
PROSECUTION THAT EARNS COMMUNITY TRUST

DAN SATTERBERG **AND** RONALD WRIGHT

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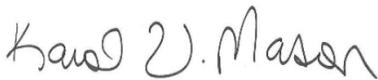
A Letter from the Co-Chairs of the IIP Advisory Board

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

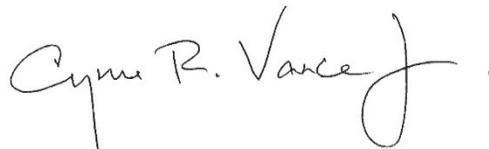
The collaborative research and engagement that informs the Executive Session enables a thorough dive into some of the most complex topics facing prosecutors and their communities: reimagining the role of the prosecutor in a democratic society; producing public safety while reducing harms created by the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

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

For further information about the Executive Session on Prosecution or the IIP, please write to IIP_JohnJay@prosecution.org.



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Prosecution that Earns Community Trust

By Dan Satterberg and Ronald Wright

We could think of this as the protest era. From the #MeToo movement to NFL players taking a knee, our country faces a period of serious upheaval. Marginalized people protest the oppression they experience on a daily basis. And these protests get the full attention of criminal prosecutors, because they go right to the heart of criminal justice and public safety.

In some communities, when police arrive at a scene of violence, they encounter witnesses who choose not to help. Police often find people at the crime scene who feel that the police and courts have never treated them fairly, so in protest, they refuse to help solve serious violent crimes in their community, even when they hold valuable evidence. An individual who has been treated unfairly by the criminal justice system may choose to boycott that system by refusing to tell police who murdered their best friend. This sometimes leads to street justice, a different and often violent kind of retribution that only creates more victims of violence.

This is called the “no snitch” rule. A more profound protest, we cannot imagine.

This boycott of the criminal justice system takes other forms, including countless victims of domestic violence and sexual assault who choose not to report the crimes they suffer. These underreported crimes are a silent protest by the most vulnerable members of our society who do not believe that involving police, prosecutors, or courts will improve their situation. Women who face domestic abuse may fear the spotlight that reporting will place on their precarious situations, including the possibility of reprisal within their own neighborhoods.

The boycott also extends to immigrant communities. Crime victims with unclear citizen-

ship status may fear that asking for help from authorities will lead those same authorities to scrutinize their right to live in this country.

Taken together, these boycotts amount to a public safety disaster. And they point to the greatest challenge for every District Attorney in America: to earn and keep the trust of the communities where crime has the greatest impact. In this essay, we aim to provide some fresh thinking that an elected prosecutor can use to apply justice outside the courtroom, working together with local community groups to create alternative forms of justice. We advocate for an expanded role of the prosecutor that reaches both upstream and downstream from the prosecutor’s traditional role as courtroom adversary.

Prosecutors who engage the community outside the criminal courtroom can help trust grow, step by step. The first step is to demonstrate that prosecutors can listen to our critics. When people in the community speak truth to power, the job of the powerful is to stop and listen. Another step prosecutors can take to earn public trust is to make concrete their commitment to treat crime victims with dignity and compassion. That means informing and including victims in the decisions that affect them.

But the prosecutor’s duties go beyond respectful treatment of victims; prosecutors also must inform and include the entire community as they create more effective accountability measures for low-level crimes and juvenile misconduct. Public safety is something that prosecutors must *co-produce with* their communities. It is not something they can simply *deliver to* the public.

The strategies we suggest below will be especially valuable to newly-elected prosecutors who want a fresh start with communities that demand a greater voice in criminal justice policy. But these strategies may also prove useful to veterans of the more than 2,500 prosecutor offices in this country who are looking for new approaches to the job. There is no guarantee that these strategies alone will vanquish the “no snitch” rule or break the silence of domestic violence victims. Our hope instead is that each elected prosecutor in America will take the first steps on the long, hard road toward building greater public trust in the local criminal justice system.

STRATEGY #1: TURN SQUARE CORNERS IN SERIOUS CRIMINAL CASES

The criminal cases at the core of your work as a prosecutor involve serious violent acts such as murders, armed robberies, sexual assaults, and felony domestic violence. For those defendants who present the greatest danger of committing future violent crimes, incapacitation may be the only responsible move. When such serious crimes as these are committed, your job as a prosecutor is to use all available evidence to prove the case in criminal court.

For this core of serious criminal cases, *how* you do the job matters just as much as *what* outcomes you obtain. That means a fair investigation and a fair trial, operating within the framework imposed by the Constitution and other legal limits. The community is watching, and it is imperative that they see every prosecutor in your office turn square corners.

Discovery practice serves as a visible test of how much a prosecutor believes in procedural justice. Open file practices that give early and full disclosure to the defense lawyer will build community trust in the criminal justice system that you represent. Concerns for witness safety are real in a small percentage of cases, but they must be considered on a case by case basis. Prosecutors cannot routinely withhold evidence or conduct trials by ambush.

As the elected prosecutor, you should support a strong local public defense system and insist that the line prosecutors in your office engage in amicable and professional conduct with their

counterparts in the defense community. An adversarial system does not require prosecutors to be personal adversaries with defense attorneys.

Plea negotiations resolve more than 90% of criminal cases, but prosecutors in your office must not take advantage of unprepared defense counsel. Furthermore, every criminal case has a “maximum justice value,” the top of the range of reasonable punishment for the misconduct. Your office must not threaten to seek additional charges or sentences outside of the maximum justice value range, just for bargaining leverage. An office that publishes filing and disposition standards can guide line-level discretion on these vital decisions.

STRATEGY #2: INVENTORY AND PRIORITIZE CORE CASES

Every office has a culture of inherited practices; an effective leader must scrutinize and reevaluate them on a regular basis. Take an inventory of the types of cases your office files and the resources normally devoted to those cases. With regular reevaluation, you might find that some areas of past emphasis should remain important going forward, but others may no longer justify the level of staffing, court time, and corrections resources they received in the past.

Your inventory should include state spending on prisons and corrections, beyond the money your office spends on filing and prosecuting the cases. For less serious cases, prosecutors should utilize non-prison punishments as a normal part of the toolkit, instead of characterizing them as a form of “leniency” that the prosecutor dispenses only in exceptional cases.

By taking inventory of past prosecutions, you may uncover some categories of cases – some of which may involve a high volume of charges – that do not call for prosecution at all. They could be addressed equally well, or perhaps even better, outside of the criminal system. Trying to identify the categories of cases that do *not* belong, at least initially, in criminal court is a perfect opportunity for prosecutors to consider whether the *community* might create solutions that are more effective than what we offer in the courtroom.

STRATEGY #3: ENGAGE RESPECTFULLY WITH THE WHOLE COMMUNITY

Prosecutors put a lot of energy into providing support for victims. The question, however, is whether your office sees and supports the full range of victims, or whether some victims fall into a blind spot. It is sometimes necessary to rethink our definition of “victim.” Sometimes we don’t see the victims of ordinary violence that happens in places where we *expect* violence to happen. When murders and assaults happen more frequently in a given neighborhood or to victims who are suspected of committing crimes themselves, the police may not clear the crimes at a high rate. Consequently, prosecutors do not file charges at a high rate.

Victims in the cases that do go forward are sometimes subjected to pejorative language by prosecutors and support staff, who might comment that they would rather work with “innocent” victims or “true” victims rather than victims who may have committed their own crimes in the past. Language matters, even when spoken out of earshot of the victim. It sets the tone for disrespectful or disinterested dealings with some victims that furthers the cycle of community distrust in police and prosecutors. The chief prosecutor can elevate this problem and suggest solutions. Set the tone for how your line prosecutors and support staff talk about the people we serve; take a stand against dehumanizing language and set a strong example by respecting all victims of crimes, regardless of their background.

Engagement with the community does not stop with victims and their families; prosecutors must ask for input from other members of the community. But in doing so, there is also a danger that a prosecutor will hear only the loudest voices or the best-connected groups. The prosecutor must represent the *whole* community: that includes those who are politically engaged and those who are not. That means reaching out to victims and witnesses, along with defendants and their families. Your line prosecutors promote “procedural justice” by taking the time to listen and to explain your actions to all of the people that the crime touched. And when prosecutors do so, people are more inclined to accept court outcomes as legitimate, even when they don’t receive what they hoped they would.

One concrete way that prosecutors can help victims of interpersonal violence is to ensure that they have priority access to civil legal aid. A new partnership in King County, Washington between the prosecutor and five civil legal aid agencies gives legal aid lawyers a presence in the courthouse. Deputy prosecutors can walk down the hall and introduce legal aid lawyers to a victim of domestic violence or sexual assault, who can review their civil legal needs and connect them with help. Victims often need help navigating the complicated terrain of family law, protection orders, landlord-tenant questions, immigration issues, employment, and a range of other legal matters. For victims of an abusive relationship, having access to an attorney who can fight for their legal needs on the civil side levels the playing field.

An important part of engaging respectfully with the community is acknowledging our nation’s shameful history of slavery and racism which continues to cloud the criminal justice system. As a person, as a prosecutor, you have inherited this history. Racial disproportionality in the criminal justice system stands as the most visible indictment against the fairness we want to see. We cannot run from this history or from criticism of our justice systems. We must speak about it and train staff how to recognize implicit and explicit bias that results from this history. It is important to recruit and nurture people of color as leaders in your office. Recognize the systems that are upstream from your office that may perpetuate racial disparities in the justice system, and take steps in your own office to resist those trends. For example, while school disciplinary policies and foster care systems may seem distant from the role of the prosecutor, they exhibit racial disparities that eventually affect the criminal justice system through the opportunities they create (or fail to create) for young people. Their systemic failures end up as criminal cases. Use your power to bring together leaders in these fields and look for ways to reroute these young people before they arrive in your office.

Respectful engagement is more than a two-way exchange between prosecutors and their communities; local police departments are inevitably part of the conversation. The public often does not differentiate between the prosecu-

tor's office and the police department, because residents of the community view the prosecutor's work through the lens of their interactions with police. This presents challenges in communications for prosecutors. One way you can meet this challenge is by encouraging law enforcement leadership to strengthen best practices in policing that treat community members with dignity. Your charging authority gives you the power to check and counterbalance some police actions. And your communications to the public should signal the independence of your office from law enforcement agencies.

STRATEGY #4: PARTNER WITH THE COMMUNITY FOR UPSTREAM AND DOWNSTREAM PROGRAMS FOR PUBLIC SAFETY

When the prosecutor's office forms joint ventures with community groups, these new alliances can enhance public safety by working both upstream and downstream from the criminal courts. Upstream efforts can prevent future crimes before the prosecutor ever files charges. Downstream efforts can shorten criminal careers after a case has been adjudicated.

Prosecutors can divert people away from the criminal courts before they ever file charges for many public nuisance offenses that are non-violent and present minimal threat to public safety. In these settings, civil penalties should replace criminal charges. Drug dependence and mental illness are two conditions that are a common driving force behind many of the cases that land on the prosecutor's desk. There are viable community-based alternatives, such as L.E.A.D. (Law Enforcement Assisted Diversion) that can turn an arrest into an intervention, opening the door to support services for the most vulnerable members of society.

In Seattle, we have begun to build community-based alternatives to the traditional court track for a variety of juvenile cases. Working with credible messengers in our community – individuals who can serve as an authentic link between the communities they grew up in and institutions that serve them – we now send some juvenile offenses and intra-familial domestic violence to diversion programs that our community partners developed. These programs are designed to change the way youth think and the way they act.

We also work with partners in the community developing restorative justice approaches, diverting some young people charged with felonies (including gun possession) to Peacemaking Circle teams. Unlike an impersonal courtroom setting where youth are assigned a lawyer and told to remain silent, the restorative process utilizes the strengths of community members who may have some shared experiences with the accused, and can conduct structured and inclusive conversations. These exchanges give juveniles the space to understand the emotional source of their actions, while allowing victims to be heard. Efforts to re-engage youth with school or vocational training can support this restorative process.

When we develop alternatives to the court system with community justice initiatives, it is important for the prosecutor to be involved in program design, and to take the lead in finding sources of money to pay the community for the value they bring. Sustainable programs cannot be built on the backs of volunteers, or on the hope that existing programs will have the capacity to sustain themselves. These community alternatives to the court system must also be designed with an evaluation component built in to ensure long term success. Ironically, alternatives to the courtroom and the jail cell are held to a standard of scrutiny that has rarely been applied to the criminal courtroom itself.

Upstream methods such as the restorative justice practices outlined above will be more effective when paired with additional practices downstream from the criminal courtroom. These include support for prison rehabilitative programs. It is common wisdom that those leaving prison are worse off than when they entered, but there is no reason to accept this truth as inevitable. We should demand more from our Department of Corrections and insist that the state make smart investments in prison programming.

Similarly, your office can partner with local groups to promote smoother re-entry for community members as they return home from prison. Prosecutors can work with other agencies to mitigate the collateral consequences that keep formerly incarcerated people from re-integrating into society, such as lack of access to housing,

education, and employment. The prosecutor should also examine the role of court-ordered fines and fees, along with child support arrears that are assessed against men getting out of prison, because the financial burden of re-entry entrenches poverty and increases recidivism.

The true north of effective prosecution is a sense of safety and wellbeing in the local community. While criminal convictions and prison sentences can make communities safer in some cases, too many criminal cases filed under the wrong circumstances can have the opposite effect. Routinely prosecuting and jailing people who have committed lower level crimes motivated by drug dependence and/or mental illness can harm neighborhoods, families and public trust. Achieving public safety requires an acknowledgement of the limitations of the courtroom and the jail cell to cure complex social ills that arrive in your office in the guise of a criminal case.

STRATEGY #5: SHOW YOUR WORK

The community will trust your office more readily if you make it easy for the public to hold you accountable. Declare priorities and goals for the office, and then create metrics to measure your progress as you work toward those expressed goals. Along the way, give the public enough information to reach their own conclusions about your progress. To use the familiar words of a math teacher, “show your work.”

As chief prosecutor, you should create enough access to information about the office’s goals, objectives, and practices to allow voters to make an informed opinion about the quality of the work. Similarly, news reporters and other informed observers should have enough information to ask informed questions about the office. A prosecutor who declares generic objectives such as “doing justice” fails to give the public the tools needed to evaluate the elected prosecutor. Overall directions and priorities for the office should reach both the core adversarial courtroom work of the office and the community partnerships that promote public safety at various points upstream and downstream from the courtroom.

A community-oriented prosecutor’s office must look beyond conviction rates at trial when measuring success. Sober and realistic charging

decisions will result in a high number of convictions (based on pleas or trial verdicts) as originally charged. Speed also matters: the prosecutor should aim to complete discovery as soon as possible, accounting for differences in complexity among crimes. Defendants should receive a well-considered offer earlier rather than later (but not earlier than the delivery of discovery). The number and distribution of cases that an office tries each year should also serve as a measure of progress. An office should pursue enough trials to signal the gravity of certain crimes and to promote solid professional development among line attorneys, but they should not pursue so many that trials lose their power to signal an office priority. When measuring the success of community-based courtroom alternatives, the office could track how many people use the various alternative programs that you create, and compare the trajectory of individuals who participated in these programs with those who go through the criminal courts.

Inevitably, there is no single measure that tells the full story of the prosecutor’s successes and failures. A better option is to track and publicize a collection of measurements, each one giving the community something tangible to observe regarding the progress toward your declared goals. Transparent prosecution enables the public to see not just single cases, but trends and patterns in the full range of programs that the office undertakes. For example, in Washington, the prosecutor has considerable latitude to decide when a person under the age of 18 who is charged with a serious violent crime should be tried in the adult system or in the juvenile court. Though not required by law, we put out an annual report to disclose the reasons we choose to try some cases in adult court and others in Juvenile Court. Agree or disagree with our decisions, but do so informed by our transparency.

Performance data is also necessary to manage the work of the office without blinders. Reports that show trends over time are necessary for proactive prosecution that does not simply react to cases that the police assemble. Office performance data can help prosecutors spot trends in community threats while allowing them to stay alert for racial disparities in charging or other office activities. Thus, transparency has

both internal and external functions. It helps the leadership set office priorities while consulting with the community; it helps managers to enforce those priorities and to propose new ones. And finally, data makes community accountability something more than a slogan.

CONCLUSION

Every prosecutor should ask, where do we hope to find ourselves in 15 or 20 years? We hope that everyone, by that time, can expect prosecutors to declare priorities and to inform the public about specific and pre-declared performance metrics. Our vision for the future must not be tied to particular programs, but maintain a spirit of flexibility and a willingness to partner outside of the courtroom to meet the needs of changing communities.

We hope that prosecutors, over the next 15 or 20 years, can achieve greater balance among crime prevention efforts, courtroom-based justice responses, and other community responses to safety threats. We expect that balanced strategy to decrease overall crime rates decrease and to improve the sense of safety and wellbeing in our most challenged communities, in marked and measurable ways.

In the end, we want to empower communities to enhance their own safety, while trusting the criminal justice system to continue to combat serious violence. But communities will allow prosecutors to help only if we earn their trust.

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