Looking in the Mirror: The Prosecutor's Role in Ending Mass Incarceration

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I. Introduction

Prosecutors carry a noble mission: to present truth and seek justice, to punish and deter criminal wrongdoing, and to ensure the rule of law. But their actions can also have devastating community consequences. Increasingly, prosecutors are being identified as a driving force behind mass incarceration—a level of imprisonment unprecedented in our history, unparalleled across the globe, and marked by stark racial disparities.[1] The federal system, while accounting for only 13 percent of the nation's prisoners, has set the pace. Its population grew faster than that of the states throughout the 1980s and 1990s, and rose another 40 percent during the 2000s even as state populations leveled off.[2]

Prosecutors are arguably the most powerful and least scrutinized actors in our criminal justice system. Their charging decisions, plea offers, and sentence recommendations are discretionary and unreviewable.[3] In a system in which jury trials are rare—97 percent of felony convictions at the federal level and 94 percent at the state level result from guilty pleas—these choices can determine outcomes.[4]

For these reasons, many advocates today see prosecutors not only as a target for criticism, but as a potential source of reform. In 2016 and 2017, progressive candidates unseated long-serving "tough on crime" state prosecutors in several metropolitan areas. Groups like the ACLU and Color of Change have made the election of county prosecutors a cornerstone of their advocacy strategy, and organizations like Fair and Just Prosecution and the Institute for Innovation in Prosecution are supporting the new crop of reformers.

The federal government, however, is going in the opposite direction. To be sure, the Justice Department took concrete steps under Attorney General Eric Holder to avoid harsh sentences and reduce incarceration: launching the Smart on Crime initiative in 2013, supporting a meaningful clemency program, and advocating for policies that better reintegrate formerly incarcerated people into society. But Donald Trump's presidency has ushered in a period of retrenchment. Attorney General Jeff Sessions has shuttered Smart on Crime. The administration is pursuing enforcement priorities and practices that will increase incarceration.

In this environment, it may be difficult to imagine federal prosecutors as leaders in the criminal justice reform movement. Nonetheless, it is worth thinking now about ways that attorneys at Main Justice and the U.S. Attorneys' Offices could participate in prosecutorial reform—and perhaps even take up the vanguard one day. This essay discusses the ideal of the prosecutorial role, the part prosecutors have played in the incarceration boom, and the recent experiment with reform at the federal level. It then sketches four avenues to achieve broader, lasting reform.

II. Prosecutorial Role

Any discussion about prosecutors must begin with a clear understanding of their unique role in the justice system. Seventy years ago, the Supreme Court characterized the prosecutor as "the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer."[5] Prosecutors serve the interest of the government, which "in a criminal prosecution is not that it shall win a case, but that justice shall be done."[6]

Prosecutors view themselves this way. The *U.S. Attorneys' Manual*'s principles of federal prosecution are guided by a recognition "both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused, crime victims, and families whether or not a conviction ultimately results."[7] The National District Attorneys Association (NDAA) describes the prosecutor's primary responsibility as being "an independent administrator of justice," which means respecting "the rights of all participants" in the justice system.[8] The American Bar Association, in its standards for the prosecutorial function, articulates the prosecutor's duty as "not merely to convict" but "to seek justice."[9]

Lofty rhetoric comes easy, of course. To be faithful to that rhetoric, prosecutors must examine their own actions—not merely in individual cases, but in their aggregate impact on the safety, security, and well-being of American communities.

III. The Contribution of Prosecutors to Mass Incarceration

Scholar John Pfaff argues that prosecutors have been "the engines driving mass incarceration."[10] Pfaff's core argument is that the prison population rose not because sentences got longer, but because prosecutors charged more felonies. Pfaff looked at state-level data from 1994 to 2008 and found that while reported crime and arrests fell,

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felony admissions—the number of prosecutions filed—rose by 40 percent. Over this period, the rate at which arrests led to felony charges doubled from one in three to two in three.[11] In addition, comparing time served for crimes in 2000 and in 2010, he found that prison stay lengths were stable. Consequently, he concluded, prosecutors drove the rise in incarceration by filing more cases.

Pfaff's work is not without its critics. Scholar Jeffrey Bellin has argued that the admissions data Pfaff relied on were skewed by a change in case reporting standards that began in 2003. That year, the National Center for State Courts issued guidance that led states to record parole and probation revocations, domestic violence cases previously categorized separately, and preliminary hearings as new felony cases. These changes made it look like admissions jumped substantially through the period Pfaff studied when they may well have remained constant.[12] Meanwhile, other researchers have found that prison terms *have* gotten longer, which is consistent with the enactment of mandatory minimum and truth-in-sentencing laws across the country.[13]

Whether prosecutors have been filing more cases or not, there is good reason to believe they profoundly shape imprisonment in America. Prosecutors decide which cases to bring, what charges to file, and what sentences to recommend. Even though judges usually retain discretion in sentencing, prosecutors determine a defendant's exposure and influence the judge's sentence greatly. The availability of mandatory minimums for high-volume charges, such as controlled substances and firearms offenses, make prosecutorial judgments all the more consequential.

For example, under 21 U.S.C. § 851, federal prosecutors may file notices of a defendant's prior drug felonies and thereby double the applicable mandatory minimums. A person with a prior drug felony who is charged with 28 grams of crack cocaine, 1 gram of LSD, or 5 grams of methamphetamine faces 10 years to life. With two prior drug felony convictions—no matter how old—the penalty is mandatory life. As one federal judge has written, these enhancements can result in sentences that "*no one*—not even the prosecutors themselves—thinks are appropriate."[14]

After Congress created new mandatory minimums in the 1980s and as the federal government waged the War on Drugs, federal incarceration grew exponentially. In 2003, Attorney General John Ashcroft issued a directive requiring federal prosecutors to pursue mandatory minimums and sentencing enhancements in virtually all cases. That charging policy helped grow the federal prison population from 172,000 to nearly 220,000 over the following ten years.

IV. Initial Steps Toward Reform

For the same reasons that prosecutors have been able to drive up incarceration, they can help reduce imprisonment rates. Attorney General Holder took important steps toward that change. In a 2013 memo, he told line prosecutors to reserve the most severe mandatory minimums, including § 851 enhancements, for the most serious and dangerous offenses. Following the Supreme Court's ruling that any fact that increases a defendant's mandatory minimum sentence must be included in the indictment, Holder instructed prosecutors not to charge the specific quantity of drugs, when that quantity would trigger a mandatory minimum, for certain defendants. Those defendants had to be nonviolent, low-level players, with no ties to gangs or cartels, no involvement in trafficking to minors, and insignificant criminal histories.

Holder recognized that mandatory minimums had resulted in "unduly harsh sentences and perceived or actual disparities" at odds with the Justice Department's values of proportionality and equal justice.[15] He signaled that prosecutors should use their discretion responsibly to avoid punishments that would be excessive under the circumstances.

Combined with the impact of the Fair Sentencing Act of 2010, changes by the U.S. Sentencing Commission, and President Barack Obama's clemency initiative, Holder's guidance made a difference. In 2014, the federal prison population fell for the first time after 40 years of continuous growth, driven by a decline in admissions. At about 183,000 in March 2018, the population is down 16 percent from the 2013 peak.

V. Avenues for Broad and Lasting Reform

The work of reversing mass incarceration must be done primarily at the state level, where most criminal charges are brought and sentences imposed. However, because the federal system gets disproportionate attention, the Justice Department can and should be a leader in modeling reform. Smart on Crime was a good start, but more can be done. This section suggests several areas in which Main Justice components and U.S. Attorneys' Offices can advance meaningful change.

A. Committing to Data Collection, Transparency, and Accountability

As the debate between Pfaff and Bellin indicates, there is much we do not know about prosecutorial behavior. The federal government can be a leader in setting the expectation that offices will collect robust data on their own practices, subject that data to analysis, and commit to transparency by making both the raw data and their analyses public.

In some ways, federal offices are ahead of state prosecutors. Federal prosecutors are guided by policy set forth in the *U.S. Attorneys' Manual* and memoranda from the Attorney General, Deputy Attorney General, and U.S. Attorneys. The Executive Office of U.S. Attorneys collects data about charging, disposition, and sentencing, and the U.S. Sentencing Commission periodically publishes analyses of that data.[16] The Justice Department could go even deeper, however: What charges do Trial Attorneys and Assistant U.S. Attorneys decide not to present to the grand

jury or file with the court, even when they have the evidence? When do they ask for detention or particular conditions of pretrial release? How often do they use the threat of mandatory minimums, including before charging, to induce guilty pleas? When do they seek plea agreements that bind judges at sentencing? What factors lead them to recommend non-guideline sentences? How do these practices vary based on the demographics of defendants? Across districts?

Prosecutorial practices at the state level are even more of a black box. Many offices lack clear and uniform policies on charging, pleas, and sentencing. Opening up that black box through transparent data can spark meaningful reform. For example, a decade ago the Milwaukee district attorney's office worked with the Vera Institute of Justice to identify possible racial bias in its prosecutive decision making. Analysis showed a significant racial disparity in drug charging: in possession of drug paraphernalia (PDP) cases, line assistants declined to prosecute 41 percent of cases against white arrestees and only 27 percent of cases against black arrestees. The explanation was that the office was prosecuting PDP cases emerging from predominantly black neighborhoods and those involving crack cocaine pipes more aggressively than other cases. After confronting the data, the district attorney directed staff to decline PDP cases and refer defendants to drug treatment wherever reasonable. He also required supervisory approval before any PDP charges could be filed. The result was that the racial disparity in declination rates disappeared.[17]

It is vital that prosecutors' offices not only collect and analyze data, but that they make that data public. This kind of transparency permits offices to be held accountable to the communities they serve—and, in the case of local prosecutors, the people who elect them. In October 2017, Cook County state's attorney Kim Foxx released the office's first-ever report on felony charging, case disposition, and sentencing, broken down by race, age, and geography.[18] By interpreting the data and providing intelligible graphs, the report helped educate the community. By making the underlying datasets public, Foxx also showed she was not afraid to be scrutinized by her constituents.

Foxx often says, "You can't fix what you can't measure." She's right. Only when detailed data are collected, analyzed, and shared publicly can it drive real change.

B. Striving for Culture Change

Institutional culture can be a barrier to reform. A leader can issue new policies, but these do not translate automatically into shifts in behavior. One way of encouraging change is through rewards—particularly supervisory praise, organizational recognition, and elevated standing among peers.

For years, federal and state prosecutors have been judged by their conviction record and rewarded for high sentences. Having recognized that we incarcerate far too many people for far too long and at racially disparate rates, a new generation of leaders must incentivize the judicious exercise of discretion. For example, a U.S. Attorney might recognize a line prosecutor who overcomes initial reluctance and discloses exculpatory material; who declines or dismisses a case that should not be pursued; who agrees to probation to give a remorseful defendant a second chance; or who reopens a case based on signs that the defendant was wrongfully convicted or given a disproportionately long sentence. District attorneys, too, should reward their line attorneys for decisions that avoid unnecessary incarceration and reduce racial disparities.[19]

There are many ways to recognize attorneys and communicate an updated set of values. It can be done through performance evaluations and merit pay. Offices can create formal awards, in the same way that the Los Angeles Police Department now hands out "Preservation of Life" awards to officers who de-escalate street encounters and avoid using force.[20] Even more importantly, leaders can show what is valued through routine feedback and public praise at staff meetings.

When I served in the Justice Department under Attorney General Holder, the consistent message from the top was that prosecutors were to pursue justice. Winning did not mean securing the longest sentence possible, or even necessarily securing a conviction. It meant exercising restraint and being aggressive at the right times. It meant seeking punishment that fit the crime and respected the interests of all parties: victims, defendants, defendants' family members, and the public. This should become the norm across the federal and state systems.

C. Thinking Critically about Public Safety

Prosecutors are rightly focused on holding people accountable for breaking the law and on ensuring public safety. But accountability may take various forms, and public safety is often best served by alternatives to prosecution and incarceration.

Dan Satterberg, King County prosecuting attorney in Washington state, advocates "community justice," a principle that calls for "engaging community leaders and nonprofit providers in a joint effort to define accountability and then to devise alternatives to the criminal courts" in appropriate cases.[21] Restorative justice approaches require people who have committed crimes to own up to them, meet with the victim face-to-face if the victim desires, and take action to repair the harm they caused. It centers around accountability and healing. Similarly, drug treatment and mental health services can be more effective than imprisonment at preventing recidivism.

Prosecutors should view all of their activities through the lens of what will realize a community's vision of public safety while minimizing harm. On the front end, that means federal prosecutors should be wary of pursuing marijuana cases in jurisdictions that have legalized or decriminalized the drug. It means federal and state prosecutors at bond hearings should consider research showing that pretrial detention can be criminogenic.[22] On the back end, prosecutors should try to minimize collateral consequences that inhibit the successful reentry of formerly

incarcerated people into their communities. For example, former U.S. Attorney Kenyon Brown launched Project H.O.P.E. in the Southern District of Alabama to encourage employers to hire people with criminal records. Former U.S. Attorney Kenneth Polite modeled that behavior by hiring a formerly incarcerated person to run the reentry program in the Eastern District of Louisiana.[23]

Prosecutors must also consider the impact of federal immigration enforcement on their ability keep their communities safe. If undocumented individuals believe public officials will ask about immigration status and contact Immigration and Customs Enforcement (ICE), they will be less likely to report crimes and cooperate as witnesses. The same goes for individuals with legal status who have undocumented family members or friends. This is an acute issue for local officials, whose mandate does not include prosecuting immigration offenses and who must focus on core local law enforcement tasks like clearing homicide cases. Federal prosecutors face some of the same challenges. Although immigration enforcement is a federal matter, the Justice Department has an interest in ensuring that ICE does not deter witnesses from cooperating in its criminal cases. At a minimum, ICE arrests of victims and witnesses at courthouses should be prohibited.

D. Using the Bully Pulpit

Although prosecutors wield significant discretion, they operate within a system structured by legislatures, which define the substantive law and penalties. Those legislatures are responsible to a public that has often demanded overly punitive responses to crime. If prosecutors are to seek reform, then, they must advocate for legislative change and aim to shape public opinion.

It is entirely appropriate for them to do so. The American Bar Association's standards of professional conduct indicate that a prosecutor should "seek to reform and improve the administration of criminal justice." When prosecutors become aware of "inadequacies or injustices in the substantive or procedural law," they "should stimulate efforts for remedial action."[24] The National District Attorneys Association concurs: "A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so."[25]

Recent history provides examples of chief prosecutors exercising this kind of leadership. On the federal level, in 2015, then-Deputy Attorney General Sally Yates testified before the Senate Judiciary Committee in support of the Sentencing Reform and Corrections Act (SRCA). On the state level, last year Harris County prosecutor Kim Ogg committed to push the Texas legislature to reform the state's bail system.[26] We need more of this.

Associations of line prosecutors have also been active in lobbying on criminal justice policy—but often *against* reform. For example, the National Association of Assistant United States Attorneys publicly opposes the bipartisan SRCA. Its website includes a policy paper entitled "The Dangerous Myths of Drug Sentencing 'Reform.'"[27] It is unclear whether this position reflects the views of a small group of leaders or those of a majority of the country's several thousand federal prosecutors. It is clear, however, that such advocacy can derail reform.

Prosecutors are deeply respected. They have the ability to influence public opinion and shape the views of legislators and state officials. They should use that power to make the criminal system more just, rather than to preserve the status quo.

VI. Conclusion

Increasingly, prosecutors are being scrutinized for their role in driving America's high imprisonment rates, racial disparities, and other ills in our justice system. The story of prosecutorial influence, however, is not closed. By collecting and sharing data about their own practices, reorienting office culture, exercising restraint in service of public safety, and speaking out in the public arena, federal and state prosecutors can be part of the effort to undo the harms of mass incarceration.

Notes

* Chiraag Bains served in the U.S. Department of Justice between 2010 and 2017. He was Senior Counsel to the Assistant Attorney General in the Civil Rights Division, a Trial Attorney in the Division's Criminal Section, and a Special Assistant U.S. Attorney in Washington, D.C.

1 Today, the United States incarcerates 2.2 million people. From 1972 to 2014, the prison population rose from 200,000 to 1.56 million; county jails hold an additional roughly 700,000 people at any given time. Our per captia incarceration rate is the highest in the world. In the United States, five million children—1 in 14, including 1 in 9 black children—have or have had a parent in prison. Danielle Paquette, *One in Nine Black Children Has Had a Parent in Prison*, Wash. Post. (Oct. 27, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/10/27/one-in-nine-black-children-have-had-a-parent-in-prison/?utm_term=.117ab3c47f88.

2 National Research Council of the National Academies, The Growth of Incarceration in the United States: Exploring Causes and Consequences 39 (Jeremy Travis, Bruce Western, & Steve Redburn eds., 2014) [hereinafter NRC Report], available at https://www.nap.edu/read/18613/chapter/1.

3 *See, e.g.*, United States v. LaBonte, 520 U.S. 751, 762 (1997); *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Penn. L. Rev. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor.").

4 *See* Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[H]orse trading between prosecutor and defense counsel determines who goes to jail and for how long" (internal alteration marks omitted)).

5 Berger v. United States, 295 U.S. 78, 88 (1935).

6 *Id.*

7 U.S. Attorneys' Manual, 9.27–001, available at https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution.

8 National District Attorneys Association, National Prosecution Standards 1 -1.1 (3d ed. 2009), available at http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf [hereinafter NDAA Standards].

9 ABA Standards for the Prosecution Function 3 -1.2(d).

10 John Pfaff, Locked In: The True Causes of Mass Incarceration—and How to Achieve Real Reform 206 (2017).

11 *Id.* at 72.

[12] Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, Mich. L. Rev. (forthcoming 2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930116, at 10–11.

[13] *See* Xenocrypt, *Why The War on Drugs Matters in Mass Incarceration, Part 2: The Two Dimensions of Prison Populations* (Oct. 4, 2017), https://medium.com/@xenocryptsite/why-the-war-on-drugs-matters-in-mass-incarceration-part-2-the-two-dimensions-of-prison-329c347cb81b (identifying growth in prison terms for serious offenses); Steven Raphael & Michael A. Stoll, Why Are So Many Americans in Prison? 26, 50–51 (2013) (finding that from 1984 to 2004 prison time served for murder or manslaughter, rape, and robbery increased by 5, 3, and 1.5 years, respectively); NRC Report, *supra* note 2, at 53 (finding that average time served for murder rose from 5 years in 1981 to 16.9 years in 2000, for sexual assault from 3.4 years in 1981 to 6.6 years in 2009).

[14] United States v. Kupa, 976 F. Supp. 2d. 417, 420 (E.D.N.Y. 2013) (Gleeson, J.).

[15] Memorandum from Eric H. Holder, Jr., U.S. Attorney General, to the 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/oip/legacy/2014/07/23/ag-memo-department-policypon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf.

[16] *See, e.g.*, U.S. Sentencing Commission, *Demographic Differences in Sentencing: An Update to the 2012* Booker *Report* (Nov. 2017), available at https://www.ussc.gov/research/research-reports/demographic-differences-sentencing; U.S. Sentencing Commission, *An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* (July 2017), available at https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system.

[17] Wayne McKenzie, Don Stemen, Derek Coursen, & Elizabeth Farid, *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution* 6–7 (Feb. 2009), Vera Institute of Justice, available at https://www.vera.org/publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution.

[18] Kimberly M. Foxx, *Cook County State's Attorney, Data Report* (Oct. 2017), available at https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao-data-report-oct-2017.pdf.

[19] *See* David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. Davis L. Rev. Online 25, 30 (2017) (advising newly elected state prosecutors to "evaluate the attorneys in your office in part based on how scrupulous they are in honoring constitutional rights").

[20] Cindy Chang, *LAPD Awards Officers for Bravery and for Using Restraint During Police Encounters*, L.A. Times (Sept. 28, 2017, 9:05 PM), http://www.latimes.com/local/lanow/la-me-lapd-valor-awards-20170927-story.html.

[21] Dan Satterberg & Ron Wright, *Prosecutors Must Learn to Listen to Critics and Communities*, Seattle Times (Oct. 26, 2016), https://www.seattletimes.com/opinion/prosecutors-must-learn-to-listen-to-critics-and-communities.

[22] Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2017).

[23] Prosecutors need not wait till the end of a defendant's sentence to think about collateral consequences. *See* NYU Center on the Administration of Criminal Law, Disrupting the Cycle: Reimaging the Prosecutor's Role in Reentry 31–32 (2017) (discussing how charging decisions can lead to the suspension of occupational and driver's licenses, the loss of public housing or education benefits, and deportation), available at http://www.law.nyu.edu/sites/default/files/upload_documents/CACL%20Report.pdf.

[24] American Bar Association, Criminal Justice Section, Criminal Justice Standards for the Prosecution Function (4th ed. 2015) 3 -1.2(d), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

[25] NDAA Standards 1 -1.2, *supra* note 8.

[26] Kim K. Ogg, Harris County District Attorney, *Community Action Plan: Bail Reform* 2 (2017), available at https://app.dao.hctx.net/sites/default/files/2017-10/Bail%20Responses%20HCDAO%202017%20CAP_0.pdf.

[27] National Association of Assistant United States Attorneys, *The Dangerous Myth of Drug Sentencing "Reform"* (July 2015), at https://www.naausa.org/site/index.php/resources/white-papers/90-jul-2015-dangerous-myths-of-drug-sentencing-reform/file.