

# Plea Deals and Prisoner Reentry—The Connection that is Missing from Reentry Conversations

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## INTRODUCTION

The United States is an incarcerating nation,<sup>1</sup> and the criminal legal system<sup>2</sup> is the dominant government enterprise used to avoid addressing serious social ills and ailments;<sup>3</sup> in fact, serving time in prison has become the norm in disadvantaged communities.<sup>4</sup> Despite some institutional variations across the criminal legal system, the passage and implementation of punitive policies has extended the police dragnet, hardened criminal sentences, increased the size of the prison population, and intensified the over-representation and over-incarceration of Black men and women.<sup>5</sup> These efforts contribute to the carceral continuum, a phrase coined by Michel Foucault to describe how criminal policies have extended punitive statutes

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<sup>1</sup> Benjamin Howell et al., *The Stigma of Criminal Legal Involvement and Health: A Conceptual Framework*, 99 J. URBAN HEALTH 92 (2022).

<sup>2</sup> The phrase “criminal legal system” is quickly replacing the phrase “criminal justice system;” the word “legal” has superseded the word “justice” because it is clear, and has been clear for decades, that the legal system does not deliver justice. This is particularly true for Black people, starting from the founding of the nation to present day. See Erica Bryant, *Why We Say “Criminal Legal System,” Not “Criminal Justice System,”* VERA (Dec. 1, 2021), <https://www.vera.org/blog/why-we-say-criminal-legal-system-not-criminal-justice-system> [<https://perma.cc/Y4RX-82XM>].

<sup>3</sup> See generally LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (Duke Univ. Press, 2009). Wacquant explores the punitive turn of penal policies in the United States after the Civil Rights era, arguing that while the criminal justice system expanded, it created social insecurity through the destruction of the welfare state via neoliberal policies.

<sup>4</sup> *Id.*

<sup>5</sup> KEESHA MIDDLEMASS, *CONVICTED & CONDEMNED: THE POLITICS AND POLICIES OF PRISONER REENTRY* 21–80 (New York Univ. Press, 2017) (weaves together the history, politics, racial animus, the development of criminality, and the use of a felony conviction to explore the history of the criminal legal system in the United States); See generally REUBEN MILLER, *HALFWAY HOME: RACE, PUNISHMENT AND THE AFTERLIFE OF MASS INCARCERATION* (2020) (Miller explores the life-long burden of being involved in the criminal legal system); Catherine Duarte, Leslie Salas-Hernández, & Joseph Griffin, *Policy Determinants of Inequitable Exposure to the Criminal Legal System and Their Health Consequences Among Young People*, 110 AM. J. PUB. HEALTH, SUPPLEMENT 1 S43–S49 (2020); see also Bryant, *supra* note 2.

outside of its traditional boundaries in an effort to keep hundreds of thousands of people under some form of control for extended periods of time.<sup>6</sup> The carceral continuum includes multiple forms of surveillance—in the community via the police, by correctional officers inside jail and prison, by parole and probation officers who monitor the lives of those no longer imprisoned, and via digital and electronic technologies—and how these different tactics keep people trapped in the criminal legal system far longer than the original criminal sentence.<sup>7</sup> Criminal policies have dispersed the power and reach of government agents to survey, control, and punish those caught in the criminal legal system.<sup>8</sup> In theory, the carceral continuum should end when individuals complete their criminal sentence; however, once someone is caught in the system, it is difficult to completely detach from its tenacious grip.<sup>9</sup>

The entry point into the criminal legal system is via contact with the police, which may or may not lead to an arrest.<sup>10</sup> The police are viewed by some as a public benefit and a government agency that is designed to prevent harm to the public and to prevent individuals from harming each other.<sup>11</sup> The traditional powers specific to the police have been broadly construed by the courts to include regulating a community's public and private interactions, monitoring the health and safety of residents, as well as the use of land.<sup>12</sup> These powers have been extended via

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<sup>6</sup> MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* 297 (Alan Sheridan, trans., Vintage Books 2d ed. 1995) (1977); see also Duarte et al, *supra* note 5 (explores how exposure to the criminal legal system has an adverse outcome across several domains, including public health, community, family, and school).

<sup>7</sup> Katherine LeMasters et al., *Inequities in Life Course Involvement in the Criminal Legal System: Moving Beyond Incarceration*, (forthcoming 2022) available at SSRN: <https://ssrn.com/abstract=4148222> or <http://dx.doi.org/10.2139/ssrn.4148222> (examining the total exposure to the criminal legal system and how that exposure accumulates over time: “Furthermore, community supervision’s strict conditions and intense surveillance often lead to reincarceration” (4)); MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR PRISON REFORMS*, 27–28 (2020); Kimberly Cullen, *State-Sponsored Surveillance and Punishment: How Municipal Crime-Free Ordinances Exacerbate the Carceral Continuum*, 31 PUB. INTEREST L. J. 47, 47–79 (2022) (exploring how prison and punishment has been extended outside of prison into the privacy of individual homes).

<sup>8</sup> Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DÆDALUS, 74, 75–76 (2010).

<sup>9</sup> MIDDLEMASS, *supra* note 5.

<sup>10</sup> Amanda Geller & Jeffrey Fagan, *Police Contact and the Legal Socialization of Urban Teens*, 5(1) RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCI. 26, 26–49 (2019).

<sup>11</sup> Christopher Supino, Student Note, *The Police Power and ‘Public Use’: Balancing the Public Interest against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 727, 728 (2008). Supino explores the power of police to advance safety and prosperity to prevent harm to the community, and police powers related to the Fifth Amendment’s public use clause.

<sup>12</sup> Christopher Wolfe, *Moving Beyond Rhetoric*, 57 FLA. L. REV. 1065, 1075 (2005) (stating that “traditional police powers. . . extend to the protection of public health, safety, welfare, and morals”). See Wadie Said, *Law Enforcement in the American Security State*, 4 WIS. L. REV. 821 (2019).

legislation and court cases to create an almost impregnable power and unlimited jurisdiction over people, places, things, and property.<sup>13</sup> In practice, police powers are most often extended when arresting people suspected of committing a crime; although policing is supposedly race neutral, policing is implemented in a racially biased way.<sup>14</sup>

It is at this first point of contact with police, I argue, that racial disparities are introduced into the criminal legal system. Police, as the investigating agency, and prosecutors, as the arraignment agency, work together in the same locality towards one goal—getting a conviction.<sup>15</sup> Despite the popular depiction in *Law & Order* that separates the two entities, in practice the police and prosecutors work closely together to exert a great deal of power to achieve their common goal. The relationship between police and prosecutors tends to be walled off from the public's eyes, yet together, they exert an enormous amount of influence when implementing criminal statutes and policies. Their efforts are cloaked in a veil that they are preventing crime so the public acquiesces to the notion that expanding police powers is the *only* way to keep the public safe.<sup>16</sup>

The idea of law enforcement keeping “us” safe is not a universal belief; many Black people do not believe that police keep them safe, and as more Black people are arrested and funneled into incarcerating institutions, the idea of safety is relative.<sup>17</sup> It is well documented that the police have been hostile towards Black people and use their powers to expand domestic policing practices in an effort to keep (White) society feel safe from crime.<sup>18</sup> This notion that allows law enforcement to implement tools and tactics to “fight crime” is supported by the efforts of prosecutors; this co-dependent relationship prevents accountability and allows the

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Said documents the evolution of the modern police state and the symbiotic relationship that has developed with other government actors to create a repressive police state.

<sup>13</sup> Supino, *supra* note 11 at 726-727, 738. See David Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. OF COLO. L. REV. 497 (2004); see also Said, *supra* note 12.

<sup>14</sup> See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997). Kennedy explores the long-standing failure of the criminal justice system, including the police and its inability to protect Black people accused of committing crimes, as well as the racially discriminatory practices of prosecutors and prosecutorial power that extends to determining how Black people are punished.

<sup>15</sup> Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1097–1098 (2020). Romero explores the present-day relationships between police and prosecutors in relationship to the enforcement of criminal codes, politics, and the perverse incentives prosecutors have and the power of discretion, especially when investigating police misconduct and choosing to (or not to) bring charges.

<sup>16</sup> Said, *supra* note 12, at 827.

<sup>17</sup> Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice* (3-30) in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Angela J. Davis ed., Pantheon Books, 2017).

<sup>18</sup> See ANGELA J. DAVIS, *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* (Pantheon Books, 2017); Said, *supra* note 12, at 857.

two institutions to push the boundaries of legality.<sup>19</sup> For instance, when prosecutors and police work hand-in-hand to achieve a conviction, especially during the plea deal process, there are no laws outlining how they should proceed, and this independence has deep historical roots, leaving prosecutorial power nearly unchecked.<sup>20</sup> High conviction rates allow both police and prosecutors to reap personal benefits, such as clout, promotions, and for prosecutors, re-election.<sup>21</sup> This unchecked power dynamic and close cooperation between police and prosecutors creates a robust closed system that benefits them but disadvantages individuals accused of committing a crime.<sup>22</sup>

This Article explores the relationship between police and prosecutors during plea deals to consider this co-dependent relationship and its impact on defendants. Specifically, this article focuses on how plea deals have huge implications for the criminal legal system; the vast majority of criminal case outcomes in state and federal courts are decided by plea bargains.<sup>23</sup> The plea deal bargaining process results in defendants pleading guilty to lesser charges to avoid long prison sentences, but what are the consequences?<sup>24</sup> This article applies a critical lens to examine how police and prosecutors go unchallenged in the criminal legal system, which has real consequences for the system and its legitimacy. The power of prosecutors often goes unchallenged, and yet prosecutors have the power to influence other parts of the carceral continuum,<sup>25</sup> including racial disparities<sup>26</sup> and mass incarceration.<sup>27</sup>

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<sup>19</sup> See Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895 (2020).

<sup>20</sup> *Id.* at 898; see also, NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 85 (Stan. Univ. Press 2016) (citing U.S. Attorney General Robert Jackson, saying, "The Prosecutor has more control over life, liberty and reputation than any other person in America") (quoting Robert H. Jackson, Address at the Conference of United States Attorneys: The Federal Prosecutor, Apr. 1, 1940, in 24 J. AM. JUDICATURE SOC'Y 18 (1940)).

<sup>21</sup> Trivedi & Gonzalez, *supra* 19, at 897-898.

<sup>22</sup> Romero, *supra* note 15, at 1099-1101.

<sup>23</sup> See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 186, 210 (2019).

<sup>24</sup> According to the American Bar Association (ABA), plea bargaining is prevalent for practical reasons. *How Courts Work—Steps in a Trial: Plea Bargaining*, A.B.A. (Nov. 28, 2021), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/pleabargaining/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/) [<https://perma.cc/KL2V-W9R6>]. Samuel Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police, and Other Law Enforcement*, THE NATIONAL REGISTRY OF EXONERATIONS (2020), <https://repository.law.umich.edu/other/165> (explores how official misconduct by prosecutors and police lead to the conviction of innocent people and that misconduct distorts the criminal legal process to determine guilt or innocence).

<sup>25</sup> Bellin, *supra* note 23, at 172.

<sup>26</sup> Gross et al., *supra* note 24, at 27-29; Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 738 (1991).

<sup>27</sup> JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 206 (2017) ("Prosecutors have been and remain the engines driving mass incarceration.").

In contrast to other scholarship about how police and prosecutors interact with each other, my addition to this literature connects adjacent institutions in the criminal legal system—police and prosecutors—to how they impact reentry, which exacerbates racial inequities. By examining these connections, it is possible to show how racial injustice is built into the system at each stage, and how these racially unequal practices are not flaws; rather, the decisions that lead to racial disparities are a *feature* of the criminal legal system, starting with policing and connected to prosecutorial discretion when making plea deals. Although the criminal sentence of a plea deal is immediately known, the collateral consequences of a felony conviction via a plea deal are not. Yet, it is the plea deal that sets in motion the conditions of reentry, but these other punishments are not written in the final plea deal.

Part I explores police tactics, discretion, and practices to set the stage on how police decide who enters the criminal legal system. The historical overview of policing intentionally incorporates race and how race is used to justify who is arrested. Part II examines the interconnections between the criminal courts, prosecutors, criminal defense attorneys, and plea deals. Each actor at this stage of the criminal legal system has important ramifications on an individuals' reentry experiences. Part II also explores the "black box" of prosecutorial discretion, and why prosecutors' extensive power and discretion are largely unknown.<sup>28</sup> Some scholars have attempted to quantify the factors that go into prosecutors' decision making on plea deals,<sup>29</sup> but these factors are not uniform across cases nor weighed equally by individual prosecutors; therefore, it is not known if similar criminal cases are treated the same by prosecutors in the same jurisdiction or if certain criminal acts and defendants are prosecuted based on the "eye of the beholder"<sup>30</sup> that results in unequal justice. Part III analyzes the ramifications that plea deals have on reentry. Most notably, some of the policies collectively known as the collateral consequences of a felony conviction are examined. The collateral consequences of a felony conviction include thousands of statutes located outside of the criminal legal system

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<sup>28</sup> Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 690 (2020) (examining the power and discretion of prosecutors, and how they wield that power to achieve "harsh justice, mercy or leniency."); Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 825 (2020) (Wright explores how prosecutors operate in their own jurisdiction and notes that that when cases are declined, it becomes a matter of debate within the prosecutor's office, amongst lawyers, and within the larger voting public.).

<sup>29</sup> Bruce Frederick & Don Stemen, *The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making—Summary Report*, VERA (2012), <https://www.ojp.gov/pdffiles1/nij/grants/240335.pdf>. Frederick and Stemen investigate the impact of legal, quasi-legal, and extra-legal factors that influence the prosecutorial process and how prosecutors weigh these individual factors in their decision-making processes. The factors include seriousness of the offense, the defendant's criminal history, characteristics of the defendant and victim, and contextual factors related to the case, such as the strength of evidence, the seriousness of the offense, resource allocation, and time constraints.

<sup>30</sup> Megan Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion* 1 (2021), [https://scholarship.law.bu.edu/faculty\\_scholarship/1182/](https://scholarship.law.bu.edu/faculty_scholarship/1182/).

and have a negative impact on the reentry experiences of both men and women.<sup>31</sup> In the Conclusion, I offer some policy recommendations that would decrease the structural impediments and racial disparities within the criminal legal system as it relates to prosecutorial discretion and reentry.

A brief note about the scope of this essay. I focus on the institutional actors that proceed a criminal trial, specifically the role of police, prosecutors, and criminal defense attorneys because most criminal cases in the state and federal systems are determined via plea bargaining. I explore policing practices to highlight the racial bias embedded into the gateway of the criminal legal system and focus on plea bargains because of their direct impact on reentry. I choose not to explore criminal trials, incarceration, the prison experience, parole, and post-prison supervision, except insofar as they bear on the reentry experience.<sup>32</sup>

## I. THE CRIMINAL LEGAL SYSTEM

There is not a single institution that represents the criminal legal system.<sup>33</sup> The “system” operates on a continuum of networked government agencies and departments that includes law enforcement, courts, Department of Corrections (DOC), and the Federal Bureau of Prison (BOP), probation and parole,<sup>34</sup> as well as a variety of public, non-profit, and private prisoner reentry institutions.<sup>35</sup>

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<sup>31</sup> For further reading on the collateral consequences of a felony conviction and reentry experiences, see MIDDLEMASS, *supra* note 5; MILLER, *supra* note 5.

<sup>32</sup> For further reading on criminal trials, procedures, and race see Malcolm Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673 (2018); MATTHEW CLAIR, *PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT* (2020); Elizabeth Hinton, LeShae Henderson, & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf>. For information about incarceration and prison, see ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (Basic Books 2018); Kevin Reitz & Edward Rhine, *Parole Release and Supervision: Critical Drivers of American Prison Policy*, 3 ANN. R. OF CRIMINOLOGY 281, 281–298 (2020).

<sup>33</sup> See Bryant, *supra* note 2 and Wacquant, *supra* note 3 on why the phrase “criminal legal system” is used instead of “criminal justice system.”

<sup>34</sup> Reitz & Rhine, *supra* note 32, at 282-284. Parole and probation are not synonymous. Parole is a form of correctional control over a person after they have served most of their prison sentence. Parole Boards reviews parole-eligible prisoners’ cases to determine if they should be released from prison. Parole is a conditional release of prisoners that allows them to serve their remaining prison sentence in the community. Parole is a form of post-prison supervision with a set of rules and restrictions to which parolees must adhere to; if they violate parole, parolees can be remanded back to prison. Probation, in contrast, is used when a person is convicted of a crime but is not sentenced to serve time in jail or prison; instead, released to the community. Probation is a form of community supervision after a conviction and is less restrictive than parole. See also Karol Lucken, *The History of Probation and Parole*, in *HANDBOOK OF ISSUES IN CRIMINAL JUSTICE REFORM IN THE UNITED STATES* (Elizabeth Jeglic & Cynthia Calkins, eds., 2022).

<sup>35</sup> MIDDLEMASS, *supra* note 5, at 21-80.

Collectively, these institutional actors have different roles, responsibilities, and budgets in enforcing the legal code and statutory laws of the jurisdiction in which they are responsible. This system of multifaceted institutions with their own rules, regulations, applicable laws, policies, structures, budgets, and governing bodies creates a system that has each institution operating in parallel or adjacent but independent fashion to the others; there are only a few points built into the system that involves institutional cross over and collaboration.<sup>36</sup>

As a result, the criminal legal system is historically and currently deeply fragmented and poorly coordinated,<sup>37</sup> and there are few mechanisms that serve as unifiers, such as financial or administrative incentives or federal law.<sup>38</sup> Consequently, collaborative practices are not the norm, which is problematic as criminal acts are rarely confined to a single jurisdictional boundary, which means that multiple agencies have the ability and power to respond to criminal activity.<sup>39</sup> Furthermore, there is greater need for collaboration between agencies across functional boundaries in the criminal legal system to enhance performance and efficiency, reduce replication of activities and duplication of services, improve public safety in all communities, and to increase the sharing of resources and information essential to address complex social issues that intersect with criminal activity and the administration of criminal laws.<sup>40</sup> Yet, institutional fragmentation continues to be the norm because of organizational make-up, culture, and

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<sup>36</sup> Malcolm Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 L. AND SOC'Y REV. 407, 407–426 (1973). Feeley describes the criminal justice system as an entity that is responsible for the administration of justice, and that this consists of “institutionalized interaction of a large number of actors whose roles are highly defined, who are required to follow highly defined rules and who share a responsibility in a common goal—that of processing arrests.” *Id.* at 407. This 1973 assessment of the system continues to be accurate, as it is responsible for processing arrests, determining guilt or innocence, and in the former case, specifying sanctions.

<sup>37</sup> Galia Cohen, *Cultural Fragmentation as a Barrier to Interagency Collaboration: A Qualitative Examination of Texas Law Enforcement Officers' Perceptions*, 48(8) AM. REV. OF PUB. ADMIN. 886, 886–901.

<sup>38</sup> Daniel Stewart, *Collaboration between Federal and Local Law Enforcement: An Examination of Texas Police Chiefs' Perceptions*, 14(4) POLICE QUARTERLY 407, 419–422.

<sup>39</sup> A contemporary example of multiple agencies responding to an ongoing criminal act is the police response to the active shooter situation unfolding at Robb Elementary School in Uvalde, Texas, on May 24, 2022. *The Texas Tribune* reported that a total of 376 law enforcement officers arrived to assist, but the scene was uncoordinated, chaotic, absent of any leadership, and there were no clear lines of authority. Officers that were on the scene represented local, state, and federal agencies, including the U.S. Border Patrol, Texas State Police, Uvalde city police, school resource officers, U.S. marshals, DEA officers, and neighboring county law enforcement officers, such as sheriff's deputies. Zach Despart, *Systemic Failures” in Uvalde Shooting Went Far Beyond Local Police, Texas House Report Details*, THE TEXAS TRIBUNE (July 17, 2022, 12:00 PM), <https://www.texastribune.org/2022/07/17/law-enforcement-failure-uvalde-shooting-investigation/>).

<sup>40</sup> Cohen, *supra* note 37, at 887–888, 896–897.

hierarchical leadership structures, different communication systems, and different but shared jurisdictional boundaries (e.g., local, state, or federal).<sup>41</sup>

The various government agencies that have a role in the criminal legal system are a disjointed set of bureaucracies due to the piecemeal adoption of policies and the constitutional framework that divides power between institutional and individual actors.<sup>42</sup> Fragmentation is enhanced due to the politics of crime, U.S. Supreme Court decisions that have eroded constitutional protections formerly afforded to defendants, the enhancement of qualified immunity for police, the overuse of plea bargains in the era of mass incarceration, as well as changes in sentencing laws.<sup>43</sup> The system has metastasized.<sup>44</sup> William Stuntz argues that if the institutions of the criminal legal system are not reformed, then police and prosecutors “rule” because they have the power to implement “tough on crime” policies that dominate the system.<sup>45</sup> Jeffrey Bellin argues that the system has passed this point; prosecutorial preeminence is now the norm.<sup>46</sup>

Despite each institution of the criminal legal system operating independently of each other, each institution cannot exist without the others, which results in the system operating within its discrete role along the criminal legal continuum. Yet, each area—policing, prosecution, sentencing, incarceration, and reentry—has a direct impact with and upon the other institutions. For instance, individuals only reenter society after serving time in prison for a conviction, prisons are dependent on the courts ratifying convictions, the courts are dependent on prosecutors charging people with a crime so there can be a trial or plea deal ratified, and prosecutors are dependent on police arresting people to be charged with a crime. Therefore, the power to arrest people determines who enters the criminal legal system.

#### *A. Policing—The Entry Point into the Criminal Legal System*

The word “police” evolved to mean any organization or regulatory body involved in controlling community and individual interactions and then enforcing community standards in the name of “public order.”<sup>47</sup> In the early 1800s, the term police was applied to citizen watch groups, neighborhood watches, public and

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<sup>41</sup> *Id.* at 888-897.

<sup>42</sup> See Richard Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. UNIV. L. REV. 1437, 1440-1450 (2017).

<sup>43</sup> *Id.* at 1440-1450.

<sup>44</sup> Brandon Garrett, *Evidence-Informed Criminal Justice*, 86(6) GEO. WASH. L. REV. 1490, 1492 (2018).

<sup>45</sup> See William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529-539 (2002).

<sup>46</sup> Bellin, *supra* note 23, at 172-173.

<sup>47</sup> See D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIA. L. REV. 471, 475 (2004).



private groups, and slave patrols.<sup>48</sup> Police were and continue to be primarily responsible for suppressing and preventing crime and maintaining social order.<sup>49</sup> Police are viewed as an institution of social control and the government agent that investigates crime with the purpose of arresting suspects.<sup>50</sup> Police powers, such as detecting, preventing, and responding to crime, are granted to law enforcement agencies by legislatures and the courts,<sup>51</sup> but their original powers were a blend of traditions and practices.<sup>52</sup> Although these powers vary across jurisdictions and time, police powers shape the circumstances under which officers of the law interact with the public, suspects, and victims.<sup>53</sup> *Terry v. Ohio* extended to law enforcement the authority to use “reasonable suspicion” to target behaviors and conduct that individual officers deemed criminal or suspicious.<sup>54</sup> In *Discipline and Punish*, Foucault argues that “surveillance is expressed in the architecture by innumerable petty mechanisms” and these mechanisms make it possible to create an integrated system that holds power over the body.<sup>55</sup> Extending this notion of holding power over the body, police focus on the management of illegality, with the supposed criminal as the locus on which their power is centered.<sup>56</sup> This focus is problematic based on who the police deem as “criminal.”<sup>57</sup>

As the entry point into the criminal legal system, the police have the power to determine a person’s future. The police have the power and authority to leave permanent scars, and these scars have far-reaching and negative effects on being able to lead a productive life after officially exiting the criminal legal system, which should be a matter of grave concern for all.<sup>58</sup> But what exactly is police power? If

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<sup>48</sup> See Robert A. Brown, *Policing in American History*, 16 DU BOIS REV. 189 (2019).

<sup>49</sup> Lorraine Mazerolle, *The Power of Policing Partnerships: Sustaining the Gains*, 10 J. EXPERIMENTAL CRIMINOLOGY 341, 345–46 (2014).

<sup>50</sup> See DONALD BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 1 (1980). Black describes policing as a form of social control, and a system of authority that defines and responds to deviant behavior within society.

<sup>51</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>52</sup> Brown, *supra* note 48, at 190.

<sup>53</sup> Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 146 (2009) (Logan explores the police’s authority to search and seize individuals, as regulated by the Fourth Amendment, but also depends on state and local laws and policies that criminalize specific behaviors, which can be defined in various ways by state legislatures and the courts).

<sup>54</sup> *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

<sup>55</sup> See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 173, 173–174, 176–177 (Alan Sheridan trans., Vintage Books, 1977).

<sup>56</sup> *Id.* at 177.

<sup>57</sup> MIDDLEMASS, *supra* note 5.

<sup>58</sup> See *Hawker v. Sandy City Corp.*, 774 F.3d 1243 (10th Cir. 2014) (Lucero, J., concurring). *Hawker* addresses the arrest of a nine-year-old girl at school and police behavior in arresting her, but the broader phenomenon of policing addressed in *Hawker* is applicable to adults; the police have the power to make decisions and these decisions put people into the criminal legal system.

the police have so much power, should it not be defined, especially as it is the agency that makes entry into the criminal legal system possible?

### B. Police Powers

The term “police powers” does not relate directly to the police, but rather extends to the government agencies responsible for maintaining public order, to which the police are a part.<sup>59</sup> The doctrine of police power and the public good are embedded in English common law, so the term “police power” is not precisely defined in American law.<sup>60</sup> Rather, the development of a definition of “police powers” has been a creation of the judiciary branch.<sup>61</sup> The Supreme Court “acknowledged power of a State to regulate its police. . . and to govern its own citizens [and states have the power] to legislate on this subject to a considerable extent.”<sup>62</sup> The U.S. Supreme Court derived this understanding of police powers from the Tenth Amendment; yet, in 1954, the U.S. Supreme Court stated that “[p]ublic safety, public health, morality, peace and quiet, law and order . . . are some of the more conspicuous examples of the traditional application of the police power” and the Court recognized that “[a]n attempt to define [police power’s] reach or trace its outer limits is fruitless.”<sup>63</sup> More recently, in 2013, the California courts recognized the breadth of a state’s police powers in *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, writing that local police powers were a form of broad authority to be used for the purposes of public health, safety, welfare, and the appropriate uses of land.<sup>64</sup> The scope of police powers, generally, has been interpreted to apply to an array of areas under the states’ purview, which includes protecting the public’s health and safety and abating public nuisances.<sup>65</sup> States have followed this common understanding of police powers to mean nearly everything falling under its sovereignty and jurisdiction. This level of control is composed of an ever-widening net of laws and rules, court cases, and community standards.<sup>66</sup>

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<sup>59</sup> *Police Powers*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/police\\_powers](https://www.law.cornell.edu/wex/police_powers) [<https://perma.cc/2RT8-KATW>].

<sup>60</sup> *Gibbons*, 22 U.S. at 112; *Brown v. State of Maryland*, 25 U.S. 419 (1827); *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>61</sup> Supino, *supra* note 11, at 722.

<sup>62</sup> *Gibbons*, 22 U.S. at 208.

<sup>63</sup> *Berman*, 348 U.S. at 32.

<sup>64</sup> *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 56 Cal.4th 729, 738 (2013).

<sup>65</sup> Supino, *supra* note 11, at 723, 726-727. *See also* *Lochner v. New York*, 198 U.S. 45, 53 (1905) (defining “police powers” in relation to the safety, health, morals, and the general welfare of the public).

<sup>66</sup> *See* Werner J. Einstadter, *Citizen Patrols: Prevention or Control?*, 21–22 CRIME & SOC. JUST. 200, 204 (1984).

Today, when the broad definition of police powers is combined with the U.S. Supreme Court decision, *Graham v. Connor*, the police have broad discretionary power to do what is deemed “objectively reasonable,” including the use of force, when engaging with the public.<sup>67</sup> Yet, there is no clear understanding of what constitutes legally relevant “objectively reasonable,” which means, in practice, police can do a lot, and when they do act, individuals and police institutions are rarely held responsible for their actions.<sup>68</sup> In *Graham v. Conner*, the Court created a three prong test, the Graham test, and when the courts apply this three prong test,<sup>69</sup> the lower courts’ analyses differ due to the lack of guidance from the U.S. Supreme Court on how to apply reasonableness to an analysis.<sup>70</sup> In response, the courts have shown extreme deference to law enforcement. This deference bestows onto police great latitude, which has increased due to qualified immunity, which further shields the police from responsibility by limiting the police from civil rights litigation.<sup>71</sup>

Scholars argue that the ramification of this deference led to harmful consequences for people of color, particularly Black activists who are perceived as threatening and are subject to excessive force by police.<sup>72</sup> When there is not an agreed upon definition or constitutional standard of what are acceptable police powers and what are not, the social conditions produce inequitable and deadly outcomes, particularly for Black people.<sup>73</sup> When the state uses violence against its

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<sup>67</sup> *Graham v. Connor*, 490 U.S. 386, 397 (1989) (*Graham* holds that the facts and circumstances surrounding the use of force during a search or seizure, should drive the analysis of whether excessive force was used or not, and that the intent or motivation of the officer should not be considered, even if improper. Therefore, the specific intent of an individual officer who executed the search or seizure should not matter in the analysis of excessive force).

<sup>68</sup> Christopher Logel, Comment, *Cracking ‘Graham’: Police Department Policy and Excessive Force*, 20 BERKELEY J. AFR. AM. L. & POL’Y 27 (2018) (Logel argues that police department policy has no bearing on objective reasonableness under the Fourth Amendment and that due to the split in circuit courts’ application of *Graham*, now *Graham* is an open-ended standard that has life and death consequences during encounters between the police and the public).

<sup>69</sup> See *Graham*, *supra* note 67, at 396. *Graham* developed a three-prong test, the *Graham* test, which includes: (1) the severity of the crime; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.

<sup>70</sup> Logel, *supra* note 68; Jesse Chang, Note, *Who is the Reasonable Police Officer? A Localized Solution to a Nationwide Problem*, 122 COLUM. L. REV. 87, 87 (2022).

<sup>71</sup> Karen J. Pita Loo, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B. U. L. REV. 817, 817 (2020).

<sup>72</sup> *Id.*; see also KENNEDY, *supra* note 14.

<sup>73</sup> Osagie K. Obasogie, *More than Bias: How Law Produces Police Violence*, 100 B. U. L. REV. 771, 774 at n.5 (2020). See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN 2* (The New Press, 2017) (describing the relationship between Black people and the state as follows, “there has never ... been peace between black people and the police” because the criminal process, police, and policies treat Black Americans with contempt); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio’s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1537 (2017) (arguing that legality of stop and frisk has facilitated the wholesale harassment of Black people in the United States); Tracey

own citizens, the law should be clear and unambiguous, and when police powers are used disproportionately against racial minorities, there should be legal standards that hold the police accountable. However, there are only vague and ambiguous legal standards; therefore, when a court affirms police actions as acceptable, suggesting that the police are adhering to the law,<sup>74</sup> the harm done by the police (and subsequently by the courts) permits more violence.

### *C. Historical Evolution of Policing in the United States*

Police practices in the United States developed along two trajectories—one pattern evolved in the North and a different policing system developed in the South—and when the two are studied separately, it shows that northern cities replicated the British model, while policing practices and institutions in the antebellum South were developed in response to slavery. Southern police were created by White, wealthy citizens to protect their property, including their enslaved property, and themselves against threats of slave rebellions.<sup>75</sup> Therefore, by describing both systems, it is possible to show that the southern system developed prior to and concurrently to policing in northern cities.<sup>76</sup>

#### 1. Policing in Northern Cities

In the North, policing was heavily influenced by the British, but was not a complete replication of British policing; rather, northern cities, like Boston, Chicago, New York, and others, experiencing similar urban issues as London, England—industrialization, rapid immigration and migration, political and industrial elites—modeled their policing practices after “the watch.”<sup>77</sup> “The watch” which was established as an organization composed of community volunteers that worked in agreement to protect the property rights of White, wealthy citizens and their respective communities, tended to walk the streets at night in an effort to warn

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Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 362 (1998) (exploring the Supreme Court’s decision to permit the police to use pretextual reasons to stop Black drivers. The burdens of performing a cost-benefit analysis of race-based traffic stops becomes a “perfect illustration of why many Black people feel like they are treated as second-class citizens by police and in America’s judicial system”).

<sup>74</sup> See LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 14 (Univ. Chi. Press 2016) (judicial deference to organizations that engage in symbolic policies appear to advance the rights of “have nots[.]” or marginalized people, but in practice these symbolic policies fail to protect, let alone advance, the rights of Black people).

<sup>75</sup> See SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 93-97, 99-104 (Harv. Univ. Press 2003).

<sup>76</sup> See Philip L. Reichel, *The Misplaced Emphasis on Urbanization in Police Development*, 3 POLICING & SOC’Y 1, 9 (1992).

<sup>77</sup> Brown, *supra* note 48, at 190.

residents about any impending danger or to disrupt suspected criminal activity.<sup>78</sup> Over time, “the watch” was extended to daylight hours, with separate night watches, and both became an early system of policing and crime control.<sup>79</sup> Depending on the jurisdiction, local neighborhood watches were referred to as private police or citizen patrols, and local input allowed each community to have a voice in how crime was to be controlled and how property was to be protected.<sup>80</sup> Informal law enforcement groups then branched out to investigate crimes; the day watch and night watch, as well as investigators, were eventually replaced with a centralized municipal police department in the 1830s in cities across the North.<sup>81</sup>

The transition from an informal to modern police force was completed by the 1880s, when every major northern city had set up its own municipal police force,<sup>82</sup> and although police took on slightly different institutional forms across northern jurisdictions, each police agency developed into an institution focused on social control and crime prevention.<sup>83</sup> These early policing practices were based on power and authority extended from a central government authority, namely the state, to local jurisdictions;<sup>84</sup> the choices made by government to take an active role in crime prevention and social control granted police forces formal authority to take on the “collective liability to effect nominal control over social behavior.”<sup>85</sup> As “the watch” was developed and implemented in the North, private police organizations were developed in the South to do the same thing—control social behavior.<sup>86</sup>

## 2. Policing in the South

In the South, policing developed as a direct response to control enslaved people, prevent their escape, and empower all White people—poor and elites—to support white supremacy.<sup>87</sup> From its earliest inception in the South, police patrols were created to enforce compliance of White social and economic norms, specifically

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<sup>78</sup> See GARY POTTER, *THE HISTORY OF POLICING IN THE UNITED STATES* (Ashgate Publ’g, 2013); see also Steven Spitzer, *The Rationalization of Crime Control in Capitalist Society*, 3 CONTEMP. CRISES 187 (1979).

<sup>79</sup> POTTER, *supra* note 78.

<sup>80</sup> Einstadter, *supra* note 66.

<sup>81</sup> *Id.*

<sup>82</sup> Brown, *supra* note 48, at 190; see Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51 (1988).

<sup>83</sup> Brown, *supra* note 48, at 192; See RICHARD J. LUNDMAN, *POLICE AND POLICING: AN INTRODUCTION* (Holt, Rinehart, and Winston 1980).

<sup>84</sup> *Id.*

<sup>85</sup> Spitzer, *supra* note 78, at 190.

<sup>86</sup> POTTER, *supra* note 78.

<sup>87</sup> *Id.* at 875; HADDEN, *supra* note 75, at 98-103; see also Marlese Durr, *What is the Difference between Slave Patrols and Modern Day Policing? Institutional Violence in a Community of Color*, 41 CRIT. SOCIO. 873 (2015).

including slavery, the major economic engine that upheld the fabric of southern society; controlling the enslaved population was necessary to maintain the racial economic order, which made every White person responsible for holding others in their group to the same racialized expectations.<sup>88</sup> Upholding the racial order was of utmost importance to elite Whites, which required supporting the color line through slave codes, private security, and daily surveillance of the enslaved population.<sup>89</sup>

The combination of laws, practices, private security forces, and daily surveillance of enslaved populations prevented enslaved people from escaping, but more importantly, reinforced to White citizens their responsibility to maintain the legal, political, social, and economic conditions of southern society.<sup>90</sup> Preserving the institution of slavery was of utmost important to Whites, as slavery was the economic backbone of the South, and the profitability of slavery and the political institutions that supported slavery were critical to maintaining the viability of a southern economy and racially segregated society.<sup>91</sup> Therefore, the creation of some form of policing was necessary.

Initially, private security, in the form of plantation overseers, were used to control the enslaved population on individual plantations. Private security consisted of armed men on horses who were accompanied by dogs to track down and capture any enslaved person who attempted to escape and to restrict the movement of enslaved between plantations.<sup>92</sup> However, as the enslaved population grew, plantation overseers became insufficient to secure and keep track of the expanding enslaved population. Therefore, White plantation owners looked for ways to reduce their costs and decrease the potential of losing capital (e.g., enslaved people escaping);<sup>93</sup> they turned to the state for assistance. Small and large plantation owners and enslavers petitioned the state legislature for publicly funded security slave patrols, arguing that their requests were for the management of the public good and to keep the racial social order, and not a personal request for the management of their slaves.<sup>94</sup> The argument was a winning one because the enslaved population was considered a common problem as *all* White people feared the quickly growing Black population, enslaved and free,<sup>95</sup> and White fear and anxiety due to the perceived threat of violence that Black people presented and the desire of Whites to control all Black people, who they deemed as dangerous, made it critical for the White

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<sup>88</sup> Spitzer, *supra* note 78, at 187.

<sup>89</sup> HADDEN, *supra* note 75.

<sup>90</sup> Mark Thornton et al., *Selling Slave Families Down the River: Property Rights at Public Auction*, 14 J. POL. ECON. 71 (2009).

<sup>91</sup> *See id.*

<sup>92</sup> HADDEN, *supra* note 75.

<sup>93</sup> Thornton et al., *supra* note 90.

<sup>94</sup> *Id.*

<sup>95</sup> *See* FOX BUTTERFIELD, *ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* (1995); *see also* Ryan A. Quintana, *Planners, Planters, and Slaves: Producing the State in Early National South Carolina*, 81(1) J. S. HIST. 79 (2015).

community to protect the southern economic racial caste system.<sup>96</sup> White fear of Black people unified White people across economic classes, which made publicly funded citizen patrols politically easy to support because all White people wanted to ensure that the enslaved population remained enslaved.<sup>97</sup>

Slave patrol statutes passed by state legislators transferred enslavers' security costs to the state, and when slave patrols came under state control, state legislators granted members of each citizen patrol to use a variety of techniques that were deemed appropriate for the circumstances to control the enslaved population.<sup>98</sup> Techniques included beating, maiming, and even killing enslaved people if they violated the slave codes or were caught away from his or her plantation without a proper pass.<sup>99</sup> As enslavers came to rely on public financial support to reduce their personal costs, White society was making a concerted effort to undermine any threat of uprisings by enslaved people, which was of paramount importance to Whites, landowners and the landless, alike, and ensured the viability of the institution of slavery.<sup>100</sup> When enslavers, who were a small percentage of the White population, were able to influence the political process to protect and maintain the institution of slavery, they directly reinforced the state's "political" commitment to white supremacy, safeguarded the South's way of life, and reduced the threat of future slave uprisings with the enforcement of slave patrols.<sup>101</sup>

Slave patrols pre-date the formation of northern police departments, and Samuel Walker describes them as the first publicly funded police organizations designed to be a security force.<sup>102</sup> Their formation played a significant role in the perpetuation of slavery, and their "members" were chosen on the same model used by militias; composed largely of White men and some women civilians from the community, small groups were organized with a captain at the lead, who was responsible to organize patrols, maintain a regular schedule, and patrol over a specific geographical area or zone.<sup>103</sup> White citizen patrols maintained control in the

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<sup>96</sup> MIDDLEMASS, *supra* note 5, at 51–80.

<sup>97</sup> HADDEN, *supra* note 75.

<sup>98</sup> *Graham v. Conner*, *supra* note 67. This language about "reasonableness" as it relates to the circumstances, is echoed in *Graham*.

<sup>99</sup> HADDEN, *supra* note 75. Slave patrols played a significant role in perpetuating slavery. Slave patrols had an enormous amount of power and autonomy to use over the lives of enslaved persons. *See also* MIDDLEMASS, *supra* note 5, at 71–73.

<sup>100</sup> Thornton et al., *supra* note 90, at 73.

<sup>101</sup> *Id.*; BUTTERFIELD, *supra* note 95 (despite efforts to target uprisings by the enslaved prior to their fruition, it was not always possible; therefore, Whites felt it was necessary to proactively control the enslaved population through formal and informal mechanisms, including citizen patrols using their power to control and subdue enslaved people).

<sup>102</sup> SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 214-216 (Oxford Univ. Press, 1980).

<sup>103</sup> HADDEN, *supra* note 75, at 99-104. (identifying three primary responsibilities and functions of slave patrols: (1) searching slave lodgings for weapons, hunting for escaped slaves hiding from other

outskirts and rural areas of the state, and due to their official recognition to control enslaved and free Blacks, they became an extension of the regular police.<sup>104</sup> Regular police patrolled and focused on crime control in towns and other population centers, and due to the differentiation between populations and jurisdiction, slave patrols and the regular police developed specialties and the division of responsibilities, and through the evolution of these practices, each type of patrol improved its skills and level of expertise.<sup>105</sup>

As the regular police dealt with crimes committed by Whites, citizen patrols focused on keeping the enslaved and free Black populations in their subordinate place in society.<sup>106</sup> Both police forces bolstered the social norms of white supremacy.<sup>107</sup> Slave patrols had an enormous amount of autonomy, including the power to find and capture escaped enslaved people, monitor all authorized and illicit gatherings of enslaved people, and had the right to use violence to achieve social control, force compliance, and enforce white supremacy.<sup>108</sup> As the state granted each type of patrol the power and authority to survey and control the state's various populations, the extension of power to patrols reinforced the state's sovereignty and ensured that the enslaved population was not granted the protection of the law.<sup>109</sup>

### 3. Race & Policing

Police departments share similar characteristics to slave patrols, such as: 1) public funding; 2) institutions organized based on written rules and procedures; 3) accountability to a central government authority; 4) designed to protect property; and 5) they both extended the authority of individuals to use force and other control techniques to coerce socially acceptable behaviors and norms.<sup>110</sup> Social control and public order, maintained via the police, were key to maintain economic and

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plantations, and implementing a form of punitive discipline to keep slaves in line; (2) keeping slaves off of the main roadways, and when necessary to chase down, apprehend and return runaway slaves to their owners; and (3) to terrorize slaves by disassembling their meetings, deterring slave revolts, and discouraging any type of gatherings by groups of slaves).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> ROBERT A. OLWELL, *MASTERS, SUBJECTS AND SLAVES: THE CULTURE OF POWER IN THE SOUTH CAROLINA LOW COUNTRY 1740–1790* (1998).

<sup>108</sup> HADDEN, *supra* note 75, at 90.

<sup>109</sup> HADDEN, *supra* note 75, at 250–261, 302. Hadden shows that slave patrols' powers were institutionalized by southern states via the Slave Codes and Patrol Acts; KENNEDY, *supra* note 14.

<sup>110</sup> See Anthony Platt, *Crime and Punishment in the United States: Immediate and Long-Term Reforms from a Marxist Perspective*, 18 CRIME & SOC. JUST. 38 (1982); ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000); See also Reichel, *supra* note 82; BUTTERFIELD, *supra* note 95.



commercial interests, both of which needed a stable and orderly work force and an unchanging political and social environment to conduct business.<sup>111</sup>

The politics of race played a consequential role in the development of policing in the North and the South, and the history of police strategies cannot be separated from contemporary policing practices.<sup>112</sup> This is because the decisions about who was policed and how different populations and jurisdictions were policed were political in nature and started what can be called a path dependent course;<sup>113</sup> namely, the protection of White property and the policing of Black bodies were solidified in policy and political institutions via the establishment of racially biased policies, which garnered the needed political support to justify the continued use of slave patrols and northern police units.<sup>114</sup> Today, the historical, political, and policy decisions intended for slave patrols have deadly consequences for Black men, women, and children,<sup>115</sup> demonstrating the power of path dependent racially biased policies.<sup>116</sup> The consequences of police practices and policies are not insignificant; the actions taken by law enforcement determine who is surveyed, stopped, frisked, arrested, and ultimately end up in the criminal legal system. As an extension of the government, the police are complicit “in protecting routinized forms of police violence.”<sup>117</sup>

The political discourse around policing centered around the phrases, “public safety” and “law and order,” which are code words used by politicians and others to extend the power of the state and its sovereignty to pass and implement control focused policies; in some states the power was indescribable,<sup>118</sup> especially related to

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<sup>111</sup> See POTTER, *supra* note 78; see also Steven Spitzer & Andrew Scull, *Privatization and Capitalist Development: The Case of Private Police*, 25 SOC. PROBS. 18 (1977).

<sup>112</sup> HUBERT WILLIAMS & PATRICK V. MURPHY, *THE EVOLVING STRATEGY OF POLICE: A MINORITY VIEW* (1990).

<sup>113</sup> See ROBERT LIEBERMAN, *SHAPING RACE POLICY: THE UNITED STATES IN COMPARATIVE PERSPECTIVE* 1–55 (2005). Lieberman investigates the historical construction of race in three countries—the U.S., France, and Britain—and how policy decisions made in one century creates racial inequality in the next century. Using path dependency as a framework, which analyzes the capacity (or lack of capacity) of institutions to change due to their historical construction, traditions, and structural complexity, Lieberman details the parallel histories of race in three countries to demonstrate how persistent racial inequality is across time. By exploring the development of social policies, Lieberman shows how historical decisions create a “policy path” that is set in place and hard to divert from due to institutional resistance. When it comes to race and race-targeting policies, Lieberman demonstrates that once a policy path is set the historical roots of racial oppression are “baked” into the policy and institution; as a result, future so-called “race neutral” policies are in fact racially biased in their implementation due to past decisions.

<sup>114</sup> Reichel, *supra* note 82, at 57–62; see also LIEBERMAN, *supra* note 113.

<sup>115</sup> WALKER, *supra* note 102; Megan Ming Francis, *The Strange Fruit of American Political Development*, 6(1) POLITICS, GROUPS, & IDENTITIES 128, 128–137; See also Brown, *supra* note 48.

<sup>116</sup> LIEBERMAN, *supra* note 113.

<sup>117</sup> Francis, *supra* note 115, at 128.

<sup>118</sup> Christopher Tomlins, *Necessities of State: Police, Sovereignty, and the Constitution*, 20 J. POL’Y HIST. 47 (2008).

how state power was utilized to police Black people and maintain white supremacy.<sup>119</sup> Specifically, to maintain slave patrols, community watches, and the evolution of policing, southern states had to establish the institutional bureaucracies to support policing, such as the construction of courts and jails.<sup>120</sup> Many of these institutions were created to maintain the “public order;” however, the development of these new bureaucratic institutions replaced informal control mechanisms that responded crime, preserved the status quo, and extended social control over the public.<sup>121</sup> The creation of such institutions made “law and order” visible to society.

The new institutions coordinated the enforcement of a variety of laws, such as Jim and Jane Crow,<sup>122</sup> and punishment related to criminal statutes targeting “Black crimes;” by criminalizing specific behaviors as “Black,” including “pig laws,” vagrancy, theft, burglary, obtaining goods under false pretenses, embezzlement, and bigamy, laws and the police reinforced the idea that Black people were criminal.<sup>123</sup> The racialized arguments supporting the enumeration of “Black crimes” were grounded in White supremacy and White existential fear of blackness.<sup>124</sup>

This history of race and politics did not decline with the abolishment of slavery and slave patrols; rather, it changed and evolved, and the politics of “law and order” came to the forefront during the 1960s when the modern politics of “law and order” emerged. Both Republicans and Democrats used political language to call for more “law and order,” as the ideas of the Great Society gave way to crime politics, and the Republican Party successfully blamed Democrats for the rise in street crime and urban riots, and then linked crime to the fears of white voters.

Barry Goldwater, during his 1964 acceptance speech at the Republican National Convention, called for government having the inherent responsibility to maintain a stable society through free market policies and the enforcement of law and order; freedom, he argued, was to be balanced between liberty and the law so that liberty would be allowed but order would prevent the mob from taking over.<sup>125</sup> Goldwater’s call for law and order was quickly followed by other politicians calling for the same. For instance, to counter Republicans’ call for “law and order,”

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<sup>119</sup> Quintana, *supra* note 95.

<sup>120</sup> *Id.*; BUTTERFIELD, *supra* note 95. KEYSSAR, *supra* note 110.

<sup>121</sup> POTTER, *supra* note 78.

<sup>122</sup> Pauli Murray, *Why Negro Girls Stay Single*, NEGRO DIGEST, 4, 5 (July 1947); PAULI MURRAY, *STATES’ LAWS ON RACE AND COLOR*, (Athens: Univ. Georgia Press, 1950). (writing about how the simultaneous structures of white supremacy and male supremacy was reinforced, arguing that Jim Crow restricted an intersectional analysis of women).

<sup>123</sup> Ruth Delaney et al., *Reimagine Prison: American History, Race, and Prison*, VERA (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/3CK2-7DXN>]; See also KEYSSAR, *supra* note 110; BUTTERFIELD, *supra* note 95; MIDDLEMASS, *supra* note 5.

<sup>124</sup> KEYSSAR, *supra* note 110; MIDDLEMASS, *supra* note 5; BUTTERFIELD, *supra* note 95.

<sup>125</sup> Barry Goldwater, 1964 Republican National Convention Acceptance Speech (July 16, 1964), <https://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm> [<https://perma.cc/K9NJ-JZ23>].

President L. B. Johnson merged the War on Poverty with a War on Crime to extend laws to address the substantive issues of crime, punishment, and related social issues.<sup>126</sup>

George Wallace, during the 1968 presidential election as a third-party candidate for the American Independent Party, used a law and order strategy in an attempt to win several states in the Deep South; although Wallace did not expect to become president, his strategy of explicitly linking race for the need for more “law and order” was an effective political message.<sup>127</sup> Republicans adopted the use of “law and order” political rhetoric to connect with White voting blocs that did not benefit from Republican economic and tax policies but held strong racial hostility towards Blacks; this allowed Republicans to gain support from White voters for its law and order policies without having to change its approach to tax policies.<sup>128</sup>

The Johnson and Nixon administrations increased federal crime spending, and Ronald Reagan, during his bid for the presidency in 1976, brought back “law and order” and then as president, implemented a series of new crime policies.<sup>129</sup> One example was the politicization of the War on Drugs, which statutorily differentiated powder cocaine and crack cocaine.<sup>130</sup> Reagan triggered a bipartisan competition on which political party could be the “toughest” party on crime.<sup>131</sup> This pattern repeated itself in the 1990s at the federal level with President Clinton and Democrats at the local and state levels, as both parties competed to seize ownership of the politics of crime by passing increasingly punitive measures.<sup>132</sup> The frenetic expansion of the politics of “law and order” occurred during a period of socioeconomic and racial change across the country, which extended the criminal legal system beyond its

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<sup>126</sup> MICHAEL FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 51-52 (2005).

<sup>127</sup> *Id.*; Julia Azari, *From Wallace to Trump, The Evolution of “Law and Order,”* FIVETHIRTYEIGHT (Mar. 13, 2016), <https://fivethirtyeight.com/features/from-wallace-to-trump-the-evolution-of-law-and-order/> [<https://perma.cc/VY7X-M4N9>].

<sup>128</sup> See KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997); Michael Tonry, *Why are U.S. Incarceration Rates so High?* 45(4) CRIME & DELINQUENCY 419, 419-437 (1999).

<sup>129</sup> Keesha Middlemass, *War as Metaphor: The Convergence of the War on Poverty & the War on Drugs in THE WAR ON POVERTY* 85-104 (Kyle Farmby ed., Lexington Books 2014).

<sup>130</sup> Powder and crack cocaine are derived from the same coca plant, and according to experts have no pharmacological differences, and offer similar physiological and psychoactive effects, regardless of how the cocaine is ingested—smoked, injected or snorted. See Dorothy Hatsukami & Marian Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 J. AMA 1580-1588 (1996).

<sup>131</sup> Katherine Beckett & Megan Ming Francis, *The Origins of Mass Incarceration: The Racial Politics of Crime and Punishment in the Post-Civil Rights Era*, 16 ANNUAL REV. OF LAW & SOC. SCIENCE 433, 437-438 (2020).

<sup>132</sup> *Id.* at 437.

traditional boundaries into other policy areas.<sup>133</sup> The passage of racialized laws shaped not only policing strategies but also the larger criminal justice continuum.<sup>134</sup> The political rhetoric about “law and order” was in response to the social and racial progress of the Civil Rights Movement; the push back contributed to policies that fueled the rise in mass incarceration.<sup>135</sup>

The racial history of the U.S. is intimately tied to the history of policing, past political calculations, and Whites’ fear of Black people, all of which continues to cast a shadow that connects blackness to criminality.<sup>136</sup> Police tactics focus on responding to “undesirable” groups who are thought of as criminal; by concentrating police resources, manpower, and attention to surveying communities of color, particularly Black ones,<sup>137</sup> and these choices ensure racial disparities in who is arrested, convicted, and incarcerated.<sup>138</sup> For instance, Black men and women are more likely to be arrested, convicted, and incarcerated than Whites and Latinos,<sup>139</sup> with Black men six to eight times more likely to be charged and incarcerated when compared to White men.<sup>140</sup>

## II. PROSECUTORS AND CRIMINAL DEFENSE ATTORNEYS—AN ADVERSARIAL SYSTEM

The connection between prosecutorial discretion, plea bargaining, and reentry is understudied, and although racial, ethnic, social, and economic disparities and inequities emerge at each juncture of the criminal continuum, some decision points are more critical than others, such as arrest and the charges decided by the

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<sup>133</sup> Mark Peffley, Jon Hurwitz, & Paul Sniderman, *Racial Stereotypes and Whites’ Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30, 30–60 (1997); see also Middlemass, *supra* note 129.

<sup>134</sup> MIDDLEMASS, *supra* note 5.

<sup>135</sup> MIDDLEMASS, *supra* note 5.

<sup>136</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Herbert Blumer, *The Future of the Color Line*, in *THE SOUTH IN CONTINUITY AND CHANGE* (John McKinney & Edgar Thompson eds., 1965); F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* (1991); WACQUANT, *supra* note 8; Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Merge*, 3 PUNISHMENT & SOC’Y 95 (2001); Loïc Wacquant, *The New Peculiar Institution: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377 (2000); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

<sup>137</sup> See Delaney et al., *supra* note 123.

<sup>138</sup> TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2009); Jennifer Ortiz & Hayley Jackey, *The System is Not Broken, it is Intentional: The Prisoner Reentry Industry as Deliberate Structural Violence*, 99(4) THE PRISON J. 484 (2019).

<sup>139</sup> See Ortiz & Jackey, *supra* note 138, at 486–487.

<sup>140</sup> *Trends in U.S. Corrections*, SENT’G PROJECT (May 17, 2021), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [https://perma.cc/3BYX-5EJM].

prosecuting attorney. Decisions made at the entry point of the criminal legal system sets in place what happens if bail is granted, during plea negotiations, sentencing, incarceration, and reentry.<sup>141</sup> Yet, this adversarial system—prosecutors for “the State” versus a defendant—puts the power of the government against an individual, and the system and state actors converge in an effort to “win” a conviction against a defendant.<sup>142</sup>

It is at this point—the criminal process—where tensions arise between two separate value systems—the value system of policing for crime control<sup>143</sup> and due process for defendants.<sup>144</sup> If police prescribe to only the crime control model, then prosecutors and criminal courts must (should?) value due process, but this does not always happen in criminal cases. Instead, actors within the system make a series of minute decisions as they attempt to balance the competing demands of the two value systems—crime control versus due process.<sup>145</sup> I argue that both values are undermined with the use of plea deals. The intersection and conflict between what the law demands, what the police do, how prosecutors respond, the role of criminal defense attorneys and defendants, and what the court expects, is evident by examining prosecutorial discretion and plea deals. Moreover, the interdependent decisions made by law enforcement, prosecutors, and the courts, are compounded by each additional decision, which contributes to racial disparities in the disposition of cases, initial charges, the overcharging of disadvantaged groups, sentencing, fines, and other sanctions, including detention, bail, and incarceration.<sup>146</sup>

#### A. Rules of the Criminal Courts

The criminal courts are where the law, legal doctrine, lawyers, judges, police, and defendants come into contact. Each actor has a distinct role, and it is the criminal courts, the place where cases are tried and verdicts are rendered, that makes criminal courts different from other public institutions. Namely, criminal courts have the power to render a verdict, set a sentence and corresponding punishment, and is the

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<sup>141</sup> Besiki L. Kutateladze, *Tracing Charge Trajectories: A Study of the Influence of Race in Charge Changes at Case Screening, Arraignment, and Disposition*, 56(1) CRIMINOLOGY 123 (2018); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998) [hereinafter *Prosecution and Race*]; Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 LEG. & PUB. POL’Y 821, 832 (2013) [hereinafter *Racial Justice*]; MIDDLEMASS, *supra* note 5.

<sup>142</sup> See Trivedi & Van Cleve *supra* note 21 and surrounding text about unchecked prosecutorial power; see also *infra* Part II.

<sup>143</sup> Kevin Cyr, *The Police Officer’s Plight: The Intersection of Policing and the Law*, 52 ALTA. L. REV. 889, 890–891 (2015).

<sup>144</sup> See Herbert L. Packer, *Two Models of the Criminal Process*, 113 UNIV. PA. L. REV. 1 (1964).

<sup>145</sup> Cyr, *supra* note 143, at 894.

<sup>146</sup> See Kutateladze, *supra* note 141.

only place in the American system that can impose a felony conviction.<sup>147</sup> This makes criminal courts different from other public institutions because they have the power to impose fines, coerce a defendant into a plea deal, and incarcerate someone.<sup>148</sup>

In addition to the charges and punishment attached to each criminal charge, Malcolm Feeley argues that the processes that unfold in criminal courts are shaped by a number of interdependent factors and interconnected sets of relationships, all of which influence the outcome of a case.<sup>149</sup> Feeley writes about how each court has its own distinct pathologies,<sup>150</sup> and each has its own peculiar information system and shorthand language that creates a closed community.<sup>151</sup> Members of this closed community are familiar with the traditions, activities, and language of the legal system, which makes the process opaque and hard to understand for those uninitiated, which is detrimental to defendants.<sup>152</sup>

Criminal legal practices that unfold in a criminal court have been established to contend with the fundamental challenges of adjudicating many people in a timely fashion who have allegedly violated the law. The process that unfolds in criminal court is supposed to incorporate constitutional due process protections for defendants while applying the formal law to the alleged actions and behaviors of the defendant. Yet, criminal courts display the power differentials between “the state”—police, prosecutors, and judges—versus the defendant<sup>153</sup> and is the location where the weight of the criminal justice system is brought to bear on an individual.

Following an arrest and being charged with a crime, defendants are arraigned; this is when the defendant is brought to court and there is a formal reading of the charge(s) brought against them by the state. At this time, judges decide if bail is granted. Scholars describe arraignment court as “nothing short of chaos.”<sup>154</sup> The chaos is embedded into the arraignment process, which is designed to process a high number of people; the courts are crowded, defendants are often handcuffed together, and public defenders are often given only a few minutes to meet their clients, gather information, and then represent their client in front of a judge; judges weigh the

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<sup>147</sup> MIDDLEMASS, *supra* note 5. See *infra* Part III and accompanying text regarding collateral consequences of a felony conviction.

<sup>148</sup> See M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493 (2021).

<sup>149</sup> MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

<sup>150</sup> *Id.* at xxvii.

<sup>151</sup> *Id.* at xxxii.

<sup>152</sup> See Hanan, *supra* note 148.

<sup>153</sup> The power of the state creates a huge disparity, as prosecutors have free access to investigators and labs while defense attorneys must pay for these same services in defense of their client. See John Pfaff, *Decarceration's Blindspots*, 16 OHIO ST. J. OF CRIM. LAW 253 (2019).

<sup>154</sup> Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L. J. 845, 846 (2019); FEELEY, *supra* note 149, at 3; ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN ERA OF BROKEN WINDOWS POLICING* (2018).

information, such as the severity of the charges, if the defendant has strong or weak ties to the community, is a flight risk or not, has prior arrests, or any other number of factors, to determine if s/he will be released on their own recognizance or if bail will be granted.<sup>155</sup> This one decision—to release someone on their own recognizance or grant bail<sup>156</sup>—has tremendous legal, financial, social, and lifelong consequences.<sup>157</sup> The bail decision at arraignment dictates the course and outcome of the criminal case, and will reverberate in a person's life well beyond the completion of the case.<sup>158</sup> At arraignment, the bail decision is the moment that the power of the state to detain someone is made public.<sup>159</sup>

Following arraignment, for most of the actors involved in a criminal case, except for the defendant, the flow of the case follows a similar worn path until a verdict is rendered. However, a criminal case is not business as usual for the defendant, as their character, history, social and family background, professional life, interactions with the police, and other factors are examined in relationship to the charges. A key actor at this juncture of the legal process are prosecutors. The rules and practices of a criminal case is where routine discretion is extended to the prosecutor, and only the prosecutor. The discretion of prosecutors to charge or not to charge is based on the partnership between prosecutors and law enforcement.<sup>160</sup>

### B. Law Enforcement & Prosecutors

Law enforcement and individual officers are given broad discretionary powers on how they interact with the public. An arrest and detention comes with significant consequences *prior* to conviction.<sup>161</sup> Individuals can be jailed while waiting for the prosecutor to act, and while waiting in jail, but not convicted of a crime, defendants

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<sup>155</sup> See Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800 (2012).

<sup>156</sup> According to the American Bar Association (ABA), bail is the amount of money judges decide that a defendant must post to the court to be released from police custody while awaiting trial. Bail is not a fine and is not designed to operate as a punishment; rather, the purpose of bail is to ensure that a defendant will appear for all pre-trial hearings they must be present and to appear for trial. Bail is returned to defendants when their trials are over. *How Courts Work—Steps in a Trial: Bail*, A.B.A. (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/) [https://perma.cc/AH4E-VT5B].

<sup>157</sup> See Rahman, *supra* note 154.

<sup>158</sup> *Id.*; see also Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017).

<sup>159</sup> Emily Brissette, *Bad Subjects: Epistemic Violence at Arraignment*, 24 THEORETICAL CRIMINOLOGY 353, 354 (2020).

<sup>160</sup> See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

<sup>161</sup> See Amanda Geller, *The Process is Still the Punishment: Low-Level Arrests in the Broken Windows Era*, 37 CARDOZO L. REV. 1025 (2016).

may be disqualified from a job or thrown out of public housing; an arrest can lead to volatile family relationships and unstable childcare, can jeopardize receiving public benefits, such as food stamps and health care; and an arrest and detention can lead to unsettled social networks and social stigma.<sup>162</sup> From the point of being stopped by the police, arrested, and jailed, the criminal suspect has few, if any, protections against unwarranted maltreatment,<sup>163</sup> including the physical invasive nature of the arrest,<sup>164</sup> the psychological effects of being detained, chained, and caged,<sup>165</sup> as well as the financial and time commitment, or “procedural hassle,” that defendants are subjected to.<sup>166</sup>

The police determine who is arrested, and the choice to arrest is based on the standards set by their respective departments, legal standards, and law. However, individual officers also operate with broad discretion and knowledge that arrests can lead to criminal charges and convictions, if the alleged criminal behavior rises to a level that meets a threshold for prosecutors to charge; prosecutors serve as the final decision maker in whether to charge a defendant with a crime.<sup>167</sup> Charging a person with a crime relies on a symbiotic relationship between prosecutors and law enforcement who work in a collaborative manner to bring a case to completion via a guilty outcome. The close working relationship and inter-related system of direct communications between the police and prosecutors takes place out of the public’s eyes.<sup>168</sup>

The police-prosecutor relationship is a complicated one;<sup>169</sup> on one hand, a close level of cooperation leads to improved communication and sharing of information, and improves the rate of convictions, but on the other hand, a close relationship between police and prosecutors means that there is a lack of boundary between the two government agents.<sup>170</sup> The relationship between police and prosecutors is an

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<sup>162</sup> See Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79(3) AM. SOC. REV. 367 (2014); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449 (2005).

<sup>163</sup> See Brissette, *supra* note 159.

<sup>164</sup> See Geller, *supra* note 161.

<sup>165</sup> See Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014).

<sup>166</sup> See KOHLER-HAUSMANN, *supra* note 154.

<sup>167</sup> See Ronald Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010 (2005).

<sup>168</sup> See Romero, *supra* note 15.

<sup>169</sup> David Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the U.S., and How This Affects Police Reform Efforts*, LEGAL STUDIES RESEARCH PAPER SERIES 3 (2011), [https://www.prisonlegalnews.org/media/publications/univ\\_of\\_pittsburgh\\_law\\_paper\\_on\\_prosecutor\\_police\\_relationships\\_2011.pdf](https://www.prisonlegalnews.org/media/publications/univ_of_pittsburgh_law_paper_on_prosecutor_police_relationships_2011.pdf).

<sup>170</sup> See Alexandra Hodson, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships & How Immunity Lets Them ‘Get Away with Murder*, 54 IDAHO L. REV. 563 (2018).



interlocking system that functions to create mutual dependence.<sup>171</sup> As police conduct autonomous investigations on the alleged crime and perpetrators, and upon completion, turn their investigation over to a prosecutor, decisions made by police dictate the workload for prosecutors,

Prosecutors are responsible for reviewing the case brought by the police to determine which cases will move forward; working together, they become mutual dependent actors on the same team, as the evidence provided by the police and the classification of the crime, sets in motion the charges that are filed against the defendant by the prosecutor.<sup>172</sup> At this juncture, the police-prosecutor relationship is to move cases that are deemed “winnable” forward through the criminal legal system;<sup>173</sup> this is the heart of the police-prosecutor relationship—winning cases. The desire to win cases creates a close working relationship between the police and prosecutors in the name of administering justice.<sup>174</sup> This is the crux of prosecutorial power—criminal matters cannot proceed upon a prosecutor decides to bring charges.<sup>175</sup> Prosecutors have the unfettered discretion to take evidence from the police, charge or decline to charge a defendant, and then steer each case to a preferred outcome; discretion is a prosecutors’ power.<sup>176</sup>

### C. Prosecutorial Discretion

A prosecutor is a law enforcement officer who has the authority to pursue criminal charges against a defendant, and they operate as an intermediate actor between police, judges, and defendants, in the space between the law. Prosecutors determine the resolution of criminal cases by determining the charges to be brought against defendants, which makes a prosecutor a quasi-judge.<sup>177</sup> The position of prosecutor is unique, and their authority often goes unchecked.<sup>178</sup> No other

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<sup>171</sup> Harris, *supra* note 169.

<sup>172</sup> See Ericka Wentz, *Funneled Through or Filtered Out: An Examination of Police and Prosecutorial Decision-Making in Adult Sexual Assault Cases*, 26(15-16) VIOLENCE AGAINST WOMEN 1919–1940 (2020).

<sup>173</sup> *Id.* at 1920.

<sup>174</sup> Success for prosecutors is defined as winning convictions. See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2127 (2010); Kenneth Bresler, “*I Never Lost a Trial*”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541 (1996).

<sup>175</sup> Joan E. Jacoby, *The American Prosecutor in Historical Context*, PROSECUTOR 33, 33 (May/June 1997).

<sup>176</sup> Bellin, *supra* note 23, at 176–179.

<sup>177</sup> See U.S. DEPT. JUST., PRINCIPLES OF FEDERAL PROSECUTION (2020) <https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution> (last visited Jul. 2020) [<https://perma.cc/R78F-S9YP>].

<sup>178</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 840 (2006); see also Trivedi & Gonzalez Van Cleve, *supra* note 19; Romero, *supra* note 15.

government official in the United States criminal system has as much discretion and unreviewable power as prosecutors.<sup>179</sup>

Prosecutorial discretion is vast, diffused, and goes unchallenged because it has been upheld numerous times by the courts.<sup>180</sup> Moreover, prosecutorial discretion is unconstrained by the law; there is no law that tells prosecutors what to do or how to perform.<sup>181</sup> It is rarely checked by the political process via elections and because elected officials have granted them the ability to apply the criminal code and determine charges, which is inconsistent with the fundamental principles of the justice system.<sup>182</sup> The prosecutor's discretion in charging defendants undermines constitutional principles,<sup>183</sup> and makes prosecutors powerful actors in an adversarial system that pits the government against an individual.<sup>184</sup>

### 1. Overcharging

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<sup>179</sup> Daniel Fryer, *Race, Reform, and Progressive Prosecution*, 110 J. CRIM. L. CRIMINOLOGY 769, 773 (2020); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016).

<sup>180</sup> *United States v. LaBonte*, 520 U.S. 751, 762 (1997); *Oyler v. Boles*, 368 U.S. 448 (1962); *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Katzenbach*, 359 F.2d 234 (D.C. Cir. 1965).

<sup>181</sup> Romero, *supra* note 15, at 1122. The ABA's Model Rules have been adopted across the country and by each state, as well as the ABA Prosecution Standards; both are aspirational and unenforceable. See Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 474 (2017).

<sup>182</sup> Stuntz, *supra* note 178; James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1554 (1981). (Vorenberg explores the debate on what constitutes the principles of the justice system, which includes, fairness, consistency, proportionality, and access; sentencing and corrections that are rational, logical, and understandable to stakeholders; balance between public safety and defendants' rights, while holding offenders accountable; and that a person, *despite* being charged with a crime, is considered innocent until proven guilty, that guilt must be satisfied beyond a reasonable doubt, and the person charged is the person who committed the crime). See also *Principles of Effective State Sentencing and Corrections Policy*, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/civil-and-criminal-justice/principles-of-sentencing-and-corrections-policy.aspx> (last visited May 11, 2022) (constitutional principles outlined in the Bill of Rights and affirmed by the U.S. Supreme Court).

<sup>183</sup> See Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800 (2012); see also Vorenberg, *supra* note 182.

<sup>184</sup> See *Statement of Purpose*, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE (NAPD), <https://www.publicdefenders.us/stateofpurpose#:~:text=The%20National%20Association%20for%20Public,to%20justice%20for%20poor%20people>. (last visited Sept. 11, 2022) [ <https://perma.cc/8J9K-8BYG>] National Association for Public Defense (NAPD) is focused on addressing systemic failures of the criminal legal system to provide the constitutional right to counsel, a fundamental and necessary component of the criminal legal system. Defendants who are unable to pay for defense attorneys are granted a public defender under the Sixth Amendment of the U.S. Constitution; however, public defender programs are under resourced, attorneys are under paid, and stretched thin as they face daunting workloads. Moreover, the power of defense attorneys and the role of prosecutors are unequal; prosecutors have the power of the state behind them, while defense attorneys must rely on other funds to provide the right to counsel.

Although prosecutors have the discretionary power to downsize criminal charges to spare the defendant from more serious penalties or dismiss all charges, dismissing charges are not the norm.<sup>185</sup> Instead, prosecutors are more likely to overcharge defendants. Overcharging takes on two forms: horizontal and vertical overcharging.<sup>186</sup>

Horizontal overcharging is when the prosecutor adds excessive charges in an effort to force a plea bargain deal while vertical overcharging is when a prosecutor charges a defendant with the highest and single offense that fits the circumstances of the case. The “extravagant” charges may not be the highest charge that the prosecutor can get a conviction, but vertical overcharging operates as a signal to the defendant the power of the state and tends to push a defendant to plead guilty to a lesser or another charge.<sup>187</sup> Both horizontal and vertical overcharging are prosecutorial tactics to instigate a plea deal via “charge bargaining.”<sup>188</sup> Charge bargaining is a type of plea bargaining when the defendant is coerced to plead guilty or no-contest to another offense, and in agreement, the prosecutor will dismiss or reduce charges.<sup>189</sup> For instance, a prosecutor can overcharge a defendant so the judge will deny bail, which ensures the defendant won’t be released prior to trial. With the discretionary authority to overcharge, knowing that each additional charge decreases the likelihood that bail will be granted as the severity of the potential punishment increases,<sup>190</sup> prosecutors can tilt the outcome of the case to their favor.<sup>191</sup>

In more ways than one, the state’s power, via the prosecutor, is on full display when a defendant is charged with a crime, as the decisions made by the police to arrest and initially charge the defendant is rarely, if ever, questioned, the police’s version of events are accepted as fact, and is “nearly dispositive;” this power to charge cannot be overstated, as the power to charge renders the concept of “innocent until proven guilty” an abstract concept as prosecutors use their discretionary authority to overcharge in an effort to force an outcome of the case prior to a court trial and verdict.<sup>192</sup>

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<sup>185</sup> State prosecutors may worry about trial losses when a defendant does not accept a plea deal, which means criminal cases may be dismissed; however, as KOHLER-HAUSMANN, *supra* note 154, at 144–45, argues that mass dismissal of charges by prosecutors could be a process of “marking” each person with an arrest record, and prosecutors can, in future cases, use this earlier arrest records to overcharge a defendant in a future case. *See also* Bellin, *supra* note 23, at 192–194.

<sup>186</sup> Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703 (2014).

<sup>187</sup> *Id.* at 704–705.

<sup>188</sup> Stephen S. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 278–82 (1989).

<sup>189</sup> Kyle Graham, *Facilitating Crimes: An Inquiry into the Selective Invocation of Offenses Within the Continuum of Criminal Procedures*, 15 LEWIS & CLARK L. REV. 665, 686–87 (2011).

<sup>190</sup> *Prosecution and Race*, *supra* note 141; *Racial Justice*, *supra* note 141.

<sup>191</sup> *See* Wendy Calaway & Jennifer Kinsley, *Rethinking Bail Reform*, 52 UNIV. RICH. L. REV. 795 (2018).

<sup>192</sup> *See* NATAPOFF, *supra* note 32; KOHLER-HAUSMANN, *supra* note 154.

Overcharging is the choice of prosecutors to add a charge to the original arrest charges made by the police, and implies a disproportionate amount of criminal conduct by the defendant, which may or may not be supported by the evidence; overcharging is a ploy by prosecutors, who intend to reduce some or all of the charges during the plea bargaining process.<sup>193</sup> When prosecutors overcharge defendants—charging a defendant with multiple offenses that carry harsh sanctions and punishments—the goal is to goad the defendant into pleading guilty to a lesser offense in a plea deal.<sup>194</sup> This is one of the oldest tricks in a prosecutor’s bag of tricks;<sup>195</sup> overcharging defendants to ensure the best possible outcome for the state, a guilty plea. Overcharging is antithesis to the principles of the criminal justice system and is thought by many to be immoral and corrupt.<sup>196</sup> The “overcharging phenomenon” has become an integral part of modern plea bargaining,<sup>197</sup> yet has dreadful ramifications for the person who awaits the disposition of their case. Overcharging is the power of the state to instill fear into a defendant, and that fear is used by the state to punish defendants. Defendants’ fear puts unmeasurable pressure on them to accept “lessor” charges instead of taking the risk of going to trial and having additional punishment imposed by the state.<sup>198</sup>

Discretion allows prosecutors to pick and choose which cases to charge and which among the overlapping related offenses can be charged to any one defendant.<sup>199</sup> The overlapping criminal statutes and excessive prison sentences attached to charges have provided prosecutors an arsenal to force defendants into trading excessive charges and time in prison for a guilty plea.<sup>200</sup> By overcharging and piling on charges,<sup>201</sup> prosecutors force defendants to bargain away their right to

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<sup>193</sup> See Graham, *supra* note 186.

<sup>194</sup> *Prosecution and Race*, *supra* note 141.

<sup>195</sup> “Overcharging” and prosecutorial discretion concerning charging practices emerged in the scholarly literature in the mid-1960s and remains an important part of prosecutors’ tool kit to influence plea deals. See e.g., Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L. J. 1030, 1035 (1967); Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 UNIV. CHI. L. REV. 50 (1968).

<sup>196</sup> *United States v. Robertson*, 15 F.3d 862, 876 (9th Cir. 1994) (Reinhardt, J., concurring) (“The practice of overcharging a defendant involves an abuse of the prosecutor’s generally unreviewable discretion.”).

<sup>197</sup> *Lafler v. Cooper*, 132 S.Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (surmising that plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”).

<sup>198</sup> Hanan, *supra* note 148.

<sup>199</sup> Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 712 (2010); J. Harvie Wilkinson, Jr., *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099 (2014).

<sup>200</sup> Wilkinson, *supra* note 199.

<sup>201</sup> Graham, *supra* note 186.

go to trial.<sup>202</sup> This is the power of prosecutorial discretion, which has an outsized impact on the outcome of cases. Prosecutors are the main actors in plea deals, which is a loosely regulated practice that leads to a guilty plea.<sup>203</sup> The power to overcharge is one regrettable aspect of the modern criminal legal system, especially as it is related to what is “hidden” within the legal system; prosecutors’ decision-making process takes place out of the public’s eyes, and these hidden decisions lead to systemic racism.<sup>204</sup>

Systematic racism is evident in who is overcharged and undercharged, and the vestige of racism continues to lead to racial disparities due to a combination of policy decisions by state legislators, policing practices, prosecutorial discretion,<sup>205</sup> and plain old racism of who is deemed criminal.<sup>206</sup> Prosecutors have a responsibility to balance vague concepts of “public interest” and “justice,” which provides few, if any, constraints on prosecutors’ choices. The lack of restraints on prosecutors’ decision-making results in disparities, as racial and ethnic minorities, social outcasts, and the poor tend to be treated most harshly by the criminal legal system.<sup>207</sup>

Despite historical patterns of racially discriminatory practices along the criminal continuum,<sup>208</sup> racial and class disparities often take place before a prosecutor gets a case,<sup>209</sup> and there have been few substantiated claims that prosecutors have or are purposely engaging in racially discriminatory practices;<sup>210</sup> however, when they work with police who engage in “testilying”<sup>211</sup> and police falsification of records via “reportilying” to help prosecutors achieve a conviction,

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<sup>202</sup> Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33 (2002).

<sup>203</sup> Kutateladze, *supra* note 141.

<sup>204</sup> Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIM. & JUST. 273, 274 (2010).

<sup>205</sup> *Id.*

<sup>206</sup> MIDDLEMASS, *supra* note 5.

<sup>207</sup> Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. UNIV. L. REV. 987 (2021) (until recently, it was almost impossible to challenge police or prosecutors of racial discrimination due to a near impossible standard set in *United States v. Armstrong*, 517 U.S. 456 (1996); however, criminal defendants have charged federal law enforcement agencies with racially discriminatory tactics and practices). See Vorenberg, *supra* note 182; Kutateladze, *supra* note 141.

<sup>208</sup> ALEXANDER, *supra* note 136; Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

<sup>209</sup> Siegler & Admussen, *supra* note 207; Roberts, *supra* note 208.

<sup>210</sup> Exception is Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 203, 205 (2007) (noting that racial disparities cannot be eliminated without the active participation of many actors in the criminal system, including prosecutors, which requires having the decisions prosecutors make be examined to determine if their decisions are causing racial disparities when charging cases or when engaging in plea bargaining deals).

<sup>211</sup> Steven Zeidman, *From Dropsy to Testilying: Prosecutorial Apathy, Ennui, or Complicity?*, 16 OHIO ST. J. OF CRIM L. 423, 427-428 (2019).

these practices lead to unjust decisions that have racial implications.<sup>212</sup> Additionally, prosecutorial discretion can add to racial disparities in post-arrest decisions, too.<sup>213</sup>

Prosecutors are the drivers of mass incarceration,<sup>214</sup> and their discretionary powers can be used to decline to prosecute individuals who are racial minorities when aggressive policing or certain offenses only fall upon racial minorities (e.g., smoking marijuana).<sup>215</sup> As it is the prosecutor's responsibility to pursue justice and determine which offenses to pursue, the prosecutor does *not* have to prosecute every individual case brought to their attention from the police.<sup>216</sup> To do this, prosecutors must untangle themselves from their close and complicated relationship with the police<sup>217</sup> and determine what the police did and did not do to sustain the charges,<sup>218</sup> especially as increasing evidence of police misconduct and outright criminality exists.<sup>219</sup> Scholars have explored the role of prosecutors and the race of defendants, and found that implicit bias and racial biases impact prosecutors' decisions.<sup>220</sup> Minorities, particularly Black men, suffer from overcharging by prosecutors, and this is one major cause of racial inequality in the criminal legal system.<sup>221</sup> Moreover, there are numerous studies showing racial disparities between the charging of

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<sup>212</sup> Hodson, *supra* note 170, at 586–588; *see also* Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L. J. 211 (2000).

<sup>213</sup> ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); K. Babe Howell, *Prosecutorial Discretion: The Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. OF LEGAL ETHICS 285, 297 (2014).

<sup>214</sup> Pfaff, *supra* note 27.

<sup>215</sup> Howell, *supra* note 213 at 297–298.

<sup>216</sup> *Id.* at 289.

<sup>217</sup> *See* Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885 (2018) (exploring the complicated relationship between prosecutors and police).

<sup>218</sup> Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 312, 353–354 (2017).

<sup>219</sup> Vorenberg, *supra* note 182; Kate Levine, *How We Prosecute the Police*, 104 GEO. L. J. 745 (2016). Police crimes are committed by sworn law enforcement officers and can occur while an officer is on- or off-duty. Examples of recent police criminality include three former Minneapolis police officers convicted of violating George Floyd's civil rights. Amy Forliti et al., *3 ex-cops convicted of rights violations in Floyd killing*, AP NEWS, (Feb. 24, 2022) <https://apnews.com/article/death-of-george-floyd-george-floyd-minneapolis-race-and-ethnicity-racial-injustice-ab7a1e89268ac60a58ae8a317e0b6079> [<https://perma.cc/EGX4-H8LF>].

<sup>220</sup> Christopher Robertson, Shima B. Baughman, & Megan Wright, *Race and Class: A Randomized Experiment with Prosecutors*, 16(4) J. EMPIRICAL LEGAL STUDIES, 807, 807–847 (2019); Sunita Sah et al., *Blinding Prosecutors to Defendants' Race: A Policy Proposal to Reduce Unconscious Bias in the Criminal Justice System*, 1 BEHAV. SCI. & POL'Y 69, 72 (2015).

<sup>221</sup> Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors*, 98 CORNELL L. REV. 383, 386 (2013); James Babikian, *Cleaving the Gordian Knot: Implicit Bias, Selective Prosecution, & Charging Guidelines*, 42 AM. J. CRIM. L. 139, 140 (2015); *Prosecution and Race*, *supra* note 141.

federal crimes under drug laws, pre-trial diversion, domestic violence cases, and misdemeanor cases, all resulting from prosecutorial decisions.<sup>222</sup>

#### D. Plea Deals

A plea deal is a guilty conviction, and the majority of criminal cases at the state and federal levels are decided by plea bargain<sup>223</sup> and are increasingly used when defendants are *not* given bail and detained: “. . . a detained person may plead guilty—even if innocent—simply to get out of jail.”<sup>224</sup> Therefore, when prosecutors make vertical or horizontal charging decisions,<sup>225</sup> each choice is equally significant as each determines a range of sanctions that have profound consequences for the defendant, their families, and their community.<sup>226</sup> Prosecutors have more discretion relative to defendants, judges, criminal defense attorneys, and other actors in the criminal legal system,<sup>227</sup> and plea deals take place “in the shadow” of a trial and the court.<sup>228</sup> When prosecutors make charging decisions, they are representing a policy judgement that applies specific laws to a particular set of circumstances, which means prosecutors bridge the many divisions of the criminal legal system.<sup>229</sup> Prosecutors pursue specific types of defendants, most notably those deemed by the public as worthy of punishment, and defendants that the public fears.<sup>230</sup> Standen argues that prosecutors pursue convictions in an effort to convict as many people as possible for the “public’s safety.”<sup>231</sup> This provides a foundation for prosecutors to argue that they are “tough on crime,” but being tough precludes their ability to

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<sup>222</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912, 923 (2006); Robertson et al., *supra* note 220, for a review of cases showing racial disparities in who is charged.

<sup>223</sup> Robertson et al., *supra* note 220, at 4; Bibas, *supra* note 222.

<sup>224</sup> Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 930–31 (2008) (noting that “it is entirely possible that most wrongful convictions . . . are based on negotiated guilty pleas to comparatively light charges” to avoid “prolonged pretrial detention”); Natapoff, *supra* note 162.

<sup>225</sup> See *supra* notes 182–188 and surrounding text.

<sup>226</sup> Roberts, *supra* note 208.

<sup>227</sup> Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L. J. 1420, 1425 (2008).

<sup>228</sup> Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464, 2465–2466 (2004); See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993); Shawn D. Bushway, Allison D. Redlich, & Robert J. Norris, *An Explicit Test of Plea Bargaining in the “Shadow of the Trial,”* 52 CRIMINOLOGY 723 (2014).

<sup>229</sup> Sklansky, *supra* note 179.

<sup>230</sup> Standen, *supra* note 228.

<sup>231</sup> *Id.* at 1495.

pursue just and fair sentences.<sup>232</sup> The criminal code provides some direction in terms of criminal activity and sentencing, but prosecutors have more discretionary authority to determine charges, which means that sentencing reflects the charges brought by prosecutorial decisions.<sup>233</sup>

Plea deals become a contractual agreement that metes out punishment and criminal sanctions without the adversarial system having to prove guilt. When a defendant chooses to go to trial and force the state to prove the charges brought against them, in many cases, defendants are charged, denied bail, held in jail, offered a plea deal, and then never brought to trial. For instance, Kalief Browder, a Black 16-year-old, was incarcerated on Rikers Island for almost three years, accused of stealing a backpack, and held without trial. Mr. Browder refused to plead guilty to the charges, was incarcerated for exercising his constitutional right to a trial, and after prosecutors dropped all charges, Mr. Browder was eventually released without a conviction.<sup>234</sup> This is a common practice: every criminal justice system is going to arrest people accused of committing a variety of crimes and many will be convicted, but until the charges are dismissed, people are incarcerated waiting for their trial date.<sup>235</sup> Mr. Browder is just one example of the inequalities that take place; defendants await in jail for their case to be adjudicated while prosecutors can ask for continuance and wait out defendants in the hope they will plead guilty via a plea deal.

#### E. Criminal Defense Attorneys

Like prosecutors, criminal defense attorneys are officers of the court, are active participants in the adversarial system, and act as a translator of the criminal legal system for their clients. Criminal defense attorneys take on the role of protector for the accused, provide legal protection against the government and the charges brought against their client, and have a special duty to provide quality representation, protect the system from unjust and wrongful convictions, and seek the truth about

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<sup>232</sup> Prosecutors' duty should be to achieve justice, not to only obtain convictions. *See* Howell, *supra* note 215, at 286.

<sup>233</sup> Misner, *supra* note 160.

<sup>234</sup> *Kalief Browder: A Voice to End Solitary Confinement*, STOP SOLITARY FOR KIDS (March 1, 2017), <https://stopsolitaryforkids.org/kalief-browder-lost-to-solitary-confinement/> [<https://perma.cc/BK6C-U8AE>] (After Mr. Browder, who was 16 years old at the time of his arrest, was charged as an adult, and spent three years locked up on Rikers Island without a trial, 14 months of which he was in solitary confinement. He maintained his innocence and refused to plead guilty. Shortly after he was released from Rikers, he took his own life in 2015).

<sup>235</sup> Robert Lewis, *Waiting for Justice*, CAL MATTERS (March 31, 2021), <https://calmatters.org/justice/2021/03/waiting-for-justice/> [<https://perma.cc/6CDK-TL3B>] (In California, over 44,000 people are being held in local jails without being convicted or sentenced to a crime (they are poor and cannot post bail and be released); over 1,300 of them have been waiting in county jail for more than three years, and for 332 of them, they have been waiting for longer than five years).



what happened and who did what.<sup>236</sup> In an adversarial system, prosecutors determine who is charged and what they are charged with, and these decisions set in motion the corresponding criminal punishments.<sup>237</sup> In this same system, criminal defense attorneys play an important role in opposing the prosecutor (and the state), advocating for their client, and negotiating more favorable pleas, or in obtaining a dismissal of all charges.<sup>238</sup> If defendants agree to accept a plea deal, they are usually, but not always, represented by a criminal defense attorney<sup>239</sup> who is responsible for engaging with the prosecutor to find the “best” deal for their client.<sup>240</sup>

In an ideal world, criminal defense attorneys have the time, resources, and ability to investigate the facts of the case and the charges, talk to witnesses, wait for discovery materials to be shared by the prosecutor, but few defense lawyers even attempt to investigate cases.<sup>241</sup> This is because public defenders are more overburdened than prosecutors.<sup>242</sup> Defense counsel are so overburdened that they tend to not have the time or resources to ferret out claims of innocence, identify and then litigate issues related to police misconduct and/or suppression of evidence during discovery, develop mitigating evidence, challenging overcharges or identifying weaknesses in the prosecutors’ case prior to entering plea negotiations.<sup>243</sup> Both the failure to conduct adversarial hearings and increasing use of overcharging to force plea deals to circumvent a trial insulate police from having their misconduct questioned in open court, prosecutors’ decisions on charges are not challenged via cross-examination, racial disparities stay hidden in the “shadow of the trial,”<sup>244</sup> and defendants’ constitutional rights are left unprotected;<sup>245</sup> which makes criminal defense attorneys a critical part of the system.

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<sup>236</sup> Roberta K. Flowers, *The Role of the Defense Attorney: Not Just an Advocate*, 7 OHIO ST. J. CRIM. L. 647 (2010).

<sup>237</sup> Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549–2550 (2004).

<sup>238</sup> Howell, *supra* note 213, at 293–295; See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2013).

<sup>239</sup> *Gideon v. Wainwright* provides a constitutional protection that defense counsel be provided to the indigent, commonly known as public defenders, the Sixth Amendment right to counsel was extended to misdemeanor cases in *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>240</sup> Bellin, *supra* note 23, at 195. (defense attorneys are obligated to their individual clients’ interests, but this individualized approach dilutes their ability to engage in coordinated actions against prosecutors.). See John Blume, *How the “Shackles” of Individual Ethics Prevent Structural Reform in the American Criminal Justice System*, 42 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 23, 38 (2016).

<sup>241</sup> Howell, *supra* note 213, at 294–295.

<sup>242</sup> *Id.* at 295; see Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. UNIV. L. REV. 261, 262 (2011).

<sup>243</sup> Howell, *supra* note 213, at 295; see WILLIAM STUNTZ, *THE COLLAPSE OF THE AMERICAN CRIMINAL JUSTICE SYSTEM* (2011).

<sup>244</sup> Bibas, *supra* note 228, at 2464–2466. See Bushway et al., *supra* note 228.

<sup>245</sup> Howell, *supra* note 213, at 295–296. See Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L. J. 315, 339 (2005).

Criminal defense attorneys are able to assess a client's best interests and determine a strategic legal plan to defend against the charges brought by the state. The seriousness of the charges and consequently the severity of the punishment affects the way criminal defense attorneys prepare for a case. When a case will likely result in a fine or a misdemeanor, they tend to spend less time with a case than one when a defendant has been charged with a crime that has a long prison sentence attached (e.g., manslaughter, robbery, arson, kidnapping).<sup>246</sup>

Criminal defense attorneys work in the "shadow of the trial;"<sup>247</sup> this legal theory posits that criminal defense attorneys will work with their client, the defendant, to make the best "rational" decision under the law and based on the information available to them prior to the start of trial. While working in the "shadow of the trial," the defense attorney and their client will engage in a process called "playing out the trial"—what is the likelihood of conviction based on an assessment of the evidence provided during discovery and investigation (e.g., confession, eye-witness testimony, scientific evidence, such as DNA or video), if the case is "triable," and what the possible sentence could be if found guilty at trial; based on this analysis, the criminal defense attorney and their client will weigh all of the available information to determine if the defendant should take a plea deal or go to trial.<sup>248</sup>

Plea deals, then, are tactical decisions based on risks and potential consequences of being found guilty. Plea deals reduce defendants' rights and the states' responsibilities are reduced, as they do not need to prove guilt beyond a reasonable doubt. Safeguards that are an integral part of trials are absent during plea bargaining—prosecutors abdicate their responsibility as a gatekeeper and file perfunctorily charges based on the police's version of events (i.e., arrest records, sufficient evidence to warrant filing charges, fully respected the accused's constitutional rights, and that the police did not lie on their reports or document any false information).<sup>249</sup>

Criminal defense attorneys are at a disadvantage when engaging in plea deals because of the asymmetry of information inherent in plea bargaining.<sup>250</sup> Furthermore, broad prosecutorial discretion and the practice of overcharging diminishes a criminal defense attorney's ability to know what will be in the final plea agreement to advise their client about the consequences of accepting any deal. Criminal defense attorneys need to have access to the state's case and have an opportunity to evaluate the states' case through full discovery.<sup>251</sup> Without full

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<sup>246</sup> Howell, *supra* note 213.

<sup>247</sup> See Bibas, *supra* note 244; Bushway et al., *supra* note 228.

<sup>248</sup> Shawn Bushway & Allison Redlich, *Is Plea Bargaining in the 'Shadow of the Trial' a Mirage?*, 28 J. QUANTITATIVE CRIMINOLOGY 437, 438 (2011); Bibas, *supra* note 244, at 2467-2470.

<sup>249</sup> Zeidman, *supra* note 211, at 424; see Oritseweyinmi Joe, *supra* note 217, at 899.

<sup>250</sup> Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 778 (2016).

<sup>251</sup> Bibas, *supra* note 244.

discovery, criminal defense attorneys' understanding of the strength of the evidentiary material that the state has against their client is unknown.

Plea deals are successful, in part, because of this incomplete information, but also because there are numerous criminal laws, statutes, and regulations that cover almost all behaviors, which makes it relatively easy for prosecutors to choose from the "jurisprudential minefield" of crimes that lead to long prison sentences.<sup>252</sup> The menu of charges leads to the overcriminalization of individuals, as the decision to charge a person with a felony crime is unconstrained and relies solely on the prosecutor.<sup>253</sup> Therefore, plea deals are not optimal for defendants, especially when "justice" is being sought.<sup>254</sup> This is problematic because prosecutors work for the state and (should) have an ethical duty to seek and promote judicial economy by only trying cases they are more likely than not to win.<sup>255</sup> Yet, as defendants await trial or a plea deal while incarcerated, they must contend with many losses, including being fired from a job or the loss of income, loss of housing, time away from family and friends, the stigma of spending time in jail, and psychological impact of being locked up.<sup>256</sup>

From the state's perspective, plea deals are viewed as an efficient way to dispose of case;<sup>257</sup> Justice Kennedy wrote: "The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties."<sup>258</sup> This rationale is used to justify the use of plea bargains, especially as the defendant gets a reduced sentence by pleading guilty to some criminal act they have been accused of doing.<sup>259</sup> Yet, what costs are born by defendants when accepting a plea deal<sup>260</sup> or when they are pressured by the prosecutor through overcharging?<sup>261</sup>

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<sup>252</sup> Tim Wu, *American Lawbreaking*, SLATE (Oct. 14, 2007), <http://www.slate.com/articles/news-and-politics/jurisprudence/features/2007/americanlawbreaking/introduction.html> [https://perma.cc/S7Z3-S8ZY].

<sup>253</sup> Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 103 (2013); GENE HEALY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (Cato Inst., 2004); HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011).

<sup>254</sup> Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749, 749–50 (1983).

<sup>255</sup> Bibas, *supra* note 244.

<sup>256</sup> MILLER, *supra* note 5.

<sup>257</sup> Zeidman, *supra* note 211.

<sup>258</sup> *Missouri v. Frye*, 132 S. Ct 1399, 1407 (2012).

<sup>259</sup> Brandon Garrett, *Why Plea Bargains Are Not Confessions*, 57 WM. & MARY L. REV. 1415, 1420 (2016).

<sup>260</sup> John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 170 (2014).

<sup>261</sup> See Kenneth Bordens & John Bassett, *The Plea Bargaining Process from the Defendant's Perspective: A Field Investigation*, 6 BASIC & APPLIED SOC. PSYCH. 93 (1985).

Zeidman argues that in an adversarial system, the norm of having full scale hearings and trials should be the norm;<sup>262</sup> however, as between 94 to 97 percent of criminal cases are decided without a trial, the criminal legal system is broken.<sup>263</sup> The lack of “adversarial” exchanges in the system places each defendant in a precarious position with respect to the criminal legal system, dilutes the quality of justice imposed by the criminal legal system, the legitimacy of the criminal legal system is called into question, and the harms are not limited only to defendants and their families.<sup>264</sup> Moreover, defendants may not fully understand the consequences of pleading guilty to a felony charge beyond their criminal sentence (i.e., incarceration, fines, probation, parole). This is the case because there is no one person or institution that is responsible in the criminal legal system to explain to defendants about the collateral consequences of a felony conviction<sup>265</sup> and the costs and burdens imposed on the individual *and* the broader community.<sup>266</sup>

### III. THE CARCERAL REACH BEYOND THE TRADITIONAL BOUNDARIES OF THE CRIMINAL LEGAL SYSTEM—REENTRY

Prosecutorial discretion is an integral part of the criminal legal system, and plea deals keep the system moving; however, plea deals lead to different sentences for similarly situated defendants convicted of the same criminal offenses.<sup>267</sup> But, in a system that routinely pressures defendants to accept a guilty conviction in a plea deal, defense attorneys are at a disadvantage to negotiate a better deal for their clients because of the asymmetrical flow of information from prosecutors; the power dynamics related to information sharing may have defense attorneys wait to take a “worse” deal due to delays.<sup>268</sup> This is a huge issue when 94 to 97 percent of criminal cases are resolved via plea deals.<sup>269</sup> An additional issue is that court trials are supposedly the “touchstone” of the criminal legal system,<sup>270</sup> and plea bargaining puts

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<sup>262</sup> Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L. J. 315, 340 (2005).

<sup>263</sup> Howell, *supra* note 213, at 296. See Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association’s House of Delegates, UNITED STATES DEPARTMENT OF JUSTICE (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<https://perma.cc/X7D2-BCKV>]; Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 NYU REV. L. & SOC. CHANGE 407, 408 (2014).

<sup>264</sup> Howell, *supra* note 213, at 295.

<sup>265</sup> MIDDLEMASS, *supra* note 5.

<sup>266</sup> Roberts, *supra* note 208.

<sup>267</sup> Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 959 (2005).

<sup>268</sup> Alkon, *supra* note 263.

<sup>269</sup> *Id.*

<sup>270</sup> Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1120 (2011).

the system into peril as there are no “checks” on police trickery and prosecutorial misconduct,<sup>271</sup> and the barriers to appeal are almost insurmountable after pleading guilty to a crime.<sup>272</sup> Sentencing guidelines have attempted to regulate sentence disparities and decrease disparities linked to extra-legal or unproven factors, such as race, ethnicity, or gender of the accused or the victim,<sup>273</sup> but plea deals remove these protections and there are no corresponding guidelines or procedures for how to conduct plea deals to decrease racial disparities.<sup>274</sup>

The U.S. Supreme Court has left plea bargaining largely unregulated, with only one rule; the Court has limited “unfair surprises” with regards to plea bargaining—prosecutors cannot breach a previous plea agreement.<sup>275</sup> Otherwise, prosecutors have utmost discretion; for instance, they are not required to engage in discovery prior to a plea deal.<sup>276</sup> The lack of hard rules and regulations for plea bargaining means that the fundamental requirement of a valid and “truthful” guilty plea from the defendant is at risk. If a defendant decides to plead guilty via a plea deal, that decision should always be accompanied by the defendant and their legal representative knowingly and voluntarily accepting a plea deal without improper threats or coercion, and fully understanding the ramifications of a guilty plea.<sup>277</sup> Pressure, coercion, or implied threats, however, may come in the form of overcharging a defendant by adding enhanced penalties that extend a prison sentence into decades rather than years.<sup>278</sup> Defendants, when accepting a plea deal, are informed about their criminal sanctions, but are rarely, if ever, informed about the collateral consequences of their guilty plea.<sup>279</sup>

The body of laws attached to a felony conviction outside of the criminal legal system have many names; scholars call them collateral sanctions, internal exile, secret sentences, invisible punishments, civil disabilities, and the collateral consequences of a felony conviction.<sup>280</sup> Although the civil sanctions of a felony conviction are not integral to a criminal sentence and are not included in plea deals, experts recognize that these legal conditions are part of the criminal legal system

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<sup>271</sup> Zeidman, *supra* note 211.

<sup>272</sup> Katie Wynbrandt. *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*. 126 YALE L. J. 545, para. 4 (2016).

<sup>273</sup> King et al, *supra* note 267, at 960.

<sup>274</sup> *Id.* at 961–962.

<sup>275</sup> Alkon, *supra* note 263, at 410; *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

<sup>276</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (*Brady* fails to protect defendants during plea bargaining, and simply requires the prosecution to disclose evidence favorable to an accused where the evidence is material either to guilt or to punishment).

<sup>277</sup> Alkon, *supra* note 263, at 409–410.

<sup>278</sup> Bibas, *supra* note 270, at 1124–1127.

<sup>279</sup> *See Padilla v. Kentucky*, 559 U.S. 356, 372 (2010); *see also Delgadillo v. Carmichael*, 332 U. S. 388, 390–391 (1947) (underscoring how critical it is for defense counsel to inform noncitizen clients about their risk of deportation).

<sup>280</sup> MIDDLEMASS, *supra* note 5, at 80; Middlemass, *supra* note 129.

and should be broadly included in criminal justice policies, but are not.<sup>281</sup> These policies are imposed after the criminal sentence, and collectively create socially disabled citizens.<sup>282</sup>

When prosecutors charge a defendant with a felony and the defendant accepts a plea deal, this decision ends the criminal trial, but puts in place a set of collateral consequences that reach beyond the criminal legal system. These collateral consequences vary by jurisdiction and are imposed via statutes outside of the criminal legal system.<sup>283</sup> The U.S. Supreme Court made clear in *Padilla* that consequences beyond the criminal court that result in “banishment or exile” must be communicated to the defendant prior to completing a plea deal.<sup>284</sup> The Court stated that counsel must inform clients if a plea deal carries the risk of deportation, and that the consequences of a criminal plea and its impact demands no less.<sup>285</sup> The idea that the court is responsible for fully instructing defendants of their rights, as well as the consequences of accepting a guilty plea, is a constitutional necessity to ensure the integrity of the criminal legal system.

Although *Padilla* applies specifically to a defendant accepting a guilty plea and the adverse impact that his guilty plea has on his immigration status, the Court declared that “defense counsel need not discuss with their clients the collateral consequences of a conviction” and only needed to advise a client about the direct consequences of a criminal conviction.<sup>286</sup> The Court argued that criminal defense attorneys were experts dealing with criminal proceedings and were not expected to possess expertise in other areas of law outside of their training and experience.<sup>287</sup> *Padilla* made clear that it was aware of a wide variety of consequences beyond conviction, sentencing, and prison, and that the additional consequences impair an individuals’ ability to obtain future employment and are serious in nature, but the Court declared that it was not its job to impose on defense counsel responsibilities outside of their expertise, especially as a conviction can lead to a complex set of consequences due to the inexact nature of laws.<sup>288</sup>

The Court’s argument in *Padilla* follows precedent; a felony conviction is a permanent change to one’s status because the social disabilities will carry throughout one’s life<sup>289</sup> and a felon “customarily suffers the loss of substantial

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<sup>281</sup> MIDDLEMASS, *supra* note 5, at 80.

<sup>282</sup> *Id.*

<sup>283</sup> Stuntz, *supra* note 45, at 506; Heaton et al., *supra* note 158; MIDDLEMASS, *supra* note 5.

<sup>284</sup> *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010).

<sup>285</sup> *Id.* at 374–376.

<sup>286</sup> *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 377–378. The Court gave as an example, “crimes involving moral turpitude or aggravated felonies” and determining which crimes fall into these categories is not an easy task.

<sup>289</sup> *Fiswick v. United States*, 329 U.S. 211, 222 (1946); *see also* *Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (“Conviction of a felony imposes a status upon a person

rights.”<sup>290</sup> The Court in *Padilla* specifically downplays the severity of the burden of a guilty conviction as it relates to the collateral consequences of a felony conviction, and upholds restrictions attached to a felony conviction as legal.<sup>291</sup> The Court does not differentiate between a felony conviction that triggers collateral consequences or specific crimes, such as drug convictions or crimes of moral turpitude, or if the consequences are automatic, while others are imposed on a case-by-case basis or are life-time restrictions.<sup>292</sup> The Court has made clear, time and time again, that the criminal legal system, via defense attorneys, is *not* responsible for informing defendants of the consequences of a guilty plea or conviction. This is problematic because no one institution or actor in the criminal legal system is responsible for notifying defendants of the collateral consequences of a felony conviction. There is no “Department of Reentry;” instead, there is a vast number of disconnected public agencies at the local and state levels, as well as private and non-profit organizations, that inform individuals about their rights and restrictions.<sup>293</sup>

After a plea deal is negotiated between prosecutors and criminal defense attorneys, the defendant, depending on their situation, will be immediately released from jail or serve a shorter prison sentence than the original charges would have garnered. If the person is incarcerated, upon completing their prison sentence, they are released to reenter society and that is when the full force of the collateral consequences of a felony conviction become apparent.<sup>294</sup> Usually, defendants are not aware of the extent of the collateral consequences that are attached to a felony conviction, as they are *not* included in a plea bargain agreement, and, the connection between plea bargains and reentry is understudied, especially as plea bargains happen upon outside of the sentencing guidelines and<sup>295</sup> take place in the “shadow of the court,”<sup>296</sup> as over 94 percent of criminal cases are resolved with plea deals.<sup>297</sup>

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which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”).

<sup>290</sup> *Estep v. United States*, 327 U.S. 114, 122 (1946); *see also* *Daniels v. United States*, 532 U.S. 374, 379 (2001) (“States impose a wide range of disabilities on those who have been convicted of crimes, even after their release.”).

<sup>291</sup> *Daniels v. United States*, 532 U.S. 374 (2001) (upholding disabilities imposed after a conviction and release from prison); *Richardson v. Ramirez*, 418 U.S. 24 (1974) (upholding felon disenfranchisement); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding civil commitment); *Smith v. Doe*, 538 U.S. 84 (2003) (upholding sex-offender registries and registration); *Hawker v. New York*, 170 U.S. 189 (1898) (upholding occupational ineligibility); *Padilla* (upholding deportation); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (upholding the prohibition on possession of firearms).

<sup>292</sup> MIDDLEMASS, *supra* note 5.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *See* Solomon Miller, *Ending Prosecutor’s Moral Hazard in Criminal Sentencing*, 32 GEO J. LEGAL ETHICS 833, 834–835 (2019).

<sup>296</sup> Standen, *supra* note 228.

<sup>297</sup> Alkon, *supra* note 263.

Prosecutors, with few restraints on their decision making capabilities, can radically depart from sentencing guidelines,<sup>298</sup> creating racial disparities in who is sentenced and for how long.<sup>299</sup> Studies about racial disparities continually show that Black people are more likely to be arrested and charged, as well as receive harsher prison sentences than white defendants.<sup>300</sup> Race, in many instances, operates as a proxy to determine the defendant's latent criminality, and this disparity extends to the plea bargaining process.<sup>301</sup>

#### A. *The Collateral Consequences of a Felony Conviction*

The collateral consequences of a felony conviction are attached to the “tough on crime” political era and the politics of punishment, which surged in popularity in the 1980s, and continues to this day.<sup>302</sup> Once a person is convicted of a felony, their position with respect to the law is complicated.<sup>303</sup> The individual is socially disabled by a single felony conviction and the individual must bear the costs of the collateral consequences found in state and federal statutes, civil laws, employment laws, and multiple bodies of other regulations.<sup>304</sup> There are no parameters and no end date to the collateral consequences of a felony conviction, which have widespread consequences beyond the criminal sentence; such consequences exacerbate existing racial, social, and economic disparities.<sup>305</sup> In many instances, reentering society after serving time in prison is harder than doing time.<sup>306</sup> The “hard” part about reentering is the number of restrictions that span the spectrum of policy areas<sup>307</sup> that reentering adults encounter, and can include the loss of rights, such as voting and the right to parent minor children, the inability to access public benefits (i.e., traditional welfare), and individuals have restricted access to public and private housing, educational and vocational programs, and employment opportunities.<sup>308</sup>

The laws that result in socially disabling individuals convicted of a felony are not written in the criminal code but rather cover all categories of statutes outside of

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<sup>298</sup> Miller, *supra* note 295, at 840.

<sup>299</sup> *Id.*

<sup>300</sup> See Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018).

<sup>301</sup> *Id.* at 1191–1192.

<sup>302</sup> MIDDLEMASS, *supra* note 5.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*; Keesha Middlemass, *Felony Conviction as a Roboprocess*, in LIFE BY ALGORITHMS: HOW ROBOPROCESSES ARE REMAKING OUR WORLD (Catherine Besteman & Hugh Gusterson eds., 2019).

<sup>305</sup> MILLER, *supra* note 5; MIDDLEMASS, *supra* note 5.

<sup>306</sup> MIDDLEMASS, *supra* note 5, at 83.

<sup>307</sup> JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); SARAH ESTHER LAGESON, *DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE* (2020).

<sup>308</sup> MIDDLEMASS, *supra* note 5.



the criminal code.<sup>309</sup> Due to the invasive nature of a felony conviction in employment, housing, education, family relations, and other statutory areas, being socially disabled is a near permanent status.<sup>310</sup> Although there are some ways to remove a felony conviction from one's record, they are limited.<sup>311</sup> Today, upwards of 90 million Americans have a felony record,<sup>312</sup> and as new civil sanctions, restrictions, and disqualifications continue to proliferate,<sup>313</sup> all individuals with a felony record will experience some form of social disability.<sup>314</sup> When individuals with a felony conviction are restricted from accessing the legal job market, unable to secure legal employment, unable to use the legal banking system, the chances that individuals reentering will recidivate only increases.<sup>315</sup>

### CONCLUSION

Scholars traditionally study otherwise linked phenomena as separate parts of a larger system; for instance, racially biased policing leads to overcharging by prosecutors who overuse plea bargains to win convictions, individuals then reenter society socially disabled due to a felony conviction. The criminal legal system operates on a continuum; therefore, the different functions should be studied as interconnected institutions that have a cumulative impact on individuals who come into contact with the system. Studying the interconnections, I argue, is more important than studying issues separately because what happens at the front-end, middle, and back end of the criminal legal system has multiple impacts on individuals at each stage of the continuum.<sup>316</sup>

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<sup>309</sup> See MIDDLEMASS, *supra* note 5. Megan Denver et al., *The Language of Stigmatization and the Mark of Violence: Experimental Evidence on the Social Construction and Use of Criminal Record Stigma*, 55 CRIMINOLOGY 664 (2017).

<sup>310</sup> Jacobs, *supra* note 307. See Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2 WIS. L. REV. 321, 321-323 (2015) (finding relief from a past felony conviction is an increasingly important policy issue); LAGESON, *supra* note 307.

<sup>311</sup> See Alexander Burton et al., *Beyond the Eternal Criminal Record: Public Support for Expungement*, 20 CRIM. & PUB. POL'Y 123 (2021).

<sup>312</sup> Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, THE SENTENCING PROJECT (Sep. 2018), <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/> [<https://perma.cc/CW6Z-3494>].

<sup>313</sup> Council of State Governments, *THE NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION* (2020), available at <https://niccc.csgjusticecenter.org/about/> (The Council of State Governments estimates that there are almost 45,000 restrictions, and the majority of these restrictions are in the area of employment).

<sup>314</sup> MIDDLEMASS, *supra* note 5.

<sup>315</sup> *Id.*; Middlemass, *supra* note 304.

<sup>316</sup> See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005).

A felony conviction exercises hegemonic power over those who have been convicted, and increased attention needs to be paid to prosecutorial discretion and its connection to the back end of the criminal legal system and reentry as plea deals offer an incomplete picture of the collateral consequences when pleading guilty to a crime defined as a felony. Full information of what a plea deal entails should be shared with individuals as they move along the justice continuum, from plea deal to prison to release; individuals would benefit from knowing the full ramifications of their plea deal, including the collateral consequences of making a guilty plea. Making a fully informed decision is one of the requirements of accepting a plea deal—the defendant must knowingly and voluntarily accept a plea deal without improper threats or coercion, and with full understanding of the ramifications of a guilty plea.<sup>317</sup> Yet, as the system works, full understanding of the ramifications of a guilty plea deal are not shared with defendants.

The connection between plea deals and reentry is an important but missing component in discussions about reentry, especially as reentry and plea deals are permanent features of the criminal legal system.<sup>318</sup> Reentry success and failure is affected by many different factors, but the major reason reentry failure is the norm is because of how a felony conviction socially disables adults and prevents them from engaging in legal society. When individuals are not able to reenter and access resources, such as public benefits, housing or legal employment, they will continue to be forced to live on the margins of society, which exacerbates racial disparities, undermines public safety, and maintains high recidivism rates.<sup>319</sup>

Every case may represent one person, but that one person represents a social network of family, friends, and community ties, and the criminal legal system distorts these relations via state-imposed violence.<sup>320</sup> There is nothing “racially just” about the carceral continuum, from policing practices to plea deals to reentry, and the damage inflicted by the criminal legal system is unquantifiable;<sup>321</sup> this article offers a tiny window into how the flaws of the system are connected, and how the adversarial system puts defendants, especially Black ones, in a disadvantaged position against the state from the first police encounter through to reentry. As race remains a significant factor when decisions are made along the carceral continuum, overt and hidden acts of racial discrimination by actors need to come out from the

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<sup>317</sup> Alkon, *supra* note 263, at 409–410.

<sup>318</sup> See Cheryl Jonson & Francis Cullen, *Prisoner Reentry Programs*, 44 CRIME & JUST. 517 (2015); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005).

<sup>319</sup> MIDDLEMASS, *supra* note 5; MILLER, *supra* note 5; Denver et al., *supra* note 309.

<sup>320</sup> Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 CRIMINOLOGY 441, 467 (1998); Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L. J. 778, 826 (2021); See Ortiz & Jackey, *supra* note 138 at 498-500, for information about structural violence.

<sup>321</sup> Roberts, *supra* note 208.

“shadow of the trial,” and one area that is ripe for reform is prosecutorial discretion that leads to overcharging defendants that leads to plea deals.

Plea deals contribute to the racial inequalities and disparities in the criminal legal system. The structural impediments and racial disparities within the system are embedded at each stage of the criminal continuum—policing, arrest, charges, prosecutorial discretion, sentencing, and reentry—and this bodes ill for racial minorities, especially with the increased use of overcharging and engaging in plea bargaining with defendants and criminal defense attorneys who have incomplete information and are disadvantaged due to the asymmetry of information sharing. The disadvantages increase when a felony conviction imposes restrictions on an individual *outside* of the criminal legal system, which is incompatible with a system that is supposed to be about “justice.”

There tends to be broad agreement about the principles of the justice system,<sup>322</sup> but they are not applied equally to all groups. The system is not “just” towards racial minorities, and the concept of fairness, consistency, and proportionality is not achieved via plea bargains. Sentencing, via plea bargains, is not rational and logical when prosecutors overcharge and then bargain outside of the sentencing guidelines. It is debatable that prosecutors are thinking of public safety when overcharging defendants; instead, prosecutors tend to be interested in holding offenders accountable based on police accounts, demonstrating that there is no balance between the public’s safety, police actions, and individual responsibility. Prosecutors and the police have far too much power and discretion to make it a fair system. Laying out these realities is important to begin to understand the collective harm imposed by the system. Pointing out when there are inconsistencies with the principles of the system is how reforms can be proposed and biases and inequalities in the system can be addressed.

Plea deals have a significant impact on events that happen downstream along the criminal justice continuum and raise a host of questions about prosecutorial discretion, sentencing guidelines, the overuse of plea deals, and the vast powers prosecutors have to make life-changing decisions outside of the public’s eye. Plea bargaining occurs through mediation between a defense attorney and a prosecutor, and the negotiation process is conducted largely in private, which allows for overcharging defendants with crimes beyond the original charge(s). Once the plea deal is finalized, it is made public and reported out via court records, but by then, decisions have been made and the defendant is likely not to know the consequences beyond their criminal sentence. Sklansky argues that everyone involved in the plea bargaining process is advantaged by participating in it,<sup>323</sup> but this argument ignores the defendant and the consequences that s/he will encounter upon reentering society.

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<sup>322</sup> *Principles of Effective State Sentencing and Corrections Policy*, NATIONAL CONFERENCE OF STATE LEGISLATURES <https://www.ncsl.org/research/civil-and-criminal-justice/principles-of-sentencing-and-corrections-policy.aspx> [<https://perma.cc/6VGQ-U7UA>] (constitutional principles outlined in the Bill of Rights and affirmed by the U.S. Supreme Court).

<sup>323</sup> Sklansky, *supra* note 179.

The political landscape around crime has distorted punishment, and penal harm has now achieved hegemonic status in the United States.<sup>324</sup> The primary institutions of the criminal legal system focus on punishing individuals because it is designed to arrest, convict, and incarcerate people; despite declining crime rates, the United States continues to be the world's leader in incarcerating people.<sup>325</sup> The criminal legal system is not neutral in who is arrested, convicted, and incarcerated, and extreme disparities by race and gender will continue as long as prosecutors have the authority to use their discretion to determine which cases are overcharged and which charges are dismissed.

Plea bargains have a direct impact on reentry experiences, and when men and women are released from prison, their guilty plea follows them wherever they go outside of criminal laws.<sup>326</sup> Only a criminal court can impose a felony conviction, which means that the courts should take responsibility for informing defendants about their full array of rights and which ones they will lose upon conviction. A felony conviction operates as a form of extra-legal punishment outside of the purview of the courts.<sup>327</sup> Yet, these burdens, collateral consequences, and resulting social disabilities are not shared with individuals when pleading guilty to a crime; in fact, no one in the criminal legal system is responsible for telling defendants about the consequences of a felony conviction. This implies that the criminal legal system is only interested in communicating criminal sanctions, such as prison time, court fees and fines, and restitution, if applicable, during plea deals, as the other sanctions and punishments remain unvoiced. Therefore, when prosecutors overcharge to gain leverage over a defendant to secure a conviction, plea negotiations, at the very least, *should* include a list of the collateral consequences related to a accepting a guilty plea.

As prosecutors have an incentive to overcharge and add enhanced penalties resulting in a possible extended prison sentence,<sup>328</sup> the criminal legal system should take the responsibility to inform defendants about the collateral consequences of a guilty plea, regardless of what the Court argues. The Court disagrees with this position.<sup>329</sup> Yet, as the criminal legal system is the only institution that has the power to impose a felony conviction when a defendant is found guilty of a crime, the system should be responsible for informing defendants about the consequences of a guilty plea and meeting a minimal level of ethical standards when convicting a defendant of felony crime.

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<sup>324</sup> CLEAR, *supra* note 138.

<sup>325</sup> *Criminal Justice Facts, THE SENTENCING PROJECT*, <https://www.sentencingproject.org/criminal-justice-facts> [<https://perma.cc/8ZFB-MLPT>].

<sup>326</sup> MIDDLEMASS, *supra* note 5.

<sup>327</sup> *Id.*

<sup>328</sup> Bibas, *supra* note 270, at 1124–1127.

<sup>329</sup> See *supra* notes 283–286 and surrounding text.