

## Prosecutorial Success Based on Conviction Rates Distorts the Criminal Justice System

Most prosecution offices and individual prosecutors measure their success and effectiveness with a heavy focus on the number of convictions they obtain. This often stems from political pressure to be seen as tough-on-crime. The focus on conviction rates creates tremendous pressure on prosecutors to adopt a win-at-all costs attitude. The institutional culture created by focusing on convictions ignores the question of whether a criminal conviction really is just 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, prosecutorial success should focus on maintaining an adversarial system that acts consistent with the law, is fair and transparent, equitably resourced, evidence-based, and minimizes the negative impact that prosecutors’ actions have on individuals and communities, particularly communities of color. Major transformation is necessary to succeed, and prosecutors must be willing to pursue these measures despite protests from internal or external sources. “The American prosecutor today has the power to shift the decision-making framework of the criminal system from retributive to restorative without a single legislative act.”<sup>1</sup>

**Conviction rates are not indicators of prosecutorial success**—unless overflowing prisons and the social devastation that mass

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incarceration brings is the intended outcome. Very little data is available indicating what strategies are most effective to measure prosecutorial performance.<sup>2</sup> It seems obvious that prosecutors should be focused on justice and safety. If we are to move to a restorative model of criminal justice (which emphasizes repairing the harm caused by criminal behavior) and determine the most effective strategies available to prosecutors to accomplish this goal, prosecutors must consider the effects of their work on the entire criminal justice system and the communities they serve rather than individual cases.<sup>3</sup> For example, diversion or substance abuse programs might have a greater impact on the recidivism rate than prosecuting youth offenders or those dependent on drugs or alcohol and might

be cost-effective. Prosecutors must partner with judges, police, and defense attorneys to create evidence-based policies to move to a restorative framework.

**Prosecutor focus on high conviction-rates creates incentives for misconduct.** Prosecutors exercise enormous discretion at nearly every phase of the criminal legal process and their decisions are not subject to any systematic review. The use of unregulated discretion to deliver high conviction rates creates incentives for misconduct, often in the form of blatant constitutional violations of a defendant's rights. These include withholding evidence favorable to the defense, denying a defendant's right to counsel, striking jurors based on race, knowingly offering perjured testimony at trial, and using illegally obtained evidence to obtain convictions, which fails to protect individuals from unconstitutional police actions. Flagrant abuses of power during plea-bargaining and grand jury proceedings also violate the spirit of the Constitution's protections. Far from inconsequential, misconduct often results in wrongful convictions, victims forced to endure retrials, and devastated families—especially in Black and Latinx communities—while the guilty go unpunished. Winning convictions may be an indication of a line prosecutor's prowess as a litigator, but high conviction rates say little about justice and public safety.

Disciplinary authorities must take prosecutorial misconduct more seriously<sup>4</sup> and pursue prosecutors aggressively for misconduct.<sup>5</sup> Courts should also impose disciplinary measures.<sup>6</sup> 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 most just outcome, there is decreased emphasis on convictions and less incentive for misconduct.

**Redefining success to focus on goals of restorative justice and public safety provide more appropriate incentives for prosecutors than conviction rates.** In general, when compared to convictions, alternative measures of accountability accompanied by programmatic options increase public safety and fairness in the criminal justice process. Alternative approaches to incarceration allow many defendants to access a range of community resources that decrease the probability of re-offending, to address 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.”<sup>7</sup> This strategy is implemented as early as possible in a case and has the potential to reduce criminal justice system involvement and incarceration rates while maximizing public safety.<sup>8</sup> Deferred prosecution allows individuals to stay in the community while completing several activities, such as restitution, community service, and addiction counseling. Unlike probation, deferred prosecution offers individuals the chance to avoid charges or conviction. Upon successful completion charges can be withheld, or dismissed if a plea has already been entered.

**Diversion programs** can be initiated during the law enforcement, pretrial, 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. Diversion programs can reduce dockets, lower costs, focus prosecutor attention on cases that demand more time and resources, 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.<sup>9</sup> Failure results in the resumption of traditional criminal proceedings.<sup>10</sup>

**Despite its promise, redefining prosecutorial success has several challenges.** The win-at-all-costs mindset is the product of many factors, not least of which is the political demand for prosecutors to be tough-on-crime, arising out of fear, racism, and a legitimate desire to increase public safety. However, prosecutors can drive positive changes in public views and among their ranks. They must demand that justice and public safety be served by developing and deploying the most effective and individualized case resolution. Working with stakeholders to get buy-in, prosecutors must educate the public on the positive impact on public safety these alternatives offer and develop a slate of approaches tailored to the specific needs of their community.

Once prosecutorial success measures are determined, chief prosecutors must implement guidelines and require training for all staff. This training should include the implications of “mass incarceration, racial disparities in the criminal justice system, the criminalization of poverty, [implicit bias,] and related topics.”<sup>11</sup> Prosecutors unreceptive to change must be replaced.<sup>12</sup> The objective is to focus on strategies that deliver true justice, fairness, and public safety.



**The Legal Defense Fund calls on District Attorneys to re-evaluate their vision of prosecutorial success, seek measures of success that embrace restorative justice and employ criteria beyond conviction rates that can create safer communities without the harmful collateral consequences that have resulted from measures of success that prioritize conviction and incarceration.**

## 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) (discussing the immediate change that prosecutors are able to make in the criminal justice system given their enormous discretion and authority).
- 2 See generally Robin Olsen et al., *Collecting and Using Data for Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices*, Urban Inst. (2018), [https://www.urban.org/sites/default/files/publication/99044/collecting\\_and\\_using\\_data\\_for\\_prosecutorial\\_decisionmaking\\_0.pdf](https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking_0.pdf).
- 3 *Id.* at 13.
- 4 Samuel J. Levine & Bruce A. Green, *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).
- 5 *Id.* at 145.
- 6 See *id.*; see also *id.* at 181–82 (“[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.”); Carrie Pettus-Davis et al., *Deferred Prosecution Programs: An Implementation Guide*, Institute for Justice Research and Development (Dec. 2019), [https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication\\_pdfs/deferred\\_prosecution\\_programs\\_implementation\\_guide.pdf](https://ijrd.csw.fsu.edu/sites/g/files/upcbnu1766/files/media/images/publication_pdfs/deferred_prosecution_programs_implementation_guide.pdf).
- 7 Pettus-Davis et al., *supra* note 6, at 8 (citing: Love, M. C., *Alternatives to conviction: Deferred adjudication as a way of avoiding collateral consequences*. 22 Fed. Sentencing Rep. 6–16. (2015)).
- 8 *Id.* at 5.
- 9 George C. Orwat et al., *An evaluation of the Cook County State’s Attorney’s Office Deferred Prosecution Program*, Ill. Crim. Just. Info. Auth. (2015), [http://www.lcjia.state.il.us/assets/pdf/ResearchReports/Cook\\_County\\_Deferred\\_Prosecution\\_evaluation\\_0715.pdf](http://www.lcjia.state.il.us/assets/pdf/ResearchReports/Cook_County_Deferred_Prosecution_evaluation_0715.pdf)
- 10 Pettus-Davis et al., *supra* note 6, at 8.
- 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.