

# THE PROSECUTOR'S ETHICAL DUTY TO END MASS INCARCERATION

*Angela J. Davis\**

## I. INTRODUCTION

Of the many crises in our criminal justice system, none is more critical than the problem of mass incarceration. The United States has the highest incarceration rate in the world, with over 2.2 million people in prison or jail and 4.7 million on probation and parole.<sup>1</sup> Making up only five percent of the world's population, the United States incarcerates more than twenty percent of the world's prisoners.<sup>2</sup>

Over ten years ago, Justice Anthony Kennedy gave a major address at the American Bar Association ("ABA") Annual Meeting in which he decried the overuse of incarceration and the harsh penalties that result in extraordinarily lengthy prison terms. According to Justice Kennedy, "[o]ur resources are misspent, our punishments too severe, our sentences too long."<sup>3</sup> He went on to say, "I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."<sup>4</sup> Justice Kennedy urged the bar to come up with solutions:

In seeking to improve our corrections system, the Bar can use the full diversity of its talents. Those of you in civil practice who have expertise in coordinating groups, finding evidence, and influencing government policies have great potential to help find more just solutions and more humane policies for those who are the least

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\* Angela J. Davis is a Professor of Law at American University Washington College of Law and a former Director of the Public Defender Service for the District of Columbia. She thanks Shawnta Albro and Layla Medina for their excellent research assistance.

1. NICOLE D. PORTER, SENTENCING PROJECT, THE STATE OF SENTENCING 2014: DEVELOPMENTS IN POLICY AND PRACTICE 1 (2015).

2. *The Prison Crisis*, ACLU, <https://www.aclu.org/prison-crisis> (last visited July 24, 2016).

3. Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting 4 (Aug. 9, 2003).

4. *Id.*

deserving of our citizens, but citizens nonetheless. A decent and free society, founded in respect for the individual, ought not to run a system with a sign at the entrance for inmates saying, “Abandon Hope, All Ye Who Enter Here.”<sup>5</sup>

More recently, former Attorney General Eric Holder made criminal justice reform one of his highest priorities. From the beginning of his tenure as Attorney General in 2009, when he announced a review of the U.S. Department of Justice (“Justice Department”) charging and sentencing policies, to his farewell speech before he stepped down in 2015, Holder consistently spoke out against harsh sentencing policies resulting in the nation’s extraordinarily high prison population and unwarranted racial disparities.<sup>6</sup> Similar to Justice Kennedy, he addressed the ABA stating that “[t]oo many people go to too many prisons for far too long and for no truly good law enforcement reason”<sup>7</sup> before going on to announce sweeping reforms in the federal system.<sup>8</sup>

Perhaps, the strongest evidence that the prison population has reached a point of crisis is the recent effort of conservative and liberal policymakers to pursue criminal justice reform. In an unusual showing of bipartisanship, republican and democratic legislators have formed a coalition to pass legislation that would lessen penalties for some crimes, with the goal of reducing the prison population.<sup>9</sup> Congressmen as far apart on most issues as Senator Patrick Leahy and Senator Rand Paul have worked together to propose bipartisan legislation to reduce lengthy sentences for many federal crimes.<sup>10</sup>

This Article argues that prosecutors have an ethical duty to take action that significantly reduces the incarceration rate in the United States.<sup>11</sup> Reducing mass incarceration will require a multifaceted approach, but prosecutors are uniquely situated to have the greatest and most immediate impact on this problem because of their vast discretion and power. Part II examines the criminal justice policies, practices, and

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5. *Id.* at 7.

6. See Angela J. Davis, *Eric Holder Transformed the Attorney General into an Advocate for the Poor*, NEW REPUBLIC (Sept. 26, 2015), <https://newrepublic.com/article/119616/eric-holders-criminal-justice-legacy>.

7. Eric Holder, U.S. Att’y Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013).

8. *See id.*

9. Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

10. See Rand Paul & Patrick Leahy, *Join Us to Do Away with Mandatory Minimums*, U.S. NEWS (Aug. 14, 2013, 5:40 PM), <http://www.usnews.com/debate-club/is-eric-holder-making-a-good-move-on-mandatory-minimums/rand-paul-and-patrick-leahy-congress-is-read-to-do-away-with-mandatory-minimums>.

11. *See infra* Part IV.

laws that produced the current crisis.<sup>12</sup> Part III discusses the power and discretion of prosecutors and how their charging and plea bargaining practices have contributed to the crisis of mass incarceration.<sup>13</sup> Part IV argues that prosecutors have an ethical duty to take action to significantly reduce the incarceration rate.<sup>14</sup> Part V describes two projects that prosecutors should implement and support: diversion programs for all nonviolent felonies and clemency programs for prisoners who no longer pose a danger to society.<sup>15</sup>

## II. THE CRISIS OF MASS INCARCERATION

With 2.2 million people in America's prisons and jails, the United States has the dubious distinction of having the highest incarceration rate in the world, which is five to eight times greater than all other liberal democracies in the world.<sup>16</sup> The number of federal prisoners alone has grown by eight hundred percent during the past three decades.<sup>17</sup> There are several reasons for this drastic increase in the incarceration rate, including the war on drugs, the passage of harsh sentencing guidelines, and numerous mandatory minimum sentencing laws at the federal and state level.

During the 1980s, the Reagan administration declared a war on drugs.<sup>18</sup> Nancy Reagan introduced her "Just Say No" campaign, and the administration launched a law enforcement strategy that resulted in an exponential increase in federal prisoners and unprecedented racial disparities in the prison population.<sup>19</sup> In 1982, Congress authorized twelve new regional drug task forces that included over one thousand new FBI and DEA agents and federal prosecutors.<sup>20</sup> Federal drug prosecutions increased by ninety-nine percent between 1982 and 1988.<sup>21</sup>

Congress passed harsh sentencing laws that drastically increased the penalties for a number of drug offenses. These laws included mandatory minimum terms with no possibility of release before the

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12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

16. MARC MAUER, SENTENCING PROJECT, STATEMENT TO THE SENATE JUDICIARY COMMITTEE ON "THE STATE OF CIVIL AND HUMAN RIGHTS IN THE UNITED STATES" 1 (2014), [http://www.sentencingproject.org/wp-content/uploads/2015/11/rd\\_Statement\\_for\\_SJC\\_Hearing\\_on\\_Civil\\_and\\_Human\\_Rights\\_in\\_the\\_U.S.\\_Dec\\_2014.pdf](http://www.sentencingproject.org/wp-content/uploads/2015/11/rd_Statement_for_SJC_Hearing_on_Civil_and_Human_Rights_in_the_U.S._Dec_2014.pdf).

17. *Id.*

18. *See* MARC MAUER, RACE TO INCARCERATE 60 (2d ed. 2006).

19. *See id.* at 60-61.

20. *Id.* at 61.

21. *Id.*

minimum term is completed.<sup>22</sup> Judges are required to sentence any person convicted of one of these crimes to at least the mandatory term, regardless of the particular circumstances of the crime or the defendant's criminal history.<sup>23</sup> Consequently, first-time offenders and individuals who played a minor role in the commission of the offense have been and continue to be sentenced to long prison terms.<sup>24</sup>

One factor that contributed to the passage of these laws was the emergence of crack cocaine. This inexpensive form of cocaine was marketed widely in low-income, predominantly African American neighborhoods in the inner cities.<sup>25</sup> The media reported and perpetuated information about crack cocaine that ultimately was proven to be false. Crack was perceived to be a much more dangerous drug than powder cocaine, leading to reports that the children of users of crack—so-called “crack babies”—would develop severe mental and physical disabilities.<sup>26</sup> It was also reported that crack was more addictive than powder cocaine, and it caused its users to become violent.<sup>27</sup> All these myths were ultimately proven to be false.<sup>28</sup>

In 1986, well-known University of Maryland basketball star Len Bias died of a drug overdose.<sup>29</sup> In the midst of the media frenzy over crack cocaine, it was falsely reported that Bias had died from a crack overdose.<sup>30</sup> Bias was one of the biggest stars in college basketball. The Boston Celtics had drafted him shortly before he died.<sup>31</sup> Congress responded to this high-profile death by quickly passing the Anti-Drug Abuse Act of 1986.<sup>32</sup> This law created five- and ten-year mandatory minimum prison terms for first-time drug dealers.<sup>33</sup> The length of the mandatory minimum term would depend on the type and quantity

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22. *See id.* at 62.

23. *See* KARA GOTSCH, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, “AFTER” THE WAR ON DRUGS: THE FAIR SENTENCING ACT AND THE UNFINISHED DRUG POLICY REFORM AGENDA 2 (2011), [https://www.acslaw.org/sites/default/files/Gotsch\\_-\\_After\\_the\\_War\\_on\\_Drugs\\_0.pdf](https://www.acslaw.org/sites/default/files/Gotsch_-_After_the_War_on_Drugs_0.pdf).

24. *See id.* at 2-3.

25. *Id.* at 3-4.

26. *Crack Babies: Twenty Years Later*, NAT'L PUB. RADIO (May 3, 2010, 1:52 PM), <http://www.npr.org/templates/story/story.php?storyId=126478643>.

27. *Id.*

28. *See* DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 5* (2006) (dispelling all the common myths about crack cocaine); *Crack Babies: Twenty Years Later*, *supra* note 26.

29. VAGINS & MCCURDY, *supra* note 28, at 1.

30. *Id.*

31. *Id.* At the time of Bias's death, the Speaker of the House of Representatives was Tip O'Neill, who was from Boston. MAUER, *supra* note 18, at 62.

32. *See* VAGINS & MCCURDY, *supra* note 28, at 1.

33. *Id.* at 2.

of the drug.<sup>34</sup> The law was passed swiftly, with no reports of its impact on communities or the prison population.<sup>35</sup> Congress even bypassed the committee hearings that ordinarily accompany the passage of legislation.<sup>36</sup>

Most notably, there was no study or evaluation of the propriety of one of the most controversial components of the law—the one hundred to one disparity between the penalties for crack and powder cocaine offenses.<sup>37</sup> Congressmen made conclusory statements about the dangerousness of crack cocaine to justify the penalty disparity.<sup>38</sup> Various congressmen stated that crack led to the commission of more serious crimes, it was more addictive, and young people were more prone to use it.<sup>39</sup> These and other conclusory statements were made without any supporting evidence to justify the stark disparity.<sup>40</sup>

Two years later, Congress passed the Anti-Drug Abuse Act of 1988 that ratcheted up the penalties for drug offenses even more.<sup>41</sup> This law expanded the same mandatory minimum penalties to drug conspiracies and attempts.<sup>42</sup> It also made crack cocaine the only drug with a mandatory minimum penalty for simple possession, even for first-time offenders.<sup>43</sup>

These harsh mandatory minimum sentencing laws were passed around the same time period that Congress took on a major overhaul of federal sentencing with the passage of the Sentencing Reform Act of 1984.<sup>44</sup> This law created the U.S. Sentencing Commission—an independent agency charged with creating sentencing guidelines to establish uniformity in sentencing.<sup>45</sup> Members of both political parties complained that there was too much disparity in the sentences imposed by federal judges. At the time, the general consensus was that guidelines that created a system of determinate sentencing would resolve this

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34. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 110-39 (1995).

35. VAGINS & MCCURDY, *supra* note 28, at 2.

36. Spencer A. Stone, Note, *Federal Drug Sentencing—What Was Congress Smoking? The Uncertain Distinction Between “Cocaine” and “Cocaine Base” in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 315-16 (2007).

37. VAGINS & MCCURDY, *supra* note 28, at 2.

38. Stone, *supra* note 36, at 336-41.

39. *Id.*

40. See VAGINS & MCCURDY, *supra* note 28, at 2.

41. See U.S. SENTENCING COMM'N, *supra* note 34, at 116.

42. *Id.*

43. *Id.*

44. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

45. U.S. SENTENCING COMM'N, *supra* note 34, at 115.

problem.<sup>46</sup> Adopted in 1987, the guidelines were published in a complex 845-page manual, which indicated a narrow range of months within which judges were required to sentence defendants based solely on the offense and the defendant's criminal history.<sup>47</sup>

The federal sentencing guidelines failed to achieve their stated goal. Not only did the disparities continue, but they worsened.<sup>48</sup> The guidelines did not eliminate discretion; they simply transferred it from judges to prosecutors. Federal judges complained that they were required to impose sentences that were unfair.<sup>49</sup> Most of the sentencing ranges were exceptionally high, and there were very few offenses for which probation was permitted.<sup>50</sup> In addition, judges could no longer take into account mitigating circumstances when sentencing an individual. Some made speeches from the bench before sentencing an individual, stating that they did not want to impose a particular sentence but were required to do so by the guidelines.<sup>51</sup>

The federal war on drugs inspired most states to follow suit. Many states passed harsh mandatory minimum sentencing laws—some harsher than the federal laws.<sup>52</sup> Twenty-two states also established sentencing commissions and sentencing guidelines.<sup>53</sup> As a result, the federal and state prison populations exploded.<sup>54</sup>

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46. See U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 8, 13 (1991).

47. See generally U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 1987).

48. See Douglas C. McDonald & Kenneth E. Carlson, *Why Did Racial/Ethnic Sentencing Differences in Federal District Courts Grow Larger Under the Guidelines?*, 6 FED. SENT'G REP. 223, 223 (1994).

49. David G. Savage, *Justices OK Latitude on Sentencing*, L.A. TIMES (Dec. 11, 2007), <http://articles.latimes.com/2007/dec/11/nation/na-scotus11>.

50. See U.S. SENTENCING GUIDELINES MANUAL § 5B1.1 (U.S. SENTENCING COMM'N 2013); *Guide for Users*, 34 GEO. L.J. ANN. REV. CRIM. PRO. 1, 710-13 (2005).

51. See Gary Cohn, *More Judges Balking at Mandatory Drug Sentences They Say the Federal Law Is Unfair. And Some Refuse to Hear Drug Cases*, PHILLY (June 20, 1993), [http://articles.philly.com/1993-06-20/news/25972935\\_1\\_federal-sentencing-laws-drug-cases-drug-sentences](http://articles.philly.com/1993-06-20/news/25972935_1_federal-sentencing-laws-drug-cases-drug-sentences); see also Carrie Johnson & Marisa Peñaloza, *Judge Regrets Harsh Human Toll of Mandatory Minimum Sentences*, NAT'L PUB. RADIO (Dec. 17, 2014, 3:08 PM), <http://www.npr.org/2014/12/16/370991710/judge-regrets-harsh-human-toll-of-mandatory-minimum-sentences> (explaining a federal judge's distaste for mandatory minimum sentences in certain instances).

52. See Gotsch, *supra* note 23, at 2 (noting that Missouri adopted a seventy-five to one sentencing disparity between crack and powder cocaine, and Oklahoma set a six to one quantity-based sentencing disparity that required a ten-year mandatory minimum sentence for possessing five grams of crack cocaine and twenty-eight grams of powder cocaine).

53. See *About NASC*, NAT'L ASS'N SENT'G COMM'NS, <http://thenasc.org/aboutnasc.html> (last visited July 24, 2016).

54. See Gotsch, *supra* note 23, at 3.

In 1994, President Clinton signed the Violent Crime Control and Law Enforcement Act.<sup>55</sup> This law authorized billions of dollars for states to build more prisons contingent upon the states passing so-called “Truth-in-Sentencing” laws, which reduced prisoners’ eligibility for parole.<sup>56</sup> The law also expanded the federal death penalty and created mandatory life sentences for individuals convicted of a third violent felony.<sup>57</sup>

In 2005, the U.S. Supreme Court held that the federal sentencing guidelines were no longer mandatory,<sup>58</sup> and in recent years, there have been efforts to reform the federal and state laws. On the federal level, the effort was led by the Sentencing Commission itself, which issued a series of reports urging crack cocaine sentencing policy reform. The commission was successful in achieving a reduction in the guidelines range for crack offenses in 2007, but the harsh mandatory minimum sentences imposed by Congress remained.<sup>59</sup> Finally, in 2010, the Fair Sentencing Act was passed, reducing the one hundred to one disparity for crack offense to eighteen to one.<sup>60</sup> Subsequent amendments made the law partially retroactive, permitting some defendants to file motions requesting a reduction.<sup>61</sup>

Most recently, a bipartisan group of senators introduced legislation to further reverse the harsh sentencing laws passed during the 1980s. The Sentencing Reform and Corrections Act would grant broad authority to federal judges to exempt a substantial number of nonviolent drug offenders from mandatory minimum prison terms.<sup>62</sup> Other parts of the Act would allow it to apply retroactively for many more prisoners.<sup>63</sup> The Sentencing Commission announced that, ultimately, up to 46,000 of the nation’s 100,000 drug offenders in federal prison may qualify for

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55. Carrie Johnson, *20 Years Later, Parts of Major Crime Bill Viewed as Terrible Mistake*, NAT’L PUB. RADIO (Sept. 12, 2014, 3:32 AM), <http://www.npr.org/2014/09/12/347736999/20-years-later-major-crime-bill-viewed-as-terrible-mistake>.

56. *Fact Sheet: Violent Crime Control and Law Enforcement Act of 1994*, U.S. DEP’T OF JUST., <https://www.ncjrs.gov/txtfiles/bills.txt> (last visited July 24, 2016).

57. *Id.*

58. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

59. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 3, 5, 7 (2015).

60. *Id.* at 7.

61. *See Final Crack Retroactivity Data Report Fair Sentencing Act*, U.S. SENTENCING COMM’N (2014), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final\\_USSC\\_Crack\\_Retro\\_Data\\_Report\\_FSA.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/fair-sentencing-act/Final_USSC_Crack_Retro_Data_Report_FSA.pdf).

62. Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

63. *Id.*; Mike Riggs, *House Judiciary Committee Approves Sentencing Reform and Corrections Act*, FAMILIES AGAINST MANDATORY MINIMUMS (Nov. 18, 2015), <http://famm.org/house-judiciary-committee-approves-sentencing-reform-and-corrections-act>.

early release.<sup>64</sup> Many of the states have been even more proactive than the federal government in reforming sentencing laws. Between 2009 and 2013, forty states took some action to reduce the penalties for drug offenses.<sup>65</sup>

These efforts are promising, but there are still 2.2 million people in the nation's prisons and jails. Despite the Supreme Court's holding in *United States v. Booker*,<sup>66</sup> most federal judges continue to apply the federal sentencing guidelines.<sup>67</sup> Thousands of prisoners sentenced under the harsh federal and state sentencing laws enacted in the 1980s remain in prison—some serving life sentences for nonviolent drug offenses.<sup>68</sup> Even if the latest proposed federal legislation is passed, it will not affect the sentences of these prisoners.

One of the most significant consequences of sentencing guidelines and mandatory minimum sentences was the transfer of discretion and power from judges to prosecutors. Prosecutors already exercised great discretion and power in the criminal justice system, but these sentencing policies increased that power and discretion significantly, leaving no doubt that prosecutors had become the most powerful officials in the criminal justice system. The recent efforts to reduce the prison population do not address the enhanced power of prosecutors. However, the mass incarceration crisis cannot be resolved without a change in prosecutorial practices.

### III. THE PROSECUTOR'S ROLE IN THE MASS INCARCERATION CRISIS

#### A. Charging and Plea Bargaining

Prosecutors have played a significant role in the crisis of mass incarceration. The tough laws that established lengthy and mandatory minimum prison terms gave prosecutors the tools to fill the nation's prisons and jails. None of these laws required prosecutors to charge

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64. See Erik Eckholm, *Thousands Start Life Anew with Early Prison Release*, N.Y. TIMES, Nov. 2, 2015, at A10.

65. Drew Desilver, *Feds May Be Rethinking the Drug War, but States Have Been Leading the Way*, PEW RES. CTR. (Apr. 2, 2014), <http://www.pewresearch.org/fact-tank/2014/04/02/feds-may-be-rethinking-the-drug-war-but-states-have-been-leading-the-way>.

66. 543 U.S. 220, 245 (2005); see also *supra* text accompanying note 58.

67. U.S. SENT'G COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 3, 5 (2012) (noting that the guidelines have continued to significantly influence sentences for most offenses); see also Dan Honold, Note, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. ON LEGIS. 389, 392 (2014).

68. Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 295-96 (2015).



every individual at the highest possible level or even to charge at all, but far too many of them did.<sup>69</sup>

A prosecutor decides whether to charge an individual with a crime and what the charge or charges should be. A police officer may arrest an individual if she has probable cause to believe the individual committed a crime, but she may only recommend that the prosecutor bring charges. The final charging decision belongs solely to the prosecutor.<sup>70</sup>

The prosecutor may charge an individual if she has probable cause to believe that the individual has committed a crime.<sup>71</sup> She may charge the defendant with the crime or crimes recommended by the police or with more or less serious crimes.<sup>72</sup> Or, the prosecutor may forego charges altogether, even if there is probable cause (or even proof beyond a reasonable doubt).<sup>73</sup> The decision to charge or decline charges is totally within the discretion of the prosecutor.<sup>74</sup>

The plea bargaining process is also totally controlled by the prosecutor.<sup>75</sup> As with charges, a prosecutor may offer a plea bargain to a defendant but is not required to do so.<sup>76</sup> A judge may not compel a prosecutor to offer a plea—the decision is made solely by the prosecutor.<sup>77</sup> Since ninety-five percent of all criminal cases are resolved with a guilty plea,<sup>78</sup> the prosecutor's control over charging and plea bargaining decisions gives her the power to control the entire criminal justice system.

When Congress passed the federal sentencing guidelines and mandatory minimum sentencing laws, it increased the power of prosecutors even more. Congress' concern about the discretion that produced disparities in sentences did not result in the elimination of discretion. Instead, discretion was transferred from judges to prosecutors—from judges who imposed sentences in open, public courtrooms to prosecutors who made charging and plea bargaining decisions behind closed doors. The vast discretion that prosecutors

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69. See, e.g., *infra* notes 83-124 and accompanying text.

70. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 23 (2007).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 43.

76. *Id.* at 43-46.

77. *Id.*

78. Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097, 1136 (2004).

previously exercised was enhanced and centralized by guidelines and mandatory minimum sentencing laws.

In the federal system, the charging and plea bargaining decisions are particularly significant. Federal sentencing laws require very lengthy prison terms, and before the *Booker* decision, the guidelines were mandatory.<sup>79</sup> Many crimes carry lengthy mandatory minimum terms in addition to sentences required by the guidelines.<sup>80</sup> A judge was required to impose mandatory minimum terms and could only sentence outside the guidelines if the prosecutor filed a “substantial assistance” motion under section 5K1.1.<sup>81</sup> That section of the guidelines permitted a judge to depart from the guidelines if the prosecutor stated that the defendant had provided “substantial assistance” to the government in the investigation of the criminal behavior of someone else.<sup>82</sup>

Since prosecutors only need meet the low standard of probable cause to bring charges, it is relatively easy for them to “pile on” charges that they may not be able to prove beyond a reasonable doubt at trial. A defendant facing multiple charges with mandatory minimum and lengthy prison terms would, not surprisingly, feel compelled to accept the prosecutor’s offer to plead guilty to one or more of the charges in exchange for the prosecutor’s offer to dismiss the remaining charges. The deal might include an agreement to testify against another defendant to reduce the sentence even more. Defendants who chose to exercise their constitutional right to a jury trial often suffered extremely harsh consequences.

Clarence Aaron was one such defendant. Aaron grew up in a housing project in Mobile, Alabama.<sup>83</sup> Despite growing up in a high crime neighborhood, Aaron managed to avoid the pitfalls and remained crime-free, ultimately enrolling in Southern University.<sup>84</sup> While in college, he made a bad decision. He introduced an old high school friend to a college classmate whose brother was a drug dealer.<sup>85</sup> Aaron was present during a drug transaction and received \$1500 for his role in the

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79. See *supra* notes 55-57 and accompanying text.

80. These are commonly referred to in the Sentencing Guidelines as “Upward Departure Provisions,” in which the crime is of such a nature or committed in such a way as to allow for additional sentencing. See, e.g., Honold, *supra* note 67, at 394-96.

81. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENT’G COMM’N 2013); Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1258 (1994).

82. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1.

83. Clarence Aaron, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/clarence-aaron> (last visited July 24, 2016).

84. *Id.*

85. *Id.*

deal.<sup>86</sup> He was charged with conspiracy to possess a controlled substance with intent to distribute, possession of a controlled substance with the intent to distribute, and attempt to possess a controlled substance with intent to distribute.<sup>87</sup>

Clarence Aaron went to trial and was convicted of all charges. Aaron, a first-time, nonviolent offender, was sentenced to three life sentences without the possibility of parole—just for introducing someone to a drug dealer.<sup>88</sup> Others who played a much more significant role in the drug transaction agreed to plead guilty and testify against Aaron.<sup>89</sup> They all received much more lenient sentences. One co-conspirator who testified that he was a major drug dealer and had made over a million dollars was sentenced to fourteen years but only served seven years and ten months.<sup>90</sup> The high school friend was sentenced to ten years but only served four.<sup>91</sup> The drug kingpin who played the most significant role was sentenced to life, but his sentence was reduced to twenty-four years, and he was expected to be released in 2014.<sup>92</sup> Aaron's role in the drug transaction was the least significant, but he was sentenced to the most time—more time than most violent repeat offenders.<sup>93</sup> President Obama finally commuted his sentence, but not before he had served twenty years in federal prison.<sup>94</sup>

Defendants who accept the prosecutor's plea offers are also often subject to long, unfair sentences. Such was the plight of Kemba Smith. Like Clarence Aaron, Kemba Smith was a college student.<sup>95</sup> She grew up in a middle class home in Richmond, Virginia, before attending Hampton University.<sup>96</sup> Smith met Peter Hall during her sophomore year. Hall was a major drug dealer and eight years older than Smith.<sup>97</sup> Hall brutally beat Smith throughout the relationship, and she tried to leave

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86. Adriano Hrvatin, Comment, *Unconstitutional Exploitation of Delegated Authority: How to Deter Prosecutors from Using "Substantial Assistance" to Defeat the Intent of Federal Sentencing Laws*, 32 GOLDEN GATE U. L. REV. 117, 123 (2002).

87. *United States v. Chisholm*, 73 F.3d 304, 306 (11th Cir. 1996).

88. *See* Hrvatin, *supra* note 86, at 125.

89. *Id.* at 123-24.

90. Jennifer Lawinski, *Locked up for Life, Part One: The Case of Clarence Aaron*, FOX NEWS (Dec. 4, 2008), <http://www.foxnews.com/story/2008/12/04/locked-up-for-life-part-one-case-clarence-aaron.html>.

91. *Id.*

92. *Id.*

93. *See* Adam Serwer, *Obama Commutes Clarence Aaron's Sentence*, MSNBC (Dec. 19, 2013, 4:52 PM), <http://www.msnbc.com/msnbc/obama-rights-decades-old-injustice#49291>.

94. *Id.*

95. *See Kemba Smith*, SENT'G PROJECT, [http://www.sentencingproject.org/detail/feature.cfm?feature\\_id=1](http://www.sentencingproject.org/detail/feature.cfm?feature_id=1) (last visited July 24, 2016).

96. *Id.*

97. *Id.*

him on several occasions.<sup>98</sup> He insisted that she help him, and she was too afraid to say no.<sup>99</sup> Hall was a dangerous drug dealer who had killed a man he suspected of cooperating with federal investigators.<sup>100</sup> Hall told Smith about the murder and even suggested that he suspected Smith's father might be cooperating with federal agents.<sup>101</sup> Smith was terrified and did whatever Hall told her to do.<sup>102</sup> She ultimately was indicted along with Hall and other alleged co-conspirators.<sup>103</sup>

While some of her co-defendants cut deals with the prosecutors, Smith remained loyal to Hall.<sup>104</sup> By the time she finally decided to cooperate, Hall had been murdered, and the prosecutors were no longer interested in making a deal.<sup>105</sup> On advice of counsel, Smith pled guilty to conspiracy to possess with intent to distribute cocaine, conspiracy to engage in money laundering, and making false statements to a federal agent.<sup>106</sup> Her lawyer told her that the government would ask for a reduced sentence, and she expected a sentence of about five years.<sup>107</sup> Instead, she was sentenced to 24.5 years in prison.<sup>108</sup> She was seven months pregnant at the time.<sup>109</sup> Fortunately for Smith, President Clinton commuted her sentence after she served 6.5 years.<sup>110</sup>

Similar to Clarence Aaron, Kemba Smith was a nonviolent, first-time offender whose role in the drug conspiracy was minor.<sup>111</sup> The prosecutors conceded that she never handled or sold drugs.<sup>112</sup> However, Smith did carry large sums of money for Hall, and she was in a van with him that carried large amounts of cocaine.<sup>113</sup> She also lied to a federal agent.<sup>114</sup> For these actions, she was sentenced to 24.5 years in prison. As in Aaron's case, Smith's alleged co-conspirators were offered much

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98. *Id.*; see also Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 469 (2006).

99. See *Kemba Smith*, *supra* note 95.

100. See Libby Copeland, *Kemba Smith's Hard Time*, WASH. POST (Feb. 13, 2000), <http://www.washingtonpost.com/wp-dyn/articles/A46891-2000Feb13.html>.

101. *Id.*

102. See Levy-Pounds, *supra* note 98, at 468-70.

103. *Id.* at 470-71.

104. See *id.* at 473.

105. *Id.* at 472-73.

106. Copeland, *supra* note 100.

107. *Id.*

108. Levy-Pounds, *supra* note 98, at 470; see also *Kemba Smith*, *supra* note 95.

109. *Kemba Smith*, *supra* note 95.

110. *Id.*

111. *Id.*

112. Levy-Pounds, *supra* note 98, at 470-71.

113. Copeland, *supra* note 100.

114. *Id.*

better deals. Some escaped prosecution altogether because they cooperated with the prosecutors, providing information against other defendants.<sup>115</sup> The woman who helped Hall commit the murder was not charged at all and was put in the witness protection program.<sup>116</sup>

The stories of Clarence Aaron and Kemba Smith are unusual only because they were both fortunate to have their sentences commuted. The sentences they received are not unusual. There are thousands of federal prisoners still serving lengthy sentences for nonviolent drug offenses<sup>117</sup>—many are first offenders.<sup>118</sup> Commutations are rare, and recent efforts to expedite the pardon process have been unsuccessful.<sup>119</sup> As of December 2015, President Obama had only commuted 184 sentences.<sup>120</sup>

The prosecutors in Aaron's and Smith's cases did not have to charge them with offenses that require such lengthy prison terms. They chose to do so, and it is difficult to ascertain why. Neither of them was a major drug dealer or even sold drugs at all. Yet, they were charged with offenses that required more prison time than many violent offenses—in the case of Aaron, life in prison without the possibility of parole.<sup>121</sup> The prosecutors in each case chose to offer deals to other defendants who committed much more serious offenses—deals that permitted many of them to serve relatively short periods of time in prison. In Smith's case, some served no time at all. It is difficult to understand how these decisions comport with fairness and justice.

Legislators pass laws, and prosecutors enforce them. However, they have a responsibility to enforce the laws fairly. Certainly, prosecutors should not blindly prosecute every case to the fullest extent of the law. When legislatures pass laws, they expect prosecutors to use their

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115. *Id.*

116. *Id.*

117. *See* United States v. Garrison, 560 F. Supp. 2d 83, 88 (D. Mass. 2008) (“Indeed, the [Sentencing] Guidelines’ scoring makes no distinction between violent and nonviolent offenses: an addict with a record of drug convictions could have a higher score than another defendant with a murder conviction.”); *Offenses*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_offenses.jsp](https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp) (last updated July 23, 2015) (finding that approximately forty-six percent of inmates are charged with drug offenses).

118. *See* Copeland, *supra* note 100.

119. *See* Peter Baker, *Obama Plans Broader Use of Clemency to Free Nonviolent Drug Offenders*, N.Y. TIMES, July 4, 2015, at A1 (explaining that even though President Obama is expected to commute dozens of sentences, he will barely make a dent in the clemency applications).

120. Melanie Garunay, *President Obama Has Shortened the Sentences of More People than the Last 5 Presidents Combined*, WHITE HOUSE BLOG (July 23, 2015, 1:22 PM), <https://www.whitehouse.gov/blog/2015/12/18/president-obama-has-shortened-sentences-more-people-last-5-presidents-combined>.

121. Lawinski, *supra* note 90.

discretion in deciding when, whom, and how to charge.<sup>122</sup> Prosecutors have vast discretion when making these decisions, and they should exercise that discretion in ways that produce fair and just results.<sup>123</sup> As one former prosecutor described his charging and plea bargaining responsibilities, “‘doing justice’ meant seeking to achieve a ‘just,’ and not necessarily the most harsh, result.”<sup>124</sup> That same former prosecutor stated:

[A] prosecutor may be said to have ‘done justice’ by not bringing criminal charges that were legally supported by the evidence but which would have resulted in disproportionately harsh punishment given such considerations as the insignificance of the wrongdoing, the defendant’s prior exemplary conduct, or the defendant’s frail physical condition.<sup>125</sup>

### B. *The Decision to Pursue Felony Charges*

A confluence of factors contributed to the exponential growth in the prison population during the past few decades.<sup>126</sup> The passage of lengthy and mandatory minimum sentencing laws, the war on drugs, and prosecutors’ charging and plea bargaining decisions all played a role. However, the extent to which each of these factors contributed to prison growth had been unclear until empirical research by Professor John Pfaff shed significant light.

Pfaff’s research demonstrates that prosecutors’ charging decisions were the single most significant factor that caused the increase in prison admissions between 1994 and 2008.<sup>127</sup> Pfaff’s examination of data from the National Center for State Courts and the Bureau of Justice Statistics’ State Court Processing Statistics project determined that the increase in the prison population between 1994 and 2008 was caused primarily by prosecutors’ decisions to bring substantially more felony charges in

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122. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 874 (2004) (“Rarely do statutes include explicit criteria that dictate prosecutors’ decisions. This phenomenon may either be because the legislators have an expectation that prosecutors will fully enforce the law or because the legislators wish to condemn the prohibited conduct for symbolic reasons without forming concrete expectations regarding enforcement.”).

123. See *United States v. Jones*, 983 F.2d 1425, 1433 (7th Cir. 1993) (“[T]he prosecutor’s ethical duty is to seek the fairest rather than necessarily the most severe outcome . . .”).

124. Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 608 (1999).

125. *Id.* at 623 (footnote omitted).

126. See *supra* notes 52-57 and accompanying text.

127. See John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* 13-14 (July 12, 2011) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1884674](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884674).

criminal cases.<sup>128</sup> Pfaff demonstrates that during this period, felony arrests declined by 10.1%, but case filings rose by 37.4% and prison admissions rose by 40%.<sup>129</sup>

Pfaff notes the need for further research to determine why felony filings increased during this period of time. He acknowledges that such research will be difficult because of the lack of transparency in prosecutor offices, referring to them as “empirical black boxes.”<sup>130</sup> Pfaff posits that one possible reason might be the fact that more defendants had longer criminal records during this period of time due to the increase in arrests and convictions between the 1960s and early 1990s.<sup>131</sup> He suggests that prosecutors might be more inclined to bring felony charges against defendants with a lengthier criminal record.<sup>132</sup> This theory may only be confirmed with further research. Regardless of the reasons, the evidence of the dominant role that prosecutors have played in the mass incarceration crisis is significant and supports the suggestion that prosecutors must lead the charge in addressing the problem.

#### IV. THE PROSECUTOR'S ETHICAL DUTY TO PURSUE JUSTICE

All lawyers are required to follow established ethical rules in the practice of law. All states except California have adopted some version of the ABA *Model Rules of Professional Responsibility*.<sup>133</sup> Lawyers who violate any rules may be prosecuted by their state's bar counsel and face discipline or even disbarment.

Rule 3.8, entitled “Special Responsibilities of a Prosecutor,” addresses the ethical duties of prosecutors.<sup>134</sup> The first sentence of the Comment to Rule 3.8 states, “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”<sup>135</sup> The Comment imparts the same sentiment as the Supreme Court's pronouncement in *Berger v. United States*:

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128. *See id.* at 26.

129. *Id.* at 10.

130. *Id.* at 38-39 (stating individual offices and counties can gather data better to determine prosecutorial decision-making).

131. *Id.* at 26 (“If prosecutors are generally more likely to file charges the longer a defendant's record, then filings could rise during a time of declining arrests if the average record length per arrestee is growing.”).

132. *Id.*

133. ABA *Model Rules of Professional Conduct: About the Model Rules*, A.B.A., [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (last visited July 24, 2016).

134. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2014).

135. *Id.* r. 3.8 cmt. 1.

The 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>136</sup>

In addition to the *Model Rules of Professional Responsibility*, the ABA has established criminal justice standards that serve as guidelines for prosecutors, defense attorneys, and policymakers. There are separate standards for defense attorneys and prosecutors. The standards are aspirational, and lawyers are not disciplined or sanctioned in any way if they do not follow them. The standards are consistent with the *Model Rules of Professional Responsibility* but provide guidance on a much wider range of issues.

The same responsibility provided by the Comment to Rule 3.8 is established under Standard 3-1.2(b) of the *ABA Standards for Criminal Justice: Prosecution and Defense Function*—the duty of prosecutors to do justice—which states that “[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”<sup>137</sup> Standard 3-1.2(b) continues, “[t]he 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>138</sup> Standard 3-1.2(f) states as follows:

The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. 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.<sup>139</sup>

The Comment to Rule 3.8 and Standard 3-1.2 together charge prosecutors with serving as both ministers and administrators of justice. In his article, *(Ad)ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, Professor R. Michael Cassidy discusses the difference between the two. He notes that the use of the word “administrator” in the Prosecution Function Standards “is meaningful

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136. 295 U.S. 78, 88 (1935).

137. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-1.2(b) (4th ed. 2015).

138. *Id.*

139. *Id.* Standard 3-1.2(f).



and highlights the difference between pursuing justice in individual cases as a litigator and pursuing the public interest by promoting a just system as a government official.”<sup>140</sup>

Numerous scholars have written about the prosecutor's role as a minister of justice in a variety of contexts.<sup>141</sup> The consistent theme is that the prosecutor has a much broader duty than her role in the adversarial system where she represents the government in criminal cases, and that duty is to assure that justice is done—both in individual cases and in the criminal justice system as a whole. The Comment to Rule 3.8, the Prosecution Function Standards, and the Supreme Court make it clear that prosecutors should not just seek convictions but should pursue the broader goal of justice. Sometimes it is just to seek a conviction, but sometimes it is not. The language in Standard 3.1-2(b) indicating that prosecutors should exercise their discretion and not pursue criminal charges in appropriate cases is instructive, as is the language in Standard 3.1-2(f) urging prosecutors to consider the broader goals of the criminal justice system, seek reform, and improve the administration of justice.

#### V. ENDING MASS INCARCERATION: TWO PROPOSALS

Cassidy, a former prosecutor, argues in *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform* that prosecutors have an ethical duty to reform the criminal justice system as both ministers and administrators of justice.<sup>142</sup> He proposes that prosecutors “oppose mandatory sentences for all but the most serious, violent,

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140. R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 994 (2014).

141. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 296-97, 302, 313 (2013) (presenting the idea that the criminal justice system is biased because of the prosecutor's discretion); Bennett L. Gershman, *The Prosecutor as a "Minister of Justice,"* 60 N.Y. ST. B.J. 8, 8 (1988) (stating that prosecutors are on top of the world and their powers are constantly reinforced by legislators and the courts); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 47-58 (2009) (explaining how the minister of justice theory of the American prosecutor translates into post-conviction work); Eli Paul Mazur, Note, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333, 1355-60 (2002) (arguing that prosecutors as ministers of justice breach their ethical duties when they engage in implicit plea bargaining because it renders the defendant's procedural safeguards ineffective).

142. Cassidy, *supra* note 140, at 995 (differentiating both roles, Cassidy states that “as an advocate (*minister*), a prosecutor must temper zeal with a fidelity to truth and a commitment to fair play,” and “as a leader/governor (*administrator*), a prosecutor must be guided by the public interest in promoting a fair, reliable and efficient criminal justice system worthy of confidence and respect”).

offenses.<sup>143</sup> Cassidy also argues that prosecutors should implement internal policies and guidelines in their offices to assure the fair and even-handed exercise of discretion in the plea-bargaining process and more thoughtful charging decisions.<sup>144</sup>

Cassidy argues that mandatory minimum sentences for nonviolent offenses should be repealed because they are costly, compel guilty pleas, encourage recidivism, and are implemented in a racially discriminatory way.<sup>145</sup> His arguments are persuasive, and his suggestion that prosecutors join the advocacy movement in their role as administrators of justice is an important one. Prosecutors are uniquely situated to persuade legislators of the ineffectiveness and unfairness of these laws.

Cassidy's second proposal is not as persuasive. He acknowledges that the fight to end mandatory minimum sentences will be difficult and argues that in the meantime, prosecutors should implement and publish guidelines that would govern when line prosecutors might dismiss or reduce charges that carry mandatory minimums.<sup>146</sup> Prosecutors would be required to submit requests to reduce or dismiss these charges to a review committee.<sup>147</sup> The goal of this internal regulation would be to assure the fair and equitable exercise of discretion.<sup>148</sup>

Cassidy's guidelines proposal, if implemented consistently, might result in a more equitable process, but it is difficult to see how it would reduce mandatory minimum sentences. He argues that requiring prosecutors to go through a committee and get permission to reduce or dismiss mandatory charges would encourage them to be more thoughtful at the charging stage of the process.<sup>149</sup> In other words, if prosecutors knew that they would be required to go through this process to reduce or dismiss these charges, they would be more restrained in bringing them in the first place. This argument is speculative at best, and the proposal is quite a circuitous route to more reasonable charging decisions. In light of Pfaff's research revealing the impact of prosecutors' felony charging decisions on the prison population,<sup>150</sup> more direct and impactful action by prosecutors is necessary.

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143. *Id.* at 999.

144. *Id.* at 1010-11.

145. *Id.* at 997-1010.

146. *Id.* at 1013.

147. *Id.*

148. *Id.* at 1013-14 (predicting that this practice will make prosecutors think twice before charging a crime with a mandatory minimum sentence because they will have to seek approval from the reviewing committee to dismiss the case).

149. *Id.* at 1014.

150. *See supra* text accompanying notes 126-32.

A prosecutor has an ethical duty to seek justice and improve and reform the administration of the criminal justice system. That duty could be fulfilled by working to reduce mass incarceration through the expanded use of diversion and clemency programs. These two proposals could bring about a direct and substantial reduction in the prison population without posting a threat to public safety.

#### A. Expanded Use of Diversion

State prosecutors should expand existing diversion programs to include all misdemeanors and all nonviolent felonies.<sup>151</sup> Currently, most prosecutor offices have diversion programs for first-time offenders charged with minor misdemeanors.<sup>152</sup> These diversion programs offer defendants the opportunity to have their charges dismissed if they meet certain conditions within a certain time period.<sup>153</sup> For example, they might be required to complete a drug or alcohol program, do community service, pay restitution, or enroll in an education or employment program.<sup>154</sup> Upon successful completion of the program or other conditions, the prosecutor dismisses the charges.<sup>155</sup> These diversion programs are very beneficial in that the defendant avoids a criminal conviction and all its collateral consequences. Most prosecutor offices, however, only offer diversion for very minor offenses (possession of marijuana, petty theft, littering, etc.).<sup>156</sup> These programs have been in existence for decades.<sup>157</sup> Their continued use serves an important purpose but they do not address the crisis of mass incarceration.

Since about half of all prisoners are serving time for nonviolent offenses, expanding diversion programs to include this category of offenses would significantly reduce the number of people going to prison.<sup>158</sup> The devastating effects and financial and human costs of mass

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151. Although this article addresses the implementation of these proposals on the state level, they could be implemented on the federal level as well.

152. See *A National Survey of Criminal Justice Diversion Programs and Initiatives*, CTR. FOR HEALTH & JUST. 17, 20-21, 28 (Dec. 2013), [http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report\\_web.pdf](http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversion%20Report_web.pdf).

153. See *id.* at 17.

154. See, e.g., *id.* at 25 (listing the requirements of Vermont's diversion program).

155. *Id.* at 20, 23 ("Successful completion results in a dismissal or reduction of charges.").

156. *Id.* at 28.

157. See *id.* at 17.

158. See John Pfaff, *For True Penal Reform, Focus on the Violent Offenders*, WASH. POST (July 26, 2015), [https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7\\_story.html](https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html) (quoting a "key point" in a speech by President Obama, Pfaff provides, in pertinent part, that "[o]ver the last few decades, we've also locked up more and more nonviolent drug offenders than ever before, for longer than ever before," which "is the real reason our prison population is so high").

incarceration demand a comprehensive, impactful solution. Prosecutors should implement policies that result in a term of imprisonment for those who threaten the safety of others, while seeking alternatives to incarceration for others who break the law.

Every defendant charged with a misdemeanor or nonviolent felony would not receive diversion. Prosecutors would set eligibility criteria and conditions that would have to be fulfilled before the case is dismissed. For example, it would be reasonable to exclude defendants with a violent criminal record or extensive criminal history. However, restricting the programs to first offenders only may not be reasonable, especially when one considers the effects of previous arrest and charging policies, racial profiling, and other practices. Once criteria are set, participants would be required to fulfill conditions based on individualized assessments. For example, defendants with substance abuse problems would be required to complete rehabilitative programs. Those with education or mental health needs would complete appropriate programs. Defendants charged with theft or other property crimes might be required to make restitution to their victims or do some form of community service. Defendants who fail to meet the required conditions would be discharged from the program and prosecuted in accordance with normal office policies.

Some prosecutor offices offer diversion to individuals charged with felonies, but the requirements are usually very restrictive.<sup>159</sup> One prosecutor, who has successfully used diversion in a wide range of felony cases, is John Chisholm, the District Attorney for Milwaukee County, Wisconsin.<sup>160</sup> Chisholm implemented an early intervention program that results in either dismissal or reduction of charges for those who successfully comply with prescribed conditions.<sup>161</sup> Chisholm does not offer the program to defendants charged with very violent offenses,

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159. See Daniel Hurst, *Pretrial Diversion in Kentucky*, HURST & HURST (Mar. 4, 2014), <http://www.hurstandhurstlaw.com/pretrial-diversion-in-kentucky> (citing the requirements of the diversion programs for Class D felonies in Kentucky, which excludes offenders who have received a felony conviction or have been put on probation in ten years prior to the offense); see also *Felony Pre-Trial Intervention*, ST. ATTY'S OFFICE FLA. (May 26, 2016), <http://sao17.state.fl.us/felony-pti.html> (explaining that, in Florida, a first-time, third-degree felony offender can qualify for this program); Mark Mitchell, *The Choice Is Yours: An Innovative Alternative-to-Incarceration Program in Philadelphia*, PHILA. SOC. INNOVATIONS J. (Sept. 2011), <http://philasocialinnovations.org/journal/articles/featured-social-innovations/405-the-mary-howard-health-center-meeting-the-health-care-needs-of-the-chronically-homeless-in-philadelphia-sp-3199?showall=&limitstart> (explaining a program that bases eligibility on age, violent offenses in historical or present charges, arrest history, and outstanding warrants).

160. Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER, May 11, 2015, at 24, 24-25.

161. *Id.* at 28.

but it is not restricted to misdemeanor offenders.<sup>162</sup> Eligibility is determined by a detailed assessment of each defendant that includes an examination of his criminal record, background, lifestyle, and other relevant factors.<sup>163</sup> Individuals admitted to the program are closely supervised and required to participate in programs that address their individual needs.<sup>164</sup> Chisholm's efforts have resulted in a significant reduction in misdemeanor prosecutions.<sup>165</sup>

### B. Support for Clemency Programs

The President of the United States and the governors of each state have the power to grant clemency to prisoners.<sup>166</sup> There are different forms of clemency. A pardon involves restoration of an offender's civil rights, such as the right to vote.<sup>167</sup> A commutation of a sentence involves reducing the term of a sentence—to either time served or some reduced amount of time.<sup>168</sup> A commutation does not remove a conviction from a person's record.<sup>169</sup>

Expanded use of diversion is a forward looking policy with the potential to reduce the number of individuals going to prison, but diversion cannot provide relief for the thousands of prisoners currently serving excessive prison sentences. Any effort to achieve a meaningful reduction of the current prison population should involve clemency in appropriate cases. President Obama has used his clemency power to release a small number of nonviolent offenders who had already served many years of their excessive sentences, but the criteria for clemency established by the Justice Department excludes a significant number of federal prisoners who may deserve clemency.<sup>170</sup> For example, priority consideration is given only to prisoners who have been convicted of

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162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.* at 32 (explaining that Chisholm's program resulted in prosecutions dropping from nine hundred thousand to fifty-two hundred).

166. Kaye Foley, *Executive Clemency Explained*, YAHOO! (July 17, 2015), <https://www.yahoo.com/katiecouric/executive-clemency-commutations-pardons-on-july-124350231873.html>; Daniel Engber, *How Does a Governor Grant Clemency?*, SLATE (Nov. 30, 2005, 6:08 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2005/11/how\\_does\\_a\\_governor\\_grant\\_clemency.html](http://www.slate.com/articles/news_and_politics/explainer/2005/11/how_does_a_governor_grant_clemency.html).

167. Foley, *supra* note 166.

168. *Id.*

169. *Id.*

170. Matt Ford, *The Limits of Obama's Clemency*, ATLANTIC (Dec. 18, 2014), <http://www.theatlantic.com/politics/archive/2014/12/the-limits-of-obama-mercy/383870>.

low-level, nonviolent offenses and who have already served at least ten years in prison.<sup>171</sup>

Many prisoners serving excessive sentences are nonviolent offenders, but over half of current state prisoners are serving time for violent offenses,<sup>172</sup> and some do not pose a danger to society. For example, there are some offenses that are technically categorized as violent offenses that do not involve violent behavior. Unarmed burglary is classified as a violent crime in some jurisdictions even though the crime does not involve physical harm or danger to another person.<sup>173</sup> In addition, there may be prisoners who were convicted of violent offenses but did not engage in violent behavior, such as an accomplice to a robbery who acted as a lookout. Finally, even individuals who were directly involved in a violent crime may no longer pose a threat because they are elderly or ill or because they have served a substantial period of time in prison with an exceptional record demonstrating that they are rehabilitated. Clemency should not be limited to individuals convicted of low-level, nonviolent offenses.

Prosecutors should establish clemency units in their offices to support clemency for prisoners convicted of nonviolent offenses and for prisoners convicted of violent offenses who have demonstrated they do not pose a danger to society. Prosecutors should become advocates for an expanded use of the clemency power, including direct advocacy with governors. They should support reasonable criteria for commutations and pardons, and the process should involve individual assessments of prisoners rather than automatically excluding large categories of prisoners based solely on the offense. Factors to consider should include the nature of the offense, the extent of the prisoner's involvement in the crime, his criminal record, his behavior in prison, and other relevant factors.

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171. See *Clemency Initiative*, U.S. DEP'T OF JUST., <http://www.justice.gov/pardon/clemency-initiative> (last visited July 24, 2016) (listing factors that make a person eligible for clemency).

172. See Pfaff, *supra* note 159 (finding that, since 1990, sixty percent of state prison populations has come from locking up violent offenders, as opposed to seventeen percent who are serving time for nonviolent drug offenses).

173. See RICHARD F. CULP ET AL., IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998-2007, at 55-56 (2015), <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf> (finding that California, Pennsylvania, and North Carolina apply the classification of aggravated burglaries not based on being armed or causing injury but solely on structure type and occupancy).

## VI. CONCLUSION

As ministers of justice, prosecutors have an ethical duty to take action to correct injustices in the criminal justice system.<sup>174</sup> There is no greater injustice than the excessive and unwarranted incarceration of millions of individuals that has produced the crisis of mass incarceration in the United States. Prosecutors have the power and discretion to implement practices and policies that can reduce the prison population in significant ways, namely by expanding the use of diversion and supporting a more expansive use of the clemency power. Prosecutors have played a significant role in creating the crisis of mass incarceration, and they have an ethical duty to do whatever they can to fix it.

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174. *See supra* Part IV.