

(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform

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This Article stakes out an ethical argument in favor of prosecutorial leadership on sentencing reform. Prosecutors have a duty as “ministers of justice” to go beyond seeking appropriate conviction and punishment in individual cases, and to think about the delivery of criminal justice on a systemic level—promoting criminal justice policies that further broader societal ends. While other authors have explored the tensions between a prosecutor’s adversarial duties and “minister of justice” role in the context of specific litigation, few have explored what it means to be an “administer” of justice in the wider political arena. The author sets forth a new construct of what is required for a prosecutor to be a neutral, nonpartisan “administer of justice” in her legislative and public advocacy activities.

Applying this paradigm to the ongoing national debate about sentencing reform, the author argues that a prosecutor’s administrative responsibilities as a leader in the criminal justice establishment and her fiduciary responsibilities as a representative of the sovereign should compel her to join in the effort to repeal mandatory minimum sentencing provisions for most drug and non-violent offenses. Not only are mandatory sentences in most instances inefficacious and unduly coercive, but they allow for an arbitrary and discriminatory application that is essentially unreviewable by courts. The author distinguishes his argument against mandatory minimum penalties from the so-called “Smart on Crime” movement, by grounding a prosecutor’s duty to promote sentencing reform in ethical reasoning as opposed to pragmatic or cost-savings considerations.

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A second important question the author addresses in this Article is how an ethical prosecutor should make plea bargaining decisions in the face of mandatory minimum prison terms that are retained by the legislature. Even with political support from some of this nation's most conscientious prosecutors, state legislatures are unlikely to repeal or cut back on all mandatory minimum sentences. Some mandatory prison terms—for crimes such as murder, repeat offense OUI and aggravated sexual assault—will likely stay on the books notwithstanding current calls for reform and the robust advocacy recommended above. In the second half of this Article, the author addresses the prosecutor's ethical conduct in charging and plea bargaining crimes that carry mandatory prison terms. While there has been substantial legal scholarship to date that has decried the manner in which mandatory minimum penalties have transferred sentencing discretion from judges to prosecutors, beyond that descriptive lament there has been very little attention paid to how exactly prosecutorial discretion might be more meaningfully channeled and constrained. The author argues that prosecutors could mitigate many of the harsh and unjust consequences of mandatory minimum sentences through internal self-regulation; that is, by instituting and publishing clear office policies governing when line prosecutors may dismiss or reduce charges that carry them. He proposes specific guidelines that state prosecutors should adopt to ensure a consistent and even-handed application of mandatory minimum penalties, so that line prosecutors do not abuse the substantial discretion that has been afforded them in the plea bargaining process.

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INTRODUCTION

In 1995, former District Attorney Robert Morgenthau of Manhattan wrote a now-famous editorial in the *New York Times* opposing a death penalty bill then pending before the New York State legislature. With courage and candor, Morgenthau said this about the death penalty:

It exacts a terrible price in dollars, lives and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives. . . . That's why many district attorneys throughout New York State and America oppose it—privately. Fear of political repercussions keeps them from saying so publicly.¹

Notwithstanding Morgenthau's complaint, the New York legislature passed, and the Governor signed, an act authorizing the imposition of the death penalty.² The act remained in effect for the next nine years until the New York Court of Appeals suspended its implementation citing state constitutional infirmities.³

Today, prosecutors across this country face a moral, ethical and political dilemma with respect to mandatory minimum sentences similar to the one they first faced with respect to the death penalty in the latter part of the twentieth century. Should they admit that mandatory minimum sentences have been a failure and advocate for their repeal in favor of more penologically sound sentencing strategies? Or, should they continue their "tough on crime" stance on punishment, because it is both politically expedient and provides them with strategic leverage for plea bargaining in a horribly overburdened criminal justice system?

In this Article, I stake out an ethical argument in favor of prosecutorial leadership on sentencing reform. Prosecutors have a duty as "ministers of justice" to go beyond seeking convictions and legislatively authorized sentences in individual cases, and to think about the delivery of criminal justice on a systemic level, promoting criminal justice policies that further broader societal ends. Specifically, I argue that a prosecutor's administrative responsibilities as a leader in the criminal justice establishment, and her fiduciary responsibilities as a representative of the sovereign, should compel her to join the effort to repeal mandatory minimum sentencing provisions for most drug and nonviolent offenses. Not only are mandatory sentences in most instances unduly coercive and counterproductive, but they also allow

1. Robert Morgenthau, Op-Ed., *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25.

2. Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 1.

3. *People v. LaValle*, 817 N.E.2d 341, 366–67 (N.Y. 2004).

for an arbitrary and discriminatory application that is essentially unreviewable by courts.

I recognize that even with the political support of this nation's prosecutors, state legislatures are unlikely to repeal or cut back on all mandatory minimum sentences. Some mandatory prison terms—for crimes such as murder and repeat violent offenses—will likely stay on the books notwithstanding even the most robust law reform efforts by conscientious prosecutors. Thus, a second question I grapple with in this Article is how an ethical prosecutor should make discretionary charge reduction decisions in the face of mandatory minimum prison terms duly enacted and retained by the legislature. While there has been substantial legal scholarship to date that has decried the manner in which mandatory minimum penalties have transferred sentencing discretion from judges to prosecutors, beyond that descriptive lament there has been very little attention paid to how exactly prosecutorial discretion might be more meaningfully constrained through internal self-regulation and transparency. In this Article I argue that prosecutors can mitigate many of the harsh and unjust consequences of mandatory minimum sentences by instituting and publishing office policies governing when line prosecutors may dismiss or reduce charges that carry them. I also propose and draft specific guidelines that state prosecutors should follow to ensure a consistent and even-handed application of mandatory minimum penalties so that line prosecutors do not abuse the substantial discretion that has been afforded them by the plea bargaining process.

This Article proceeds in three parts. In Part I, I examine the so-called “prison problem” in America, and explain how the rise of mandatory sentencing in the 1980s and 1990s has contributed to our country's alarming and unparalleled incarceration rate. In Part II, I examine the ethical responsibilities of prosecutors under the American Bar Association (“ABA”) *Model Rules of Professional Conduct* and the nonbinding ABA *Criminal Justice Standards*. I shape the contours of a duty that prosecutors owe to their constituents not only to seek just results in individual cases, but also to help shape a criminal justice system that is collectively just and consonant with the public interest: that is, effective at protecting public safety, transparent, consistent and fair. I explain how most mandatory minimum sentences, in practice, are antithetical to each of these overarching systemic goals. I also describe isolated but important instances in recent years where prosecutors in certain states have joined in the fight to repeal or limit mandatory sentencing schemes, and I examine the political, demographic and social conditions that have made such leadership possible. In Part III, I

propose a form of internal self-regulation for prosecutors interested in promoting consistency and avoiding arbitrary and discriminatory application of mandatory sentences—urging them to set up a committee in their jurisdictions to review and approve (against established criteria) any dismissals of charges involving mandatory sentences. I also propose a role for judges to play in promoting such prosecutorial self-regulation by insisting on a written statement of reasons for dismissal of charges carrying a mandatory minimum penalty during the plea bargaining process.

My focus for reform will be on state prosecutors and state sentencing systems. While attention to federal sentencing practices seems to be a deeply ingrained habit of criminal law scholars, the federal system accounts for only 6% of felony convictions in the United States each year.⁴ With regards to criminal justice—or injustice—in America, the rubber meets the road in state courts, because that is where the vast majority of property, vice and violent crimes are prosecuted. Moreover, federal prosecutors are already regulated in part by the plea bargaining guidelines of the *United States Attorneys' Manual*, by the adoption of substantial cooperation procedures (so-called “5k1.1 Committees”) in district offices and by the federal safety valve, which allows a United States District Court judge to deviate from mandatory sentences in limited circumstances for a small number of low-level drug crimes.⁵ I will draw on some of these constraints on federal prosecutorial discretion in Part III of the Article, where I describe the wisdom and contours of proposed state-level reforms.

I. MANDATORY MINIMUM SENTENCES AND THE PROBLEM OF MASS INCARCERATION

The United States imprisons more people than any other country, including China (a nation with four times our population).⁶ At the end of 2012, the United States was incarcerating a total of 2.2 million people in local, state and federal jails and prisons.⁷ To put this

4. Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1353 (2005).

5. 18 U.S.C. § 3553(f) (2012). For a proposal to broaden the federal safety valve, see S. 619, 113th Cong. (2013).

6. *United States v. Bannister*, 786 F. Supp. 2d 617, 650 (E.D.N.Y. 2011) (citing JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION 3 (2007)).

7. According to the Bureau of Justice Statistics, as of 2012 there were over 1.5 million people incarcerated in our nation's state and federal prisons. *Prisoners in 2012 – Advance Counts*, BUREAU JUST. STAT. (July 25, 2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4737>. An

“incarceration explosion”⁸ in even more dramatic relief, the United States comprises 5% of the world’s population, but houses 25% of its prisoners.⁹

Our three-decade-long incarceration spiral¹⁰ has coincided with the disturbing proliferation of mandatory minimum penalties enacted by Congress and state legislatures. Every state and the federal government now has at least one criminal offense on the books carrying a mandatory minimum penalty,¹¹ and most have many more. In the federal system, there are now over 170 federal crimes that carry mandatory sentences, an increase of 78% since 1991.¹² At the state level, common crimes carrying mandatory sentences include: drug trafficking (distribution of or possession with intent to distribute narcotics above a certain weight);¹³ distribution of narcotics within a school zone;¹⁴ assault on an elderly, blind or disabled person;¹⁵ possession or use of a firearm during the commission of a felony;¹⁶ repeat offender operating under the influence (“OUI”);¹⁷ committing designated crimes while masked;¹⁸ commission of a felony at the direction of or in affiliation with a gang;¹⁹ carjacking;²⁰ certain hate crimes;²¹ vehicular manslaughter;²² rape;²³

additional approximately 740,000 were housed in local jails and houses of correction. *Jail Inmates at Midyear 2012 – Statistical Tables*, BUREAU JUST. STAT. (May 22, 2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4655>.

8. *Bannister*, 786 F. Supp. 2d at 649 (internal quotations omitted).

9. John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1087 (2013); Richard A. Viguerie, Op-Ed., *A Conservative Case for Prison Reform*, N.Y. TIMES, June 9, 2013, at A23.

10. Since 1980, the size of the American prison population has more than quadrupled. Viguerie, *supra* note 9. Over this same period, the federal prison population has increased by an even more alarming 790%. NATHAN JAMES, CONG. RESEARCH SERV., THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 51 (2013).

11. Rachel E. Barkow, *Administering Crime*, 52 UCLA. L. REV. 715, 748 (2005); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion*, 48 J.L. & ECON. 591, 591 (2005).

12. William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 331 (2011).

13. *See, e.g.*, FLA. STAT. § 893.135 (2013); 18 PA. CONS. STAT. § 7508 (2013).

14. *See, e.g.*, MASS. GEN. LAWS ch. 94C, § 32J (2013); TENN. CODE ANN. § 39-17-432 (2013).

15. *See, e.g.*, CONN. GEN. STAT. § 53a-60c (2013); HAW. REV. STAT. § 706-660.2 (2013).

16. *See, e.g.*, FLA. STAT. § 775.087; MINN. STAT. § 609.11(5)(b) (2013).

17. *See, e.g.*, IOWA CODE § 321J.2 (2013); ME. REV. STAT. tit. 29-A, § 2411 (2013).

18. *See, e.g.*, MASS. GEN. LAWS ch. 265, § 17; OKLA. STAT. tit. 21, § 1303 (2013).

19. *See, e.g.*, CAL. PENAL CODE § 186.22 (West 2013); MINN. STAT. § 609.229.

20. *See, e.g.*, CONN. GEN. STAT. § 53a-136a; VA. CODE ANN. § 18.2-58.1 (2013).

21. *See, e.g.*, N.Y. PENAL LAW § 485.10(4) (McKinney 2010).

22. *See, e.g.*, MASS. GEN. LAWS ch. 265, § 13 ½; N.J. STAT. ANN. § 2C:11-5 (West 2013).

23. *See, e.g.*, OKLA. STAT. tit. 21, § 1115; VA. CODE ANN. § 18.2-61.

certain sexual offenses involving minors;²⁴ so-called “three strikes and you’re out” punishments for habitual offenders;²⁵ and murder.²⁶ This list certainly is not exhaustive.

Legislatures began to enact mandatory minimum penalties more routinely in the early 1980s, in order to counteract widely disparate sentences handed out by judges and to promote uniformity in sentencing.²⁷ Some scholars thought that mandatory minimum sentences would increase the general deterrent effect of criminal laws by sending a strong message to would-be offenders about the likelihood of imprisonment upon apprehension.²⁸ Other commentators thought that these sentences would promote public safety by specifically incapacitating some of our nation’s most dangerous criminals.²⁹ Uniformity, deterrence and incapacitation were thus the most frequently expressed grounds for taking sentencing discretion away from judges in this fashion.³⁰ But a hidden contributing factor was what Philip Pettit terms the “outrage dynamic”: dramatic and highly sensationalized media accounts of some criminals receiving lenient sentences were often followed by renewed “tough on crime” measures by lawmakers.³¹

While it has become popular to blame our current mass incarceration crisis on the “war on drugs” that commenced with the Reagan administration in the 1980s,³² draconian narcotics penalties are not the only source of the problem. The *length* of prison sentences is an often-overlooked piece of the incarceration puzzle,³³ and increased sentence

24. See, e.g., CONN. GEN. STAT. § 53a-70c; IDAHO CODE ANN. § 19-2520G (2013).

25. See, e.g., CAL. PENAL CODE § 667 (West 2013); FLA. STAT. § 775.084 (2013).

26. See e.g., MASS. GEN. LAWS ch. 265, § 2; OR. REV. STAT. § 163.115 (2013).

27. See Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 193 (1993).

28. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–77 (1968); Phil Gramm, *Drugs, Crime and Punishment; Don’t Let Judges Set Crooks Free*, N.Y. TIMES, July 8, 1993, at A19.

29. See, e.g., Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT’G REP. 230, 230 (1992).

30. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 85–88 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Chapter_05.pdf.

31. See Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 BUFF. CRIM. L. REV. 427, 437 (2002).

32. See MICHELLE ALEXANDER, THE NEW JIM CROW 5 (rev. ed. 2012); ERNEST DRUCKER, A PLAGUE OF PRISONS 50–51 (2011).

33. See Kevin R. Reitz, *Don’t Blame Determinacy: U.S. Incarceration Growth has been Driven by other Forces*, 84 TEX. L. REV. 1787, 1799 (2006).

length is a direct product of mandatory minimum sentencing schemes.³⁴ Simply put, more people are being sentenced to prison in the United States as a result of mandatory minimum penalties, and those who are sentenced to prison are staying there longer.³⁵ The drug war was not the *sole* driver of mass incarceration³⁶ because mandatory sentences for weapons offenses, vehicular offenses and certain forms of aggravated assault have also contributed to prison growth. But there is also a subtle way in which the war on drugs has *magnified* our incarceration problem, by allowing more defendants to be treated as habitual offenders as a result of prior drug convictions as opposed to diversions.³⁷ Mandatory sentences for narcotics and weapons offenses have thus worked in tandem with habitual offender laws to fuel our nation's incarceration spiral.

Although mandatory sentences have caused our nation's prison population to explode, they have not achieved the desired goal of sentencing uniformity. These laws have simply shifted sentencing authority to prosecutors,³⁸ who enjoy unfettered discretion to dismiss or reduce a charge carrying a mandatory sentence in exchange for a guilty plea.³⁹ Overlapping criminal codes magnify this enlargement of executive authority because they permit prosecutors to select charges from a broad menu of criminal offenses that may fit the defendant's behavior.⁴⁰ A study by the United States Sentencing Commission found that in about 25% of the cases in the federal system where the arrested

34. *United States v. Bannister*, 786 F. Supp. 2d 617, 650 (E.D.N.Y. 2011).

35. According to a report by MassINC, the average length of stay of incarceration in the United States since 1990 has increased by one-third. BENJAMIN FORMAN & JOHN LARIVÉE, MASSINC, CRIME, COST, AND CONSEQUENCES: IS IT TIME TO GET SMART ON CRIME? 12 (2013).

36. John Pfaff has studied state prison growth between 1980 and 2009, and has concluded that incarcerations for narcotics offenses account for only 21% of prison growth during that period, while violent offenders account for 51% of that growth and property offenders 16%. Pfaff, *supra* note 9, at 1093. While the percentage *change* in incarceration rates for state narcotics offenders dwarfs that for violent and property offenders (the percentage of state prisoners serving time for narcotics offenses has grown by over 1000% between 1980 and 2009), that is because the base rate of incarceration for narcotics offenses was so low in 1980 compared to the other two classes of offense. *Id.*

37. *Id.* at 1096–97.

38. Bjerk, *supra* note 11, at 592.

39. MICHAEL TONRY, SENTENCING MATTERS 147 (1996) (“Prosecutors often avoid application of mandatory sentencing laws simply by filing charges for a different, but roughly comparable offense that is not subject to mandatory sentences.”); see Kyle Graham, *Overcharging*, SANTA CLARA L. DIGITAL COMMONS 4 (Mar. 1, 2013), <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1609&context=facpubs> (discussing the “charge-bargaining” and “overcharging” practices that prosecutors engage in to secure guilty pleas).

40. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (describing how the broad range and overlapping nature of activities criminalized by the legislature shifts power to prosecutors).

offense was covered by a mandatory minimum penalty, the defendant was ultimately tried or sentenced under an alternative statute.⁴¹ Moreover, as I will discuss in Part III, prosecutors tend to circumvent these mandatory minimum laws based on their own preferences or constraints, rather than any transparent assessment of the strengths or weaknesses of the case.⁴² Prosecutorial choices—not legislative preferences—are thus driving sentencing outcomes.⁴³ Because prosecutors can readily bargain around mandatory minimums without stating their reasons and subjecting these reasons to review, mandatory sentencing laws are fostering disparity rather than promoting uniformity.

There is also strong evidence that the second rationale for mandatory sentencing—deterrence—has proven to be a massive failure. At both the federal and the state level, mandatory minimum penalties for drug crimes have proliferated.⁴⁴ But after thirty years of enforcing harsh drug laws, the demand for narcotics in the United States has remained relatively stable, causing many commentators to liken this failed thirty-year experiment to Prohibition.⁴⁵ The overwhelming empirical

41. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 56–58 (1991), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/199108_RtC_Mandatory_Minimum.htm.

42. See Bjerk, *supra* note 11, at 606–08. As I will argue in Part III, *infra*, the considerations that are invisibly guiding a prosecutor's discretion with respect to charge reductions are not presently subject to any real political check. See Marc L. Miller & Ronald F. Wright, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1597–99 (2010) [hereinafter *Accountability Deficit for Prosecutors*].

43. Professors Stuntz and Barkow have argued convincingly that legislatures implicitly tolerate this manipulation of mandatory minimum penalties because the prosecutor's power to coerce guilty pleas reduces the overall cost of convicting criminal defendants. See Barkow, *supra* note 11, at 728; Stuntz, *supra* note 40, at 520.

44. Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 936 (2001). Close to 50% of federal inmates are now serving time for drug offenses. NANCY LA VIGNE & JULIE SAMUELS, URBAN INST., THE GROWTH & INCREASING COST OF THE FEDERAL PRISON SYSTEM: DRIVERS AND POTENTIAL SOLUTIONS 5 (2012), available at <http://www.urban.org/UploadedPDF/412693-The-Growth-and-Increasing-Cost-of-the-Federal-Prison-System.pdf>. Many of these inmates are serving mandatory minimum sentences. See Mark W. Bennett, *How Mandatory Minimums Forced Me to Send More Than 1000 Nonviolent Drug Offenders to Federal Prison*, NATION (Oct. 24, 2012), <http://www.thenation.com/article/170815/how-mandatory-minimums-forced-me-send-more-1000-nonviolent-drug-offenders-federal-pri#>.

45. See, e.g., Hon. Juan R. Torruella, *Déjà Vu: A Federal Judge Revisits the War on Drugs, or Life in a Balloon*, 20 B.U. PUB. INT. L.J. 167, 199 (2011); Grover Norquist, *What Conservatives Are Saying*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/what-conservatives-are-saying> (last visited Aug. 21, 2013) (“Illegal drug use rates are relatively stable, not shrinking. It appears that mandatory minimums have become a sort of poor man's Prohibition: a grossly simplistic and ineffectual government response to a problem that has

evidence suggests that increases in sentence length for drug crimes in this country have not had a significant effect on deterrence.⁴⁶ As will be discussed in Part III, if there is any deterrent value whatsoever to mandatory sentencing that outweighs its high costs and negative effects, it is likely to be limited to the specific deterrent effect of incapacitating a very narrow class of violent offenders.

We may have reached a tipping point. Some signs now suggest that our nation's overemphasis on incarceration—particularly its preference for mandatory minimum sentencing schemes—is starting to erode.⁴⁷ More than a dozen jurisdictions have begun to roll-back certain mandatory minimum sentences, particularly for drug crimes, through a variety of mechanisms,⁴⁸ such as: increasing the quantity of drugs which is necessary to kick in the mandatory penalty,⁴⁹ decreasing the distance necessary to establish the required proximity element of a school zone offense⁵⁰ and providing judges with discretion to deviate from statutory mandates and divert offenders to probation for certain first time narcotics offenses.⁵¹ In those states that have modified their mandatory sentences, however, incremental reform rather than outright repeal has been the dominant theme.⁵² These modest reforms have been motivated by a number of interdependent factors such as the high cost of incarceration,⁵³ a recognition that diversion and treatment may be

been around longer than our government itself.”).

46. See, e.g., Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28–29 (2006) (“Imaginable increases in severity of punishment do not yield significant (if any) marginal deterrent effects. Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence.” (citation omitted)).

47. See Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 26, 2013, at A11 (explaining that many states are decreasing their prison populations by altering sentencing for lower-level drug-related offenses and creating alternatives to prison for these crimes); Nicholas D. Kristof, *Help Thy Neighbor and Go Straight to Prison*, N.Y. TIMES, Aug. 11, 2013, at SR1 (same).

48. See Families Against Mandatory Minimums, *Recent State-Level Reforms to Mandatory Minimum Laws*, FAMM (Feb. 25, 2013), <http://famm.org/Repository/Files/FS%20List%20of%20State%20Reforms%202.25.13.pdf>.

49. See, e.g., Act of Aug. 2, 2012, ch. 192, 2012 Mass. Legis. Serv. (West); Act of July 14, 2012, S.B. 628, §§ 195.222–23, 2012 Mo. Legis. Serv. (West); see also Fair Sentencing Act of 2010, Pub. L. No. 111-220, §§ 2–3, 124 Stat. 2372, 2372 (eliminating the mandatory minimum penalty for possession of crack cocaine and reducing crack cocaine disparity under sentencing guidelines from 100:1 to 18:1).

50. See, e.g., Act of Apr. 20, 2011, ch. 13, 2011 Del. Legis. Serv. (West); Act of Aug. 2, 2012, ch. 192, 2012 Mass. Legis. Serv. (West).

51. See, e.g., Act of June 29, 2011, file 29, 2011 Ohio Legis. Serv. Ann. (West); Act of June 2, 2010, No. 273, § 37, 2010 S.C. Acts.

52. See Marc Mauer, *State Sentencing Reforms: Is the “Get Tough” Era Coming to a Close?*, 15 FED. SENT’G. REP. 50, 52 (2002).

53. *Id.* at 51; see ALEXANDER, *supra* note 32, at 14 (“Many of the states that have

more effective approaches than incarceration for low-level drug offenses⁵⁴ and the loss of political saliency for “get tough on crime” rhetoric during an era of declining crime rates.⁵⁵ While these incremental reforms to our nation’s narcotics laws have begun—just slightly—to reduce the size of our nation’s prison population, these reductions have been exceptionally modest compared to the overall scale of our mass incarceration problem.⁵⁶ More importantly, the chief prosecutors who have supported such limited reform have done so not because the laws amended were fundamentally unfair or inequitable, but because they believed that alternative punishment schemes for certain crimes would be less costly and more efficient.⁵⁷ So far, what has been missing from the discourse about mandatory minimum sentencing is a discussion of the ethical responsibilities of prosecutors who perceive themselves as operating within a flawed system.

In Part II, I intend to set forth an *ethical* (as opposed to an economic, political or pragmatic) argument in favor of prosecutorial leadership in sentencing reform. My primary audience in Part II includes chief prosecutors, criminal justice scholars and law reform advocates in those thirty or so states that have not yet undertaken any meaningful repeal of mandatory minimum sentences. In Part III, I will address a more

reconsidered their harsh sentencing schemes have done so not out of concern for the lives and families that have been destroyed by these laws or the racial dimensions of the drug war, but out of concern for bursting state budgets in a time of economic recession. In other words, the racial ideology that gave rise to these laws remains largely undisturbed.”).

54. Mauer, *supra* note 52, at 51.

55. *Id.* In 2012, the U.S. crime rates for serious violent crime—murder, rape, robbery and assault—fell to their lowest point since 1963. Daniel B. Wood, *US Crime Rate at Lowest Point in Decades. Why America is Safer Now.*, CHRISTIAN SCI. MONITOR (Jan. 9, 2012) <http://www.csmonitor.com/USA/Justice/2012/0109/US-crime-rate-at-lowest-point-in-decades.-Why-America-is-safer-now>.

56. Goode, *supra* note 47 (reporting that the number inmates in state and federal prisons dropped for a third straight year from a peak of 1.61 million in 2009 to 1.57 million in 2012).

57. Such pragmatic arguments in favor of incremental criminal justice reform have been cleverly labeled the “‘smart on crime’ movement.” See Roger Fairfax, *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 906 (2012). Several prominent chief prosecutors have jumped on the “smart on crime” bandwagon. Attorney General Eric Holder, at a 2009 meeting of the American Bar Association, argued that “[g]etting smart on crime requires talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy.” Eric Holder, U.S. Attorney Gen., Remarks at the 2009 ABA Convention (Aug. 3, 2009), available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>. California Attorney General Kamala Harris, during her tenure as San Francisco District Attorney, authored a book urging law enforcement officials to “reject[] our old, unsuccessful approaches and rhetoric, having realized that if we truly want to be tough, we must be much smarter in our modern war on crime.” KAMALA HARRIS, SMART ON CRIME: A CAREER PROSECUTOR’S PLAN TO MAKE US SAFER 199 (2009).

national audience, and attempt to set the framework for an internal regulatory structure that will enable prosecutors in all states to fulfill their ethical obligations as “ministers of justice” by changing the manner in which they exercise discretion when enforcing those criminal statutes that are likely to continue to carry mandatory sentences, even after the current wave of state reform movements has tempered or concluded.

II. THE PROSECUTOR’S ETHICAL DUTY TO SUPPORT SENTENCING REFORM

For almost a century, courts, scholars and bar disciplinary authorities have promoted the image of our nation’s prosecutors as quasi-judicial officers whose role in criminal adjudication differs from that of an ordinary advocate.⁵⁸ Comment [1] to the ABA *Model Rules of Professional Conduct* Rule 3.8 notes that “[a] prosecutor has the responsibility of a *minister of justice* and not simply that of an advocate.”⁵⁹ Its predecessor, the *Model Code of Professional Responsibility* EC 7-13, similarly provided that “[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to *seek justice*, not merely to convict.”⁶⁰ Both formulations hail from a 1935 Supreme Court opinion, wherein Justice Sutherland stated that:

[The prosecutor] 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*.⁶¹

The most commonly cited and convincing ground for imposing a special obligation on prosecutors to serve as “ministers of justice” is their special role as a fiduciary representing the sovereign.⁶² Because the prosecutor represents society at large, she has no personal client to direct her course of action and must make decisions about what is in the best interests of the sovereign that ordinarily would be entrusted to a client. This unique role of both principal and agent requires the prosecutor to pursue the public interest, rather than simply pursue a conviction. Former *Model Code* provision EC 7-13 accurately captured

58. See Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 39 (2009).

59. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt.[1] (2013) (emphasis added).

60. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 EC 7-13 (1982) (emphasis added).

61. *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added) (reversing conspiracy conviction due to prosecutor’s improper cross examination and closing argument).

62. See R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 2 (2d ed. 2013); Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 634 (1999).

this unique fiduciary obligation by requiring that all decisions of a prosecutor “affecting the public interest should be fair to all.”⁶³ Yet except for a narrow range of very specific limitations on a prosecutor’s discretion—such as the duty to refrain from prosecuting a case without probable cause, the duty to disclose exculpatory information to the defense and the duty to refrain from urging an unrepresented accused to waive important pre-trial rights⁶⁴—attorney discipline rules offer very little guidance on what exactly it means to “seek justice” if you are a public prosecutor.⁶⁵ The prosecutor’s duty has been described by one leading authority as “maddeningly vague and frustratingly amorphous.”⁶⁶

In analyzing the contours of a prosecutor’s unique ethical responsibilities, scholars typically focus on litigation and allude to the prosecutor’s “dual role” as both an advocate and quasi-judicial officer.⁶⁷ Certainly the sovereign is a client who is deserving of competent, strong and persuasive advocacy in pursuit of the conviction and punishment of guilty persons. When a prosecutor is performing an adversarial function in court (e.g., arguing for conditions of bail, opposing a motion to suppress evidence, presenting evidence at trial) the prosecutor’s role as advocate therefore requires her to represent the state’s case in the light most favorable to the government. The critical ethical inquiry in that context, however, is whether and how such zeal should be tempered by the prosecutor’s additional obligation as a “minister of justice,” and what exactly that phrase might mean. Several scholars, including myself, have attempted to stake out some contours to this “justice” obligation in the context of litigation. The late Fred Zacharias argued that it requires attention to adversarial fairness to help ensure that the results of criminal proceedings are both as accurate as possible and worthy of respect.⁶⁸ Dan Medwed has argued that the obligation to seek justice requires a fundamental commitment to protecting the innocent from wrongful conviction and punishment.⁶⁹ Alafair Burke has argued

63. MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 EC 7-13 (1982).

64. See MODEL RULES OF PROF’L CONDUCT Rs. 3.8(a), 3.8(c), 3.8(d) (2012).

65. Green, *supra* note 62, at 615–16.

66. Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 155 (2011).

67. See Alafair Burke, *Prosecution (is) Complex*, 10 OHIO ST. J. CRIM. L. 697, 706 (2013); Fred C. Zacharias, *Structuring the Ethics of Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 72 (1991).

68. Zacharias, *supra* note 67, at 61–62; see MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt.[1] (2013) (“[R]esponsibility [of the prosecutor] carries with it specific obligations to see that the defendant is accorded procedural justice . . .”).

69. Medwed, *supra* note 58, at 48 (2009); see also Green, *supra* note 62, at 622 (stating that

that serving as a “minister of justice” requires neutrality in decision-making, particularly with respect to important pretrial decisions such as investigation, charging and plea bargaining.⁷⁰ Without rejecting any of these extremely helpful formulations, I have argued elsewhere that a prosecutor’s unique professional responsibility in litigation also requires a fidelity to empathy and honesty.⁷¹

Outside the adversarial context, however, it is simply not accurate to say that a prosecutor is performing a “dual role,” because she is not serving as an advocate for a party in litigation before a neutral fact finder. Perhaps that is why ABA *Criminal Justice Standards* § 3-1.2(b) uses slightly different language than ABA Model Rule 3.8 to describe a prosecutor’s special responsibilities. This section describes a prosecutor as “an *administrator* of justice, an advocate, and an officer of the court” and explains that the prosecutor must “exercise sound discretion” in performing each of these distinct yet overlapping roles.⁷² The use of the term “*administrator*,” as opposed to “*minister*,” is meaningful 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. This construction is consistent with the Supreme Court’s suggestion in *Berger* that because a prosecutor is both a representative and a fiduciary, she has a prominent role to play in *governing* as well as in *litigating*.⁷³

When the prosecutor is serving in a governing capacity rather than a litigation capacity (as she often does when giving speeches, drafting legislation, working with the police and community leaders to develop crime-prevention programs and serving on boards or commissions) the prosecutor is not performing an adversarial role in representing the sovereign, and therefore does not have any duty of zealous advocacy that must be balanced against other competing public demands. While performing these functions, a prosecutor committed to justice must detach herself from the partisan role that we normally ascribe to advocates under the standard conception of professional

the goal to “seek justice” implies pursuing substantive fairness to assure that innocent are not convicted).

70. Burke, *supra* note 67, at 705; cf. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 897.

71. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to Seek Justice*, 82 NOTRE DAME L. REV. 635, 653, 667 (2006).

72. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION § 3-1.2(b) (3d ed. 1993) (emphasis added).

73. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“It is as much [the prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to bring about a just one.”).

responsibility.⁷⁴ This theme of detachment and non-partisanship is emphasized in the commentary to ABA *Criminal Justice Standards* §3-1.2, which elaborates on the prosecutor's role as an "administrator" of justice as follows: "Such professional integrity and *detachment* is furthered by the prosecutor's efforts, independent of the prosecutorial role, to engage in appropriate law reform activities and to remedy injustices that the prosecutor sees in the administration of criminal justice generally in his or her jurisdiction."⁷⁵ A prosecutor who is engaged in governing should thus abandon her partisan role, and pursue the public interest broadly conceived without regard to whether it will provide the government with strategic advantages in litigation.

All too frequently, prosecutors in the United States embrace their responsibility as ministers of justice, while ignoring their responsibility as administrators of justice. In her role as an advocate (*minister*), a prosecutor must temper zeal with a fidelity to truth and a commitment to fair play. In her role 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. Prosecutors cannot shrink from this second responsibility by seeking justice in individual cases, while simply hoping or expecting that overall systemic justice will result. Being an *administrator* means that a prosecutor must have the courage to speak up about what works and what does not work in our criminal justice system, and to advocate for law reform whenever systemic inequities come to her attention.⁷⁶ That is why ABA *Criminal Justice Standards* § 3-1.2(d) advises that "[i]t is an important function of the prosecutor to seek to reform and improve the *administration* of criminal justice."⁷⁷ Representing a sovereign requires special attention to the public interest broadly conceived, not just to procedural fairness and accuracy in the litigation of individual cases.

74. TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* 5–11 (2009) (describing the three elemental maxims of the standard conception of legal ethics as: *neutrality*, under which a lawyer should refrain from reaching independent moral judgments about the merits of a client's objective; *partisanship*, under which lawyers should vigorously pursue their client's objectives; and *nonaccountability*, under which a lawyer may not be held morally responsible for the objectives she pursues on behalf of a client.).

75. AM. BAR ASS'N, *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION* § 3-1.2(d) cmt.6 (3d ed. 1993) (emphasis added).

76. See Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 *YALE L.J.* 2336, 2343 (2013) ("While government lawyers undoubtedly see their litigating role as paramount, they also have a responsibility to promote the sound development of the law . . .").

77. AM. BAR ASS'N, *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION* § 3-1.2(d) (3d. ed. 1993) (emphasis added).

This expectation of nonpartisanship in a prosecutor's administrative functions should extend beyond sentencing reform. Prosecutors perform a variety of administrative functions in their roles as leaders in the criminal justice community. When a prosecutor is serving on a judicial committee to study revision of the rules of criminal procedure, or is advising the executive on the composition, duties or procedures of the parole board, or is testifying before the legislature on the operational standards and audit procedures of state forensic laboratories, the prosecutor's primary function as an "(ad)minister of justice" should be to ensure the fairness and accountability of the criminal justice system—not swift and certain convictions. In those contexts, the prosecutor's duty of loyalty toward their client (the state) requires the prosecutor to abandon a partisan adversarial role in a fashion that simply would not be expected of a private defense attorney called upon to render similar advice on law reform initiatives.

What are some of the critical components of a fair and effective criminal justice system? As an "(ad)minister" of justice, a prosecutor should, at a minimum,⁷⁸ be concerned about promoting consistency in the application of the criminal laws, fairness in plea bargaining, protection of public safety through a reduction of recidivism and an efficient expenditure of limited criminal justice resources. As I will argue below, each of these four components of "systemic" justice is compromised by mandatory sentencing schemes. Prosecutors should thus feel ethically compelled to lend their considerable expertise and

78. A fifth argument in favor of repealing mandatory sentences is that they impose unduly harsh and *disproportionate* punishments; that is, they sacrifice individualized justice (calibrated punishment based on an actor's individual moral desert) in favor of deterrence and uniformity. In my view, such considerations are uniquely within the province of the legislature. The traditionally recognized goals of criminal punishment—deterrence, incapacitation, retribution and rehabilitation—involve constantly shifting and sometimes competing considerations. See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right?*, 100 J. CRIM. L. & CRIMINOLOGY 691, 691 (2010). It is difficult to construct an *ethical* (as opposed to a political, economic or pragmatic) argument that a prosecutor must oppose mandatory sentences across the board, where the legislative branch, as the primary actor in our system of government responsible for defining crimes and setting penalties, has consciously decided to value uniformity and deterrence over proportionality for particular offenses. In other words, the fact that a mandatory sentence may be harsh in individual circumstances might prompt a prosecutor as a *minister* of justice to avoid or reduce a particular charge in the context of specific litigation (as I argue in Part IV below). But it is hard to argue that as an (*ad*)*minister* of justice, a prosecutor is ethically required to oppose the legislature's decision to enact mandatory penalties for that crime in all instances on the ground of proportionality, without disturbing our traditional respect for the primacy of the legislature. Other grounds for opposing mandatory sentences that I discuss in this Part directly relate to the fair and efficient operation of the criminal justice system, which I contend are matters over which the prosecutor has at least equivalent, if not greater, day-to-day expertise than legislators. See *infra* Part IV.

political leadership to the emerging movement to repeal mandatory sentences.⁷⁹

A. Promoting Public Safety by Reducing Recidivism

Prosecutors should support repeal of mandatory sentences because in many instances they do not adequately protect public safety. For certain categories of offenders, extended periods of incarceration actually increase, rather than decrease, the offender's risk of recidivism. Recent studies suggest that for low- and medium-level offenders (such as drug offenders and some property offenders) the longer they are imprisoned, the higher the chance they will reoffend upon release.⁸⁰ One reason lengthy sentences may lead to an increase in recidivism is the destruction of community ties necessary for successful reintegration. When prison sentences are relatively short, offenders are more likely to maintain their ties to family, employers and other members of their community who will be important sources of physical, emotional and financial support upon release.⁸¹ Moreover, incarceration itself has

79. A Committee of the American Law Institute ("ALI") has recently taken a very strong position against mandatory minimum penalties in their tentative draft of the Model Penal Code Sentencing Project. Composed of a distinguished and bipartisan group of judges, scholars, government lawyers and defense counsel, the Committee has recommended that the ALI strengthen its 1962 position that mandatory minimums are "unsound" in favor of a firm, black-letter policy prohibiting such penalties. See MODEL PENAL CODE: SENTENCING § 6.06 (Tentative Draft No. 2, 2011), available at <http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%20-%20online%20version.pdf>. Subsection 6.06(3) of the draft would have "the substantive effect, in adopting jurisdictions with pre-existing mandatory penalties in their criminal codes, of repealing all such provisions." *Id.* In addition to arguments about discriminatory impact, consistency of application and coercive effect, *id.* at 19–25, the ALI Sentencing Project found fundamental flaws with mandatory penalties on the grounds of proportionality. See *id.* at 18 ("The interests of victims, and the community at large, in seeing proportionate penalties visited on criminal offenders, are frustrated by a one-size-fits-all punishment scheme.").

80. FORMAN & LARIVÉE, *supra* note 35, at 6; Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329, 350 (2002); George Gascon, *The Courage to Change: How Prosecutors Can Lead on Public Safety*, ROSENBERG FOUND., <http://justiceinca.rosenbergfound.org/gascon.php> (last visited Aug. 23, 2013). But see David S. Abrams, *Building Criminal Capital vs. Specific Deterrence: The Effect of Incarceration Length on Recidivism* 4 (Dec. 2011) (unpublished manuscript), available at [https://www.law.upenn.edu/cf/faculty/dabrams/workingpapers/Abrams Recidivism.pdf](https://www.law.upenn.edu/cf/faculty/dabrams/workingpapers/Abrams%20Recidivism.pdf) (surveying the empirical studies and finding them mostly inconclusive due to omitted variable bias on the question of whether shortening sentences decreases recidivism, but suggesting that longer sentences lead to an increased severity of recidivating crime).

81. For a thoughtful critique of mandatory minimum sentences by an experienced federal judge, see *United States v. Bannister*, 786 F. Supp. 2d 617 *passim* (E.D.N.Y. 2011). Judge Weinstein not only suggests that mandatory sentencing may lead to greater recidivism for the offender, see *id.* at 658, but that the children of those incarcerated may be adversely affected due to the impact of antisocial ethics and fatherlessness. See *id.* at 642; John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*,

criminogenic effects on prisoners by socializing them into an outsider culture and reinforcing criminal behavior; studies have shown that this negative effect increases over the length of incarceration.⁸² Finally, when crimes carrying mandatory minimum penalties are reclassified so that courts are given a choice between diversion and conviction (such as for first-time narcotics offenses)⁸³ the choice to *divert* an offender can reduce recidivism by sparing the offender many of the harsh collateral consequences of criminal conviction including the loss of voting rights, public housing and benefits and certain forms of employment licensure, all of which might serve as barriers to successful re-entry.⁸⁴

Mandatory minimum sentencing may lead to higher recidivism for reasons unrelated to the criminogenic effect of incarceration. Because sentencing judges often perceive legislatively enacted mandatory minimum sentences as too high, they frequently sentence an offender convicted under such a statute to a “one-day” differential between the minimum and maximum sentence (e.g., “five years to five years and one day”). In states where parole eligibility is calculated off of the minimum sentence, offenders have no incentive to apply for parole, and are often “wrapping” to the street without any monitoring of their behavior by a parole officer.⁸⁵ Further, some state correctional practices—either explicitly or functionally—preclude offenders serving mandatory sentences from participating in valuable programming (counseling, education, job training, etc.) while in prison. In many states, for example, a prisoner’s “earned good time” is deducted only off of the maximum sentence, so offenders serving a mandatory minimum term (e.g., “five years to five years and one day”) are provided with little incentive by the institution to participate in programming.

26 CRIME & JUST. 121, 122 (noting the effect on children from their parent’s incarceration “may be the least understood and the most consequential implication of the high reliance on incarceration in America”).

82. Martin H. Pritkin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1089–90 (cataloguing various criminogenic effects of prison).

83. See, e.g., OHIO REV. CODE ANN. § 2925.03 (West 2013); S.C. CODE ANN. § 44-53-370 (2013).

84. Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, A.B.A. J. (June 1, 2013, 4:00 AM), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions/.

85. See GOVERNOR’S COMM’N ON CORR. REFORM, STRENGTHENING PUBLIC SAFETY, INCREASING ACCOUNTABILITY, AND INSTITUTING FISCAL RESPONSIBILITY IN THE DEPARTMENT OF CORRECTION 44 (2004) (explaining that the practice of basing parole eligibility on the minimum sentence precludes “both parole supervision” and “placement in pre-release”); Anne M. Piehl, *From Cell to Street: A Plan to Supervise Inmates After Release* 13–14 (KSG Faculty Research Working Paper Series, Paper No. RWP02-005, 2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=299135.

Moreover, the length of sentence an offender will be serving affects an evaluation of his escape risk, which in turn may affect his security classification. Offenders serving mandatory minimum sentences are typically classified to higher security prisons, with fewer enrichment programs available to them.⁸⁶ Especially in states without established correctional reentry programming and post-release supervision,⁸⁷ mandatory sentencing schemes can become, by their very nature, a barrier to successful re-entry.

Prosecutors should consider public safety their highest priority. Attorney General Eric Holder recently stated in a widely covered public address that “[t]oo many people go to too many prisons for far too long for no good law enforcement reason.”⁸⁸ For some crimes, such as murder, protection of public safety through incapacitation might justifiably be the government’s primary objective, regardless of cost or collateral consequences. But for most crimes, public safety is better protected through shorter sentences coupled with re-entry programming and post-release supervision.⁸⁹ Failure to distinguish between these two types of crime based on thoughtful criteria and objective, data-driven research presents an obstacle to overall crime reduction.

B. Avoiding Undue Coercion

Prosecutors should oppose mandatory sentences for all but the most serious, violent offenses, because such sentencing schemes have a chilling effect on a defendant’s exercise of her constitutional right to a trial.⁹⁰ Many judges and former prosecutors now candidly admit that it is common for the government to use mandatory sentences as a

86. See FORMAN & LARIVÉE, *supra* note 35, at 15–16. During the height of mandatory sentencing (1990–2012), the percentage of Massachusetts prisoners incarcerated in maximum security prisons rose from 8% to 18%, even though the percentage of prisoners serving time for violent crime remained constant. *Id.* at 15.

87. See Juliene James, *A View from the States: Evidence Based Public Safety Legislation*, 102 J. CRIM. L. & CRIMINOLOGY 821, 834–48 (2012) (discussing recent legislative developments in these two areas designed to reduce recidivism at a lower cost than incarceration); Piehl, *supra* note 85, at 7, 19 (providing statistical data of a study of recidivism for the Massachusetts Department of Correction).

88. Eric Holder, U.S. Attorney Gen., Address at the 15th Annual National Action Network Convention (Apr. 4, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130404.html>.

89. See PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 35–38 (2012). The Pew Center Report also noted that instituting “comprehensive pre-release planning” and proper levels of supervision alongside early release can help further reduce the risk of recidivism. *Id.* at 38; see also Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”*: American Criminal Justice Reform—Legacy and Prospects, 7 J.L. ECON. & POL’Y 597, 610–11 (2011).

90. U.S. CONST. amend. VI.

bargaining chip to coerce guilty pleas.⁹¹ When prosecutors have discretion to charge a defendant with a crime carrying a harsh mandatory penalty and then allow the defendant to plead guilty to a lesser crime carrying a discretionary and lower penalty, this disparity may exert unconscionable pressure on the defendant.⁹² The threat of a mandatory penalty might coerce even an innocent defendant to plead guilty to a crime that she did not commit, or at least to forfeit an otherwise colorable defense.⁹³

Imagine a defendant charged with trafficking in cocaine following an undercover sale to a government agent. The defendant faces a mandatory minimum term of ten years imprisonment under state law. The defendant's sole role in the transaction was driving the principal to the scene of the meeting, which occurred outside of the car the defendant was driving. Imagine further that the government's proof that the defendant intentionally and knowingly assisted the principal in the drug transaction is very thin and there is no direct evidence that the defendant handled the cocaine or participated in any prior negotiations leading up to its sale. Notwithstanding an eminently triable case, the defendant may experience irresistible pressure to plead guilty to a lesser crime that does not carry a mandatory penalty, such as conspiracy to distribute cocaine or possession of cocaine, simply to avoid the draconian ten-year trafficking penalty.

As "(ad)ministers" of justice responsible for promoting and safeguarding a fair system of criminal adjudication, prosecutors should have grave concerns about this level of coercion. Comment [1] to ABA Model Rule 3.8 states that a prosecutor's responsibility as a "minister of justice" "carries with it specific obligations to see that . . . *special precautions are taken to prevent and to rectify the conviction of innocent persons.*"⁹⁴ One "special precaution" that prosecutors could take to prevent the conviction of innocent persons is to advocate for

91. Richard A. Oppel, Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1 (quoting experiences of U.S. District Court Judge John L. Kane and National District Attorneys Association Executive Director Scott Burns).

92. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2486–87 (2004).

93. See Stephen Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987 (1992) (discussing distortions in plea bargaining due to pervasive conflicts of interest); see also *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) ("[Plea bargaining] presents grave risks of prosecutorial overcharging that effectively compel[] an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . ."); HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. PROSECUTORS FORCE DEFENDANTS TO PLEAD GUILTY 7 (Dec. 2013), available at http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0.pdf (discussing how federal prosecutors use narcotics and weapons statutes to coerce guilty pleas).

94. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.[1] (2013) (emphasis added).

repeal of most mandatory sentences.

Certainly, mandatory sentences are not the only source of pressure on defendants to plead guilty in the absence of strong evidence. Defendants may plead guilty due to information deficits in discovery, imbalance of resources in representation and investigation or pressure from family and criminal associates.⁹⁵ But mandatory sentences are now clearly playing a prominent, if not paramount, role in coercing guilty pleas. Since the advent of mandatory sentencing in the 1980s, the percentage of felony cases proceeding to trial in state and federal court has dropped dramatically.⁹⁶ The greater the “trial penalty”—the difference between the sentence the defendant is being offered during plea bargaining before trial and the sentence she will receive after trial—the greater the pressure to plead guilty.⁹⁷ That is why the coercive effect of mandatory penalties for narcotics, property and habitual nonviolent offenses should concern prosecutors the most: the disparity between the sentence as charged and the sentence the defendant will likely face upon a guilty plea may be so great that even innocent defendants might take the deal.⁹⁸

C. Reducing Discriminatory Impact

Following the public controversy surrounding George Zimmerman’s acquittal in Florida in July 2013, President Barack Obama called on this country to begin an honest conversation about race relations in America. In his comments, the President candidly acknowledged that young African-American men are more likely to be both the perpetrators and victims of violence in our society.⁹⁹ But he also poignantly described how innocent African-American men share in this stigma because they

95. See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1175–76 (1998); see also Janet Moore, *Democracy and Criminal Discovery Reform after Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1346–49 (2012) (highlighting weak enforceability of prosecutors’ due process discovery obligations); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 34–35 (1997) (arguing that defendants with retained rather than appointed counsel have greater resources and incentive to investigate and litigate criminal cases).

96. Oppel, *supra* note 91, at A1. According to the National Center for State Courts, the percentage of felonies taken to trial in a study of nine states fell from 8% in 1976 to 2.3% in 2009. *Id.* According to a SUNY Albany study, the percentage of criminal cases taken to trial in federal district courts fell from 15% in 1980 to less than 3% in 2010. *Id.*

97. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1239–40 (2008).

98. For crimes such as murder, for example, it may be less likely that a completely innocent person would plead guilty to a twenty-year sentence for manslaughter, given the substantial time and social stigma they would face even for the lesser included offense.

99. Matt Viser, *In Words Revealing and Rare, Obama Speaks on Martin Case*, BOS. GLOBE, July 20, 2013, at A5.

are more likely than other racial groups to be the target of suspicion and differential treatment by the community.¹⁰⁰ African-American men in this country who are subject to profile stops by the police,¹⁰¹ or who are routinely followed through department stores by security personnel,¹⁰² or who regularly hear the “click” of car doors being locked when they pass by on the street,¹⁰³ certainly would not find it surprising that gross racial disparities exist in the enforcement of this nation’s mandatory minimum sentences.

A prosecutor’s decision to reduce charges is not subject to any meaningful judicial review¹⁰⁴ and is inadequately checked by the political process.¹⁰⁵ This discretion is subject to whim, caprice, arbitrary and irrational considerations,¹⁰⁶ and, perhaps most dangerous and corrosive of all, *bias*.¹⁰⁷ “[T]he power to be lenient is the power to

100. “The African American community is also knowledgeable that there is a history of racial disparities in the application of our criminal laws—everything from the death penalty to enforcement of our drug laws.” For a full transcript of the July 19, 2013 remarks, see *Obama Trayvon Martin Speech Transcript: President Comments on George Zimmerman Verdict*, HUFFINGTON POST (July 19, 2013), http://www.huffingtonpost.com/2013/07/19/obama-trayvon-martin-speech-transcript_n_3624884.html [hereinafter *Obama Transcript*].

101. See *Floyd v. City of New York*, Nos. 08 Civ. 1034, 12 Civ. 2274, 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013) (issuing a permanent injunction against the New York Police Department’s stop and frisk policy in a section 1983 action, and finding that the policy violated the equal protection clause in how the N.Y.P.D. applied it to African Americans and Hispanics), *stayed pending appeal sub nom.* *Ligon v. City of New York*, Nos. 13-3123, 13-3088, 2013 WL 5835441 (2d Cir. Oct. 31, 2013).

102. *Obama Transcript*, *supra* note 100.

103. *Id.*

104. The decision whether to prosecute and what charges to bring generally rests in the discretion of the prosecutor, and to succeed on an equal protection claim alleging impermissibly selective prosecution the defendant must demonstrate not only discriminatory effect, but also discriminatory purpose. *Wayte v. United States*, 470 U.S. 598, 608 (1985); see also *McCleskey v. Kemp*, 481 U.S. 279, 297, 313 (1987) (holding that a Georgia study showing racial disparity in prosecutors’ and jurors’ invocation of the death penalty was not enough to demonstrate an equal protection violation absent evidence of discriminatory purpose: “[w]here the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious”). Moreover, the Supreme Court has made it practically impossible for a defendant to succeed on a claim of selective prosecution, because the defendant is not entitled to discovery regarding decisions the prosecutor made in other cases unless and until he is able to make a threshold showing of discriminatory treatment. See *United States v. Armstrong*, 517 U.S. 456, 468 (1996).

105. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 591 (2009) [hereinafter *How Prosecutor Elections Fail Us*] (discussing the ways in which the democratic process fails to create prosecutor accountability).

106. See Bjerk, *supra* note 11, at 622–23 (studying enforcement decisions under three-strikes laws in twenty-four states and finding that prosecutors tend to circumvent mandatory minimum laws due to their own preferences or constraints, rather than due to any predictions about what judges, juries or defense attorneys will do).

107. See ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4–5 (2007) (discussing prosecutors’ disparate treatment of similarly situated defendants). Dean

discriminate.”¹⁰⁸ As one former prosecutor courageously acknowledged regarding the decision whether to seek the death penalty, “[t]he impact of racism, when present in a district attorney’s decision as to whom to charge, at what level to charge, whether to seek capital punishment, and whether to negotiate a plea to a lower charge and avoid capital punishment cannot be exaggerated.”¹⁰⁹ After nearly thirty years of experimentation with mandatory sentencing, the question for leaders in law enforcement is whether the possible benefits of these penalties outweigh the real and pernicious risk that they will be discriminatorily applied.

The Vera Institute of Justice has been studying racial disparities in charging and plea bargaining practices as part of their Prosecution and Racial Justice Program. Several district attorneys’ offices across the country are participating in this pilot study, including chief prosecutors in Milwaukee, Wisconsin, San Diego, California and Mecklenburg, North Carolina. Some of the initial findings¹¹⁰ by the Vera Institute are disturbing, and certainly support claims of racial disparity in the exercise of prosecutorial discretion in charge reductions with regard to crimes carrying mandatory minimum penalties. A 2012 meta-study by the Vera Institute cited five independent empirical studies examining the impact of race and ethnicity on charge reduction.¹¹¹ One study of drug offenses found that Hispanic defendants were significantly less likely to have felony charges reduced to a misdemeanor than white defendants, while African-American defendants were somewhat less likely than white defendants to benefit from such a charge reduction.¹¹²

James Vorenberg described a prosecutor’s discretion in plea bargaining as “a powerful weapon that he may use at his pleasure.” James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1552 (1981).

108. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 170 (1980), cited in *McCleskey*, 481 U.S. at 312. The majority opinion in *McCleskey* went on to observe, however, that “a capital punishment system that did not allow for discretionary acts of leniency ‘would be totally alien to our notions of criminal justice.’” 481 U.S. at 312 (quoting *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976)).

109. E. Michael McCann, *Opposing Capital Punishment: A Prosecutor’s Perspective*, 79 MARQ. L. REV. 649, 675 (1996).

110. Generalizations about the presence or absence of bias in prosecution are difficult because racial disparities vary by type of crime and level of court, and between case declinations at the screening stage and case disparities at the time of plea bargaining.

111. BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, *DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES* 13–14 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/race-and-ethnicity-in-prosecution-first-edition.pdf>.

112. *Id.* at 13; see also Margaret Farnsworth et al., *Ethnic, Racial, and Minority Disparity in Felony Court Processing*, in *RACE AND CRIMINAL JUSTICE* 54, 67 (Michael J. Lynch & E. Britt Patterson eds., 1991) (reporting results of a study showing a significant disparity in charge

Another study of weapons charges in federal court found that, in general, African-Americans and Hispanics were less likely than whites to have gun charges against them reduced.¹¹³ In Milwaukee, white defendants received much more favorable outcomes at the district court level than African-Americans or Hispanics, in terms of both case declinations and reductions in charges.¹¹⁴

A 2007 study of charging practices by prosecutors in Pennsylvania found that Hispanics arrested for a qualifying offense were significantly more likely than whites to be charged under the applicable mandatory minimum law, and females were significantly less likely to be charged than males.¹¹⁵ Interestingly, this study found that the relatively modest African-American/white difference in the application of the mandatory minimum law *increased* in counties with higher African-American populations, possibly due to the presence of a “racial threat” perception by whites.¹¹⁶

Georgia has one of the harshest mandatory penalties in effect in this country for second-offense drug distribution. In 1990, the legislature gave prosecutors the power to move for a mandatory sentencing enhancement of *life in prison* for any defendant convicted a second time of distributing, or possessing with intent to distribute, a Schedule I or Schedule II narcotic.¹¹⁷ After four years of experience with this statute, data provided by state officials revealed that 98.4% of the prisoners serving life sentences under this statute were African Americans, and that, of the convicted suspects eligible for this enhancement,

reductions for minority defendants compared to their white counterparts). The authors of the study noted that “[s]ince the defendant’s prior record may affect sanctioning decisions, the analyses focus on convicted defendants with a previous court record.” *Id.* at 60.

113. KUTATELADZE ET AL., *supra* note 111, at 13; *see, e.g.*, Lauren O’Neill Shermer & Brian D. Johnson, *Criminal Prosecutions: Examining Prosecutorial Discretion and Charge Reductions in U.S. Federal District Courts*, 27 JUST. Q. 394, 416–17 tbl.3 (2010) (presenting statistical data showing the disparity in charge reduction occurrences between Hispanic and African-American individuals). In conducting their analysis, Shermer and Johnson controlled for other potentially relevant variables, including the offender’s criminal history, offense severity, number of charges filed against the defendant and differences among federal district courts. *Id.* at 410–11.

114. *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. On Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 38–39 (2009) (statement of Wayne S. McKenzie, Director, Prosecution and Racial Justice Program), available at http://judiciary.house.gov/_files/hearings/printers/111th/111-78_53093.PDF.

115. Jeffery T. Ulmer et al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 450 (2007). In conducting his analysis, Ulmer controlled for other potentially relevant variables, including: the severity of the current offense, mandatory eligible offense type and prior criminality of the offender. *See id.* at 437.

116. *Id.* at 451.

117. *See Stephens v. Georgia*, 456 S.E.2d 560, 561 (Ga. 1995) (describing the then-in-effect GA. CODE ANN. § 16-13-30(d)).

enhancement was applied for African-Americans in 16.6% of the cases but applied for white defendants in less than 1% of the cases.¹¹⁸ Notwithstanding this shocking disparity, the Georgia Supreme Court denied an equal protection challenge to the statute on both federal and state constitutional grounds, and ruled that the defendant had failed to prove under *McCleskey v. Kemp*¹¹⁹ that either the legislature had a discriminatory intent in enacting the statute, or that the government harbored a discriminatory motive in selecting those cases in which to seek the enhancement.¹²⁰ This unrestrained prosecutorial power in Georgia to select which habitual drug offenders would be subjected to life imprisonment continued for another year until, in 1996, the state legislature amended the statute to reduce the mandatory penalty to ten years.¹²¹

Prosecutors should feel ethically compelled to support legislative reform¹²² of mandatory minimum penalties because such sentencing schemes lay the seeds for discriminatory application. According to Pew Center studies, one in nine African-American men between the ages of twenty to thirty-four are behind bars,¹²³ and one in eleven African-American adults of all ages are under some form of correctional control either through incarceration, probation supervision or parole.¹²⁴ African-Americans comprise only 12% of the U.S population, but they make up nearly 50% of its prisoners.¹²⁵ This shocking statistic is potentially misleading because African-Americans offend at disproportionately higher rates for crimes of violence.¹²⁶ Nonetheless, most knowledgeable observers believe that African-American citizens are still overrepresented in our country's prison population, even if not as much as the 12%–50% comparison would suggest.¹²⁷ While implicit

118. *Id.*

119. 481 U.S. 279 (1987).

120. *Stephens*, 456 S.E.2d at 561–62.

121. See Act of Apr. 15, 1996, No. 932, § 1.1, 1996 Ga. Laws 1023.

122. After setting a high bar for proving discriminatory motive for purposes of equal protection claims in *McCleskey*, Justice Powell acknowledged that the legislature, not the courts, is the appropriate forum for addressing more implicit forms of bias in the criminal justice system. *McCleskey*, 481 U.S. at 319.

123. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 6 (2008).

124. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009).

125. Pfaff, *supra* note 9, at 1109.

126. *Id.*; see James Foreman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 46 (2012) ([T]he African American arrest rate for murder is seven to eight times higher than the white arrest rate; and the black arrest rate for robbery is ten times higher than the white arrest rate.”).

127. Pfaff, *supra* note 9, at 1109.

bias exists at multiple points in the criminal justice system—from police investigation, through arrest, plea bargaining and jury selection¹²⁸—the studies recounted above suggest that the transfer of unreviewable sentencing discretion to prosecutors has exacerbated the problem.

D. Redirecting Financial Resources

Mandatory sentencing policies have proven to be prohibitively expensive, which has led even some high-profile fiscal conservatives to join in the so-called “Right on Crime” movement.¹²⁹ The annual cost of incarcerating a state offender ranges from less than \$15,000 (Kentucky), to over \$60,000 (New York).¹³⁰ The rise of mandatory minimum penalties has naturally led to longer prison terms: the average length of stay for state convicts has increased by one-third since 1990.¹³¹ Over a similar period, state prison expenditures have grown from \$2.8 billion to \$50 billion.¹³² Prison systems are now the second-fastest growing area of state budgets, trailing only Medicaid expenditures.¹³³

While it might seem natural to assume that longer prison terms have significantly increased public safety, there is little direct evidence to support that view. It is true that crime rates began to fall nationally for all classes of crime in the 1990s, shortly after the tidal wave of mandatory sentences hit our nation’s shores.¹³⁴ Yet, experts have suggested that only about one-fourth to one-third of that decline is attributable to the incapacitation of persons who otherwise would be

128. For example, the peremptory challenge has persisted in state and federal courts notwithstanding pervasive evidence that prosecutors routinely employ implicit racial biases in the jury selection process. *Miller-El v. Dretke*, 545 U.S. 231, 269–70 (2005) (Breyer, J. concurring) (urging reconsideration of the peremptory challenge because “the use of race- and gender-based stereotypes in the jury-selection process seems better organized and more systematized than ever before”); Mark W. Bennett, *Unravelling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010) (“[J]udge-dominated voir dire and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish.” (citation omitted)).

129. See, e.g., Norquist, *supra* note 45 (“Viewed through the skeptical eye I train on all other government programs, I have concluded that mandatory minimum sentencing policies are not worth the high cost to America’s taxpayers.”).

130. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 10 (2012).

131. FORMAN & LARIVÉE, *supra* note 35, at 5.

132. Caren Myers Morrison, *Criminal Justice Responses to the Economic Crisis*, 28 GA. ST. U. L. REV. 953, 953 (2012) (foreword).

133. Viguerie, *supra* note 9, at A23.

134. See DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 2 (2007).

engaged in criminal activity.¹³⁵ Other factors contributing to the drop in crime over the past dozen years include the aging of the baby boom generation, having more police officers on the streets and the waning of our nation's crack epidemic.¹³⁶ Moreover, in the past ten years, seventeen states have reduced their incarceration rates and also reduced their crime rates, proving that it is possible for states simultaneously to become safer and reduce their prison populations.¹³⁷

Why should the high financial cost of incarceration be considered an “ethical” problem for prosecutors? After all, state legislatures control both the tax rate and departmental budgets. If legislators choose to spend money unwisely on the prison-industrial complex,¹³⁸ why should state prosecutors have any ethical duty to object? Perhaps if the only expenditures being sacrificed to support the high cost of prisons were public transportation, education, health care and state infrastructure needs, this might be a valid argument. But in the era of harsh fiscal austerity that has plagued states since the recession of 2008, many important criminal justice initiatives have fallen victim to the state budget axe.¹³⁹ The more money that states spend on prisons, the less money they will have to spend on other law enforcement initiatives that *more effectively prevent crime* such as juvenile intervention, mental health services, community policing, probation, re-entry programming and parole supervision.

As “(ad)ministers of justice,” prosecutors must construe their roles broadly to include crime prevention, detection and enforcement, and they must strive for the most effective balance of all three of these important functions. Even if (as some critics have argued) mandatory minimum sentences make the actual prosecution of crime less expensive because they force pleas and decrease the number of trials,¹⁴⁰ they do so at a prohibitively high price and to the detriment of other very

135. *Id.*; see also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 179 (2004).

136. See Levitt, *supra* note 135, at 179.

137. PEW CTR. ON THE STATES, *supra* note 89, at 7. The states are Alaska, California, Connecticut, Delaware, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, Oklahoma, South Carolina, Texas, Utah and Wisconsin. *Id.* at 61 n.5.

138. Steven Donziger, *The Prison-Industrial Complex: What's Really Driving the Rush to Lock 'Em Up*, WASH. POST, Mar. 17, 1996, at C3.

139. See Lanny Breuer, Assistant Attorney Gen., Prepared Remarks at the National District Attorneys Association Summer Conference (July 23, 2012), available at <http://fednews.com/transcript.html?item=20140327t5321&op=&addr=HG1-DF1-JU1-BB1> (“[Increasing numbers of prisoners] ha[ve] resulted in prison and detention spending crowding out other criminal justice investments, including aid to state and local law enforcement and spending on prevention and intervention programs.”).

140. See Barkow, *supra* note 11, at 728.

compelling budgetary needs of the criminal justice community. This is why the Department of Justice has launched the Justice Reinvestment Initiative which encourages states to take a data-driven approach to criminal justice policy, and to simultaneously reduce corrections spending while allocating the resulting cost savings to public safety strategies more likely to decrease crime and strengthen neighborhoods.¹⁴¹

In light of the four very serious indictments of mandatory minimum sentences identified above, why do so few chief prosecutors have the courage to support their repeal? Some examples from recent state reform efforts might shed light on prosecutorial motivations. In many states, prosecutors routinely and reflexively oppose amendments to mandatory minimum sentences: New York, California and Florida provide good examples of this phenomenon. New York passed changes to the harsh Rockefeller Drug laws in 2009¹⁴² over the opposition of the state's district attorneys.¹⁴³ California voters passed Proposition 36 in 2012 and restricted application of the state's harsh twenty-five-years-to-life "three strikes" law to a third serious or violent felony,¹⁴⁴ also over the opposition of the California District Attorneys Association.¹⁴⁵ In Florida, bills have been filed to cut back on mandatory minimum sentences for the past three legislative sessions,¹⁴⁶ and the Florida Prosecuting Attorneys Association has successfully opposed these measures each term.¹⁴⁷ The reason most frequently cited by prosecutors

141. See *Justice Reinvestment Initiative (JRI)*, BUREAU JUST. ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=92 (last visited Aug. 25, 2013). So far, seventeen states have adopted the JRI model, and those states are predicted to save \$3.3 billion over the next ten years.

142. The New York legislation eliminated mandatory minimum sentences for first-time, low-level drug felonies, gave judges discretion to send offenders to treatment instead of prison and allowed for the early release of drug offenders previously sentenced to mandatory minimum terms. See N.Y. PENAL LAW § 70.70 (McKinney 2012).

143. Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, at A1.

144. CAL. PENAL CODE § 667 (West 2013); see Michael J. Mishak, *Election 2012: Voters' Reactions Mixed on Raft of Ballot Initiatives*, L.A. TIMES, Nov. 7, 2012, at 1. The ballot initiative approved by voters also allowed felons previously sentenced under section 667 for a third non-qualifying felony to petition for resentencing. Mishak, *supra*.

145. Jack Leonard, *Prop. 36 Seeks to Ease California's Three-Strikes Law*, L.A. TIMES, Oct. 12, 2012, <http://articles.latimes.com/2012/oct/27/local/la-me-prop36-3strikes-20121028>.

146. See H.B. 501, 2013 Leg., Reg. Sess. (Fla. 2013) (establishing judicial safety valve for state's ten-twenty-life enhancement for use of firearm in course of felony); H.B. 561, 2012 Leg., Reg. Sess. (Fla. 2012) (adjusting threshold quantities for mandatory drug sentences); H.B. 917, 2011 Leg., Reg. Sess. (Fla. 2011) (eliminating mandatory sentences for narcotics offenses).

147. Greg Newburn, *Why is Anyone Still Listening to Prosecutors on Mandatory-Minimums?*, SENTENCE SPEAK (Apr. 3, 2013), <http://sentencespeak.blogspot.com/2013/04/why-is-anyone-still-listening-to.html>.

for opposing repeal of mandatory sentences is the declining crime rate since the 1990s: prosecutors typically point to the drop in crime as evidence that harsh sentencing laws are working,¹⁴⁸ notwithstanding evidence from several studies that our nation's declining crime rate has more to do with demographic shifts and changes in police practices than with incapacitation.¹⁴⁹ But what may really be motivating this reflexive opposition is either an unstated recognition that mandatory minimum sentences make the prosecutor's job easier by forcing guilty pleas,¹⁵⁰ and/or a concern that a return of sentencing discretion to judges might once again lead to unduly lenient sentences.

The experience in other states suggests that even when prosecutors support limited reform of mandatory minimums, they do so as a result of interest convergence¹⁵¹ rather than any principled opposition to such harsh sentencing schemes. Massachusetts,¹⁵² Ohio¹⁵³ and South Carolina¹⁵⁴ have all passed limited reforms to their drug-related mandatory minimum penalties in the past four years. But these amendments were all part of larger criminal justice packages that contained additional tools for prosecutors unrelated to narcotics enforcement. Prosecutors in these states seem to have been engaged in horse trading—taking advantage of the political climate and declining crime rates to strike a deal in order to gain other needed concessions

148. *See id.* (summarizing opposition of Florida State's Attorney Brad King); *see also* Peters, *supra* note 143, at A1 (summarizing argument of New York District Attorney Michael Green).

149. *See supra* note 136 and accompanying text (discussing the various factors responsible for the drop in crime in the 1990s, and the effectiveness of each factor).

150. *See* Barkow, *supra* note 11, at 728; Oppel, *supra* note 91, at A1.

151. The interest convergence thesis posits that, historically, some social movements have been successful when the interests of groups with different psychological motivations for supporting the change coincide. *See* Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. ONLINE 248, 252 (2012) (explaining and defending Derek Bell's interest convergence theory of school desegregation cases).

152. The Massachusetts Act reduced the school zone distance from 1000 feet to 300 feet, reduced mandatory minimum terms for certain drug offenses by approximately 33% and reduced the weight thresholds required for trafficking certain controlled substances. Act of Aug. 2, 2012, ch. 192, 2012 Mass. Legis. Serv. (West).

153. The Ohio legislation eliminated the mandatory prison term for certain third-degree drug felonies except where the offender had previously been convicted of a drug felony two or more times, and substituted in its place a rebuttable presumption of incarceration. It also allowed offenders previously sentenced to a mandatory prison term for drug offenses to apply for judicial release upon expiration of 80% of their term. Act of June 29, 2011, file 29, 2011 Ohio Legis. Serv. Ann. (West) (amending OHIO REV. CODE ANN. § 2925.03(C)).

154. The South Carolina legislation eliminated mandatory sentences for first or second drug offenses other than trafficking, amended the school-zone offense to require intent to commit the offense within proximity of a school, park or playground and allowed for compassionate parole for terminally ill or geriatric prisoners. Omnibus Crime Reduction and Sentencing Reform Act of 2010, act 273, 2010 S.C. Acts 1937.

from the legislature.¹⁵⁵ Even in California, where three district attorneys broke ranks from the California District Attorneys Association and publicly supported Proposition 36,¹⁵⁶ the primary factor motivating their support appeared to be that state prisons were severely overcrowded and subject to a mandatory release order just recently affirmed by the United States Supreme Court.¹⁵⁷ My research has failed to uncover a single prosecutor who has publicly supported reform of mandatory minimum penalties because she believed it was her ethical responsibility to do so. The convergence of other interests and concerns has provoked modest reforms in certain states, but it would be refreshing if prosecutors spoke publicly about their ethical duty to enhance the efficacy and fairness of the criminal justice system.

III. MITIGATING MANDATORY MINIMUMS: A PROSECUTOR'S ETHICAL CONDUCT IN CHARGE BARGAINING

Ethical prosecutors striving for systemic fairness in punishment will need to do more than advocate for sentencing reform. No matter how successful their leadership and advocacy in this area, the political reality is that some mandatory sentences—particularly for violent offenses—will remain on the books.¹⁵⁸ Legislators are unlikely to have the

155. Massachusetts may be a prime example of interest convergence at work. While the Massachusetts District Attorneys Association (“MDAA”) reflexively opposed the reform of that state’s narcotics penalties, District Attorney Gerry Leone of Middlesex County broke ranks with the MDAA and supported Chapter 192 of the Acts of 2012. Matt Murphy, *Prosecutors Knock Patrick, Urge His Help to Pass ‘True Anti-Crime Bill,’* LOWELL SUN, July 24, 2012, http://www.lowellsun.com/local/ci_21142760/prosecutors-knock-patrick-urge-his-help-pass-true. Not coincidentally, Leone’s jurisdiction included the town of Woburn, where a career criminal with multiple prior incarcerations had a year earlier shot a police officer while on parole. Jonathan Saltzman, *DA Not Notified of Parole Hearing: Freed Lifer Killed Woburn Officer*, BOS. GLOBE, Dec. 30, 2011, http://www.boston.com/news/local/massachusetts/articles/2010/12/30/da_not_notified_of_parole_hearing/?page=1. The sentencing reform bill supported by Leone contained a tough new habitual offender provision and revisions to the state parole board. See Murphy, *supra*.

156. Leonard, *supra* note 145.

157. In a television advertisement, the District Attorneys for Los Angeles, San Francisco and Santa Clara counties argued that Prop. 36 would reduce prison overcrowding and save the state millions of dollars. *Id.*; see also *Brown v. Plata*, 131 S. Ct. 1910 (2011) (affirming an order of a 9th Circuit Prison Litigation Reform Act panel that California must reduce its prison population to 137.5% of the designed capacity within two years because overcrowded conditions violated the Eighth Amendment rights of prisoners with medical conditions and mental health problems). Even Attorney General Eric Holder’s recent commitment to stop seeking federal charges that carry mandatory minimum sentences in routine drug cases, discussed *supra* note 88 and accompanying text, can be viewed as a form of interest convergence because the population of federal prisons is presently 40% over capacity. See Charlie Savage, *Dept. of Justice Seeks to Curtail Strict Drug Terms*, N.Y. TIMES, Aug. 12, 2013, at A1.

158. For example, 18 U.S.C. § 924(c)(1) (2012) prescribes a mandatory sentencing enhancement for possession, brandishing or discharge of a firearm during certain designated

motivation, courage or political will to repeal mandatory sentences for highly dangerous crimes like homicide, repeat offender OUI or aggravated sexual assault.¹⁵⁹ The challenge for chief prosecutors is to establish systems within their offices to help ensure that the substantial discretion prosecutors retain with respect to these offenses is exercised fairly, consistently and transparently. I propose an administrative check on prosecutorial discretion with respect to charge bargaining of mandatory minimum penalties, and I lay the groundwork below for an internal regulatory structure that may be refined and adopted by state prosecutors who are serious about fulfilling their obligations as “ministers of justice.”

Because we rarely rely on trials and the assessment of evidence to mete out criminal justice in the United States, many scholars have observed that our nation has moved from an adversarial criminal justice system to an administrative criminal justice system.¹⁶⁰ This school of scholarship has begun to examine how internal office structures and policies can be an important source of constraint on prosecutorial discretion. Marc Miller and Ronald Wright, for example, have done excellent work challenging us to think about internal regulation as a source of meaningful constraint on prosecutorial discretion.¹⁶¹ They argue that “internal executive regulation is an important and largely unexplored path for legal reform” because it can lead to more consistency and transparency in charging and plea bargaining practices.¹⁶² Daniel Medwed has similarly challenged chief prosecutors to guard against wrongful convictions by creating internal review committees within their offices to approve key prosecutorial decisions that may be affected by cognitive biases such as the decision whether to oppose a motion for post-conviction relief claiming actual innocence, or the decision to prosecute solely on the testimony of a single eyewitness.¹⁶³ Building on some of this great work, I propose a specific

felonies (five, seven and ten years, respectively). For a discussion of how frequently (and inconsistently) this enhancement is charge-bargained away by federal prosecutors, see Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities*, 66 S. CAL. L. REV. 501, 551 (1992).

159. See Barkow, *supra* note 11, at 748 (describing effect of “outrage dynamic” in criminal law); Stuntz, *supra* note 40, at 509, 553 (describing legislative enactments in the criminal law area as a “one-way ratchet,” because organized interest group pressure to narrow criminal liability or punishment is exceptionally rare).

160. See, e.g., Barkow, *supra* note 11, at 721–22.

161. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) [hereinafter *The Black Box*].

162. *Id.* at 196.

163. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 22–24 (2012).

and detailed form of internal self-regulation that could be successful in constraining a prosecutor's charge bargaining decisions for crimes carrying mandatory minimum sentences.

Attorney General Eric Holder's recent announcement that federal prosecutors should now circumvent mandatory sentences for certain drug traffickers by charging them without reference to the weight of the drug distributed illustrates the importance of implementing internal administrative checks on prosecutorial discretion.¹⁶⁴ The Attorney General did *not* commit to putting the full resources and credibility of the Department of Justice behind efforts to repeal these draconian federal drug laws. What the Attorney General committed to do was essentially *sidestep* these statutes by issuing a directive to federal prosecutors that they should use them only in certain aggravating situations, such as where the narcotics distribution was part of high-level organized criminal activity or involved the use, or threatened use, of violence.¹⁶⁵ This development on the federal level illustrates two crucial points I have emphasized in this Article: (1) notwithstanding the reform efforts I encourage, prosecutors are likely to continue to have discretion to invoke mandatory minimum penalties for certain crimes going forward, and (2) it is critical to adopt some form of transparent guidelines to ensure that this substantial discretion is exercised in a manner consistent with the public interest.

Although the ABA *Criminal Justice Standards* strongly encourage chief prosecutors to establish internal guidelines and office policies to guide the exercise of prosecutorial discretion,¹⁶⁶ few prosecutors' offices presently do so.¹⁶⁷ Supervision in most district attorneys' offices is informal and ad hoc; while approvals may be required within the office before certain charges may be dismissed or reduced, there is typically no official system in place to ensure that these decisions are made in a consistent and principled fashion over time.¹⁶⁸ Given the size

164. For a full text of the Attorney General's remarks on August 12, 2013, see Eric Holder, U.S. Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

165. Todd Ruger, *Holder Announces Shift against Mandatory Sentencing Laws*, NAT'L L.J., Aug. 12, 2013, <http://www.nationallawjournal.com/id=1202615175110/Holder-Announces-Shift-Against-Mandatory-Sentencing-Laws?slreturn=20140207155856>.

166. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION § 3-2.5(a) (3d ed. 1993) (in order to "achieve a fair, efficient, and effective enforcement of the criminal law," each prosecutor's office should develop statements of general policies to guide the exercise of prosecutorial discretion and procedures of the office).

167. ALEXANDER, *supra* note 32, at 115 ("Most prosecutor's offices lack any manual or guidebook advising prosecutors how to make discretionary decisions.").

168. Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty*:

of many prosecutorial units, the frequent turnover in supervisory positions within these offices and the limitations of human memory, reliance on informal mechanisms of supervision is insufficient to assure consistency and proportionality with regard to charge bargaining decisions.¹⁶⁹

While prosecutors typically perceive themselves as acting in the public interest and exercising reasoned discretion,¹⁷⁰ failure to identify *in writing* the considerations that are guiding their choices promotes inconsistency as well as idiosyncratic and seat-of-the-pants decision-making. For this reason, I recommend that chief prosecutors adopt written guidelines setting forth the factors that line prosecutors must consider before recommending the reduction of any felony charge carrying a mandatory minimum sentence. I also recommend that these guidelines be published on the district attorney's website so that they are available for inspection by the public and, most importantly, the defense bar. Finally, and crucially, I recommend that prosecutors establish small committees within their offices to consider and approve requests to reduce any charges involving mandatory minimum sentences. Line prosecutors would not be authorized to reduce such charges unless they submitted a written request to the committee setting forth their reasons for the charge reduction and obtained committee approval. Defense attorneys should be allowed to petition the office committee in writing for a charge reduction where the assigned line prosecutor opposes it during plea negotiations. These relatively straightforward steps would ensure that prosecutors make charge reduction decisions based on articulable, readily identifiable principles rather than based on caprice or personal bias.¹⁷¹

It may seem counterintuitive to suggest that prosecutors should seek permission to *reduce* a crime carrying a mandatory minimum penalty. If such penalties are overly harsh in particular applications, why would

Toward an Improved Process, 26 FORDHAM. URB. L.J. 767, 788 (1999).

169. See *Accountability Deficit for Prosecutors*, *supra* note 42, at 1614. Elsewhere, Miller and Wright explored prosecutors' declination decisions in four jurisdictions and concluded that while such decisions are not truly "lawless" in the sense that they fail to comply with sound or articulable legal or policy justifications, they are a form of reasoned discretion that now operates "in the shadow of the law." *The Black Box*, *supra* note 161, at 131.

170. *Id.* at 168 (concluding after studying declination decisions that most prosecutors "feel obliged to justify their choices based on public-regarding reasons").

171. See Green & Zacharias, *supra* note 70, at 886 ("[A]rticulating principles and subprinciples of prosecution has value. It can make the exercise of discretion more thoughtful and systematic, enable well-intentioned prosecutors to reach decisions with reference to impersonal norms, narrow inconsistency within a prosecutor's office, and facilitate review by supervisory prosecutors.").

we want to create any barriers to the government's exercise of leniency? Might such an approval process boomerang, and dissuade line prosecutors from reducing charges? My hope and expectation is that setting up an approval process to dismiss will cause prosecutors to be more thoughtful and conscientious in making their charging decisions. Due to the legislature's tendency to create overlapping crimes with differing penalties, "a single criminal incident typically violates a half dozen or more prohibitions" from which the prosecutor may choose in fashioning criminal charges.¹⁷² If prosecutors know that they will need to obtain permission to dismiss an offense carrying a mandatory minimum sentence, they will think twice before charging it in the first place, thereby reducing the tendency of some prosecutors to overcharge solely to create leverage for a plea.¹⁷³ By enacting a dismissal policy, chief prosecutors would encourage prosecutors to be more realistic and proportional in their charging decisions ab initio by constraining what they will have the authority to do unilaterally down the road if they are not. When prosecutors know that their conduct has consequences that will later constrain their discretion, they are more likely to pay close attention to the propriety of their initial charging decisions, rather than reflexively charging the highest possible crimes.

My proposal borrows from the practice presently used by some United States Attorneys' offices to authorize substantial assistance departures in federal court. Federal law allows a judge to depart from a mandatory sentencing provision of the United States Criminal Code if the government files a motion averring that the defendant has provided substantial assistance in the investigation and prosecution of others.¹⁷⁴ Substantial assistance motions in federal court, often known as "5K1.1 motions," are uniquely within the discretion of the government.¹⁷⁵

172. Stuntz, *supra* note 40, at 507. "The history of American criminal law is a history of haphazard addition, with new offenses joined piecemeal to existing criminal codes." *Id.* at 583.

173. See Covey, *supra* note 97, at 1254–55 (distinguishing between charging unnecessarily numerous offenses (horizontal overcharging), and charging crimes at a higher level than may be warranted by the facts (vertical overcharging)). While Model Rule 3.8 ("Special Responsibilities of a Prosecutor") does not explicitly condemn or prohibit the practice of either form of overcharging so long as the prosecutor has probable cause to believe that the offense was committed, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2013), the ABA *Criminal Justice Standards* § 3-3.9 states that a prosecutor should not bring more or greater charges "than are necessary to fairly reflect the gravity of the offense," AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION § 3-3.9 (3d. ed. 1993).

174. 18 U.S.C. § 3553(e) (2012).

175. Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 109 (1994) ("While theoretically the judge has the last word on whether the defendant receives a downward departure for substantial assistance, in practice, the government motion requirement of section 5K1.1 gives the prosecutor

Section 5K1.1 of the U.S. Sentencing Guidelines requires a motion by the government, but it does not set forth any standards for what constitutes “substantial” assistance, or how a prosecutor should exercise discretion in making such a determination.¹⁷⁶ As a procedural matter, the *United States Attorneys’ Manual* requires that all substantial assistance motions be approved in advance by either the jurisdiction’s U.S. Attorney, its Chief Assistant U.S. Attorney, a supervisory criminal Assistant U.S. Attorney or “a committee including at least one of those individuals.”¹⁷⁷ Many, but not all, U.S. Attorneys’ offices across the country are now utilizing intra-office “substantial assistance” or “downward departure” committees to approve such motions, in an attempt to achieve some consistency regarding what level and type of cooperation will suffice to warrant a departure.¹⁷⁸

My proposed framework with regard to state charge bargaining practices goes beyond this federal experience under 5K1.1 in three important respects: (1) it applies to *all* decisions to reduce a felony charge carrying a mandatory minimum penalty, not just those based on cooperation; (2) it encourages prosecutors to adopt and publish written *standards* to guide the committee’s determinations;¹⁷⁹ and (3) it allows a defense attorney to make a submission to the committee in writing if he or she believes that a prosecutor is acting unreasonably in refusing to reduce a charge.

the ultimate authority to decide whether a defendant will receive such a departure.”); *see* *Wade v. United States*, 504 U.S. 181, 186 (1992) (holding that the government’s decision not to file a substantial assistance motion was not subject to review by the court at request of the defendant unless the defendant makes a “substantial threshold showing” that it was motivated by an unconstitutional consideration, such as race or religion); *United States v. Zingsheim*, 384 F.3d 867, 872–73 (7th Cir. 2004) (holding that the court was without authority to issue a standing order requiring prosecutors in the district office to utilize a committee to make substantial assistance determinations and to require 5K1.1 motions to be accompanied by a written report from the committee containing the signatures of the committee members and the reasons for their decisions).

176. *See* U.S. SENTENCING GUIDELINES § 5K1.1 (2013); *see also* LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENTENCING COMM’N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 3 (1998) (noting that there is “scant instruction” regarding the terms and policies contained within the substantial assistance statement).

177. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27-400 (1997) [hereinafter U.S. ATTORNEYS’ MANUAL].

178. MAXFIELD & KRAMER, *supra* note 176, at 7; Lee, *supra* note 175, at 126; *see also* Michael Simon, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 944–51 (2002) (documenting disparity among districts).

179. While a survey of U.S. Attorneys’ offices revealed that many jurisdictions now have internal written policies describing what conduct by the defendant will and will not be considered as rising to the level of substantial assistance, MAXFIELD & KRAMER, *supra* note 176, at 24, these policies typically are not published and are not available to the defense.

I also recommend that chief prosecutors include on their mandatory departure committees a retired judge, lay citizen or a member of their staff who has previous experience representing criminal defendants. Many scholars have justifiably lamented that prosecutors often become entrenched in their adversarial roles, and fail to perceive or credit contrary viewpoints.¹⁸⁰ “A veneer of toughness, even cynicism” can be characteristic of long-term players in a district attorney’s office.¹⁸¹ The more seniority a supervising prosecutor has, the more likely her perspective might become both insular and jaded. Having fresh voices at the table when charge reduction decisions are made can discourage “groupthink,” and can help to assure that the public interest broadly conceived is being adequately advanced in these important discretionary decisions.¹⁸²

Guidelines regarding charge bargaining need not be overly long and complex. At a minimum, I would suggest that chief prosecutors recognize the following factors as grounds for reducing felony charges carrying mandatory penalties:

- (1) Anticipated problems of proof at trial;
- (2) Substantial cooperation by the defendant in the investigation or prosecution of other serious criminal offenders;
- (3) The chance that the mandatory sentence would frustrate rehabilitation of the offender and/or increase her risk of reoffending;
- (4) Whether the defendant is a youthful offender between the ages of seventeen and twenty-one;
- (5) Whether the mandatory sentence would be grossly disproportionate to the gravity of the offense as committed,¹⁸³ for one or more of the following reasons:
 - There was no physical injury to others;

180. See, e.g., Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 378 (2001) (“Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is.”); Stuntz, *supra* note 40, at 581 (describing a culture where prosecutors see themselves as “czars of their dockets, dispensing justice as they see fit”).

181. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140 (2004).

182. Burke, *supra* note 67, at 709–11.

183. At first blush, these considerations of proportionality might seem contrary to my earlier argument that calibrating appropriate punishment in light of the multiple aims of criminal sentencing is primarily a legislative concern. See *supra* note 78. But it shows no disrespect for legislative primacy in the criminal law to recognize that there could be situations where the legislature, if it had been able to envision an outlier situation presented by the unique circumstances of an individual case, would likely *not* have chosen to impose a harsh mandatory sentence.

- The defendant did not carry, brandish or use a weapon;
- The defendant has no prior record of felony conviction;
- The defendant played a very minor role in a joint criminal enterprise;
- The defendant's mental capacity was impaired at the time of the crime;
- The defendant is charged as a habitual offender, and there was a substantial time lapse (e.g., seven or more years) between one or more of the predicate offenses.

Offices should develop an approval form containing a checklist of these factors (as well as any other factors that the chief prosecutor may identify) along with a narrative section requiring that line prosecutors provide a brief factual description of the case and any additional reasons supporting the proposed charge reduction.

The factors I have identified above are not novel. In my experience, many prosecutors already consider them, or some constellation of them, in determining when to dismiss or reduce charges carrying mandatory minimum penalties.¹⁸⁴ Yet they do so in an informal, ad hoc and nontransparent fashion. The challenge for chief prosecutors is to *formally* identify the factors that will justify treating certain cases as outliers, and then to leave a trail in their wake explaining to others why

184. Charge bargaining around mandatory sentences is prevalent in federal practice. See Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 703 (2013). In 2003, then-Attorney General John Ashcroft issued a guideline requiring federal prosecutors to charge and pursue the highest, most readily proven offense supported by the evidence. See Amie N. Ely, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 252 (2004). However, that mandate has been softened somewhat by subsequent directives. The current Justice Department policy, as reflected in the *U.S. Attorneys' Manual*, provides:

If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges: That is the most serious readily provable charge *consistent with the nature and extent of his/her criminal conduct*;

That has an adequate factual basis;

That makes likely the *imposition of an appropriate sentence* and order of restitution, if appropriate, under all the circumstances of the case; and

That *does not adversely affect the investigation or prosecution of others*.

U.S. ATTORNEYS' MANUAL, *supra* note 177, § 9-27.430 (emphasis added). The italicized language above suggests that proportionality of the sentence, the extent of the defendant's participation in a joint criminal enterprise and the defendant's cooperation in investigation of others, are all appropriate considerations for a federal prosecutor to weigh in determining whether to reduce a charge carrying a mandatory sentence. Comment 1 to this section of the *U.S. Attorneys' Manual* further provides that "[e]xcept in unusual circumstances, this charge [to which the defendant pleads guilty] will be the most serious one" but "[t]he requirement that a defendant plead to a charge, that is consistent with the nature and extent of his/her conduct is not inflexible." *Id.* cmt.1.

those cases were considered outliers in the first place. While mercy is an important consideration for public prosecutors in fulfilling their role as “ministers of justice,”¹⁸⁵ the factors that call for mercy should not be left to the individual discretion of line prosecutors.¹⁸⁶

Many of the factors I have identified above are presently recognized as grounds for *judicial* departure from mandatory sentences under certain limited federal and state safety valve statutes.¹⁸⁷ But judicial safety valves are insufficient to eradicate the harshness and inequities of mandatory sentencing schemes for at least two reasons: first, not all states have adopted them;¹⁸⁸ second, in the federal system and those states that have safety valves, the judiciary is usually provided discretion to deviate from a mandatory minimum sentence only for a very narrow class of crimes.¹⁸⁹ Self-regulation by prosecutors to constrain and justify the exercise of their discretion will continue to be necessary for crimes in the majority of states that have not enacted judicial safety valves, and even in minority states for those crimes that are not subject to safety valve treatment.

In addition to promoting consistency, this proposed internal administrative process would also promote transparency and accountability. Prosecutors in the United States earn very low grades for any kind of transparency, internal or external.¹⁹⁰ Although prosecutors are now widely recognized as the most powerful players in the criminal justice system,¹⁹¹ there is very little public awareness of

185. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 994 (2009) (arguing that justice requires the prosecutor to view the defendant as a human being sometimes deserving of mercy).

186. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1354 (2008) (explaining that prosecutorial power to be lenient has not undergone the same level of scrutiny as other pockets of mercy—such as executive clemency and jury nullification—because of deference to prosecutorial expertise).

187. See, e.g., 18 U.S.C. § 3553(f) (2012); CONN. GEN. STAT. § 21a-283a (2013); MONT. CODE ANN. § 46-18-222 (2013).

188. See *Safety Valve Fact Sheet*, FAMILIES AGAINST MANDATORY MINIMUMS (July 17, 2012), <http://www.famm.org/Repository/Files/FS%20Safety%20valves%20in%20a%20nutshell%206.27.12.pdf> (enumerating the small number of states with safety valve provisions and detailing their contents).

189. See, e.g., 18 U.S.C. § 3553(f) (federal safety valve applies only to possession, distribution or conspiracy to distribute certain controlled substances); CONN. GEN. STAT. § 21a-283a (safety valve applies to designated narcotics offenses); ME. REV. STAT. tit. 17-A, § 1252(5-A) (2013) (safety valve applies to designated narcotics offenses); MINN. STAT. § 609.11 subd. 8 (2013) (safety valve applies to employing a dangerous weapon in the commission of enumerated offenses).

190. *The Black Box*, *supra* note 161, at 194.

191. See ALEXANDER, *supra* note 32, at 115; Bibas, *supra* note 185, at 959 (“No government official has as much unreviewable power or discretion as the prosecutor.”); Stuntz, *supra* note 40, at 577.

(and debate about) the principles that guide their substantial discretion.¹⁹² Establishing guidelines regarding when charges carrying mandatory sentences will be dismissed, and collecting data about how often such dismissals are agreed to and for what reasons, would allow voters to assess in a meaningful way whether the performance of the district attorney is in line with public values.¹⁹³

To date, very few state prosecutors have established written standards for their offices with regard to charge bargaining. Prosecutors in this country prefer to operate under an unofficial and subterranean system of internal controls, so that deviation from office policy cannot be scrutinized by judges, defense attorneys or the public. Moreover, they resist adopting charge reduction guidelines—or guidelines of any sort—out of fear that such standards will be used as “litigation weapons.”¹⁹⁴ But this fear is misplaced. The *United States Attorneys’ Manual*, which contains detailed charging and plea bargaining guidelines for federal prosecutors, contains a clear disclaimer that those guidelines are advisory only, and confer no substantive or procedural rights on a defendant.¹⁹⁵ Federal courts have balked at any attempt by defense

192. Roger Fairfax, *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1269 (2010).

193. See *How Prosecutor Elections Fail Us*, *supra* note 105, at 606–07. The vast majority of prosecutors are directly elected, usually at the local level. See STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 2 (2011) (noting that Alaska, Delaware, Connecticut and Rhode Island have a single prosecutor’s office for the entire state); STEVEN W. PERRY, BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2005, at 2 (2006) (noting that chief prosecutors are directly elected in all states except for Alaska, Connecticut, the District of Columbia and New Jersey). This holds out the promise that a prosecutor’s discretionary power will be checked at the voting booth. However, the available data suggests that prosecutor elections do not effectively ensure that the power of the office is exercised consistently with the will of the public. See Bibas, *supra* note 185, at 984; *How Prosecutor Elections Fail Us*, *supra* note 105, at 591. In the first place, incumbent prosecutors rarely lose elections, winning 95% of the time when they run for reelection. *How Prosecutor Elections Fail Us*, *supra* note 105, at 592. In part, this is driven by a paucity of challengers: 85% of incumbent prosecutors run for reelection unopposed. *Id.* at 593. By comparison, state legislators run unopposed only 35% of the time. *Id.* at 594. Even in those races where a challenger does appear, the rhetoric of the campaign tends to focus on a few sensational high-profile cases or the personal qualities of the chief prosecutor generally, rather than on more useful measures of competence and policy. Bibas, *supra* note 185, at 987 (characterizing prosecutor elections as “driven by unreliable anecdotes and scandals rather than more meaningful statistics and policies”); *How Prosecutor Elections Fail Us*, *supra* note 105, at 597 (citing a lack of debate in prosecutor elections over the values that set the priorities and policies of the office). This focus prevents the voting public from realistically assessing the performance of the prosecutor’s office to determine if prosecutorial discretion is being used in line with public values. See Bibas, *supra* note 185, at 987; *How Prosecutor Elections Fail Us*, *supra* note 105, at 597. Prosecutors are rarely called to account for their performance, and when they are, the indicia presented to voters do not accurately reflect the operation of the office.

194. DeMay, *supra* note 168, at 789–90.

195. “The principles set forth herein, and internal office procedures adopted pursuant hereto,

attorneys to use the *Manual* to force or prohibit prosecutorial action otherwise meeting statutory and constitutional requirements.¹⁹⁶ In the State of Washington, the Kitsap County Prosecuting Attorney has published “Standards and Guidelines” that govern the discretion of prosecutors in his district. These guidelines cover charging, sentencing recommendations, pretrial diversion and statements to the press.¹⁹⁷ The Introductory Note to the guidelines similarly states that:

[T]hese Standards and Guidelines are advisory only. The only right or entitlement they are intended to create is the right to a careful review by this office. They are specifically not intended to, nor do they, confer any other substantive or procedural rights or entitlements on any person or persons.¹⁹⁸

Such disclaimers are not only sensible, but also eminently enforceable should unique or unforeseeable circumstances warrant a departure from office policy.

In addition to promoting consistency, transparency and accountability, an internal approach to regulating prosecutorial discretion has the added advantage of giving chief prosecutors the data they need to see how their subordinates utilize discretion over time, and to manage that discretion in a more proactive manner.¹⁹⁹ When managers in a prosecutor’s office can analyze data on charge reductions across crimes and across time, they can track and detect disparities in charge bargaining with respect to race, gender and age. They can also identify prosecutors who either too frequently request authority to

are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.” U.S. ATTORNEYS’ MANUAL, *supra* note 177, § 9-27.150.

196. See *United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005); *United States v. Blackley*, 167 F.3d 543, 548–49 (D.C. Cir. 1999) (explaining that the *Manual* does not give rise to any “cause of action or remedies” when a prosecutor has deviated from it).

197. RUSSELL D. HAUGE, KITSAP CNTY. PROSECUTING ATTORNEY, MISSION STATEMENT AND STANDARDS AND GUIDELINES *passim* (2007), available at <http://www.kitsapgov.com/pros/StandardsGuidelines2007.pdf>. While the Kitsap County guidelines on charge reductions are not as complete or detailed as I recommend above, they do echo many of the same themes. A Kitsap County prosecutor may agree to allow a defendant to plead guilty to a lesser charge: in order to correct an error in the initial charging decision; in order to obviate anticipated evidentiary problems at trial; in light of facts discovered after charging that mitigate the seriousness of the defendant’s conduct; or after reconsidering the charging factors described elsewhere in the guidelines. *Id.* at 9.

198. *Id.* at 5.

199. See *The Black Box*, *supra* note 161, at 187 (identifying the benefits a prosecutor’s office could receive by compiling data); see also *Bibas*, *supra* note 185, at 989–90 (arguing that for stakeholder pressure to succeed, chief prosecutors need to find a way to align the interests of line prosecutors with their boss’s priorities).

charge bargain away mandatory minimum sentences (perhaps identifying patterns of overcharging), or who very seldom do so (perhaps identifying undue rigidity in plea bargaining). Finally, they can identify those crimes that carry mandatory minimum sentences that their offices most routinely reduce, and use this information to fulfill their responsibility as agents of law reform²⁰⁰ to support legislative change.²⁰¹ Implementing explicit guidelines and approval mechanisms would thus set the stage for an internal sentencing information system that would allow managers to better track decisions and monitor them for consistency and efficacy.²⁰²

Some commentators have argued that guidelines are ineffective; that is, guidelines inevitably will be either too specific to be helpful given the wide variety of factual circumstances presented by criminal conduct, or they will be too general to bind a line prosecutor's discretion in any meaningful fashion.²⁰³ But the recent experience in two states, Florida and New Jersey, suggests an opposite conclusion. In Florida, the Prosecuting Attorneys Association ("FPAA") adopted voluntary standards to guide prosecutors' discretion in charging offenders under the state's extremely broad habitual offender statute.²⁰⁴ After the Florida legislature began to consider amending the habitual offender statute in response to claims that it was being utilized in a racially biased fashion, the FPAA drafted and implemented statewide guidelines setting forth criteria prosecutors would follow for determining whether to charge an arrested suspect as a habitual offender.²⁰⁵ Under the guidelines, an indictment not meeting the express criteria must be accompanied by a written statement of reasons signed by the designated Assistant Attorney General and the elected State's Attorney explaining why the prosecutor considered deviation from the guidelines appropriate, and that statement must be filed not only with the court but

200. *See supra* Part II.

201. Describing criminal justice initiatives in North Carolina such as the Racial Justice Act and the State Sentencing Commission, Professor Janet Moore has argued that the collection of, and access to, hard data about criminal prosecutions is essential to politically effective action to promote law reform. Janet Moore, *Oppositional Politics in Criminal Law and Procedure*, UTAH L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2214637>.

202. *Cf.* Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1370 (2005) (arguing that transparency and searchability of data should be a priority for the next generation of sentencing reforms).

203. *See* Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087, 1102 n.67 (2005) [hereinafter *Prosecutorial Guidelines in New Jersey*] (collecting sources).

204. FLA. STAT. § 775.084 (2013).

205. *The Black Box*, *supra* note 161, at 192–93.

also with the FPAA.²⁰⁶ These guidelines are very specific, and require consideration of such factors as the nature and grade level of the current and predicate offenses, the number of prior convictions required for various level felonies and the intervening time period between convictions.²⁰⁷

In New Jersey, the state supreme court has required prosecutors to articulate guidelines on prosecutorial prerogatives that affect mandatory sentencing.²⁰⁸ In *State v. Lagares*, the defendant was charged with possession with intent to distribute cocaine after previously having been convicted of marijuana possession.²⁰⁹ The New Jersey repeat offender drug law allowed a prosecutor to apply for an extended mandatory term—at her sole discretion—for a second-time drug offender. The court noted that sentencing is traditionally a function of the judiciary, and that the statute’s goal of uniformity would be undermined if a prosecutor had unfettered authority to select which defendants would be subject to the increased sentence and which ones would get favorable treatment.²¹⁰ In order to save the statute from constitutional infirmity, the court construed the statute to require articulation of written guidelines by the prosecutor’s office, a statement of reasons on the record at the time of a plea for the waiver or dismissal of the mandatory drug term and an “arbitrary and capricious” standard of review by the trial judge.²¹¹ While *Lagares* and its progeny allowed individual county prosecutors to adopt different policies based on an Attorney General

206. FLA. PROSECUTING ATTORNEYS’ ASS’N, STATEMENT CONCERNING IMPLEMENTING OF HABITUAL OFFENDER LAWS § I(D) (1993), reprinted in MARC MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 181–82 (3d ed. 2007).

207. *Id.*

208. See *Prosecutorial Guidelines in New Jersey*, *supra* note 203, at 1103.

209. *State v. Lagares*, 601 A.2d 698, 700 (N.J. 1992).

210. *Id.* at 704.

211. *Id.* at 704–05.

Because we are not familiar with all of the factors that law-enforcement agencies might consider significant in determining whether a defendant should be exempted from an extended sentence, we request that the Attorney General, in consultation with the various county prosecutors, adopt guidelines for use throughout the state. Such guidelines will promote uniformity and provide a means for prosecutors to avoid arbitrary or abusive exercises of discretionary power. Moreover, to permit effective review of prosecutorial sentencing decisions, prosecutors must state on the trial court record the reasons for seeking an extended sentence. Such a statement will provide for effective judicial review and will help to insure that prosecutors follow the guidelines in each case.

Id. at 704. In *State v. Vasquez*, the New Jersey Supreme Court applied the *Lagares* rationale to a prosecutor’s refusal to waive a mandatory parole disqualifier in a drug statute. *State v. Vasquez*, 609 A.2d 29, 32 (N.J. 1992) (similar considerations for judicial oversight are “mandated to protect against arbitrary and capricious prosecutorial decisions.”).

model, two years after these decisions, the New Jersey Supreme Court mandated that charging and plea bargaining standards with respect to mandatory drug sentences be issued and enforced statewide.²¹² These guidelines in New Jersey that govern when a prosecutor may waive or reduce an otherwise mandatory term of imprisonment are now known as the “*Brimage Guidelines*.”²¹³ Although these guidelines are highly specific regarding when a mandatory drug sentence may be waived and the degree of sentencing concession that may be awarded, they permit general consideration of the defendant’s cooperation with the government, lack of use of a weapon, lack of threatened injury, lack of direct connection to school property in a school zone case and the prosecutor’s assessment of the likelihood of obtaining a conviction following trial.

The New Jersey experience with the *Brimage Guidelines* provides a useful lesson in the role that the judiciary can play in promoting self-regulation by prosecutors. Courts in the United States typically operate within a tradition of deference to executive discretion in charging and charge reduction decisions.²¹⁴ To reduce charges carrying a mandatory sentence, prosecutors either need to dismiss the charge outright, or partially dismiss the charge by deleting the factual allegation of an element of the crime that triggers the mandatory sentencing provision (e.g., deleting an allegation that a drug sale occurred within a school zone). Courts typically steer clear of reviewing such dismissal decisions for fear of interfering with core executive functions.²¹⁵ But in most states, prosecutors must seek leave of court to dismiss or partially dismiss a complaint or indictment, and it is within the court’s discretion to require a statement of the prosecutor’s reasons for doing so.²¹⁶

212. *State v. Brimage*, 706 A.2d 1096, 1107 (N.J. 1998) (“Any flexibility on the basis of resources or local differences must be provided for and explicitly detailed within uniform, statewide guidelines.”).

213. N.J. OFFICE OF THE ATTORNEY GEN., *BRIMAGE GUIDELINES 2* (2004), available at <http://www.nj.gov/lps/dcj/agguide/directives/brimagerevision.htm>.

214. *Accountability Deficit for Prosecutors*, *supra* note 42, at 1607.

215. *Prosecutorial Guidelines in New Jersey*, *supra* note 203, at 1103.

216. An extensive discussion of the difference between a *nolle prosequi* and a motion to dismiss is beyond the scope of this Article. The modern analogue to the “*nolle pros*” is the dismissal of an indictment, information or complaint without prejudice upon leave of the trial court. Some states and the federal system have explicitly abolished the common law *nolle pros*, and a motion to dismiss is the prosecutor’s exclusive avenue for terminating a prosecution short of trial or plea. See, e.g., CAL. PENAL CODE § 1386 (West 2013); IDAHO CODE ANN. § 19-3505 (2013); OKLA. STAT. tit. 22, § 816 (2013); OR. REV. STAT. § 135.757 (2013). In those jurisdictions, the governing statute or rule of criminal procedure will dictate whether the prosecutor is required to state reasons for the motion, and whether those reasons may be given orally or must be in writing. See FED. R. CRIM. P. 48(a) (allowing an attorney for the government to file a dismissal of the indictment “with leave of court”); *United States v. Ammidown*, 497 F.2d

Courts interested in promoting prosecutors' transparency and accountability can require a statement of reasons for dismissals,²¹⁷ preferably in writing, beyond the generic, overused and highly uninformative, "such dismissal would be in the best interests of justice." If it is necessary to protect the safety of a witness or the integrity of an ongoing investigation, prosecutors can be allowed to submit their statement of reasons under seal.²¹⁸

Requiring prosecutors to articulate more detailed reasons for their dismissal decisions would have two salutary effects. First, such conduct by judges is likely to prompt a prosecutor's office to develop a written set of permissible criteria for charge reductions so as to avoid having line prosecutors embarrass the office by stating on the record justifications not reasonably supported by legitimate considerations of public safety.²¹⁹ Second, this practice would allow defense attorneys to

615, 620 (D.C. Cir. 1973) (interpreting "leave of court" requirement in FED. R. CRIM. P. 48(a) to require "exposure of the reasons for dismissal;" the court generally "will not be content with a mere conclusory statement by the prosecutor that dismissal is in the public interest, but will require a statement of reasons and underlying factual basis"); 21 AM. JUR. 2d CRIMINAL LAW § 725 ("[S]ome such rules require the prosecutor to state on the record the reasons for the dismissal."). Other states that have retained the common law power of a prosecutor to enter a nolle pros have modified that power by statute to require "leave of court" "upon good cause shown," which implicitly requires a statement of reasons by the prosecutor for dismissal. See VA. CODE ANN. § 19.2-265.3 (2013) ("Nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth *with good cause therefor shown*." (emphasis added)); State v. Mucci, 782 N.E.2d 133, 139 (Ohio Ct. App. 2002) ("The prosecuting attorney shall not enter a nolle prosequi in any cause without leave of the court, *on good cause shown*, in open court. A nolle prosequi entered contrary to this section is invalid." (emphasis added)); see also HAW. REV. STAT. § 806-56 (2013) ("No nolle prosequi shall be entered in a criminal case in a court of record except by consent of the court upon written motion of the prosecuting attorney *stating the reasons therefor*." (emphasis added)); WASH. SUP. CT. CRIM. R. 8.3(a) ("The court may, in its discretion, upon written motion of the prosecuting attorney *setting forth the reasons therefor*, dismiss an indictment, information or complaint." (emphasis added)).

217. The ABA *Criminal Justice Standards* suggest that "whenever felony charges are dismissed by way of nolle prosequi (or its equivalent) the prosecutor should make a record of the reasons for the action." AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEF. FUNCTION § 3-4.3 (3d ed. 1993).

218. Many federal district courts have enacted local rules that permit a 5K1.1 motion (substantial assistance) to be filed under seal. See, e.g., N.D. IND. LOCAL R. 5-3, available at www.innd.uscourts.gov/docs/localrules/lr.pdf; E.D.N.C., ELECTRONIC CASE FILING ADMINISTRATIVE POLICIES AND PROCEDURES MANUAL 28 (2010), available at www.nced.uscourts.gov/pdfs/cmecfPolicyManual.pdf. Other jurisdictions do this as a matter of routine practice. Raymond Dearie, *Panel Five: Cooperation and Plea Agreements - Judges' Roundtable*, 79 FORDHAM L. REV. 85, 85-86 (2010).

219. The experience in New Jersey provides a useful lesson in this interplay between judicial and executive power over mandatory sentencing, and the role that judges can play in encouraging self-regulation by prosecutors in this area. In the trio of cases from *Lagares* to *Brimage*, the New Jersey Supreme Court ruled that, since sentencing is a core judicial function, it would violate separation of powers principles under the state constitution to allow prosecutors unfettered and unreviewable discretion to reduce or dismiss drug charges carrying a mandatory minimum

advocate for equitable and consistent treatment for their clients by analogy to like cases.²²⁰ When prosecutors fail to put their reasons for dismissals on the record, they create an impediment to defense attorneys researching a history of how similar cases have been treated in their districts over time.

CONCLUSION

As “(ad)ministers of justice,” prosecutors must foster and promote a criminal justice system that is consistent, transparent and fair. Because each of these systemic goals is undermined by most mandatory minimum sentencing schemes, prosecutors across this country should join in the growing movement to repeal such statutes. Prosecutors should also reform their charge reduction policies concerning those mandatory minimum penalties that remain on the books, in order to better fulfill their obligation to promote consistent plea bargaining practices within their offices. The internal regulatory framework proposed in this Article is not a substitute for the elimination of mandatory sentences for most nonviolent drug and property offenses, but it will properly supplement such reform by providing a meaningful constraint on prosecutorial discretion.

sentence, because then complete sentencing authority would be effectively transferred to the executive. The Court thus used the power to require the prosecutor to state *reasons* for the dismissal as a way to leverage advance articulation of guidelines to support those reasons. State judges need not agree with the constitutional analysis in *Lagares*, or support the inherent authority of courts to subject prosecutorial discretion to an arbitrary and capricious standard of review, to see how more rigorous judicial insistence on explanations for prosecutor behavior can naturally lead to greater internal self-regulation.

220. See Bibas, *Prosecutorial Regulation*, *supra* note 185, at 1006.