

# On Responsible Prosecutorial Discretion

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## I. INTRODUCTION

The racially disparate treatment afforded the Jena Six was likely rooted in an array of political, socioeconomic, and cultural factors. Scholars have pointed to explanations ranging from the local history of lynching in Louisiana to the criminalization of the minority poor.<sup>1</sup> Much of the outrage generated by the Jena Six case grew from the view that Mychal Bell's initial sentence was unjustly harsh. The person with the greatest influence over this outcome was the District Attorney, Reed Walters. Commentators have criticized many of Walters's decisions, including charging Bell with attempted second-degree murder, trying him as an adult, seeking such a high bond, and charging a white student who previously attacked a member of the Jena Six with simple battery.<sup>2</sup>

There are at least two possible explanations for Walters's conduct, each of which suggests different solutions. One explanation is that Walters applied the law to the facts without properly considering either in a broader context.<sup>3</sup> If that is the case, the solution might be to modify the prosecutor's role so that she must look outside traditional factors when making charging and sentencing decisions and also consider race, the need for legal reform, and local community effects.<sup>4</sup> A second explanation attributes Walters's behavior to implicit racial bias or other cognitive biases.<sup>5</sup> Perhaps Walters has an implicit bias against people of color that causes him to perceive African Americans as more likely to reoffend than whites.<sup>6</sup> Alternatively, he may have formed an initial impression of the case based on an incomplete understanding of the facts and then failed to adequately reevaluate that impression

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<sup>1</sup> See Joseph Kennedy, *The Jena Six, Mass Incarceration and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 478 (2009) (discussing labeling of African Americans as a criminal class).

<sup>2</sup> See, e.g., Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 394-95 (2009).

<sup>3</sup> *Id.* at 442-43; Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1292-93 (2008).

<sup>4</sup> Taslitz, *supra* note 2, at 434-35 (considering race and community effects); Ellen S. Podgor, *RACE-ING PROSECUTORS' ETHICS CODES*, 44 HARV. C.R.-C.L. L. REV. 462 (2009); Alfieri, *supra* note 3, at 1287-88.

<sup>5</sup> Taslitz, *supra* note 2, at 416-21 (discussing unconscious racial bias, economies of racial disesteem, and the Jena Six).

<sup>6</sup> See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006) (describing implicit racial bias and its pervasiveness).

after receiving new information.<sup>7</sup> According to this view, Walters may not have realized the reasons for his own decisions. This Response examines political and management proposals, apart from outright doctrinal reform, that seek to promote more responsible prosecutorial conduct. It explores the problems of lack of context and implicit and cognitive biases, and investigates and critiques the possible responses to each.

## II. LACK OF CONTEXT

Some scholars, such as Andrew Taslitz, argue that if Walters had properly considered the historical and sociological context surrounding the incidents at Jena High School, he would have prosecuted Bell differently or not at all. This section explores and evaluates the argument for prosecutorial attention to context, and concludes by critiquing promising proposals for community participation as a way to introduce context to prosecutorial discretion.

Andrew Taslitz argues that prosecutors should consider not only how their decisions affect the accused and the accuser, but also how charging decisions affect third parties.<sup>8</sup> He describes the public's demand for the disesteem services that prosecutors provide through the act of naming.<sup>9</sup> When the accused is a minority, disesteem is conferred upon both the individual and the minority group.<sup>10</sup> Therefore, Taslitz argues that "prosecutors should take steps to reduce, with the aim of eliminating, even *subconsciously caused* racial disesteem from their handling of individual cases."<sup>11</sup>

Along similar lines, Ellen Podgor advocates for a broader approach to charging decisions that takes into account factors such as the charging decisions in related cases, the general need for legal reform, and the broad imperative to do justice.<sup>12</sup> She suggests that if Walters had used this type of a multi-dimensional assessment, he may have proceeded more fairly.<sup>13</sup> Podgor faults the current ethical guidance prosecutors receive for focusing exclusively on single-case analysis, and she argues that when, as in Jena, the permissible (though reprehensible) conduct of one person motivated the prohibited conduct of the accused, the prosecutor should refrain from charging the second actor when it would be unjust to do so.<sup>14</sup> Walters should have taken into account past incidents of racial tension, such as the hanging of nooses: "[A] prosecutor who sees that the law fails to prohibit 'abhorrent'

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<sup>7</sup> See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1603-05 (2006) (describing confirmation bias and its possible effects in prosecutors' offices).

<sup>8</sup> Taslitz, *supra* note 2, at 5, 448-49.

<sup>9</sup> *Id.* at 440.

<sup>10</sup> *Id.* at 403.

<sup>11</sup> *Id.* at 447 (emphasis in original).

<sup>12</sup> Podgor, *supra* note 4, at 474-75.

<sup>13</sup> *Id.* at 469.

<sup>14</sup> *Id.* at 466-67.

conduct should be reluctant to bring charges against the victims of this conduct when she cannot prosecute the individuals who may have a causal connection to these activities.”<sup>15</sup> Considering the need for legal reform as an official factor influencing charging and sentencing decisions would reduce the odds of unjust outcomes.<sup>16</sup>

In light of Walters’s statement that a colorblind view of the situation guided his prosecution of Bell, scholar Anthony Alfieri has also suggested that a richer appreciation for the racial context of the Jena Six would have led to better outcomes. Alfieri calls for prosecutors to use a “race-conscious outsider conception” in morally ambiguous situations such as the Jena Six.<sup>17</sup> This approach would have the prosecutor take into consideration political factors and work to address the historical context of racial inequality.<sup>18</sup> Alfieri urges that when, as in Jena, a prosecutor is confronted with conflicting claims of human dignity—by the victim, the accused, and the community of the accused—she should seek to balance the state’s interests and the minority community’s interests.<sup>19</sup> According to Alfieri, in order to affirm the dignity of Bell and the African American community in Jena, Walters should have taken into account Louisiana’s history of failures both to prosecute white violence against blacks and to provide racially equal access to the courtroom.<sup>20</sup> By acquiescing to an all-white jury and ignoring the noose incident, Walters affirmed the victim’s dignity but failed to acknowledge the dignity of Bell and the minority community in Jena.<sup>21</sup>

Though these proposals may seem sensible in the abstract, it is unclear how far prosecutors should take them without specific guidance. Taslitz writes that the prosecutor’s therapeutic role “is parallel to and supplementary to the prosecutors’ modified do-justice adversarial role.”<sup>22</sup> But there may be cases in which the two roles conflict. For example, should a prosecutor decline to charge in cases where there is no specific evidence of racial bias, but local statistics indicate that discrimination is a factor in many arrests? A shortcoming of these proposals is their lack of specific rules that prosecutors can rely on to guide decisions. Prosecutors with a nuanced understanding of racial power dynamics probably already make decisions this way. In contrast, prosecutors who are not well-versed in these models are unlikely to interpret phrases such as racial disesteem, threaded cases, and minority community interests in keeping with the meaning that Taslitz, Podgor, and Alfieri assign them.

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<sup>15</sup> *Id.* at 471.

<sup>16</sup> *Id.* at 474.

<sup>17</sup> Alfieri, *supra* note 3, at 1302.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1305.

<sup>20</sup> *Id.* at 1306.

<sup>21</sup> *Id.* at 1305-06.

<sup>22</sup> Taslitz, *supra* note 2, at 456.

Another problem arises when one considers how a new prosecutorial role would be implemented. Many scholars predict that revising ethical standards would be ineffective. Amanda Hitchcock concludes that “[i]nternal guidelines and policies in general fail to serve the purpose of restraining the prosecutor’s discretion to any meaningful degree.”<sup>23</sup> Other scholars have observed that judicial oversight cannot address the problem because current legal doctrine requires a showing that the prosecutor’s actions were unconstitutionally racially motivated.<sup>24</sup> Alafair Burke explains that the fault-based solutions described above may not be effective if prosecutors are making poor decisions unconsciously rather than deliberately, as these solutions may attribute too much rational choice to prosecutors.<sup>25</sup>

To overcome hurdles to greater prosecutorial responsibility, some scholars suggest incorporating community participation into the prosecutorial process.<sup>26</sup> For cases like the Jena Six, Taslitz recommends adopting mechanisms that ensure deliberative community input.<sup>27</sup> In a somewhat different context—eyewitness identification reform—Taslitz proposes coordinating councils composed of external stakeholders as one way to incorporate community input.<sup>28</sup> Similarly, Alfieri advocates difference-based community participation in the prosecutorial process.<sup>29</sup> There are potential weaknesses with these approaches.

First, it may be a faulty assumption that all communities place a high priority on racial justice. As suggested elsewhere, community groups may be more likely to reflect the public pressure for strong punishment than to express public demand for greater accuracy.<sup>30</sup> Unless minority stakeholders are disproportionately represented in community groups, it may not be appropriate to let a community determine for itself what value it wants to place on racial equality in the criminal justice system. But it will likely be difficult to find consensus on how ‘representative’ community input should be, or even on how representativeness should be defined in this context. Some people will believe that those affected by the criminal justice system at large should be represented—arguably everyone—while others will believe that the people affected by racial bias in the criminal justice system should be represented—arguably mainly minority communities.

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<sup>23</sup> Amanda S. Hitchcock, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 961 (2007).

<sup>24</sup> See Podgor, *supra* note 4, at 463; see also Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128 (2008).

<sup>25</sup> Burke, *supra* note 7, at 1590.

<sup>26</sup> Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO J. PUB. L. POL’Y & ETHICS J. 271, 316 (2006) (arguing that criminal justice coordinating councils should play a role in eye witness identification line-up procedures).

<sup>27</sup> Taslitz, *supra* note 2, at 455.

<sup>28</sup> Taslitz, *supra* note 26, at 274.

<sup>29</sup> Alfieri, *supra* note 3, at 1307.

<sup>30</sup> See Hitchcock, *supra* note 23, at 945.

Even if community groups do place a high value on eradicating racial injustice, it is unclear how local participation could effectively influence prosecutor decisions in individual cases such as Jena. Taslitz argues that external deliberation is necessary to check the inherent weaknesses of internal deliberation, but he does not explain how councils could provide checks on individual cases.<sup>31</sup> It is unclear whether a proposal effective for eyewitness identification reform can be successfully applied to a situation like the Jena Six. Eyewitness identification policy can be debated and voted on by a council and then implemented by a police officer. In contrast, to make a difference in Jena, a coordinating council would need to review individual charging decisions. This type of review would be practically unworkable because it would slow down case processing and require an enormous time investment by the council members.<sup>32</sup> Though perhaps it could be done for particularly high profile cases, there is usually a lot of media attention and an opportunity for public response to those cases in the status quo.

If community bodies are established to make recommendations on office policies or individual charging decisions, they also need to have the ability to impose their decisions on prosecutors' offices and the ability to determine whether or not implementation was effective. Councils would need at least some authority to conduct internal investigations of prosecutors' offices and to uncover relevant information. Otherwise, the prosecutors will still be the ones making the ultimate decisions. Without adequate data on the internal operations of the prosecutors' offices, there is potential for greater community participation to give the appearance of reform without the substance.

### III. IMPLICIT BIAS AND COGNITIVE BIAS

In addition to calling for greater prosecutorial attention to the sociological context in which situations such as the Jena Six arise, some scholars have argued that more attention should be paid to conscious and unconscious biases that likely affect prosecutors' decisions. This section explores these biases and the ways in which they might be curbed.

#### A. *Implicit Bias*

Scholars Anthony Greenwald and Linda Hamilton Krieger explain that, at times, people do not have "conscious, intentional control" over their decision-making processes.<sup>33</sup> Implicit bias refers to the unconscious influence of beliefs or feelings on decision-making.<sup>34</sup> There are two important types of

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<sup>31</sup> Taslitz, *supra* note 26, at 314-15.

<sup>32</sup> Hitchcock, *supra* note 23, at 962.

<sup>33</sup> Greenwald & Krieger, *supra* note 6, at 946.

<sup>34</sup> *Id.*

implicit biases: attitudes and stereotypes.<sup>35</sup> An example of an implicit attitude is when a person says she feels the same way toward all races, but exhibits a preference for members of her own race.<sup>36</sup> An implicit stereotype may lead someone to prefer members of one group over another due to an unconscious belief about that group, for example a belief that men are better leaders than women.<sup>37</sup> Greenwald and Krieger note that implicit biases “can produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”<sup>38</sup>

In discussing prosecutorial discretion and the Jena Six, Taslitz notes that implicit racial biases “work so powerfully that even educating the most consciously anti-racist liberal about their existence and operation does little, if anything, to limit their effect or to encourage their bearers to recognize them at work.”<sup>39</sup> Many people who sincerely believe it is wrong to make judgments based on race have powerful implicit biases in favor of people of their same race.<sup>40</sup>

### B. Cognitive Bias

Cognitive biases, also referred to as heuristics, are unconscious mental “rules of thumb” that influence decision-making.<sup>41</sup> According to the dual process theory of cognition, people make decisions using two separate cognitive systems: a rapid, intuitive, unconscious system—System I—and a slower, deliberative, conscious system—System II.<sup>42</sup> Cognitive biases are the internal rules used in System I decisions.<sup>43</sup> Cass Sunstein and Christine Jolls observe that cognitive bias and implicit racial bias are typically analyzed separately by legal scholars, rather than together.<sup>44</sup> They argue that the two can be addressed together from a policy standpoint because System I unconsciously makes decisions based both on implicit racial bias and on cognitive bias.<sup>45</sup>

Alafair Burke describes four cognitive biases that may affect prosecutors: confirmation bias; selective information processing; belief persever-

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<sup>35</sup> *Id.* at 948.

<sup>36</sup> *Id.* at 948-49.

<sup>37</sup> *Id.* at 950-51.

<sup>38</sup> *Id.* at 951.

<sup>39</sup> Taslitz, *supra* note 2, at 417.

<sup>40</sup> See Christine Jolls, *Antidiscrimination Law’s Effects on Implicit Bias 2* (John M. Olin Ctr. for Studies in Law, Econ. & Pub. Policy Research, Paper No. 343; Yale Law School, Public Law Working Paper, Paper No. 148, 2005), available at SSRN: <http://ssrn.com/abstract=959228>.

<sup>41</sup> Christine Jolls & Cass Sunstein, *The LAW OF IMPLICIT BIAS*, 94 CAL. L. REV. 969, 973 (2006).

<sup>42</sup> *Id.* at 974.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 973.

<sup>45</sup> *Id.* at 975.

ance; and cognitive dissonance.<sup>46</sup> Confirmation bias causes people to search for information supporting their hypothesis.<sup>47</sup> This bias causes prosecutors to seek information supporting their belief in the defendant's guilt with more vigor than they seek out potentially exculpatory evidence.<sup>48</sup>

Selective information processing causes people to place more reliance on facts that weigh in favor of their beliefs than on facts that tend to disprove them.<sup>49</sup> New pieces of information that confirm a prior belief are likely to be accepted as accurate, while information contradicting a prior belief is scrutinized more closely and is more likely to be dismissed as false.<sup>50</sup> Selective information processing could affect prosecutors in numerous ways, causing them to base "their theories of guilt on retracted confessions, flawed eyewitness testimony, and false testimony from jailhouse informants."<sup>51</sup>

Belief perseverance is a failure to change one's beliefs to account for new information which disproves them.<sup>52</sup> This bias, in particular, can make it difficult for prosecutors to realize that their initial charging decision was wrong. As Burke notes, "even if the inculpatory evidence that initially supported the charges is wholly undermined, belief perseverance suggests that the theory of guilt will nevertheless linger."<sup>53</sup> Burke explains that after a prosecutor forms an impression of the defendant's guilt:

confirmation bias causes her to seek information that confirms the theory of guilt; selective information processing causes her to trust information tending to confirm the theory of guilt and distrust potentially exculpatory evidence; and belief perseverance causes her to adhere to the theory of guilt even when the evidence initially supporting that theory is undermined.<sup>54</sup>

Cognitive dissonance is the desire to believe that one's behavior conforms to one's beliefs.<sup>55</sup> Burke theorizes that cognitive dissonance plays an important role in some prosecutors' insistence that people who have been convicted and then potentially exonerated by new evidence are guilty, because they cannot bear to believe that they would charge an innocent person.<sup>56</sup>

In addition to these forms of bias inherent to the individual prosecutor, Taslitz describes how group dynamics can exacerbate biased deliberations

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<sup>46</sup> Burke, *supra* note 7, at 1593.

<sup>47</sup> For example, in studies where subjects were assigned a hypothesis and asked to work to investigate its validity by asking questions, they often only asked questions that would yield confirming results. *Id.* at 1594-96.

<sup>48</sup> *Id.* at 1614.

<sup>49</sup> *Id.* at 1596-97.

<sup>50</sup> *Id.* at 1598-99.

<sup>51</sup> *Id.* at 1599.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1606.

<sup>54</sup> *Id.* at 1614.

<sup>55</sup> *Id.* at 1601.

<sup>56</sup> *Id.* at 1612-13.

within prosecutors' offices.<sup>57</sup> Dissenting individuals are often reluctant to express their views—either for fear of harming their career and personal reputation, or because they come to believe their views are incorrect.<sup>58</sup> Additionally, deliberation among a group of like-minded individuals has been shown to cause the group to become more committed to its initial position than it was before deliberation.<sup>59</sup> When there are no dissenters, or the dissenters decline to speak up, hearing other people speak in support of one's own opinion can cause group members to become more entrenched in their beliefs.<sup>60</sup>

This section suggests that prosecutorial decisions could be strongly influenced by individual biases and group dynamics exacerbating these biases. The next section will explore possible solutions to this problem.

#### IV. STRATEGIES TO COUNTERACT BIAS

##### A. *Debiasing*

Scholars have developed a variety of proposals to help prosecutors overcome unconscious biases that lead to non-optimal or harmful behavior. Cass Sunstein and Christine Jolls note that “debiasing” strategies can sometimes overcome implicit bias and cognitive bias.<sup>61</sup> Such strategies promote or require activities that work to counteract the unconscious biases.<sup>62</sup> For example, in the realm of workplace discrimination, scholars suggest that increasing workforce diversity reduces implicit racial biases.<sup>63</sup> Displaying positive images of minorities, such as a photograph of Tiger Woods on the wall, has a similar effect.<sup>64</sup>

More specifically, Burke presents methods for counteracting the cognitive biases of prosecutors. He recommends having prosecutors switch sides throughout case preparation so that they must make arguments in favor of the defendant.<sup>65</sup> He explains: “Cognitive research suggests that the generation of explanatory arguments plays a role in belief perseverance, and that generating explanatory counterarguments can mitigate belief perseverance.”<sup>66</sup> Studies show that when a person engages in formulating an argument for a position with which they do not initially agree, it tends to make their initial beliefs less rigid and sometimes leads them to change positions.<sup>67</sup>

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<sup>57</sup> Taslitz, *supra* note 26, at 310.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 311-12.

<sup>60</sup> *Id.* at 311.

<sup>61</sup> Jolls & Sunstein, *supra* note 41, at 977.

<sup>62</sup> *Id.* at 976.

<sup>63</sup> *Id.* at 980 (citations omitted).

<sup>64</sup> *Id.* at 983 (citations omitted).

<sup>65</sup> Burke, *supra* note 7, at 1618-20.

<sup>66</sup> *Id.* at 1618.

<sup>67</sup> *Id.* at 1620 (citations omitted).

In addition, Burke recommends training attorneys about their inherent biases, although the evidence suggesting that such training is effective in helping people override their biases is inconclusive.<sup>68</sup>

Burke also advocates prosecutor involvement in professional organizations that feature pro bono work on behalf of defendants.<sup>69</sup> His theory is that an opportunity to demonstrate a “commitment to protecting the innocent” could help prosecutors avoid cognitive dissonance bias.<sup>70</sup> If prosecutors have a self-perception that they are committed to protecting the wrongly accused, it may lessen the strength of their subconscious need to affirm their initial charging decision out of a desire not to believe they were capable of incorrectly charging an innocent person.<sup>71</sup>

### B. *Compensating*

As a tactic to counter unavoidable bias, Burke proposes increasing prosecutors’ access to information.<sup>72</sup> Police often do not provide prosecutors with the entire record until after the person is charged.<sup>73</sup> Burke argues that cognitive science predicts prosecutors are at their most neutral before they make their charging decision.<sup>74</sup> Accordingly, prosecutors should have access to all information to assist in making more accurate charging decisions, because after they have already made the charging decision their own cognitive biases may prevent them from evaluating new evidence neutrally.<sup>75</sup> Burke also proposes “fresh look reviews” by advisory committees.<sup>76</sup> He suggests committees composed of judges, defense attorneys, and civil attorneys because it may be difficult for a charging prosecutor’s colleagues to challenge her decision.<sup>77</sup>

Taslitz also makes proposals for changing internal processes and soliciting outside input. He observes that, unlike the deliberative model of a legislative body, prosecutors’ offices are part of the executive branch and are set up for swift, hierarchical decision-making.<sup>78</sup> He notes: “Unless the chief prosecutor chooses to mandate internal deliberative processes on certain matters, ‘deliberation’ will consist of relatively hasty ‘consultation’ among the elected chief’s hand-chosen leadership—leaders likely chosen for their agreement with the chief’s overall law enforcement perspective.”<sup>79</sup> As an

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<sup>68</sup> *Id.* at 1616-18.

<sup>69</sup> *Id.* at 1624-26.

<sup>70</sup> *Id.* at 1626.

<sup>71</sup> Burke, *supra* note 7, at 1624-26.

<sup>72</sup> *Id.* at 1615-16.

<sup>73</sup> *Id.* at 1615.

<sup>74</sup> *Id.* at 1614-15.

<sup>75</sup> *Id.* at 1615.

<sup>76</sup> *Id.* at 1621-22.

<sup>77</sup> Burke, *supra* note 7, at 1622-23.

<sup>78</sup> Taslitz, *supra* note 26, at 307.

<sup>79</sup> *Id.*

antidote, he advocates a two-tier approach of criminal justice coordinating committees to promote external deliberation and internal institutional design to promote high quality internal deliberation.<sup>80</sup>

For internal deliberation, Taslitz endorses Cass Sunstein's proposals to set clear guidelines valuing dissent, promote expression of minority views by rewarding group accomplishments, assign a devil's advocate during discussions, take anonymous votes, and have individuals present on issues in the role of expert to the group.<sup>81</sup> Taslitz acknowledges that these techniques will only be employed successfully in offices with strong, effective leaders dedicated to reform.<sup>82</sup> Even then, internal deliberation alone is not adequate for error prevention.<sup>83</sup> Accordingly, Taslitz calls for the formation of criminal justice coordinating councils, an option proposed in one of the American Bar Association's reports.<sup>84</sup> The councils would be independent from law enforcement and draw from diverse stakeholder groups.<sup>85</sup> Taslitz believes participants could include local government representatives, public defenders, prosecutors, sheriffs, judges, law enforcement officers, social service providers, and forensic scientists, among others.<sup>86</sup>

Taslitz also believes that adding a second, external stage to deliberations would slow them down, counteracting the tendency to make hasty, intuitive decisions in task-oriented and resource-strapped environments.<sup>87</sup> A slower pace will motivate better internal deliberation because prosecutors and police will know they may have to defend their actions in public.<sup>88</sup> The councils would ensure that dissenting and diverse viewpoints are expressed before policy decisions are made.<sup>89</sup> In addition, coordinating councils would provide the transparency necessary to build political pressure for reform.<sup>90</sup>

Transparency is also a theme for Marc Miller and Ronald Wright. They advocate the use of data management systems in prosecutors' offices that could reveal when charging decisions are perpetuating racial disparities.<sup>91</sup> They focus on declination decisions because those have traditionally been immune to any kind of review, and they advocate a system requiring prosecutors to specify the reason for deciding not to charge in each individual

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 314 (citing Cass Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 1013-20 (2005)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Taslitz, *supra* note 26, at 315-22 (citing REPORT IN SUPPORT OF ABA SYSTEMIC REMEDIES RESOLUTION (2005)).

<sup>85</sup> *Id.* at 316-17.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 319.

<sup>88</sup> *Id.* at 315.

<sup>89</sup> *Id.* at 321-22.

<sup>90</sup> Taslitz, *supra* note 26, at 319.

<sup>91</sup> Miller & Wright, *supra* note 24, at 162.

case.<sup>92</sup> As an illustration, Miller and Wright describe the Prosecution and Racial Justice project of the Vera Institute.<sup>93</sup> During the project, the data management system in the Milwaukee District Attorney's Office identified a racial disparity in the charging rates for marijuana-related offenses.<sup>94</sup> Without mentioning the racial aspect of the data, the District Attorney arranged for training of the attorneys who were responsible for most of the declinations, emphasizing that their results were "haphazard" rather than putting them on the defensive by making them feel like they were being accused of racism.<sup>95</sup> Miller and Wright argue:

Managers who use disaggregated data about the outcomes and reasons invoked in their offices never have to declare who is to blame for racial disparities. Internal regulation simply asks if the racial disparity is present, whether it is a necessary by-product of other important goals, and whether the prosecutor has the power to change the disparity. Internal regulation can look forward for change strategies rather than looking backward for moral blame and legal responsibility.<sup>96</sup>

Hitchcock, like Miller and Wright, calls for collection and publication of data on prosecutor actions. She advocates tracking and making public data about capital crimes, and using that data to hold prosecutors accountable for significant racial disparities.<sup>97</sup> Legislators, judges, and the public could then use the information to demand reform.<sup>98</sup>

As a critical first measure, proposals for greater transparency such as Miller and Wright's and Hitchcock's should be implemented. Without the ability to track data it will be impossible to identify where the problem lies, because racial data on whom prosecutors charge and decline to charge is currently unavailable.<sup>99</sup> From an office management perspective, the Vera Institute project described by Miller and Wright is appealing, because it addresses racial disparities in charging decisions without condemning those responsible as racist. By promoting accountability without moral blame, this approach minimizes defensiveness and resistance. Collecting such data is also necessary in order to verify whether management techniques such as those proposed by Taslitz, Sunstein and Jolls, and Burke are effective. Making public the data on individual prosecutors' declination decisions could

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<sup>92</sup> Miller and Wright note that "declinations epitomize the black box: they remain hidden from all traditional legal review and test the capacity of our preferred strategy of internal regulation." *Id.* at 130.

<sup>93</sup> *Id.* at 162-65.

<sup>94</sup> *Id.* at 164.

<sup>95</sup> *Id.* at 164-65.

<sup>96</sup> *Id.* at 162.

<sup>97</sup> Hitchcock, *supra* note 23, at 967-69.

<sup>98</sup> *Id.* at 968.

<sup>99</sup> See Miller & Wright, *supra* note 24, at 129-30.

potentially be counterproductive.<sup>100</sup> However, publishing office-wide data on declinations by race would provide information that could be used by the media, advocacy groups, and legislatures to track the performance of district attorneys and hold them accountable.

After transparency requirements are instituted, it is unclear what additional, substantive benefits local councils would provide when it comes to preventing more cases like Jena. Councils could offer numerous benefits in the role of policy formulation.<sup>101</sup> And an important non-substantive function they would serve is to provide the appearance of public participation, thus bringing greater legitimacy to prosecutors' work. But in cases like Jena, potential benefits of the councils—greater accountability, careful internal deliberation, and involvement of diverse views—may not materialize. Furthermore, these benefits could be achieved through the democratic process as long as the necessary data was publicly available.

## V. CONCLUSION

Transparency initiatives should be implemented in prosecutors' offices across the country. Accountability will remain absent if the problem of racial disparities in charging, plea bargaining, and sentencing cannot be more narrowly pinpointed. District attorneys will have neither the incentive nor the capability to modify their offices' performance without a clearer picture of the problem's source: which charging decisions and which staff attorneys are responsible for the disparities. Where the district attorney does not personally view racially disparate results as wrong in themselves, public reporting of such data could potentially be used by advocacy groups to demand reform.

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<sup>100</sup> See *supra* note 48 and accompanying text.

<sup>101</sup> Taslitz, *supra* note 26, at 318-19.