Criminal Dockets, Sentencing, and the Changing Role of Federal Prosecutors

ANDREW D. LEIPOLD

Edwin M. Adams Professor, University of Illinois College of Law

I. Introduction

If the role of the federal prosecutor has in fact been changing (as the theme of this Issue suggests), that would be big news. United States Attorneys and their assistants are the most influential actors in the justice system, and if they are shifting focus, the ripple effect on the rest of the system could be profound.

At first glance, however, it's not obvious that the premise is correct. U.S. Attorneys spend a substantial portion of their time handling criminal cases in federal court, almost always obtaining a conviction, almost always after the defendant pleads guilty. This was true five years ago, fifteen years ago, and 50 years ago. The scale of activity has waxed and waned, prosecutorial priorities—emphasizing one crime over another—have fluctuated, but the core mission has remained remarkably constant. So we might begin by asking not *how* the role of the federal prosecutor has changed, but *if* it truly has changed.

While we are at it, we might ask *why* federal prosecutors should change. Prosecutors win an astonishing percentage of their cases, and those victories are overwhelmingly affirmed on appeal.[1] Although there have been problems with particular U.S. Attorneys' Offices, some of them extremely troubling,[2] it is hard to think of many other government actors who hit the target they shoot at quite so consistently.

Still, the answer to the question "why change?" is plain enough. Prosecution, law enforcement, and criminal justice have always been highly imperfect enterprises, whose many successes sometimes obscure the chronic difficulties. Incarceration levels are very high, almost certainly higher than is healthy. The criminal law remains a blunt and harsh tool for making communities safer and ensuring that people pay their just deserts. And of course, there remains the persistent and destabilizing entanglement of race, ethnicity, and poverty with nearly all facets of the system. Failure to change means the failure to address these problems, which like most flaws, rarely improve when ignored.

So perhaps the questions presented can be recast: Can we detect significant changes in the role of the U.S. Attorney in recent years, and if so, what is the impact of those changes on system-wide problems? If the role is not changing, *should* it? What problems in the federal system could be improved by shifts in the prosecutorial function?

Part II of this essay looks at the first question: Has the federal prosecutor's role changed? It identifies some notable and some more subtle shifts in the U.S. Attorneys' role, although it cautions that fixating on some recent moves may distract from a larger shift that had occurred at an earlier period.

Part III addresses the prescriptive question: What should federal prosecutors be doing differently? It concludes that U.S. Attorneys are especially well equipped to take on one of the most challenging issues facing the justice system today: the problem of mass incarceration.

II. Signs of Change

To begin with the conclusions, prosecutor's offices are changing in multiple ways, three of which are discussed here: (1) U.S. Attorneys' Offices have become more criminal law focused than in earlier times; (2) federal prosecutors are taking steps to maintain a high volume of cases without significantly increasing the risk to their admirable conviction rate; and (3) federal prosecutors have become a more important player in criminal sentencing.

A. Change In Emphasis

Evidence of a changing role might come from a variety of sources. We could study the Justice Department's strategic plans,[3] Department-wide memos announcing changes in direction,[4] or amendments to the *U.S. Attorney's Manual*.[5] We could interview a cross-section of experienced prosecutors, those who have lived through the changes. But at least at the outset, this section will focus on what federal prosecutors say that they are doing, as recorded in the *United States Attorneys' Annual Statistical Report*.[6]

If we look back at the last six years for which data are available (2011–2016), we might easily conclude that U.S. Attorneys' Offices are undergoing a significant transformation. The number of criminal cases filed in District Court declined each of those years, and dropped by 22 percent overall.[7] The same is true with the number of federal criminal defendants against whom charges were filed.[8] Prosecution of drug and immigration offenses, the two most popular categories of crimes in the federal system, are also down significantly since 2011.[9] Given these figures and the drop in the national crime rate over the last 20 years,[10] it is tempting to see the beginnings of a new role for U.S.

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Attorneys' Offices, one where criminal prosecutions play a less prominent role.

But while an institutional change might in fact be underway, it is probably too soon to tell. Focusing on the last six years, the last 10 years, or even on the 21st century, misses important shifts that took place in the previous decades, ones that were sufficiently large that, whereas the recent changes might be the start of a new trend, they might also be nothing more than a pull-back, and a modest pull-back at that.

Consider criminal case filings in U.S. District Court. Although filings have declined since 2011, that retreat followed more than two decades of an aggressive increase in prosecutions (see Chart 1). A similar pattern applies to criminal defendants: the 23 percent drop in defendants since 2011 followed a 130 percent increase over the previous 30 years.[11]

The declines in cases and defendants in recent years can also distract from another shift within the U.S. Attorney's Office: a long-term rebalancing of the resources devoted to civil vs. criminal matters. Although U.S. Attorneys have far less control over their civil docket,[12] as the number of criminal filings has increased over the decades, the ratio between civil and criminal cases in U.S. Attorneys' Offices has tipped significantly toward prosecutions (Chart 2).[13] Notice, however, that the ratios have followed a similar pattern to those of criminal filings generally (see Chart 1). Since 2011 the annual percentage of criminal cases has declined in comparison to civil matters, so that in 2016, the percent of criminal cases filed by U.S. Attorneys stood at 36 percent.

Since the overall "federal crime rate" is not subject to easy measurement the way traditional state crimes are,[14] it is difficult to say whether increased prosecutorial activity over the last 40 years was spurred by increased offending, an increased federal focus on law and order, or both. But the larger point should not be missed—U.S. Attorneys' Offices are now significantly more prosecution-oriented and are doing a higher volume and higher percentage of criminal cases than they were in the 1980s and 1990s. The leveling off in more recent times may simply reflect a new equilibrium at historically high levels.

Chart 1
Criminal Cases Filed 1981–2016

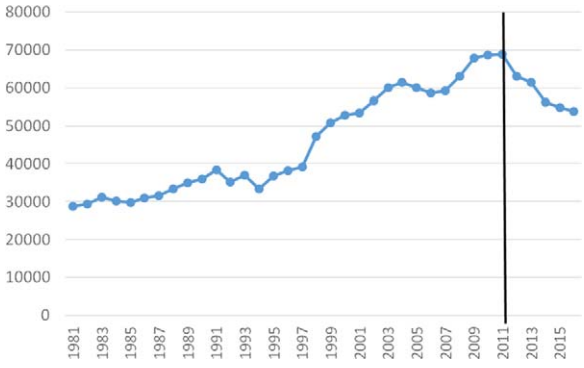
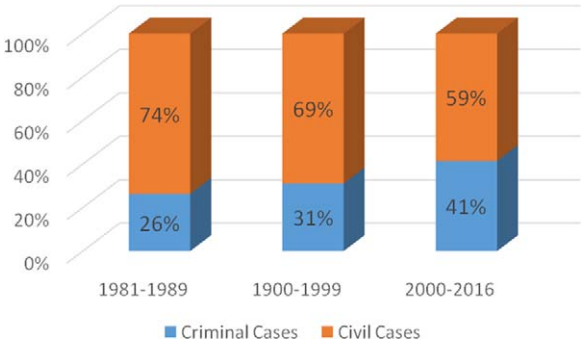


Chart 2
Case Filings, U.S. Attorney Offices



There is no single interpretation that emerges from these patterns. But other shifts may be informative. In particular, we see that even as prosecutorial activity has declined slightly in recent times, prosecutors have taken a variety of counter-measures that have helped them maintain relatively high levels of activity. Some of these steps have moved them, at least modestly, away from more traditional prosecutorial practices.

B. Volume Control

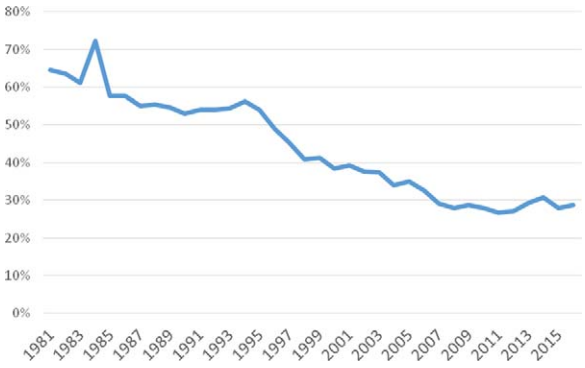
Government institutions rarely downsize on their own initiative. Nonetheless, resources are always limited, and successful institutions are constantly looking for ways to maintain levels of activity without raising their costs. U.S. Attorneys' Offices are no exception; this section discusses two ways that federal prosecutors have maintained, increased, or slowed a decrease in their workload, all without reducing the percentage of convictions they produce as a result.

1. The Decline of Declinations. Federal prosecutors have always been selective about who they charge. No one expects or wants the federal government to pursue every case of simple drug possession or every small-time fraud. So choices have to be made, often difficult ones, between those matters that merely could be pursued and those that will be.[15]

Compounding these decisions is the increasing scope of the federal criminal law. Most observers believe that the reach of the substantive law is expanding[16] (when was the last time a significant criminal statute was repealed?) bringing with it expanding enforcement responsibility, greater investigative authority, and ultimately, expanding charging decisions for prosecutors.

We might have expected this expansion to make prosecutors even more selective in their decisions. As long as the investigating agencies are faithfully pursuing the full range of federal crimes (subject to their own district's priorities) and diligently referring matters to U.S. Attorneys for prosecution,[17] we should see a larger number of cases that are not being pursued, as the demand for prosecutorial resources is spread over a greater amount of criminal behavior.

Chart 3
Percent Criminal Matters Declined, 1981–2015



But the numbers suggest otherwise. When an executive agency refers a matter for prosecution and the U.S. Attorney elects not to proceed, the prosecutor is supposed to file a declination report that briefly explains why charges are not warranted.[18] Tracking these reports shows that U.S. Attorneys are in fact becoming *less* selective over time. More specifically, the declination rate dropped more than 50% over the last 35 years (Chart 3).[19]

There are many possible explanations for this trend. Perhaps law enforcement agencies have learned from experience not to refer so many matters to the U.S. Attorney that will not result in a prosecution; in other words, it might be that ICE and the FBI are becoming more selective at the front end.[20]

Or, fewer declinations may simply mean that federal crime is decreasing—less crime means that a larger slice of the referred cases can now be pursued. If this is the case, perhaps prosecutors are declining fewer cases precisely because they want to maintain their workload. This is hardly a criticism; we want government employees to be fully engaged, and resources permitting, we prefer a world where more serious crime is prosecuted rather than less. And as prosecutors increase their ability to prosecute more cases with the same level of resources (see the next section), the decrease in declinations may represent little more than increases in the efficient processing of criminal matters.

One important explanation for the decline can probably be ruled out. The numbers do *not* suggest that declinations are down because prosecutors are moving forward with a greater number of weak or hard-to-prove cases. Between 2001 and 2016, the percentage of charged defendants who end up convicted was consistently between 91 and 93 percent. Most of the remaining defendants had their cases dismissed,[21] while the number of acquitted defendants never once got as high as 1 percent of those charged. (In fact, in 2016 more than 20 percent of all judicial districts did not see *even one* acquitted federal defendant, while another quarter of the districts saw *only* one acquitted defendant.[22]) Federal prosecutors can be more or less selective in the cases they choose, but once they decide to pursue a matter, they simply do not lose.

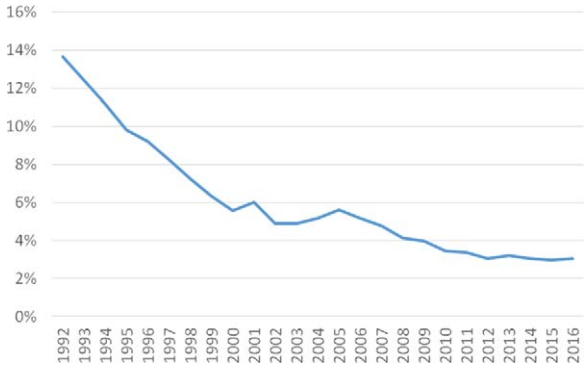
Regardless of the explanation, the declination numbers probably merit more attention. If it turned out that prosecutors were maintaining their volume by taking on increasingly small matters—cases that in earlier years would have been declined and left to the states—perhaps we are sustaining levels of federal prosecution that are unnecessary or inefficient. If it turns out that law enforcement agencies are becoming more selective in their referrals, reducing the need for prosecutors to select cases, perhaps it is the agencies that require greater scrutiny, or perhaps should be rewarded for their greater acumen. In either case (or if the explanation is something else), there seems to be little doubt that the traditional charging authority that has, in part, defined federal prosecutors is undergoing a significant change.

2. The disappearance of trial. One reason prosecutors rarely lose is that they almost never go to trial where they might lose. This point is so well known that it is hardly worth making. Once the legitimacy of plea bargaining was recognized in the 1970s[23] (and really, well before that[24]), guilty pleas have come to so thoroughly dominate the criminal system that by 1992, Robert Scott and Bill Stuntz could confidently say that plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[25]

But even if this basic point produces a yawn, the numbers, and the changes over time, remain striking. In fiscal year 1992—the time of the Scott and Stuntz declaration—14 percent of the federal defendants who had the charges against them terminated stood trial. By 2000, the percentage of these defendants stood at 6 percent. By 2010, the figure was 3 percent, where it has remained since (Chart 4).[26] The number of federal criminal trial defendants has gone down in absolute terms as well, from 6,904 in 1992 to 2,195 in 2016, a decline of more than two-thirds.[27]

There are both small and large implications for the role of the federal prosecutor. Vanishingly few prosecutors fit the mold of the classic trial lawyer, as jury selection, cross-examination, and evidentiary objections become increasingly rare experiences. In 2016, about 30 percent of the

Chart 4
Percent of Defendants Who Stand Trial, 1992–2016



judicial districts in this country had fewer than 10 jury trials, and 15 percent had fewer than 6. Bench trials are not making up the difference; in 2016, well over 50 percent of the judicial districts held zero or one bench trial.[28]

The ascendancy of guilty pleas and plea bargaining, and the avoidance of costly trials, also ensure that prosecutors can file and dispose of more cases. This allows them to maintain high levels of activity with practically no risk to their conviction rate, the traditional measure of success. Just as importantly, as convictions become a near-foregone conclusion that follows the filing of charges, the prosecutor has been able to—and has needed to—pay increasing attention to the part of the process than has changed more in the last 20 years than in the prior two centuries.

C. Sentencing

The most visible change in the prosecutors' role over the last few decades has been the need for a complete re-thinking of sentencing practice after the adoption of the Federal Sentencing Guidelines. The emergence of the Guidelines themselves overthrew decades of sentencing law, and required the digestion of hundreds of pages of new policies, rules, and math. Then, just when courts and lawyers were starting to get the hang of things, along came the *Booker* revolution,[29] which changed the Guidelines from a stern requirement to a helpful suggestion. Judges were suddenly given a much freer hand to set sentences, a power they increasingly exercise. By 2016, fewer than half of all federal sentences were within the recommended Guideline range, a drop of about 20 percent since 2006, the year after *Booker* was decided.[30] In addition, in 2016, judges sentenced below the Guideline range without the effect of a government-sponsored departure in more than 20 percent of all cases.[31]

This increase in judicial discretion has meant that prosecutors, who significantly control the inputs to the sentencing process, have seen their influence grow as well. Even before the Guidelines, prosecutors had a wide range of tools available for influencing the defendant's punishment. Prosecutors have the power to recommend sentences to judges, either as part of plea deals or otherwise. They also have always had the authority to file more or less serious charges in the first instance, drop charges as part of plea deals, and control sentencing facts and considerations through the allegations in the indictment.

Prior to the Guidelines, however, it was unclear how vigorously prosecutors would work to affect a sentence. In 1980, Attorney General Benjamin Civiletti drafted what would become a foundational part of the *U.S. Attorneys' Manual*, in which he urged prosecutorial restraint on sentencing matters. He wrote that when it came to sentencing, there should be a "clear separation of prosecutorial and judicial responsibilities," with courts naturally taking the lead role. As a result, Civiletti said the prosecutors should "avoid routinely taking positions with respect to sentencing," and that sentencing recommendations should only be given in "unusual cases."[32]

But Civiletti's efforts to minimize the prosecutor's sentencing role were even then swimming against the tide. A few years earlier, the Federal Rules of Criminal Procedure had recognized the legitimacy of plea bargaining and had codified prosecutors' ability to recommend dispositions and even constrain sentences through Type C agreements.[33] The Sentencing Guidelines then (for a time), divested judges of much of their discretion by making the Guideline range mandatory, which in turn increased the influence of the prosecutor's charging and bargaining decisions. In 2003, Congress strengthened the prosecutor's hand further with the PROTECT Act, ensuring that only the prosecutor could decide whether the defendant could receive a three-level reduction for acceptance of responsibility or a four-level reduction for fast-track immigration cases.[34] And even now, in a post-*Booker* world, as courts have wrestled back some of their sentencing authority, prosecutors' control over charge selection and sponsoring departures remains.

Like judges, prosecutors have exercised their authority frequently, at least with respect to departures. In 2016, almost 19,000 defendants were sentenced below the recommended Guideline range where the government initiated, proposed, or stipulated to the lower sentence (Chart 5).[35] This figure has slowly drifted upward in the years since *Booker*.[36]

Note, however, that the increased sentencing discretion has not reduced the flow of offenders sent to prison. To the contrary, in the last 20 years, despite the significant fluctuations in sentencing law, one trend has remained constant: with trivial deviations, the percentage of convicted offenders who were sentenced to prison increased each year (Chart 6).[37] To some extent, then, reductions in sentence length brought about by the departures are being offset by an increased percentage of defendants who are being incarcerated in the first place.

That prosecutors play a critical role in sentencing is hardly debatable. There is less agreement on whether they have exercised that power in the most desirable way. With decreased trial responsibilities and increased sentencing influence comes at least the opportunity for U.S. Attorneys' Offices to take a larger role in one of the enduring problems

Chart 5
Percent of Defendants Receiving Government-Sponsored Departures

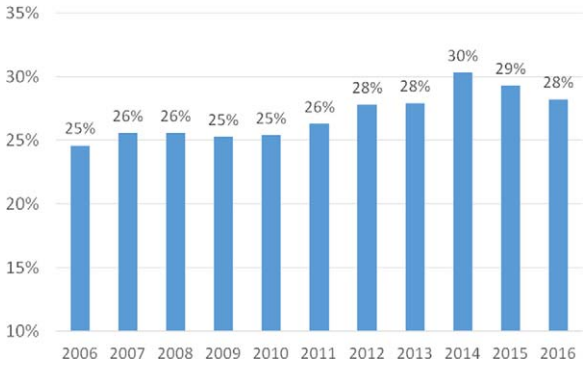


Chart 6
Percent Prison Sentence Imposed, 1996–2016

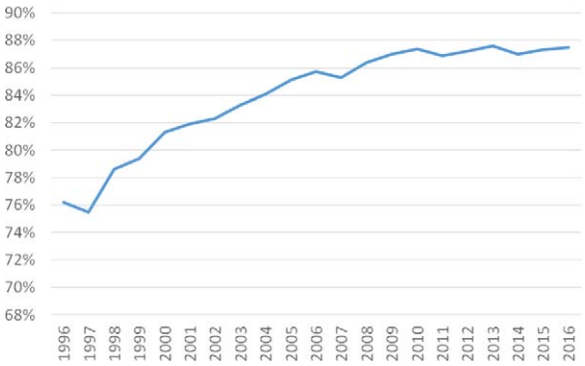
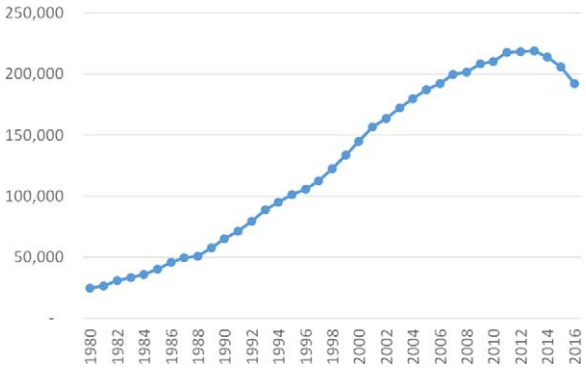


Chart 7
Federal Prison Population, 1980–2016



in the criminal justice system: the extremely high levels of incarceration.

III. Why Change? Prosecutors and Excess Incarceration

If the Guidelines and *Booker* are the primary legal changes prosecutors have faced during the last 30 years, changing attitudes about incarceration may be the dominant social and political change.

The story of incarceration in America is now sadly familiar.[38] The United States incarcerates more people than anyone else in the world, both in absolute terms and (with one small exception) per capita.[39] The U.S. has less than 5 percent of the world's population but 20 percent of the world's inmates.[40] At the end of 2015, more than 2.1 million people were behind bars in this country, which was roughly 1 of every 117 adults.[41] As a result, "mass incarceration" is now the standard way to describe the U.S. prison system.

We arrived at the current state of affairs relatively quickly. After remaining stable for many decades, the U.S. prison rate climbed sharply between 1973 and 2009, from about 110 inmates to about 500 inmates per 100,000 people, a five-fold increase in less than 40 years.[42] And while the federal prison numbers are small when compared to those of the states (California and Texas combined have more inmates than the entire federal system), the federal prisons have done their part. From at least 1980 through 2013, the federal inmate population increased every single year; only in the last three fiscal years has the population gone down. The number of federal inmates has increased 680 percent since 1980, and 32 percent since 2001 (Chart 7).[43]

But times may be changing, although the depth and duration of the changes remain to be seen. Over the last several years, a large number of states as well as the federal government have engaged in serious sentencing reform efforts,[44] often bi-partisan,[45] hoping to decrease the rate of incarceration by changing sentencing laws, increasing the use of alternatives to prison, and seeking additional resources to ease the reentry process and thereby reduce recidivism.

Many of these efforts have focused on legislative and judicial changes: reducing mandatory minimum sentences, trying to scale back punishments for drug crimes, and encouraging systems to increase the number of specialty courts, electronic monitoring, and other non-incarceration sanctions. Curiously, however, one party has gotten little attention from the reform movement—prosecutors. As John Pfaff puts it:

> Prosecutors . . . have used [their] power to drive up prison populations even as crime has declined over the past twenty or so years. To date, however, no state- or federal-level proposal aimed at cutting prison populations has sought to explicitly regulate this power. Everyone else in the criminal justice system currently faces reforms, such as efforts to change interactions between civilians and police, or to amend sentencing laws and parole policies. But prosecutors have remained untouched.[46]

It is not hard to figure out why these reforms have not targeted prosecutors. Prosecutorial discretion enjoys near-sacred status within the justice system, and neither courts, nor legislatures, nor reform commissions have shown much appetite for re-thinking its boundaries. Prosecutors have nearly unreviewable power to decide whether to charge, what to charge, how to craft the indictment, whether to offer a plea deal, the terms of any plea deal, and whether to move for departures.[47] And although courts have the last word on sentencing, the range of punishment often has already been cabined by inputs that are not subject to judicial review.

As a result, it is extremely difficult to *compel* prosecutors to change the manner in which they affect sentences. This in turn means that it is very difficult to ensure shorter prison terms, more alternative sanctions, or more diversions from prison actually take place, even if the legislature and judiciary have otherwise embraced reform. Reducing the reach of mandatory minimum sentences, for example, may not prevent a determined prosecutor from bargaining for a comparable sentence without the mandatory minimum. Increased use of probation and home monitoring

would almost certainly not be automatic, but instead would depend on factual findings, and the facts remain largely in the prosecutor's control. Statutorily reducing drug sentences might reduce the bargaining range within which pleas are struck, but this would not preclude prosecutors from encouraging a comparable sentence by adding other charges or arguing for other enhancements that they would not have pursued earlier.

This is not to suggest that federal prosecutors are, or would be, obstructionists to sentencing reform. Instead, the point is simply that prosecutorial control over the sentencing inputs are sufficiently great that reducing the prison population is unlikely to occur without the blessing of the U.S. Attorneys.

There have been signs that the Justice Department is sensitive to the incarceration problem, and to the opportunity for prosecutors to play a role in solving it.[48] One of the significant drivers of prison populations have been mandatory minimum sentences,[49] and in 2010, Attorney General Eric Holder took aim at them, encouraging prosecutors to avoid their application in drug cases where appropriate.[50] And while the results were encouraging,[51] the 2017 change in leadership has now resulted in an apparent reversal of the policy, as the political winds seem to be shifting once again.

This returns us to the changing role of federal prosecutors. It is both wrong and unfair to assume that federal prosecutors are unaware of or indifferent to the problems of excessive incarceration. It is also unfair to suggest that U.S. Attorneys or the Justice Department have not taken meaningful steps to combat the problem, as the recent, steady drop in the number of federal inmates at least suggests.[52] Still, the numbers don't lie, and even with the drop, the level of prosecutorial activity as well as the resulting prison population remains at historically high levels.

Moving the population needle back toward more traditional levels would require strong commitment and leadership from the President, the Attorney General, and the prosecutors themselves. And while it is difficult to describe precisely what that commitment would look like, any change would likely have at least three parts: (a) a sustained, cross-administration commitment to decrease imprisonment; (b) a series of policies and procedures that shape prosecutorial decisions on charging, plea bargaining, and sentencing; and (c) an articulation of how these steps are consistent with prosecutorial values.

The second point—changing current practice—would present significant institutional challenges, as no entity happily gives up authority, and self-regulation could become a paper tiger as long as courts defer so absolutely to prosecutorial discretion. But if there were a sufficient institutional commitment to reducing the size and role of prisons, there are an increasing number of reform proposals worth considering that speak directly to prosecutors, from standardized plea bargaining guidelines to changes in charging decisions, pretrial practices, and sentencing recommendations.[53]

This third point also needs some elaboration. It is a cliché that prosecutors play a dual role—advocate for the people and minister of justice—and while we know what the first role involves, the second role is neither fixed nor self-executing. But it surely means more than simply obtaining convictions, as important as that is. As the ABA Prosecution Standards make clear, "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action."[54]

A grander prosecutorial role might include a more focused commitment to reduce recidivism, and a willingness to be judged on the success in doing so. The broader role might also explicitly embrace parsimony as a guiding principle in plea negotiations and sentencing recommendations, recognizing that being tough on crime can be a vice as well as a virtue. And of course, it could involve putting the Justice Department's considerable institutional weight behind efforts to reduce the federal prison population, actively seeking out cases where the criminogenic effects and societal damage of imprisonment outweigh the benefits of incarceration, and pressing for non-incarceration resources (particularly those involving mental health and substance abuse treatment) that would make post-prison reentry more successful and recidivism less routine.

Enlisting prosecutors in the fight against problems in the justice system is not novel. For example, one obvious goal of any system is to ensure that race does not have an effect in prosecuting and sentencing offenders, and a recent report by the Federal Sentencing Commission shows that some progress is being made. Although there are still troublesome demographic effects on sentencing, those effects largely disappear for offenders who received prosecution-sponsored substantial-assistance departure in sentencing.[55] The simple fact that the government is focused on the potential for sentencing disparities and is committed to reducing them surely has helped move closer to that goal.

IV. Conclusion

At first blush, trying to enlist U.S. Attorneys in the battle to reduce the federal prison population might sound odd. Prosecutors play a large role in determining sentences, and have been a driving force in reaching the current high prison numbers, and so it might sound naïve to think that prosecutors can also be part of the solution. And indeed, thinking differently about sentencing and punishment also might be hard for federal prosecutors themselves, if for no other reason than they have been so successful in their current role. Prosecuting and punishing offenders are among the highest obligations of government, and it is tempting to say that we should not tinker with a system that performs this crucial function so successfully.

But it is also tempting to say that any institution that has been operating at such high levels of success for so many

years has the capacity to do more. The overall role of the U.S. Attorney in prosecuting offenders has remained consistent over time, while the problems related to the justice system have not. Asking more of the dominant player in that system may be the most effective way of addressing at least some of these problems.

Notes

[1] In 2016, U.S. Attorneys terminated criminal cases against almost 72,000 defendants, obtaining convictions against 93%. *See* U.S. Attorneys' Annual Statistical Report, FY2016, Table 1 at 4, Table 2A at 7, https://www.justice.gov/usao/page/file/988896/download. That year U.S. Attorneys also responded to or filed 7,845 criminal appeals, 83% of which were resolved in favor of the United States. *Id.*, Table 7 at 26. Even that impressive percentage understates the success rate on appeal, as some of the appellate dispositions listed in the "other" category involve resolutions in the government's favor. *See id*. n.1.

[2] *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St. J. Crim. L. 369 (2009) (analyzing the impact of partisan politics on U.S. Attorneys' Offices). There also have been concerns about prosecutors not living up to their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The concern famously led the former Chief Judge of the Ninth Circuit to declare, "There is an epidemic of *Brady* violations abroad in the land." U.S. v. Olson, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of petition for rehearing *en banc*).

[3] The Justice Department has published six strategic plans since 2000. The current plan is at https://www.justice.gov/about/budget-and-performance#DOJplans. The five earlier plans are at https://www.justice.gov/archive/index-publications.htm.

[4] For a useful discussion of how department policy changes through the issuance of memos from the Attorney General, see Alan Vinegrad, *DOJ Charging and Sentencing Policies: From Civiletti to Sessions*, 30 Fed. Sent'g Rep. 3 (Oct. 2017) [hereinafter Vinegrad, *DOJ Charging and Sentencing Policies*].

[5] The current *U.S. Attorney's Manual* is at https://www.justice.gov/usam/united-states-attorneys-manual. Changes or additions to the *Manual* are noted at the end of the affected section. The last major revision of the *Manual* occurred in 1997; earlier versions are at https://www.justice.gov/archive/usao/usam/index.html.

[6] The Annual Statistical Reports are found at https://www.justice.gov/usao/resources/annual-statistical-reports. Unless otherwise stated or suggested by context, the figures in this article, including the data in Charts 1–6 are original calculations and compilations taken from these Reports. These reports are cited below as *USA Annual Statistical Report*, and the Table Number refers to the designation in the most recent year (earlier reports may set forth the data in differently labeled tables.) Compilations and calculations are on file with the author. All years are fiscal years rather than calendar years.

[7] In 2011, U.S. Attorneys filed 68,926 criminal cases in U.S. District Court; by 2016, that number had fallen to 53,908, a 22% decline. *USA Annual Statistical Reports 2011*, *2016*, supra note 6, Table 1.

[8] In 2011, the number of criminal defendants in U.S. District Court who had charges filed against them was 93,920. By 2016, the number had dropped 23%, to 72,006. *Id*.

[9] Between 2011 and 2016, drug and immigration case filings in District Court dropped 23% and 28%, respectively. *Id.*, Table 3A.

[10] The U.S. crime rate is traditionally measured by reference to FBI statistics, which report the per capita rate of eight "index" crimes: murder and non-negligent manslaughter, rape, robbery, and aggravated assault (the violent crimes); larceny, burglary, motor vehicle theft, and arson (the property crimes). See FBI, Uniform Crime Reporting, at https://ucr.fbi.gov/. Between 1997 and 2016, the U.S. violent crime rate dropped 37%, and the property crime rate dropped 43%. See FBI: UCR, 2016 Crime in the United States, Table 1, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1.

[11] In 1981, there were 40,458 criminal defendants charged in district court; by 2011, the number had increased to 93,920. The growth was likely much greater, as records in the 1980s combined the filings against defendants in both district and appellate courts into a single number. See *USA Annual Statistical Report 1981*, *2011*, *supra* note 6, Table 1.

[12] Since 2001, U.S. Attorneys' Offices have been party to an average of 85,000 civil cases per year, overwhelmingly with the United States as the defendant. In 2016, for example, the U.S. was the defendant in commercial litigation in 36% of all civil matters, the defendant in prisoner litigation in 18% of civil cases, and the defendant in social security cases in another 18%. About 9% of the civil actions involved the U.S. in bankruptcy matters. The U.S. was a plaintiff in only 6% of the cases filed. See *id.*, Table 5.

[13] *See id.*, Table 1.

[14] The FBI's crime index does not measure core federal offenses such drug crimes, immigration offenses, or weapons violations. *See supra* note 10.

[15] The considerations for making these decisions are set forth in the *U.S. Attorneys Manual*, 9-27.000, Principles of Federal Prosecution, https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

[16] There is a rich literature on overcriminalization. *See, e.g.*, Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J. Law & Pub. Pol. 715 (2013); Roger A. Fairfax, Jr., *From Overcriminalization to Smart on Crime: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. Econ. & Pol'y 597 (2011); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 Wash. & Lee L. Rev. 1569 (2010); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703 (2004). *But cf.* Susan R. Kline & Ingred B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 Emory L.J. 1, 5 (2012) ("[I]n spite of the large increase in the number of federal criminal statutes, this growth itself has caused almost no impact on federal resources, nor has it destabilized the traditional balance of power between state and federal courts.").

[17] In 2016, more than 85% of the criminal cases filed were referred by Homeland Security (50% of all cases, mostly from the Bureau of Border & Customs Protection and ICE) and the Justice Department (35%, primarily by the FBI, DEA, and ATF). See *USA Annual Statistical Report 2016*, *supra* note 6, Table 3D.

[18] In recent years the most common reason for a declination was "insufficient evidence," followed by "prioritization of federal resources and interests," and "matter referred to other jurisdiction." See *USA Annual Statistical Report 2016*, *supra* note 6. Table 15. For an insightful discussion of declinations, *see* Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 Am. Crim. L. Rev. 1349 (2004).

[19] See *USA Annual Statistical Report 2001–2016*, *supra* note 6, Table 14. The percentages in the chart were calculated by dividing the number of declinations reported by the sum of declinations plus cases filed. Thus, if there were 100 cases

filed in a year and 20 declinations, the declination rate would be 17% (20/(100+20) = 0.167).

[20] In 2016, more than 85% of the criminal cases filed were referred by Homeland Security (50% of all cases, mostly from the Bureau of Border & Customs Protection and ICE) and the Justice Department (35%, primarily by the FBI, DEA, and ATF). See *USA Annual Statistical Report 2016*, *supra* note 6, Table 3D.

[21] In an average year, between 5% and 7% of federal criminal defendants will have their cases dismissed. See *USA Annual Statistical Report 2001–2016*, *supra* note 6, Table 2A.

[22] In 2016, prosecutors in 21 judicial districts reported that zero defendants were found not guilty, and another 24 reported one such defendant. Only three of the 94 judicial districts had more than 10 not-guilty defendants: one had 11, one had 13, and the Southern District of Florida reported 22. See *USA Annual Statistical Report 2016*, *supra* note 6, Table 2A.

[23] *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Santobello v. New York, 404 U.S. 257 (1971).

[24] In fiscal year 1961, for example, only 12% of federal defendants had their cases terminated by standing trial; the other 88% were "not tried." *USA Annual Statistical Report 1961*, *supra* note 6, Table 4.

[25] Robert Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992), quoted approvingly in Missouri v. Frye, 566 U.S. 134, 144 (2012).

[26] For an excellent analysis of how jury trials in particular are disappearing, see Suja A. Thomas, The Missing American Jury (2016).

[27] See *USA Annual Statistical Report 1992*, *supra* note 6, Table 2; *id.*, *2016*, Table 2A.

[28] Id.

[29] United States v. Booker, 543 U.S. 220 (2005). *See also* Rita v. United States, 551 U.S. 338 (2007); Gall v. United States, 552 U.S. 38 (2007); Kimbrough v. United States, 552 U.S. 85 (2007).

[30] In 2016, 49% of federal sentences were within the Guideline range; in 2015, the figure was 47%. Prior to 2015, the percentage of cases sentenced within the Guideline range had decreased each year after *Booker*, starting at a high of 62% in 2006 and reaching a low of 46% in 2014. The figures are from the U. S. Sentencing Commission's Annual Sourcebook of Federal Sentencing Statistics, Table N [hereinafter USSC Sourcebook 2016], at https://www.ussc.gov/research/sourcebook-2016.

[31] The percentage of non-government-sponsored, below-Guideline range sentences was 21% in 2015 and in 2016. See *id*.

[32] *See* Principles of Federal Prosecution (1980) at 51–52, https://babel.hathitrust.org/cgi/pt?id=uc1.b4177340;view=1up;seq=5. The unusual circumstances where the government could offer a sentencing recommendation were when the plea agreement required it, or when the public interest warranted an expression of the government's view. *Id.* at 51. *See also* Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, 243(110) N. Y. L.J. 2 (June 10, 2010), https://www.cov.com/-/media/files/corporate/publications/2010/06/justice-departments-new-charging-plea-bargaining-and-sentencing-policy.pdf.

[33] *See* Fed. R. Crim. P. 11(c)(1)(C).

[34] *See* Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. Crim. L. & Criminology 295 (2004).

[35] *See* USSC Sourcebook 2016, *supra* note 31, Table N.

[36] *See id.*, 2005–2016, Table N.

[37] *See id.*, 1996–2016, Figure D.

[38] For an authoritative discussion of the causes and consequences of the high U.S. incarceration rates, see National Research Council, The Growth of Incarceration in the United States: Exploring Causes and Consequences (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014), at https://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes.

[39] The U.S. is only second in the world in per capita incarceration. It trails the Seychelles, an archipelago in the Indian Ocean northeast of Madagascar, which has a population of 92,000 and a prison population of 735, for a rate of 799 per 100,000 people. The U.S. rate is 666 per 100,000. Data on world incarceration rates can be found at World Prison Brief, http://www.prisonstudies.org/, a site hosted by the Institute for Criminal Policy Research at Birkbeck, University of London.

[40] The U.S. population is about 4.4% of the world's 7.4 billion people; see https://www.census.gov/popclock/. According to the World Prison Brief, *supra* note 39, the U.S. incarcerates 20% of the more than 10 million inmates worldwide, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All&=Apply. These figures include those detained in jail as well as prison.

[41] See Danielle Kaebel & Lauren Glaze, Bureau of Justice Statistics, *Correctional Populations in the United States, 2015*, 2, Table 1 (Dec. 2016) NCJ 250374, *available at* https://www.bjs.gov/content/pub/pdf/cpus15.pdf.

[42] See National Research Council, supra note 38, at 34–35 & Fig. 2 -1.

[43] Chart 7 data is from the Federal Bureau of Prisons, https://www.bop.gov/about/statistics/population_statistics.jsp (accessed Dec. 17, 2017). The U.S. population as a whole increased by 43% between 1980 and 2016, and 15% since 2001. See https://www.census.gov.

[44] There is a wealth of information available on State and Federal efforts to reform sentencing practices and reduce prison populations. A great deal of information has been collected and generated by the Pew Charitable Trust's Public Safety Performance Project, http://www.pewtrusts.org/en/projects/public-safety-performance-project, and the Vera Institute of Justice, https://www.vera.org/ending-mass-incarceration.

[45] *See* John Pfaff, Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform (2017, Kindle locations 126–27) ("[T]he confluence of low crime and tight budgets has led to a surprisingly bipartisan push for reform during a time when those on the Left and the Right can barely agree on whether it is raining outside.").

[46] *Id.*, Kindle locations 2163–67.

[47] *See* U.S. v. Armstrong, 517 U.S. 456, 464 (1996) ("In the ordinary case, 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." (internal quotation marks and citation omitted)).

[48] Attorney General Holder's "Smart on Crime" initiative was specifically focused on the problems of excessive incarceration. See https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative.

[49] In 2016, 22% of all federal criminal defendants were convicted of an offense carrying a mandatory minimum sentence. About a third of these defendants were relieved of the mandatory penalty because they provided substantial assistance to the government, because of the statutory safety valve provision, or both. See U.S. Sentencing Commission, *Mandatory Minimum Penalties Quick Facts* (n.d.), https://www.ussc.

gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY16.pdf.

[50] *See* Memorandum from Eric H. Holder, Jr., U.S. Attorney General, to United States Attorneys and Assistant Attorney General for the Criminal Division: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), *available at* https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-drug-guidance.pdf.

[51] See U.S. Sentencing Commission, Mandatory Minimum Penalties for Drug Offenses in the Federal Criminal Justice System 5 (2017) https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171025_Drug-Mand-Min.pdf#page=9 ("Less than half (44.7%) of all drug offenders sentenced in fiscal year 2016 were convicted of an offense carrying a mandatory minimum penalty, which was a significant decrease from fiscal year 2010 when approximately two-thirds (66.1%) of drug offenders were convicted of such an offense.").

[52] As of December 14, 2017, the number of federal inmates was 184,402, down another 4% from the end of fiscal year 2016. *See* https://www.bop.gov/about/statistics/population_statistics.jsp. See also Chart 7.

[53] For an extensive and thoughtful discussion on regulating prosecutors, see Pfaff, *supra* note 45, Chapter 8 (Kindle Location 3358). For a comprehensive set of such proposals, see NYU Center on the Administration of Criminal Law, Disrupting the Cycle: Reimagining the Prosecutor'S Role in Reentry (2017), http://www.law.nyu.edu/sites/default/files/upload_documents/CACL%20Report.pdf. See also Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 Geo. J. Legal Ethics 301, 326–30 (2017);James Austin & Lauren-Brooke Eisen, How Many Americans are Unnecessarily Incarcerated? (with James Cullen & Jonathan Frank, 2016), Brennan Center for Justice, https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf (identifying categories of offenses where incarceration is unnecessary or counter-productive, and recommending that prosecutors use their discretion to seek sentencing alternatives or shorter prison terms for these offenses).

[54] See ABA Prosecution Function, Standard 3 -1.2(d), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

[55] A 2017 Report by the U.S. Sentencing Commission found that after controlling for a number of sentencing variables, "Black male offenders were 21.2 percent less likely than White male offenders to receive a non-government sponsored downward departure or variance during the Post-[2012]Report period. Furthermore, when Black male offenders did receive a non-government sponsored departure or variance, they received sentences 16.8 percent longer than White male offenders who received a non-government sponsored departure or variance." On the other hand, "there was no statistically significant difference in sentence length between Black male and White male offenders who received a substantial assistance departure" from federal prosecutors. *See* U.S. Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012* Booker *Report*, at 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.