RACE AND PROSECUTION

ANGELA J. DAVIS, JOHN CHISHOLM, AND DAVID NOBLE

A Paper in the Series on:
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A Letter from the Co-Chairs of the IIP Advisory Board

The Executive Session on Reimagining the Role of the Prosecutor in the Community (Executive Session), hosted by the Institute for Innovation in Prosecution at John Jay College of Criminal Justice (IIP), is guiding high-level culture change in the field of prosecution. Through a series of facilitated convenings and conversations spanning three years, the Executive Session brings together the foremost experts in the field of prosecution – elected prosecutors, legal professionals, scholars, policy experts, and individuals directly impacted by the justice system.

The collaborative research and engagement that informs the Executive Session enables a thorough dive into some of the most complex topics facing prosecutors and their communities: reimagining the role of the prosecutor in a democratic society; producing public safety while reducing harms created by the criminal justice system; and addressing the legacy of racial inequality and structural injustice, to name a few. In order to disseminate these conversations into the field, Executive Session members partner to undertake research and author papers, with an eye towards developing innovative responses. The papers are based on the opinions of the authors, available research, and insight from Executive Session members. While the papers do not represent a consensus of all members, they have been informed by critical engagement and collaborative discussion amongst members. The expertise and diversity of members provide a nuanced lens to some of the most pressing topics in the field of prosecution, and to the criminal justice system overall.

The Executive Session and the papers emerging from it are intended to uplift the evolving role of prosecutors and their power to facilitate the creation of an increasingly equitable and effective American criminal justice system.

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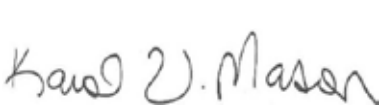

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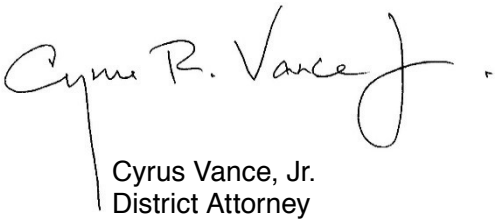

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Race and Prosecution

By Angela J. Davis, John Chisholm, and David Noble

The long-standing inequities in the American criminal justice system and society as a whole cannot be blamed solely on prosecutors. However, prosecutors do not operate in a temporal vacuum. Every action that a prosecutor's office takes is colored by this country's historical record of oppressing racial minorities. In its present state the justice system both reflects and exacerbates our societal ills. Prosecutors seeking to address systemic disproportionality and disparity must first come to appreciate how these phenomena came to be. This paper aims to unearth the roots of racial inequality in the United States, discuss how those roots produced racial disparities in the criminal justice system, and provide guidance on how the prosecutor's office can transform those disparities into positive change in policy and practice.

THE BEGINNINGS OF UNEQUAL JUSTICE

From slavery to the War on Drugs, law enforcement agencies, including prosecutor's offices, have upheld structures of oppression and discrimination. When the first Africans were brought to Virginia in the early 17th century, they worked as indentured servants alongside whites who occupied the same status.[1] Initially, black indentured servants were granted freedom after fulfilling the terms of their contracts. With a growing need for cheap labor, however, landowners gradually turned to African slaves "as a more profitable and ever-renewable source of labor."[2] To support the practice of slavery, slaveholders circulated theories about the intellectual and moral superiority of whites vis-à-vis blacks, which began to percolate throughout the popular imagination. Thus was born the institution of slavery in North America.

While some slave owners did free their slaves, these occurrences were rare. In most cases, slaves and their offspring would never experience freedom. To reinforce the institution of slavery, some of the first local police agencies in the colonies were created in the early 18th century. These slave patrols and militias grew out of a desire to control the quickly-expanding slave population.[3] In areas where slaves vastly outnumbered whites, the latter harbored fears of violent insurrections and escape attempts. In response to these fears, white men organized themselves into patrols whose main function was to track down runaway slaves and suppress potential rebellions. A central purpose of early law enforcement was thus to prevent blacks from fleeing bondage. When the Civil War brought the end of slavery, whites developed methods to subjugate blacks through criminal justice.

In the second half of the 19th century, the justice system became a tool for limiting or eliminating black Americans' newfound rights. Following the Civil War, "the nation's laws and Constitution were rewritten to guarantee the basic rights of the former slaves."[4] These efforts were best exemplified by passage of the 13th, 14th, and 15th Amendments, which abolished

[1]Bryan Stevenson, "A Presumption of Guilt: The Legacy of America's History of Racial Injustice," in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, 6.
[2]"Indentured Servants In The U.S.," *PBS History Detectives.*
[3]Gary Potter, "The History of Policing in the United States, Part 1," *Eastern Kentucky University Police Studies Online.*
[4]Eric Foner, "Why Reconstruction Matters," *The New York Times.*

slavery, guaranteed equal protection under the law to all citizens, and expanded the franchise to black men, respectively. While these amendments were in the process of being written and ratified, Southern states headed by former Confederate leaders enacted the "Black Codes," a series of laws designed to restrain freedoms of movement and labor.

The Black Codes were discriminatory laws that empowered local law enforcement to arrest and prosecute black men for minor infractions[5] such as "vagrancy" and "loitering," and sentence them to forced labor on private or state-owned farms.[6] This practice of "convict leasing" exposed black men, as well as women and children, to deplorable, unsafe working environments that were in some ways worse than the conditions of slavery. Blacks were subjected to offenses and punishments that whites were not, a fact which exemplified the criminal justice system's utility as a mechanism for maintaining white supremacy. As Bryan Stevenson writes in A Presumption of Guilt: The Legacy of America's History of Racial Justice, "the presumptive identity of black men as 'slaves' evolved into the presumptive identity of 'criminal.'"[7] In response to the Black Codes and other attempts by Southern states to continue the subjugation of blacks, a group of politicians called the "Radical Republicans" passed legislation in Congress establishing new state and local governments in the South that attempted to solidify the terms of freedom for blacks. During this period, known as Reconstruction, Southern blacks briefly wielded political power as never before. These gains were met at nearly every turn by a swift and often-violent backlash from whites.[8]

The Reconstruction era saw black men utilize their voting rights and demographic advantages to vote fellow blacks into office.[9] The successes of these legislators, which included the region's "first state-funded public school systems" and the outlawing of "racial discrimination in transportation and public accommodations," would be short-lived.[10] As evidenced by the formation of the Ku Klux Klan and other domestic terrorist groups, many Southern whites saw violence as a legitimate means for keeping blacks from voting, holding public office, or otherwise exercising their civil rights. This violence took on a variety of forms and was oftentimes legitimized through the process of criminal prosecution.

During Reconstruction and beyond, racial hatred manifested as harsh capital punishment and vigilante justice. Throughout the United States, allegations of black-on-white violence were "often enough to spark outrage, mob violence, and murder before even a biased judicial system could act."[11] Lynchings were the defining act of racial violence in the period following Reconstruction. In hundreds of cases, blacks were lynched for the murder or rape of a white person without being convicted in a court of law and often after being falsely accused. An even greater number of blacks "were lynched based on accusations of far less serious crimes, like arson, robbery, nonsexual assault, and vagrancy."[12] Some lynchings were the result of actions as trivial as speaking to a white person in a manner deemed disrespectful. In many cases, law enforcement personnel supported the practice of lynching, either by not arresting and prosecuting the perpetrators or by joining the mob themselves. Even after public hangings fell out of favor, the criminal justice system provided a venue within which lynchings could occur. In a 1902 case in Florida, where public executions were prohibited, a judge acquiesced to the demands of a white mob and authorized the public hanging of a black man convicted of murder.[13] Well into the 20th century, the legacy of racial lynchings undermined the legitimacy and fairness of the criminal justice system. The forced segregation of the Jim Crow era embodied a different sort of violence, one that

[5]Alexander, *The New Jim Crow*, 28.
[6]Stevenson, "Presumption of Guilt," 11.
[7]Ibid., 12.
[8]Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 30.
[9]Alexander, *The New Jim Crow*, 29.
[10]Foner, "Why Reconstruction Matters."
[11]Ibid., 13.
[12]Ibid., 14.
[13]Ibid., 18.

solidified economic inequality along racial lines. The Jim Crow period, which followed the end of Reconstruction, ushered in the most prominent form of legalized racial apartheid in the United States. Students of American history are familiar with the ways in which Jim Crow laws impacted public transportation, employment, housing, education, religious worship, medical care—nearly every facet of life in the South.[14] It must be noted, however, that other regions of the country were similarly intolerant towards the idea of racial equality. From New York City to Southern California, both codified and unwritten rules barred blacks from white-controlled spaces and opportunities. At the national level, federal legislation reinforced the racist policies established by state and local governments. To cite one example, while black Americans were sacrificing their lives for the Allied cause during World War II, the federal government built segregated housing developments for white and black workers who flocked to cities that were defense industry hubs. After the war, a Federal Housing Administration program facilitated the suburbanization of America while forbidding developers from allowing black families to move into these neighborhoods. As a result, blacks who migrated from the South to factory cities in the Northeast and Midwest during the Great Migration could not acquire familial wealth in the form of home equity. Black families and individuals languished in fading urban centers as the industrial decline took hold in the early 1970s.[15] The effects of legally sanctioned residential segregation would continue to impact how government officials reacted to rising urban crime and unrest during the Civil Rights movement.

MASS INCARCERATION AS WE KNOW IT TODAY

During the latter half of the 20th century, criminal justice came to be seen as a panacea for the ills of society.[16] This phenomenon played out in cities and towns nationwide. In low-income communities of color, over-enforcement and over-criminalization went hand in hand. Racial disparities in the criminal justice system grew as a result of law enforcement's increased reliance on arrest and incarceration.

At the height of the Civil Rights movement, a time when the federal government appeared ready to embrace policies that would achieve racial equality and eradicate poverty through greater investments in education, healthcare, transportation, and other areas, riots in cities across the country compelled government officials to consider how they might rein in minority communities.[17] In 1964, President Lyndon B. Johnson signed into law the Civil Rights Act and the "initiatives that constituted the War on Poverty." The following year, just days after presenting the Voting Rights Act to Congress, Johnson introduced the Law Enforcement Assistance Act. As Elizabeth Hinton writes in From the War on Poverty to the War on Crime, this legislation followed "a summer of urban unrest in Harlem, Brooklyn, Rochester, Chicago, and Philadelphia in 1964," and "offered a response to the threat of future disorder by establishing a direct role for the federal government in local police operations, court systems, and state prisons for the first time in history."[18] In the final years of Johnson's presidency, the Vietnam War and rising crime rates (or the perception thereof) diverted government funds away from the "Great Society" programs that many Americans saw as little more than handouts to the poor. The Safe Streets Act of 1968 created the Law Enforcement Assistance Administration (LEAA), which aimed "to promote the modernization of law enforcement and to help each state build its respective criminal justice apparatus."[19] Thus, the same presidential administration that introduced progressive legislation aimed at increasing equality for blacks undermined that legislation with new laws that would reinforce racial inequities.

The federal government's intensified focus on urban crime was often justified through long-held beliefs about so-called black

[14]Alexander, *The New Jim Crow*, 35.
[15]Richard Rothstein, "America is still segregated. We need to be honest about why," The Guardian.
[16]Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, 9.
[17]Ibid., 56.
[18]Ibid., 1-2.
[19]Ibid.

pathology. Mainstream social theories with roots in the Reconstruction era posited that black people, particularly those living in low-income neighborhoods, were inherently prone to criminal behavior and delinquency and thus needed to be controlled and, if necessary, incapacitated.[20] New technologies for tracking crime patterns seemed to support these assumptions. New York City, for example, saw a nearly threefold increase in reported robberies and burglaries between 1965 and 1966. This was evidence not of a true crime spike but of a change in how the city was measuring crime.[21] Nevertheless, as New York and other cities experienced these perceived crime spikes, urban riots proliferated, as a result of widespread inequality as well as police brutality. In response, the federal government and state governments saw an urgent need to address the apparent lawlessness in the country's inner cities. Law enforcement became the primary mechanism for accomplishing this goal, and with the support of funding and influence from the LEAA, incarceration in America quickly expanded.[22]

As the "War on Crime" morphed into President Richard Nixon's "War on Drugs," law enforcement agencies targeted their crime-control efforts towards low-income communities of color, and specifically young black men.[23] The rising rates of incarceration among black men beginning in the '70s represented a cruel feedback loop: the police deployed a disproportionate amount of manpower and other resources in black neighborhoods because data suggested that black people were more crime-prone than other groups. Because of over-enforcement in these neighborhoods, arrest rates were significantly higher than in other areas. These higher arrest rates in turn were used to justify the over-enforcement, bolstering crime-fighting strategies that focused on black neighborhoods.[24] Moreover, the collateral consequences of arrest and incarceration narrowed life opportunities for people coming out of prison. While the correlation between crime, poverty, and segregation must be acknowledged, policy-makers made a deliberate decision to respond to rising crime and disorder with increased law enforcement rather than attempting to address deficits in housing, employment, education, and healthcare.[25] Under the Nixon administration, crime was seen as a root cause of poverty rather than a consequence, and so the criminal justice system became known as the most effective remedy.

When the heroin epidemic took hold in the 1970s, states and the federal government followed the lead of New York Governor Nelson Rockefeller and established extremely punitive sentencing guidelines for drug crimes. Rockefeller had once favored providing treatment, housing, and job training for drug offenders. However, in the early '70s, with New York City facing a homicide rate four times greater than it is today, Rockefeller turned to a "zero-tolerance" approach that called for mandatory "sentences of 15 years to life for drug dealers and addicts—even those caught with small amounts of marijuana, cocaine, or heroin."[26] The historical record tends to focus on changes to drug legislation, but sentences for violent crimes were also increased significantly.[27] The already heightened law enforcement presence in minority communities meant that, under these policies, police removed tens of thousands of young black and brown men from their neighborhoods and placed them under correctional control. By the end of the decade, the "tough-on-crime" philosophy and related policies were commonplace throughout the U.S., even if their effects on public safety remained inconclusive. Under the Reagan administration, Congress passed even harsher

[20]Elizabeth Hinton, "A War within Our Own Boundaries': Lyndon Johnson's Great Society and the Rise of the Carceral State," Journal of American History 102, no. 1 (2015): 100-112.
[21]Hinton, *War on Poverty*, 6.
[22]Hinton, "War within Our Own Boundaries."
[23]Hinton, *War on Poverty,* 182.
[24]Ibid., 20-21.
[25]Marc Mauer, "The Endurance of Racial Disparity in the Criminal Justice System," in *Policing the Black Man: Arrest, Prosecution, and Imprisonment*, 36.
[26]Brian Mann, "The Drug Laws That Changed How We Punish," NPR.
[27]James P. Lynch and William J. Sabol, "Did Getting Tough on Crime Pay?" *Crime Policy Report*.

sentencing laws, including the Anti-Drug Abuse Act of 1986. One component of this act was the "hundred to one disparity between the penalties for crack and powder cocaine offenses."[28] This disparity was based on a belief, later proven to be untrue, that crack, which was mainly sold in majority-black urban neighborhoods[29], was more addictive than powder cocaine and led to more crime.[30] Prosecutor's offices played a significant role in the enforcement of these policies, and if prosecutors were aware of the disproportionate impact of these new policies, they did not attempt to change the course. When prosecutors charged crimes with mandatory minimums, judges were mandated to deliver harsh sentences. Of course, no guidelines or statutes required "prosecutors to charge every individual at the highest possible level or even to charge at all, but far too many of them did."[31] For example, during the plea-bargaining process, prosecutors who had stacked multiple charges against a defendant were able to incentivize pleas by having the individual plead guilty to one charge in exchange for the dismissal of the others.

Disproportionality and disparity in the criminal justice system remain deeply entrenched today. In 1980, about 10 percent of young black men who dropped out of high school were incarcerated; that figure reached 37 percent by 2008.[32] For U.S. residents born in 2001, the lifetime likelihood of incarceration is 1 in 3 for black men and 1 in 6 for Hispanic men compared to 1 in 17 for white men. For women, the likelihood of incarceration is 1 in 18 for black women and 1 in 34 for Hispanic women compared to 1 in 111 for white women.[33] Disparities abound through every stage of the justice process. Not only are black and Hispanic Americans more likely to be arrested than members of other groups, but once arrested, they are more likely to be detained pending trial." This "significantly increases the likelihood that a defendant will be sentenced to incarceration after trial and for longer periods of time."[34] Following release from prison, blacks and Hispanics face greater barriers to housing, employment, and education compared to whites.[35] In this way, incarceration is a multiplier of the myriad systemic obstacles facing communities of color.

The facts of racial inequality in the United States are startling. Beginning at birth, black children face an uphill battle to survive, let alone thrive. According to the most recent government data, the mortality rate of black infants is more than double that of white infants. This disparity "is actually wider than in 1850, 15 years before the end of slavery."[36] As adults, black women die from complications related to pregnancy at three to four times the rate of white women. A consensus is growing among medical experts around the theory that the "inescapable atmosphere of societal and systemic racism" faced by black women in America "can create a kind of toxic physiological stress" that contributes to higher rates of maternal and infant death. Along with worse health outcomes, blacks continue to lag far behind whites in terms of wealth and social mobility. Data released by the Federal Reserve in 2017 showed that the median net worth for whites is almost ten times that of blacks. This is in large part due to federal housing policy in the mid-20th century that boosted white homeownership while making it exceedingly difficult for blacks to buy homes. As a result, white families have long possessed more familial wealth. White families are for this and other reasons better equipped to bounce back from economic downturns like the Great Recession. Despite progress made on some fronts, the racial wealth gap has actually widened since 2007. If current trends continue, the median net worth for blacks will fall to zero by 2053. These data matter because class—not race—is "the

[28]Angela J. Davis, "The Prosecutor's Ethical Duty to End Mass Incarceration," in *Hofstra Law Review* 44, no. 4 (2016): 1-24.
[29]Michel Martin, "Crack Babies: Twenty Years Later." *Tell Me More*.
[30]Davis, "The Prosecutor's Ethical Duty."
[31]Ibid.
[32]Becky Pettit and Bruce Western, "Incarceration & social inequality," American Academy of Arts & Sciences.
[33]"Fact Sheet: Trends in U.S. Corrections," *The Sentencing Project*.
[34]Jessica Eaglin and Danyelle Solomon, "Reducing Racial and Ethnic Disparities in Jails: Recommendations for Local Practice," *Brennan Center for Justice*.
[35]Devah Pager. "The Mark of a Criminal Record," *American Journal of Sociology* 108, no. 5 (2003): 937-75.
[36]Linda Villarosa. "Why America's Black Mothers and Babies Are in a Life-or-Death Crisis," *The New York Times*.
[37]Eli Day. "The Race Gap in US Prisons Is Glaring, and Poverty Is Making it Worse," *Mother Jones*.

single greatest predictor" of incarceration.[37] Blacks comprise a disproportionate share of the U.S. prison population mainly because they are significantly more likely to occupy a lower social stratum.

In sum, racial disparity and disproportionality in the criminal justice system have always stemmed from inequality in society at large, and these trends continue today. Considering the fundamental injustice of the facts presented above, prosecutors have an ethical duty to utilize their discretion to create justice in the fairest possible manner.

WHAT CAN PROSECUTORS DO?

After examining the historical role that race plays in shaping and influencing the culture and structure of the criminal justice system, a daunting question remains: what can elected prosecutors do about it? First, a realistic caveat: given the power and scope of race as a dynamic baked into our respective responses to crime, and acknowledging that race issues permeate all of the vital institutions in the communities we serve, the suggestions below are not intended as universal panaceas, nor will any one idea alone radically alter the trajectory of the problem. They are starting points, not ending points. Some can be accomplished through policy changes. Some require a reallocation of resources and prioritization. Some can be taken to scale, while others can only be done incrementally. It is our strong belief, however, that engaging in a focused effort to reduce the impact of racial disparity can, over time, result in meaningful change. The core motivating principle is that the traditional role of the prosecutor can be transformed to address the evolving needs of our respective communities. The moral justification for these reforms is embodied in the American Bar Association's Standards for Criminal Justice: Prosecution and Defense Function, which state, "the prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."[38] The disproportionality and disparity in the justice system are clear evidence of "inadequacies or injustices." As prosecutors seek to address these issues, they should actively reckon with the realities of racial inequality in the U.S.; assess the possible racial impacts of internal and external policies and practices; and work with the community to make changes in policy and practice that reflect the community's definitions of safety, equity, and wellness. Confronting the present and historical impact of disproportionality and disparity requires a complete reimagining of the front end of the justice system. Prosecutors wield significant discretion and should therefore lead the charge in creating a system that is fair for all individuals.

Before devising strategies that will effectively address disparities, prosecutors should analyze current decision-making at key discretionary points and use these data to determine if certain practices are contributing to racially disparate outcomes. This process should also encompass a thoughtful examination of internal and external office policies around these practices. The primary objectives of such an investigation are to pinpoint the institutional contributors to disparities; examine how prosecutors are utilizing discretion; and ultimately institute necessary changes in policy and practice. Unlike their predecessors, prosecutors today have a wealth of data analysis technologies available to them, either in their offices or through partnerships with law enforcement colleagues, local universities, or foundations. The data analysis process entails scrutinizing prosecutorial decision-making outcomes at the following discretion points: intake, bail, charging, plea recommendation, and sentencing. Regarding case intake, it is crucial that offices examine the acceptance rates of different types of cases brought by the police department.

In 2006, the Milwaukee District Attorney's Office collaborated with the Vera Institute of Justice on a project that illustrates how analyzing data can lead to more equitable outcomes. That year, a report by the Sentencing Project, titled "Uneven Justice: State Rates of Incarceration

[38] *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-1.2(b) (4th ed. 2015).

by Race and Ethnicity," revealed that black people in Wisconsin were incarcerated at a disproportionately higher rate than in every state besides South Dakota.[39] Given that Milwaukee is the largest city in Wisconsin, the DA's Office was determined to find out why Milwaukee was incarcerating its black citizens at such a disproportionate rate. Vera began by measuring racial discrepancies in charging and case acceptance rates by offense. While they found no significant disparity in the overall Milwaukee County charge rate, they did find significant disparity in certain types of offense categories, particularly in low-level drug offenses.[40] This discovery spurred the DA's office to seek technical assistance from the National Institute of Corrections (NIC). The NIC helped Milwaukee County adopt the Evidence Based Decision-Making Framework, which calls for offenders to receive services and interventions commensurate with their risk of reoffending. With this framework in place, the DA's Office was able to increase the capacity of pretrial services and community resources in order to reduce the number of individuals in jail or prison without compromising public safety. An initial assessment of the policy changes related to low-level offenses showed that they had essentially eliminated the disparity.[41]

Once a prosecutor's office has completed the data analysis process and reviewed both external and internal policies, it can begin developing and implementing changes to address racially disparate outcomes. Prosecutors should strive to create meaningful partnerships with their constituents in an effort to produce policies and practices that better serve people directly impacted by the criminal justice system. This kind of partnership requires constituents to believe that prosecutors—and the criminal justice system more broadly—are dedicated, willing, and able to deliver justice in a fair manner based on community-centered standards of safety, equity, and wellness. But for racial minorities, our country's long history of systematic oppression under the color of law has severely compromised their faith in the legitimacy of law enforcement. Only after understanding this reality can prosecutors work to make amends for the past. A sincere apology from a chief prosecutor to the communities that have suffered the most can be one component of this reckoning. At a panel discussion at Stanford Law School in 2017, San Joaquin County (CA) District Attorney Tori Verber Salazar described how she and her office undertook this effort: "There was a time when … we were not the guardians of justice we should have been. And we have to accept responsibility, and we have to apologize. I apologize to all of you. And I have been going out throughout the county and apologizing … for the role we played and for the distrust that has grown."[42] Salazar went on to say that this apology, coupled with genuine understanding, is a bridge towards "substantive change."[43] This point is crucial: acknowledging past as well as existing injustices allows prosecutors to honor those who have been hurt, which is the first step toward creating trusting relationships and enhancing public safety.

By acknowledging past and present harms and fostering reconciliation with affected communities, prosecutors elevate the notion that the justice system should serve the needs and desires of community members. But to turn this aspiration into a reality—to create a system that prioritizes prevention over punishment and rehabilitation over removal—prosecutors must ensure that their staff understands that criminal justice involvement is both a symptom of and a contributor to systemic inequities. Line prosecutors who fully grasp historical and modern-day inequality will hopefully be inspired to reduce the disproportionality and disparity they observe in their caseloads. It falls on top

[39]Marc Mauer and Ryan King, "Uneven Justice: State Rates of Incarceration by Race and Ethnicity," *The Sentencing Project*.
[40]"A Prosecutor's Guide for Advancing Racial Equity," *Vera Institute of Justice*.
[41]Vera also partnered with the Manhattan District Attorney's Office (DANY) to examine racial disparities in case outcomes. The objective of the two-year study, which began in January 2012, was to determine whether prosecutorial discretion at important decision points contributed to disparate outcomes. At the study's conclusion, District Attorney Cyrus R. Vance, Jr. announced the findings publicly and committed to producing strategies to prevent unwanted racially disparate outcomes. See "A Prosecutor's Guide for Advancing Racial Equity," *Vera Institute of Justice*.
[42]"21st Century Prosecutors: A Panel Discussion with Reform-Minded District Attorneys," YouTube video, 1:13:40, posted by "stanfordlawschool," Nov. 6, 2017.
[43]Ibid.

prosecutors to seek out resources that will give their staff proper context regarding the harms they are trying to alleviate both within their jurisdictions and at a systemic level. When armed with accurate information regarding the correlation between existing policies and practices and unwanted racially disparate outcomes, prosecutors can determine the appropriate reforms for their offices.

In addition to fostering equity in the justice system, strategies that reduce disproportionality and disparity also help minimize the system's footprint. One such strategy is identifying the racial impact of race-neutral factors. As outlined by the American Bar Association, prosecutors should consider certain factors when deciding to charge someone with a crime, such as the strength of the case, the extent or absence of harm caused by the offense, or the views and motives of the victim or complainant. With such wide discretion, it is possible for prosecutors to make charging or plea-bargaining decisions without any racist intent that nevertheless produce racial disparities. For example, a prosecutor should evaluate the credibility of the victim in the eyes of a jury when considering the strength of the case. Victims with prior convictions may be perceived to have less credibility at trial. Because low-income people of color are more likely to have had criminal justice contact because of over-policing, victims from these communities experience justice differently from people who have never been involved in the criminal justice system. To use another example, imagine a scenario in which a white man and a black man are arrested for drug possession. If the white man can afford a lawyer who pushes for an alternative to incarceration, the prosecutor might drop that case. On other hand, if the black man cannot afford a private lawyer and his public defender is overworked, the prosecutor has more motivation to move forward with the black man's case. This scenario could lead to a racially disparate outcome despite the fact that the prosecutor had no racist intent.

As illustrated by the factors and examples described above, public policies that were conceived without any sort of discriminatory intent can exacerbate disparities in the justice system. For this reason, prosecutors should examine statutes where the law appears to be disproportionately impacting people of color. Drug-free school zone laws are an example of this phenomenon. Black Americans are more likely to live in "densely populated urban areas [where] a much higher proportion of the city area lies within a school zone than in more spread out suburban or rural neighborhoods."[44] As a result, blacks in urban areas who are convicted of drug crimes are more likely to face "enhanced school zone penalties."[45] Prosecutors can decide whether or not to charge these enhanced offenses while also working with the state legislature to amend statutes that have discriminatory impacts.

Prosecutors can make a unilateral decision to not charge offenses that create racial disparities, a level of power which speaks to the discretion built into the office. When prosecutors decide to stop prosecuting certain cases, they should emphasize that they are not simply ignoring the statutes of their jurisdiction. Rather, they are creating alternate pathways that data and experience have proven to produce better outcomes for individuals. One such pathway is diversion for appropriate misdemeanor and felony offenses at the arrest, pre-charge, and pre-trial phases. To cite an example, the Manhattan District Attorney's Office announced in 2017 that it would no longer pursue criminal prosecutions in subway fare evasion cases after discovering that the vast majority of the 10,000 people arrested each year for this offense were people of color. Instead of prosecuting these individuals, the office would work with the NYPD to offer pre-arraignment diversion to those arrested. Another pathway allows individuals to return home following arrest rather than be detained.[46] As research has shown, black and Hispanic people are more likely to be detained following arrest than similarly situated white people. This fact contributes to disproportionate

[44]Mauer, "The Endurance of Racial Disparity," 49.
[45]Ibid.
[46]"District Attorney Vance to End Criminal Prosecution of Approximately 20,000 low-level, non-violent misdemeanors per year," *Manhattan District Attorney's Office*.

incarceration rates for blacks and Hispanics because defendants who are detained before trial tend to face harsher sentences. Therefore, prosecutors can consider eliminating the use of pretrial detention for individuals who do not present a safety or flight risk. Utilizing discretion in these ways presents prosecutors with more opportunities for engaging their communities in participatory justice.

Somewhat paradoxically, in the quest to minimize the footprint of the justice system, prosecutors may want to step outside of their offices to create public safety in tandem with community. In Milwaukee, the DA's office has embraced a community prosecution model consisting of a partnership with residents, other criminal justice stakeholders, and community organizations. Within this model, prosecutors help address quality of life issues and discuss public safety concerns with community members. Similarly, King County, WA, has experimented with "peace circles" for first-time juvenile gun offenders. This framework, which was developed and implemented on the recommendation of a community advisory board, places youth in "groups consisting of community members, faith-based leaders, social workers and counselors that aim to address the root cause of their negative behavior."[47] Prosecutors in Milwaukee, King County, and elsewhere are able to undertake such innovative initiatives because they have worked to increase trust with their community—trust which relies upon transparency and accountability.

Putting mechanisms in place to review internal policies and practices is crucial to measuring the impacts of reforms and keeping the public informed of progress or setbacks. Prosecutors should develop data and analytical capability as a tool to measure their case intake and impacts, including the characteristics of defendants; the types of charges being filed; the outcomes of different charges (broken down by race); the percentage of victims who have previously been defendants; and the number of juveniles entering the system. These data should be shared with the public so that constituents are aware of the use and impacts of prosecutorial discretion. Prosecutor offices should also examine policies and practices relating to hiring, staff retention, and case assignment. While it may be challenging to accurately assess and address the effects of implicit biases on prosecutorial outcomes, diversity among staff can certainly affect how an office engages with defendants and victims from communities of color. When community members feel that the prosecutor is of and from the community, they may view the entire justice process as more legitimate.

CONCLUSION

The ABA's Standards for Criminal Justice invoke the aspirational goal of every district attorney's office: treating each and every defendant, victim, and witness with fairness and dignity. Furthermore, the standards point to the prosecutor's duty to look beyond the immediate demands of the cases that pass through their offices. As Standard 3-1.2(f) states, "the prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system."[48] Prosecutors have played a role in perpetuating many of the inequities in the criminal justice system. Thus, their duty as "problem solvers" requires them to implement policies and practices that will make the system fairer for everyone. This undertaking cannot undo past injustices, but it can allow prosecutors to make meaning from these injustices by working towards a more equitable future. As democratically elected officials, prosecutors have a moral and ethical responsibility to help break the cycle of inequality.

[47] AJ Dent, "King County celebrates peacemaking," *Capitol Hill Times*.
[48] *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 3-1.2(f) (4th ed. 2015).

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