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## Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment

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Has the role of the U.S. Attorney in our criminal justice system changed? In this Issue, six former Justice Department officials and U.S. Attorneys who served during the Obama administration make the case that the role of the U.S. Attorney underwent substantial transformation between 2009 and 2017. How these changes will be reshaped under the current administration remains an open question, for them and all of us.

This *FSR* Issue is lucky to have four former U.S. Attorney contributors who hail from the South, the Midwest, and the West. Their perspectives vary, though all six former government official contributors display unvarnished admiration for both President Barack Obama and Attorney General Eric Holder. Attorney General Holder, one contributor stresses, was willing to listen to different voices, even those criticizing his policies, to think critically, and ultimately to use the input he received in reshaping policies. These contributors report that the administration's overarching goal was to decrease mass imprisonment, with a three-prong approach: prevention, prosecution, and reintegration.

Their perspective on change may be ruffled slightly by Professor Andrew Leipold, who presents novel data to test the claims of other contributors. While Professor Leipold confirms the data reflect change, he wonders whether recent developments may be a short-term blip in a more long-lasting overall reconfiguration toward more federal prosecutions. Ultimately, disagreement between former Obama administration officials and Leipold may be about the salutary role prosecutorial discretion can play. Even starker challenges could be at the bottom of this discussion: How central a role can and should prosecutors play in solving problems that may be characterized as criminal, but are deeply rooted in social and economic inequality, or raise questions about the role of government in determining personal choices?

This introductory article focuses first on the impact leaders willing to use their influence can have in changing long-standing orthodoxy, prevailing attitudes, and approaches. Clear goals and a guiding philosophy are especially important for federal prosecutors who enjoy broad discretion. It may not be possible to cabin such discretion effectively in individual cases unless prosecutors follow an overarching goal, such as decreasing imprisonment.

The second section discusses the three-part strategy the Department of Justice pursued under Eric Holder's tenure—prevention, prosecution and re-entry. The article then turns to the challenge of metrics. Certain data collected and analyzed in one era may be neither relevant nor appropriate when goals change. Yet, collection and analysis of relevant local and national data demand a substantial investment of resources. Finally, the last section raises the challenging question what role federal prosecutors can and should play as federal prisons are overcrowded even though the national crime rate remains historically low. With the opiate crisis beckoning, it may be time to ask whether the criminal justice paradigm has served us well in addressing social problems.

### I. The Power of Leadership in a World of Discretion

The term “mass incarceration” has entered the media and public consciousness only within the last decade, long after U.S. incarceration rates became the highest in the world. The phrase has galvanized public discourse and advocacy. Apparently it also substantially impacted the Justice Department during

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the Obama years. As Professor Leipold indicates, it is hard to induce prosecutors to change practices. Yet the former government prosecutors who have contributed to this issue all assert that change happened.

Under Attorney General Holder's leadership, the Department began to reconsider the role of its prosecutors in contributing to mass incarceration. Large-scale imprisonment is costly. DOJ found itself re-allocating resources from law enforcement to the Bureau of Prisons.<sup>1</sup> The greatest cost, however, may be less tangible. Individuals are condemned to spend decades behind bars. Families and communities lose stability and the contributions of those incarcerated. On a societal level, the magnitude of incarceration has decreased the trust of impacted communities in law enforcement, led to questions about the fairness of our criminal justice system, and indirectly may have undermined, rather than supported, community safety. One of our contributors characterized the overly lengthy sentences imposed during those years as "too much unnecessary punishment."

Although the federal prison population is hardly the sole driver of the U.S. incarceration rate, its growth has been exponential and federal inmates now constitute the single largest group of prisoners.<sup>2</sup> The budgets and number of positions in U.S. Attorney's offices around the country have also grown substantially. In the three decades between 1975 and 2003, the number of attorney and non-attorney positions more than tripled, from around 3,000 to over 10,000. And they continue to grow, though at a lesser pace.<sup>3</sup> Because of the impact of inflation, budgetary numbers are more difficult to compare. Yet a 46 percent growth in the decade between 1993 and 2003 reflects the increased bandwidth of federal prosecutions in recent decades.

Attorney General Holder recognized the importance of charging practices on imprisonment rates. This led him to issue two memoranda detailing how federal crimes generally, and especially those prosecutable under drug statutes that carry mandatory minimum sentences, should be evaluated.<sup>4</sup>

Mandatory minimums, with their recidivism enhancements, had been driving long sentences, especially in drug cases. Judge Rose, who served as an assistant U.S. Attorney for over a decade in the Northern District of Iowa, describes how that office used to charge during the Clinton years and later under Attorney General Ashcroft's charging guidance.<sup>5</sup> Today she remains haunted by some of the lengthy terms, in some cases life sentences, imposed on comparatively small drug dealers who had two or more state felony drug convictions. Although these offenders may have appeared to be dangerous recidivists for whom such mandatories were originally designed, today she views them as relatively minor criminals whose sentences are disproportionate, costly, and unfair. Barbara McQuade, the former U.S. Attorney in Michigan, views recidivism enhancement as only one of the drivers of long sentences. In her opinion, the rules governing conspiracies also contribute to the ease with which mandatory minimum charges can be brought.

Attorney General Holder's charging memoranda asked prosecutors to evaluate drug cases individually, to assess whether a charge, especially when it carried a mandatory sentence, truly fulfilled the purposes for which it was designed. It was that change in charging guidance that opened the door for U.S. Attorneys to rethink their decisions and leadership, and to change the climate in their offices. Judge Rose discusses how she, as U.S. Attorney in the Northern District of Iowa, began to defer more to state prosecutors, file sentencing motions, and institute different charging practices. The first Holder memorandum freed federal prosecutors to consider an individual's background rather than only the information law enforcement presented about the offense. With her leaving after three years as U.S. Attorney, she described the changes as having grown into a "fragile sapling," left in the hands of her successors to thrive or wither.

## II. The Three-Part Strategy: Prevention, Prosecution, Re-Entry

According to all the former prosecutors, their mission changed from a sole focus on prosecutions to greater responsibility for preventing crime and for the re-entry of offenders. That led them to emphasize solving community problems over prosecuting individual cases. Attorney General Holder's Smart on Crime initiative demanded that new approach.

### A. Prevention

Wendy Olson, the former U.S. Attorney in Idaho, noted that U.S. Attorneys responsible for Indian Country—about half of all U.S. Attorneys—turned their attention to better ensuring public safety there. Despite commonalities in approach, each tribe demanded a different strategy as it faced unique challenges and needs, frequently connected to geography and its distinct social and economic situation. Federal legislation adopted in 2010 and DOJ policies mandated that U.S. Attorneys form more effective partnerships with tribal entities. They established tribal liaisons, helped develop procedural safeguards in tribal courts, and appointed tribal prosecutors as Special Assistants, especially under the Violence Against Women Act to better combat the high rate of domestic violence in Indian Country.<sup>6</sup>

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Despite these promising developments, a recent report by the Office of Inspector General outlines some of the shortcomings of current tactics.<sup>7</sup> It notes the ongoing lack of coordination within the Department of Justice and with other departments and agencies responsible for Indian Country. It also criticizes the absence of coordinated communication with tribes and insufficient training for tribal law enforcement. Public safety in Indian Country still does not appear to be a priority in the Department of Justice.

Yet, crime in Indian Country reflects larger social and economic problems beyond the ability of prosecutors to solve. Although the closer cooperation with tribal authorities will provide benefits to all involved and may increase public safety, the criminal justice system alone cannot solve long-standing problems in Indian Country. Only the sustained focus on Indian Country by numerous government agencies and substantial investments there will effectively address structural shortcomings and ultimately bring down the persistently high violent crime rate.

Some of the lessons learned in the cooperation between stakeholders in Indian Country and U.S. Attorneys are more generalizable. Most importantly, ongoing communication with local communities and their cooperation are crucial in reducing crime. Goals attendant to an improvement in public safety should include an increase in community trust and ultimately rehabilitation of our criminal justice system in communities that have become too familiar with its coercive powers.

### **B. Prosecution**

Smart on Crime and the policy changes on charging increased the discretion of prosecutors in deciding when to file for mandatory sentences. Our contributors welcomed the opening for discretion, but discretion that was guided and remained cabined. McQuade fears that the Sessions charging memorandum fails to provide sufficient guidance and may ultimately lead to greater disparity.<sup>8</sup>

Since concerns about mass imprisonment do not appear to drive DOJ policies under Attorney General Jeff Sessions, the Department will not cabin discretion in light of that goal. It is therefore unlikely that the federal inmate population will continue to decline. Leipold would not rely solely on Department goals in restraining prosecutorial discretion, but go a step further. He calls for “a series of policies and procedures that shape prosecutorial decisions on charging, plea bargaining, and sentencing. . . .”

Leipold’s analysis indicates that the number of federal prosecutions dropped substantially over the last six years. Yet in light of the built-up over the preceding decades, the decrease looks modest. Despite the discussions in this Issue, his data also indicate that U.S. Attorneys continue to send an ever larger percentage of individuals prosecuted to prison.

### **C. Re-Entry**

Judges interested in starting re-entry courts have needed the cooperation of local U.S. Attorneys. Judge Rose currently runs a post-conviction court that is part of an evaluation program by the Federal Judicial Center. The partnership with a university criminologist has allowed her to move from anecdotal impressions to scientifically founded evidence with regard to assessing which individual characteristics predict likelihood of success and provide reason for departures and variances. Using their sentencing discretion, combined with a risk-based approach, requires judges to take greater risks and make more evaluative judgments than they had become used to under a regime of mandatories.

A recent report by the U.S. Sentencing Commission on the demographic impact of departures, which is reprinted in this Issue, indicates that substantial assistance motions have tended to be race neutral, perhaps indicating that federal prosecutors attend to the potential for racial bias when exercising this power. The data do not address the question of whether there may be any racial inequity in charging decisions. The report does, however, find substantial racial inequity in judicial decisions with respect to variances and non-prosecutorially initiated departures. It is possible that the data show unexamined race bias in the federal judiciary, yet that is not the only possible conclusion. These variances and judicial departures may be based on factors not detected in the Commission’s analysis. Judge Rose’s data-informed decisionmaking, for example, may be such a case. The Commission should explore these questions as new risk-based methodologies may include factors that camouflage racial bias or at least racially disparate impact.

## **III. The Crucial Role of Data**

The criminal justice system generates a host of data. Still some of it requires different presentation and compilation to allow for a more illuminating glance into the system, as Leipold’s analysis so aptly

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demonstrates. Other data, however, remain uncollected. Many of our contributors bemoan the absence of relevant data, especially locally, that could have helped inform their decision making.

#### **A. What We Measure**

Joyce Vance, the former U.S. Attorney in the Northern District of Alabama, critiques the prevailing approach of counting the number of cases prosecuted, the number of convictions obtained, the number of defendants involved, and the number of prison years imposed, in assessing a prosecutor's effectiveness. These datapoints may be particularly misleading in the case of federal prosecutors, who have a broad array of cases from which they can choose, ranging from challenging high-level, white-collar prosecutions and civil rights cases to easily provable small drug cases, electronic receipt of child pornography, or illegal re-entry.

Measurements should align with the goals to be achieved. As both the Obama and the Trump Justice Departments have declared crime prevention a goal, the number of prosecutions should not be the sole measurement of a prosecutor's effectiveness. After all, state prosecutors are best able to prosecute street crime, and as Chiraag Bains, who served in a high-level position in the Civil Rights Division and as a federal prosecutor, reminds us, they are responsible to the local community for their prosecutorial choices. Federal prosecutors have a unique portfolio, and their prosecutorial decisions may impact community trust as well as public safety on a broader level. These choices also reflect presidential priorities and therefore signal the respective weight of the goals and values of an administration, such as rooting out corruption or police brutality or enforcing drug policies.

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#### **B. How We Define What We Measure**

Ed Chung, a former state and federal prosecutor and high-ranking official in the Office of Justice Programs, discusses Project Safe Neighborhoods, which combines prevention, prosecution, and re-entry through the creation of multi-agency and multi-jurisdictional partnerships to reduce gun violence. The current administration continues to highlight all three elements, though numbers may speak louder than press releases and announcements. Current enforcement priorities and budget requests demonstrate that DOJ has abdicated these goals and instead deems the number of arrests and convictions most important. Chung's concerns go farther, however.

Project Safe Neighborhoods used to prioritize serious violence, with its greatest successes in situations where it also provided individuals with opportunities and alternatives to a career in crime. The definition of "violence," however, is flexible, and Chung fears that the current Justice Department may interpret the term overly broadly and target relatively minor offenders. That would lead to a decline in community cooperation and trust in law enforcement because local communities will fail to perceive sufficient value in this approach. This approach will also add inmates to the federal prison system.

#### **C. What We Should Measure**

To assess whether a local U.S. Attorney's office pursues a strategy that effectively prevents crime, data are crucial. The Office of Inspector General in its report indicated the need for a more accurate collection of data on tribal crime. Without such a database, it would be difficult to measure changes and assess whether the current approaches have made tribal lands safer.

Joyce Vance would agree. She argues for metrics that help determine whether prosecutors have achieved the purpose of their work, an increase in public safety. A narrow focus on case numbers, convictions, and prison years has led to mass imprisonment but, at least within the last 15 years, has not contributed meaningfully to the drop in crime, as influential crime studies indicate. In fact, in some districts this approach may have had the opposite effect.

Prosecutors should be judged by the qualitative impact of their work on public safety. Yet, these metrics are harder to obtain. Large caseloads of easy cases show a busy office and can create the impression of large success. But they may have little meaningful impact on public safety. More disturbingly, as long as easily measureable case metrics are available and other data are not, the allocation of resources will remain based on traditional production measures. That may reinforce failed policies.

Local, real-time data could help prosecutors ascertain what programs and initiatives are affective in impacting public safety. Vance asserts that "[w]e should develop data and performance metrics that incentivize the types of prosecutions that benefit communities the most as well as giving prosecutors credit for participation in other types of programs." When such data are available to guide prosecutors, resources should be allocated accordingly. Vance fears that without meaningful metrics, "criminal justice policy will be made on the basis of ideology."

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It is not merely the dearth of data that contribute to the frustration of some prosecutors but also their inability to analyze them. Judge Rose's re-entry court partnered with a criminologist who provided scientifically accurate analysis and therefore could help guide her understanding of the predictors of recidivism. Such analysis is crucial to prevent anecdotal decision making.<sup>9</sup> In fact, data partnerships between universities and non-partisan think tanks, on the one hand, and prosecutors or courts, on the other, should become the norm to improve our criminal justice system.

Relevant sentencing data are also often missing. Olson notes that there is insufficient data from state and federal courts to assess whether there are sentence disparities between Native American and other defendants, in part because applicable state data do not exist. Leipold would like to see recidivism data to assess whether U.S. Attorneys were successful in reducing recidivism. If re-entry remains an important component of the work of U.S. Attorneys, that would certainly be a meaningful metric.

#### **IV. Powerful but not Omnipotent**

Federal prosecutors play a crucial role in the criminal justice system. Yet, that is only one of many systems that address social problems. Empowering U.S. Attorneys to become community problem solvers may put them into a more central role than we might be willing to cede to a system that is ultimately driven by punishment.

##### **A. The Power of Federal Prosecutors**

As Vance indicates, many innovative criminal justice programs, including specialized courts and diversion approaches, could not have occurred without the support, or at least the acquiescence of federal prosecutors. That makes them crucial gatekeepers in re-imagining the criminal justice system.

Technically prosecutors have almost unlimited discretion. In the case of federal prosecutors it tends to be cabined through guidance from the Justice Department, often in the form of charging memoranda. In contrast to state prosecutors, most of who are elected, U.S. Attorneys are not accountable to any local constituency. Their accountability to Washington may also be tenuous. Yet, the Justice Department can set the tone and the direction of what it expects its prosecutors throughout the country to do. It can provide the focus and rationale that stand behind charging memoranda and other policies. It can also create a vibrant feedback structure that increases input, evaluation, and 360 accountability.

Some of our contributors have highlighted the power of U.S. Attorneys to convene different constituencies. They use it to bring stakeholders together. The convening power is valuable and impactful. There are limits to it, however. Some community stakeholders may question the wisdom of a prosecutor, rather than a more neutral entity, leading criminal justice discussions. It may be more fruitful for a federal prosecutor, for example, to convene state prosecutors and law enforcement officials, than to attempt to bring to the table community groups that may be concerned about how federal prosecutorial power has been wielded locally.

Because of fears about the future of prosecutions and the use of mandatory sentences, as expressed by those contributors who were federal prosecutors during the Obama administration, it is even more likely that community organizations, advocacy groups, and certain service providers would be suspect of the efforts of a U.S. Attorney. This may be especially true for immigrants and their communities, who may deem the Department of Justice merely another entity that enforces immigration law. Bains counsels in favor of separating the enforcement of federal immigration law from law enforcement generally, a task that might be especially difficult for federal prosecutors.

Bains suggests also that prosecutors use the bully pulpit to inform and persuade legislatures and other constituencies. That may be more applicable to local prosecutors, but federal prosecutors should participate in the national discourse, especially in light of their knowledge of local differences and challenges. That requires thoughtful prosecutors who are aware of the power their position carries with it and are united in a common goal, such as decreasing imprisonment.

##### **B. Prosecutorial Mindset**

Many U.S. Attorneys are career prosecutors, having served as state and/or federal prosecutors prior to their appointment. Any position, held sufficiently long, shapes a person's mindset. Frequently they see the world only from their vantage point. Often they defend lengthy sentences, or at least believe in the orthodoxy that sentences measured in decades are necessary and proportionate. Many federal prosecutors feared, for example, that fewer mandatory sentences would lead to less cooperation and a drop in plea rates. Those numbers never changed, however. Federal prosecutors may have underestimated the length of guideline sentences. Even though Bains states that ultimately prosecutors should ask for the "right sentence, not the longest," length is subjective and contested.

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Rose discusses how the prevailing ethos in a U.S. Attorney's office will shape both prosecutions and prosecutors. That may be especially true in smaller offices, and some research indicates that this may apply in particular to less experienced and more junior prosecutors.<sup>10</sup> Unless a defendant pled guilty, Judge Rose's former district would ask for recidivism enhancements in every case where they could be applied. Although that office may have defined "readily provable" unusually broadly, so as to allow for charges to be laid even in cases that took substantial effort, office culture dictated such an aggressive stance, which guided every decision.

Vance notes the idealism and strong belief of prosecutors in fairness and public safety. Yet, ultimately they are socialized into seeing prosecutions and prison terms as crucial to enforcing societal norms. That mindset may make them outstanding prosecutors. It is more questionable that it would allow them to reimagine our current system so as to bring the rate of incarceration down to the rate in 1980, for example.

There is much discussion about use of a medical model to address the current opiate crisis. Whether that would be the correct approach remains uncertain, yet in light of their training and socialization it is hard to imagine federal prosecutors developing such a model. Presumably physicians or social workers would be in a better position to set up such an alternative, with prosecutors supporting the approach but receding into the background. Adopting such a model would also require resources to be reallocated from prosecution and prisons to treatment, a likely reason for prosecutors to oppose any move off the criminal justice model.

The flaw in relying on prosecutors to spearhead fundamental change, however well-intentioned and dedicated they may be, rests specifically with the way in which they were trained and socialized. Even though one can leave some of that thinking behind, as Judge Rose indicates, it would be immeasurably harder to task a prosecutor with thinking outside the criminal justice system. We need their support in "finding humanity," but they may not be the most suitable leaders in reimagining a system that needs a fundamental overhaul if we are serious about achieving an imprisonment rate that resembles that of Western democracies rather than autocratic and repressive regimes.

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#### Notes

- <sup>1</sup> *Hearing before the Committee on the Judiciary, U.S. Senate*, 112th Cong., 2d sess. (Aug. 1, 2012), S. Hrg. 112-946 (Opening Statement of Hon. Patrick Leahy), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg20971/html/CHRG-112shrg20971.htm>.
- <sup>2</sup> E. Ann Carson, U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2016*, Tbl 2, at 4 (Jan. 2018), NCJ 251149, available at <https://www.bjs.gov/content/pub/pdf/p16.pdf>.
- <sup>3</sup> In 2017, the Department of Justice counted 10,731 employees, 6,408 of whom were attorneys in U.S. Attorney offices. For 2018, the Department requested an increase of 300 attorneys, which amount to almost 5% of that workforce.
- <sup>4</sup> Memorandum from Eric H. Holder, Jr., U.S. Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division: Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013), available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>; Memorandum from Eric H. Holder, Jr., U.S. Attorney General, to all Federal Prosecutors: Department Policy on Charging and Sentencing (May 19, 2010), available at [https://www.fd.org/sites/default/files/criminal\\_defense\\_topics/essential\\_topics/sentencing\\_resources/clemency/holdermemo.pdf](https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/clemency/holdermemo.pdf).
- <sup>5</sup> Memorandum from John Ashcroft, U.S. Attorney General, to All Federal Prosecutors: Department Policy Regarding Charging Criminal Offenses, Disposition of Charges, and Sentencing (Sept. 22, 2003), available at [https://www.justice.gov/archive/opa/pr/2003/September/03\\_ag\\_516.htm](https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm).
- <sup>6</sup> See, e.g., Violence Against Women Reauthorization Act of 2013, S. 47, 113th Congress 2013–2015, Title IX—Safety for Indian Women; Judicial Council of California, Administrative Office of the Courts, Center for Families, Children & the Courts, Native American Communities Justice Project, *Beginning the Dialogue: Domestic Violence, Sexual Assault, Stalking & Teen-Dating Violence*, Policy Paper (May 2010), available at <http://www.courts.ca.gov/documents/NACJPPolicyPaper051810.pdf> (indicating high level of domestic and family violence in Native American communities).
- <sup>7</sup> Office of the Inspector General, U.S. Department of Justice, *Review of the Department's Tribal Law Enforcement Efforts Pursuant to the Tribal Law and Order Act of 2010* (Dec. 2017), available at <https://oig.justice.gov/reports/2017/e1801.pdf>.
- <sup>8</sup> See Memorandum from Jeff Sessions, U.S. Department of Justice, Office of the Attorney General, to All Federal Prosecutors: Department Charging and Sentencing Policy (May 10, 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.
- <sup>9</sup> See also M. Casey Rodgers, *Evidence-Based Supervision in the Northern District of Florida: Risk Assessment, Behavior Modification, and Prosocial Support – Promising Ingredients for Lowering Recidivism of Federal Offenders*, 28 Fed. Sent'g Rep. 239 (2016).
- <sup>10</sup> See, e.g., Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 Arizona L. Rev. 1065 (2014).