

Basing Prosecutorial Success on Conviction Rates Grossly Distorts the Criminal Justice System

Most prosecutors' offices and individual prosecutors measure their success and effectiveness, with a heavy focus on the number of convictions they obtain. This often stems from a political pressure to be seen as tough on crime. But the focus on conviction rates creates tremendous pressure on prosecutors to adopt win-at-all costs attitudes. The institutional culture created by focusing on convictions ignores the question of whether conviction really is the best form of justice in a given case, and worse, provides incentives for prosecutorial misconduct to occur in the pursuit of the "win". Rather than fixating on win-loss tallies, real prosecutorial success requires maintaining an adversarial system that acts consistent with the law, is fair and transparent, equitably resourced, evidence-based, and minimizes the negative impact prosecutors' actions have on individuals and communities, particularly communities of color. Major reforms are necessary to achieve this type of success,¹ and prosecutors must be willing to pursue them in spite of the inevitable protests from internal or external sources.

Conviction rates are not proven indicators of prosecutorial success—unless overflowing prisons and the social devastation that mass incarcerations bring is the intended outcome. There's clear evidence that alternatives to convictions have a much greater impact on justice, fairness and public safety, and at a much lower cost. If we are to move to a restorative model of criminal justice, determining which are the most effective strategies available to prosecutors to accomplish this goal, instead of focusing on details about individual cases, prosecutors must consider the effects of their work on the entire criminal justice system and on the communities they serve.² For example, diversion or substance abuse programs might have a greater impact on the recidivism rate than prosecuting youth offenders or addicts and can be very cost-effective. Prosecutors must partner with judges, police, and defense attorneys to create evidence-based policies that move the system to a restorative framework.

Prosecutors' undue focus on high conviction-rates creates incentives for misconduct. Prosecutors exercise enormous discretion at nearly every phase of adjudication and their decisions are not subject to any systematic review. The use of unfettered discretion to deliver high conviction rates creates incentives to misconduct, often in the form of blatant violations of a defendant's constitutional rights. These include withholding evidence favorable to the defense, denying defendants' right to counsel, striking jurors based on race, knowingly offering perjured testimony at trial, and failing to ensure a defendant's protection from illegal searches and seizures by the police. Far from inconsequential, misconduct often results in wrongful convictions, the guilty going unpunished, victims forced to endure retrials, devastated families and communities, especially Black and Latinx. Winning convictions may be an indication of a line prosecutor's prowess as a litigator, but high convictions say very little about achieving goals of justice and public safety.

To be sure, disciplinary authorities must take prosecutorial misconduct more seriously³ and pursue prosecutors more aggressively for misconduct.⁴ Courts might also impose disciplinary regulation.⁵ But the most effective way to combat misconduct associated with the dogged pursuit of wins is to no longer equate success with high conviction rates. When a prosecutor is incentivized to pursue the best outcome for achieving justice, there is decreased emphasis on convictions, and less incentive for misconduct.

Redefining Success. Measuring success by other means than high conviction rates makes sense. With the well-established fact of extensive racial bias in the criminal justice system, high conviction rates have created an exorbitantly expensive jail and prison system filled to overflowing with Black and Latinx defendants despite the fact that crime overall is down.⁶ Mass incarceration and gross disparities in the treatment of people based on race

have not made the country safer or enhanced our progress in achieving the constitutional principle of equal justice under law. In fact, over policing and over incarcerations have destabilized many African American and Latinx communities causing a panoply of devastating consequences with cascading effects across society. That the focus on high conviction rates also incentivizes misconduct by government officials duty bound to uphold the law only underscores the need to move away from it as the key measure of a good prosecutor.

Focusing on goals of restorative justice and public safety instead of high conviction rates would provide more appropriate incentives for prosecutors than conviction rates. In general, when compared to convictions, alternative measures of accountability accompanied by programmatic options can help increase public safety and fairness in the criminal justice process. Through the development and use of alternative approaches to incarceration, many defendants can access a range of community resources that decrease the probability of re-offending as well as other problematic behaviors (e.g., substance use) while increasing fairness and equity in the system.

Deferred prosecution programs have tangible benefits for defendants, prosecutors, and the community.⁷ This mechanism is usually implemented as early as possible in the case. Where practiced, it has generally proved to reduce criminal justice involvement and incarceration rates while maximizing public safety.⁸ Deferred prosecution allows the defendant to stay in the community while pursuing a variety of program activities such as restitution, com-

munity service, and addiction counseling. Unlike probation, deferred prosecution offers individuals the chance to avoid charge or conviction. Upon successful completion, charges can be withheld, or dismissed if completed before or after a plea is entered.

Diversion programs are usually initiated during the law enforcement, pre-trial, or trial phase of a case. During the law enforcement phase, low-level drug offenders, for example, might be referred to treatment, in lieu of entering the criminal system. During the pretrial and prosecution phases, diversion programs can reduce dockets, lower costs, focus prosecutor attention on cases that demand more time and attention, and produce better outcomes for individuals and communities. Designed to reduce recidivism, these programs provide additional oversight to cases involving a range of special populations.⁹ Failure results in the resumption of traditional criminal proceedings.¹⁰

Prosecutors are powerful actors in the criminal justice system and in a good position to drive change among their ranks. They must demand that justice is served only by developing and deploying the most effective and individualized case resolution strategy. Working with stakeholders to get buy-in, they should develop a slate of strategies tailored to the needs of their community. Once the options are determined, prosecutors must implement guidelines and require training for all staff. In addition to detailing the alternatives to conviction, training should include the implications of mass incarceration, racial disparities in the criminal justice system, the criminalization of poverty, implicit bias, and related topics,¹¹ on the process of doing

justice. Reform-minded district attorneys should not hesitate to replace prosecutors who are not receptive to change.¹² The objective is to focus on that combination of strategies which delivers true justice, fairness, and public safety.

Changing prosecutor institutions, incentives, and loyalties can produce a criminal legal system that prioritizes loyalty to justice over winning convictions. Reform-minded prosecutors must investigate evidence-based strategies that have proved to have an impact on promoting long-term public safety, promote accountability, and are restorative, not solely retributive (or punitive). Once deployed they must track the efficacy of each strategy and adjust emphasis accordingly. Prosecutors must also advocate for professional standards based on local public-safety priorities. This includes implementing diverse hiring practices, which could help determine the appropriate case management to the widest variety of defendants, and providing training on implicit racial bias, alternatives to filing criminal charges, and forming partnerships that allow meaningful input from judges, law enforcement, defense counsel, and community organizations.



The Legal Defense Fund calls on District Attorneys to take the necessary and important steps to re-evaluate their current vision of prosecutorial success, seek measures of success that embrace restorative justice and employ criteria, other than conviction rates, that can create safer communities without the harmful collateral consequences that the drive for conviction and incarceration as the primary measures of success for the criminal justice system has inflicted on society at large and most harshly on people of color and low income.

Notes

1. Olwyn Conway, How Can I Reconcile With You When Your Foot is On My Neck?: The Role of Justice in the Pursuit of Truth and Reconciliation, 2018 MICH. ST. L. REV. 1349, 1392 (2018).
2. *Id.*
3. Bruce A. Green & Samuel J. Levine, Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis, 14 OHIO STATE J. CRIM. LAW 143, 161 (2016).*Id.* at 161.
4. *Id.* at 145.
5. See *id.* See also, Deferred Prosecution Programs: An Implementation Guide, Institute for Justice Research and Development, Pettus-Davis et al. December 2019, p. 8, <https://ijrd.csw.fsu.edu/publications/tools-field/deferred-prosecution-programs-implementation-guide> (last accessed August 16, 2020), “[T]he extensive historical and contemporary record of judicial review of prosecutors’ charging decisions may indeed suggest a justification for state courts, if they so choose, to regulate prosecutorial discretion more meaningfully.”
6. See generally Ames Grawert and Cameron Kimble, Crime in 2018: Final Analysis, Brennan Center (Jun. 11, 2019), <https://www.brennancenter.org/our-work/research-reports/crime-2018-final-analysis>; Lauren-Brooke Eisen, What Caused the Crime Decline, Brennan Center (Feb. 12, 2015), <https://www.brennancenter.org/our-work/research-reports/what-caused-crime-decline>.
7. *Id.* at p.8, citing: Love, M. C., Alternatives to conviction: Deferred adjudication as a way of avoiding collateral consequences. Federal Sentencing Reporter, 22(1), 6-16. George et al. (2015)
8. *Id.* at p. 7.
9. George, C., Orwat, et al., An evaluation of the Cook County State’s Attorney’s Office Deferred Prosecution Program (2015). http://www.lcjia.state.il.us/assets/pdf/ResearchReports/Cook_County_Deferred_Prosecution_evaluation_0715.pdf
10. Deferred Prosecution Programs: An Implementation Guide, Institute for Justice Research and Development, Pettus-Davis et al. December 2019, p. 8, <https://ijrd.csw.fsu.edu/publications/tools-field/deferred-prosecution-programs-implementation-guide> (last accessed August 16, 2020)
11. See also Angela J. Davis, Reimagining Prosecution: A Growing Progressive Movement, 3 UCLA CRIM. JUST. L. REV. 1, 25 (2019).
12. *Id.* at 26.