defined as a unit that "conducts extrajudicial, fact-based review of secured convictions to investigate possible allegations of actual innocence. A CRU is typically contained within a local prosecutor's office." *Id.* at 2. The report discusses the North Carolina Innocence Inquiry Commission, which is a state-created unit to examine wrongful convictions.

193. See *id.* at 8.

194. *Id.* at 2–4.

195. See generally *id.*

196. *The Code for Crown Prosecutors*, CROWN PROSECUTION SERV., [https://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](https://www.cps.gov.uk/publications/code_for_crown_prosecutors/) [<https://perma.cc/47CZ-43V3>] (last visited Mar. 15, 2017).

enactments.<sup>197</sup> In addition to the Code, the Crown Prosecution Service (CPS), the UK's institutional prosecutor, publishes "The Director's Guidance on Charging," which is periodically updated.<sup>198</sup> The CPS also issues a wide variety of specific guidance documents on handling various challenges presented by specific kinds of prosecutions (e.g., domestic violence,<sup>199</sup> forensic evidence,<sup>200</sup> and unexplained infant deaths<sup>201</sup>).

With the growing recognition that our criminal justice system operates as an administrative model and not an adjudicative one, and one that is dominated by prosecutors, comes an increased need to formalize procedures by which prosecutors essentially function as fact-finders to determine who is guilty and of what offenses. Failure to have written guidelines permits the kind of ad hoc decision-making that can be discriminatory and inconsistent, and can result in systemic unfairness with significant social consequences. This is exactly how one would describe the emergence of the mass incarceration state.

## 2. THE NEED FOR DATA

The twin pillars of transparency and accountability guide institutions and administrative offices in a liberal democracy like the United States. Transparency is acknowledged as a key democratic norm,<sup>202</sup> and systems that assure documentation of practices, procedures, and data have long been established

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197. Section 10 of the Prosecution of Offences Act requires that the director issue a code for crown prosecutors that provides guidance to crown prosecutors on charging, discontinuing proceedings, and mode of trial. Prosecution of Offences Act 1985, c. 23, § 10 (Eng.), <http://www.legislation.gov.uk/ukpga/1985/23/section/10> [<https://perma.cc/ZRP9-LS3Z>] (last visited Feb. 10, 2017).

198. *The Director's Guidance on Charging 2013 (Revised Arrangements)*, CROWN PROSECUTION SERV. (5th ed., May 2013), [https://www.cps.gov.uk/publications/directors\\_guidance/dpp\\_guidance\\_5.html](https://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html) [<https://perma.cc/E9CP-MLXH>].

199. *Domestic Abuse Guidelines for Prosecutors*, CROWN PROSECUTION SERV., [http://www.cps.gov.uk/legal/d\\_to\\_g/domestic\\_abuse\\_guidelines\\_for\\_prosecutors/](http://www.cps.gov.uk/legal/d_to_g/domestic_abuse_guidelines_for_prosecutors/) [<https://perma.cc/NV85-PG6V>] (last visited Feb. 10, 2017).

200. *Low Copy Number DNA Testing*, CROWN PROSECUTION SERV., [http://www.cps.gov.uk/Publications/Prosecution/low\\_copy\\_testing.html](http://www.cps.gov.uk/Publications/Prosecution/low_copy_testing.html) [<https://perma.cc/7P2S-9RMX>] (last visited Feb. 10, 2017).

201. *Non Accidental Head Injury Cases (NAHI, Formerly Referred to as Shaken Baby Syndrome [SBS])—Prosecution Approach*, CROWN PROSECUTION SERV., [http://www.cps.gov.uk/legal/l\\_to\\_o/non\\_accidental\\_head\\_injury\\_cases/](http://www.cps.gov.uk/legal/l_to_o/non_accidental_head_injury_cases/) [<https://perma.cc/SHE3-7CF4>] (last visited Feb. 10, 2017). Other examples of checklists used by UK prosecutors can be found at *Autism: Checklist for Prosecutors*, CROWN PROSECUTION SERV., [http://www.cps.gov.uk/publications/prosecution/autism\\_-\\_checklist\\_for\\_prosecutors\\_v2.pdf](http://www.cps.gov.uk/publications/prosecution/autism_-_checklist_for_prosecutors_v2.pdf) [<https://perma.cc/G7SF-7UH4>] (last visited Apr. 10, 2017); *Low Copy Number DNA Analysis (LCN)—Prosecutors' Checklist of Questions*, CROWN PROSECUTION SERV., [http://www.cps.gov.uk/publications/prosecution/lcn\\_checklist.html](http://www.cps.gov.uk/publications/prosecution/lcn_checklist.html) [<https://perma.cc/F8B4-ME5X>] (last visited Feb. 10, 2017); *The Director's Guidance On Charging 2013 (Revised Arrangements)*, CROWN PROSECUTION SERV. (5th ed. May 2013), [https://www.cps.gov.uk/publications/directors\\_guidance/dpp\\_guidance\\_5.html](https://www.cps.gov.uk/publications/directors_guidance/dpp_guidance_5.html) [<https://perma.cc/4MPM-SU7U>].

202. See Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, in PUBLIC ACCOUNTABILITY: DESIGN, DILEMMAS AND EXPERIENCES 1, 3 (Michael W. Dowdle ed., 2006). On the prevalence of transparency discourse, see Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1340–42. For general benefits of transparency in government, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–902 (2006); see RICHMAN, *Accounting for Prosecutors*, *supra* note 20, at 28.

within government and business.<sup>203</sup> An operating principle for public officials and civil servants, as well as directors and managers of companies and organizations and board trustees, is a duty to “act visibly, predictably and understandably to promote participation and accountability.”<sup>204</sup> It is often said that without transparency, there can be little accountability.<sup>205</sup> Yet, within the U.S. criminal justice system the broad discretion afforded to prosecutors is not accompanied by requirements that practices and procedures be documented or that the exercise of discretion be explained.<sup>206</sup> Although transparency is a robust concept within government agencies, we do not demand transparency of our prosecutors.<sup>207</sup> Other countries regularly require annual reports from prosecuting agencies.<sup>208</sup> While data collection may be unwieldy in some instances, transparency for data in charging decisions should be adopted.<sup>209</sup>

Again, it is fair to say that we are unique in how little data we collect or keep regarding prosecutorial practices and their consequences.<sup>210</sup> Shawn Marie Boyne has shown that a “significant part of a German prosecutor’s initial training

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203. See generally Jennifer Shkabatur, *Transparency With(out) Accountability: Open Government in the United States*, 31 YALE L. & POL’Y REV. 79 (2012).

204. *Definitions*, TRANSPARENCY & ACCOUNTABILITY INITIATIVE, <http://www.transparency-initiative.org/about/definitions> [<https://perma.cc/T5EK-FRRK>] (last visited Mar. 15, 2017).

205. See Mark Bovens, *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182, 182 (Ewan Ferlie, Laurence E. Lynn Jr. & Christopher Pollitt eds., 2007); see also Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1254 (2009) (“Modern public law is strongly devoted to the notion that public officials should be held ‘accountable’ for their decisions.”).

206. Prosecutors are protected by “evidentiary rules that preclude the presentation of a great deal of information considered in the decision to charge, as well as legislation lacking much specificity, and a doctrinal framework that frees prosecutors from ever explaining why charges were not brought.” RICHMAN, *Accounting for Prosecutors*, *supra* note 20, at 25.

207. See generally Mark Fenster, *The Transparency Fix: Advocating Legal Rights and Their Alternatives in the Pursuit of a Visible State*, 73 U. PITT. L. REV. 443 (2012) (examining transparency campaigns to prevent government secrecy concluding that it requires organizing from the outside and that its definition and limits are contested).

208. See, e.g., CROWN PROSECUTION SERV., ANNUAL REPORT AND ACCOUNTS 2015–16, [https://www.cps.gov.uk/publications/docs/annual\\_report\\_2015\\_16.pdf](https://www.cps.gov.uk/publications/docs/annual_report_2015_16.pdf) [<https://perma.cc/8M3Z-RBJC>] [hereinafter CROWN ANNUAL REPORT].

209. See Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1174–75 (2005) (suggesting administrative model of transparency for charging decisions and citing Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (describing system as prosecutor-centered administrative law system; rejecting whole-sale administrative law model because pretense of legislative primacy serves useful functions and because cost of APA type procedures would be excessive; but commending a right to be heard regarding prosecutorial charging decisions); cf. Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000) (arguing for administrative-law rulemaking approach to regulate discretionary enforcement by police of overbroad penal codes).

210. Ironically, of course, we are also unique in the extent to which we permit a defendant’s record to be public, punitive, and permanent. See, e.g., RICHMAN, *Accounting for Prosecutors*, *supra* note 20, at 31 (“The European Union and its member states treat individual criminal history information as personal data that the individual has a right not to have disclosed by government personnel or by private parties.” (internal citation omitted)).



involves one-on-one training in the art of documenting actions taken on a case file.”<sup>211</sup> England and Wales maintain extensive records on prosecutorial processing of cases that are published in annual, publicly available reports<sup>212</sup> and data complications,<sup>213</sup> or are otherwise available to the public.<sup>214</sup> In the late 1990s, federal and state organizations strengthened data collection systems to study aspects of the criminal system. Notably, the U.S. Department of Justice Bureau of Justice Statistics (BJS) periodically sponsored studies to “collect data on the resources, policies, and practices of local chief prosecutors in state court systems.”<sup>215</sup> From 1990 to 1996, the NSP collected data from a nationally representative sample of chief prosecutors that tried felony cases in state courts of general jurisdictions.<sup>216</sup> Then, in 2003, to provide empirically-based information to establish performance measures, the National District Attorneys Association (NDAA) gathered information to produce “Prosecution for the 21st Century,” a performance measurement framework.<sup>217</sup> This data, however, does not address charging decision-making. Since then, numerous studies have examined aspects of prosecutorial practice.

Some jurisdictions have moved toward greater data collection. For example, South Dakota, to assess the impact of the state’s sentencing reforms on its mass incarceration problem, required extensive collection of data about charging, sentencing, and parole revocation, but did not collect data about how prosecutors made charging decisions or document their role in sentencing.<sup>218</sup> Significantly, organizations that seek to improve the criminal justice system work with prosecutors’ offices in various cities and collect data to examine policies and practices.<sup>219</sup> But thus far, little data has been gathered on the granular level that examines prosecutorial decision-making at the charging stage.

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211. Richman opines, “If the characteristic fault of German prosecutors is to deny that there is any discretion to explain” (because at least in principle they operate on the doctrine of legality), “that of American prosecutors—and it’s probably more grievous—is to offer scant explanation for starkly discretionary decisions.” RICHMAN, *Accounting for Prosecutors*, *supra* note 20, at 25.

212. See, e.g., CROWN ANNUAL REPORT, *supra* note 208.

213. See *id.* at 18.

214. See *id.*

215. 2011 *National Survey of Prosecutors*, NORC AT U. OF CHL., <http://www.norc.org/Research/Projects/Pages/2011-national-survey-of-prosecutors.aspx> [<https://perma.cc/6D4H-D8GZ>].

216. The National Center for State Courts collects data about the operation of state courts that includes case filings, dispositions, and related data. See NAT’L CTR. FOR STATE COURTS, <http://www.courtstatistics.org/> [<https://perma.cc/6NB4-Z4FG>] (last visited Mar. 15, 2017).

217. NAT’L DIST. ATTORNEYS ASSOC., AM. PROSECUTORS RESEARCH INST., PERFORMANCE MEASURES FOR PROSECUTORS: FINDINGS FROM THE APPLICATION OF PERFORMANCE MEASURES IN TWO PROSECUTORS’ OFFICES I (Apr. 2007), [http://www.ndaa.org/pdf/performance\\_measures\\_findings\\_07.pdf](http://www.ndaa.org/pdf/performance_measures_findings_07.pdf) [<https://perma.cc/RU8Q-969R>].

218. Brian Elderbroom et al., *Assessing the Impact of South Dakota’s Sentencing Reforms: Justice Reinvestment Initiatives*, URBAN INST. (May 2016), <http://www.urban.org/research/publication/assessing-impact-south-dakotas-sentencing-reforms-justice-reinvestment-initiative> [<https://perma.cc/3LLT-DY5W>].

219. For example, the Vera Institute collects and analyzes data in six jurisdictions to develop policies to reduce racial and ethnic disparities in prosecutorial decision-making. *Prosecution and Racial Jus-*

Aside from the insulation—intentional or otherwise—that this gives to prosecutorial discretion, prosecutors cannot exercise their proper role as ministers or administrators of justice without understanding what the office is actually doing and the impact of what is being done. Certainly, no standards, guidelines, or policies can be effective without reliable data;<sup>220</sup> nor can systemic impacts be evaluated or avoided if there is no way to track or identify them. Arguably, the failure to track the impact of prosecutorial charging procedures contributed to the mass incarceration problem—no one was keeping track. Certainly, other injustices—such as occurred in Kings County, where a series of prosecutors presumably relied on the same incredible witness to prosecute a series of unrelated homicides<sup>221</sup>—could not have happened with adequate internal data controls.

The information that is missing as to charging, for example, and that should be kept, should include at a minimum case-level data on the following:

- Names and identity of police and other law enforcement personnel involved; personnel history of law enforcement officials;
- Charges at arrest; charges at arraignment; charges dropped or dismissed, if any, and why;
- Data on the defendant, including race, age, social, professional, educational, psychological, and other information;
- The same personal data on the victim, relationship to the defendant and to law enforcement, and the nature of the harm;
- Relationship(s), if any, between police and defendant and police and victim;
- What collateral consequences were considered; what alternative dispositions and diversion programs were considered and why they were or were not chosen; any special sentencing outcomes (mandatory minimums, gun enhancements, predicate felony laws) that were threatened, even if later dropped;
- Charges at plea;
- Plea offers made;
- Prior criminal record of defendant, victim, and witnesses;

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*tice Program*, VERA INST. OF JUSTICE, [archive.vera.org/centers/prosecution-and-racial-justice-program](https://archive.vera.org/centers/prosecution-and-racial-justice-program) [https://perma.cc/E7AM-G465] (last visited Mar. 15, 2017).

220. That is, “[w]e cannot understand what we cannot measure, and we cannot change what we cannot understand.” *American Bar Association and NAACP Legal Defense Fund Joint Statement on Eliminating Bias in the Criminal Justice System* (July 16, 2015), <http://www.naacpldf.org/files/about-us/ABA-LDF%20Joint%20Statement%20on%20Eliminating%20Bias%20in%20the%20Criminal%20Justice%20System.pdf> [https://perma.cc/XV6N-D4DF].

221. David A. Love, *Dirty Ex-Cop Louis Scarcella’s Framing of Innocent Black Men Is Costing NYC Millions*, GRIO (Jan. 14, 2015), <http://thegrio.com/2015/01/14/louis-scarcella-nypd-wrongful-convictions/> [https://perma.cc/44VP-QGAP].

- Race, gender, level of experience, prior disciplinary action, reversal, or other judicial mention of the ADA;
- Race, gender, status (private, institutional public, court appointed), level of experience, prior disciplinary action, reversal, or other judicial mention of defense counsel; and status of defense counsel (private, public, court-appointed, etc.);
- Number of appearances before disposition; reasons for adjournments; and
- Manner of disposition and sentence.

Establishing a system to collect such data is feasible in this digital world.<sup>222</sup> Of course, developing systems to gather such data can be costly and time consuming, and prosecutors may express reluctance to provide such data to the public about the inner workings of their offices. However, working through criminal justice policy organizations or in public-private partnerships to establish systems to collect such information is likely to be the most productive and cost efficient method. Practical complaints are no longer an excuse. Proposals for online case review of systems suggest data collection points can be established so that “individual judges and prosecutors will be able to create, map, and view the heuristics they use to make decisions about cases.”<sup>223</sup>

## CONCLUSION

The dysfunction of our criminal justice system is widely reported with a focus upon “mass incarceration.” The number of people charged with crimes and serving time in U.S. prisons is unprecedented. Moreover, there is an increasing focus upon other ills in the system, including the disproportionate punishment of poor people of color; the lack of meaningful public defense funding; the increasing number of wrongful convictions; the detention of defendants because they have no money for bail; internationally unprecedented severe sentences, including the mandatory minimums that enable prosecutors to secure questionable guilty pleas and judges to impose excessively harsh sentences; the inaccurate administrative system in misdemeanor court; and the destructive social impact of collateral consequences.

There are many causes for these disturbing conditions. Congress and the state legislatures enacted severe sentencing statutes—longer sentences, mandatory minimums—that made our already punitive sentencing scheme ever more punitive, and gave prosecutors uniquely powerful weapons in securing guilty pleas or for financing the expansion of police powers. Overcriminalization,

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222. See Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, and Efficiency*, 21 MICH. J. RACE & L. 205, 209–10 (2016) (arguing for OCR systems where some cases are resolved online rather than in person).

223. *Id.* at 213.

defunding of diversion programs, privatization of prisons, and increased parole violations all exacerbate the problem and the interaction of many of these phenomena have led to our current problems.

But surprisingly, in looking for the causes and cures for the mass incarceration state, very little, if any, attention has been paid to the role of the most powerful actor in the criminal justice system: the prosecutor. Remarkably, we now know that the major cause of the explosion in our prison population is aggressive prosecutorial charging practices. Necessarily, prosecutorial practices should change to prevent a continuation, or a worsening, of mass incarceration.

How should this occur? Changes in the criminal justice process can best be achieved internally, by internal guidelines or by otherwise changing the cultures of the various players in the process, rather than primarily through external judicial or legislative directives. By examining the multi-faceted role of the prosecutor not only in an adversary role or an administrative one, but as a minister of justice, this Article suggests changes in prosecutorial practices that require a prosecutor's office to: (1) re-calibrate the minister of justice and advocacy balance in recognition of the current mass incarceration crisis—the prosecutorial role as an advocate at trial differs from prosecutors' gatekeeping role in making charging decisions; (2) ensure independence from law enforcement in the charging function as required by the *ABA Standards*, in part through the use of written standards, checklists, and forms; (3) collect currently non-existent, objective data that breaks down and memorializes available information on each decision to charge as well as its consequences; and (4) help to draft written charging procedures and policies based on the collection of that data-driven information.

The documented impact of charging practices on the problem of mass incarceration requires a frank and realistic look at the prosecutor's charging function and the charging culture. Greater transparency, independence, and written procedures based on accurate and complete data would help prosecutors fulfill their powerful minister of justice function.