

A Vision for the Modern Prosecutor

Produced by the Executive Session of the Institute for Innovation in Prosecution at John Jay College

In the wake of unprecedented and overdue attention on the criminal legal system and its role in our Nation's legacy of racial injustice, as elected prosecutors and members of the Institute for Innovation in Prosecution's Executive Session on the Role of the Prosecutor, we believe that it is possible to describe and call for an emerging vision for the role of a modern prosecutor. In doing so, we find it necessary to contrast this vision with a description of the traditional ways that prosecutors have carried out their responsibilities. In this paper we describe this contrast between traditional practice and a vision of the future by comparing their conceptions of justice, modes of operation, culture, accountability, and metrics. In making these contrasts, we celebrate the power and potential of the current wave of prosecutorial reform that we are witnessing around the country. We have high hopes that this movement will support the broader re-examination of our society's response to crime and aspiration for justice.

Conceptions of Justice

Traditionally:

Prosecutors¹ have defined their role principally as part of a larger criminal justice system that operates with a primary focus on case processing.

In this conception, prosecutors typically accept cases from the police who bring arrests to the front door of the system. In reviewing these cases, prosecutors apply legal standards that determine whether the police have made a good case and apply protocols and policies developed within the prosecutor's office. In proceeding with cases and in the exercise of discretion regarding charging and bail recommendations, prosecutors' offices apply a sense of appropriate dispositions that often reflect "going rates" established by office policies or unarticulated local traditions. Serious cases are typically thought to require pretrial detention and an outcome that includes incarceration. The more serious the case, the longer the period of the prison sentence. These framings and actions have produced racial and other disparities, which prosecutors have typically viewed as a product of larger factors and forces beyond their control.

¹ In this paper we use the term "prosecutor" to refer to all lawyers who serve a prosecutorial function, including elected or appointed chief prosecutors.

***We believe the future of prosecution requires that:
Prosecutors explicitly set aside this notion of the criminal justice system as a case processing apparatus.***

We believe that our concept of prosecution should move toward a model of community justice. Most fundamentally, this conception requires that prosecutors engage a broad range of stakeholders and community interests in a respectful and reciprocal manner. Not only is this engagement necessary for the prosecutor to be an agent of just and lasting change, but also for the work of the prosecutors' office to be viewed as legitimate in our democracy. Prosecutors will necessarily maintain working relationships with other criminal justice institutions and actors, but they should regard themselves as ultimately accountable to the communities they serve. They should welcome the responsibility for producing just and effective processes and outcomes. In striving for these outcomes, the modern prosecutor should recognize that office and local notions of "going rates" for case dispositions have little connection to justice or effectiveness. These heuristics cannot substitute for more thoughtful and grounded conceptions of what represent appropriate case outcomes and justice for the parties involved and the wider community. The identification of incarceration as a necessary corollary of "seriousness," and the reflexive equating of elevated seriousness with longer sentences of incarceration, must be replaced by broader and more varied ideas and practices regarding just and effective dispositions. Prosecutors must recognize their contribution to producing racial and other disparities and should regard such disparities as unacceptable and hold themselves accountable for their elimination. Finally, as they recognize historical harms caused by the operations of the criminal justice system, they should exercise leadership, as elected officials, in advocating for policies that can ameliorate those harms.

Modes of Operation

***Traditionally:
Prosecutors have been largely reactive.***

Prosecutors' daily operations are driven primarily by the cases brought to them, the structure of applicable laws, and their relationships with other criminal justice actors and institutions, chiefly the police "upstream" and the courts "downstream." They have defined their work largely as the processing of those cases. Cases, the individuals and groups they represent, and the conflicts that lie behind those cases, are typically seen as the formal fact pattern presented, and are not situated in a broader context. Prosecutors have typically not collected or analyzed data about crime and public safety problems to inform the execution of their duties. Nor have they typically analyzed the workings of the criminal justice system, its aggregate outcomes, or its societal impacts, other than with respect to their own internal operations. Exceptions to these core traditional activities, while frequent, have been seen as special initiatives, diversions from the norms of case processing, or pilot projects. These exceptions have had little impact on the core operations of the traditional prosecutorial office. Prosecutors traditionally have taken existing legal structures, practices, and relationships largely as givens and, for the most part, have not sought to influence or alter them. Beyond that, they have taken the broader social and community settings in which they operate largely as givens and have for the most part not sought to influence or alter them.

We believe the future of prosecution requires that:

Prosecutors no longer regard themselves as recipients of other actors' cases or as limited by existing system options with respect to dispositions of those cases.

Prosecutors should recognize that people—both survivors and the accused—are not cases, and that particular facts occur in larger contexts. While they must necessarily interact with other criminal justice institutions and actors, prosecutors should expand their view of their work beyond case processing to include affirmative engagement with core issues of social, racial, and economic justice. They should identify important public safety and crime problems and take responsibility for assessing and addressing those problems, including by means other than simple case processing. They should take an active role in shaping the broader legal world, and the world of criminal justice institutions, such as sentencing policy, effective public defense, adequate health services, and conditions of confinement. They should seek to be proactive with respect to those issues, problems, and core elements. As prosecutors and advocates for justice, they are seen as a check and balance for the action of other actors with the ability to be agents of transformative change by expanding their use of that role. They should have their own means for analyzing information about their core issues and interests. Prosecutors should aspire to be transparent, data-rich, and intelligence-driven. They should focus on preventing crime and public safety problems, not simply reacting to them. They should consider a wide range of ways in which they might prevent crime by supporting communities, families, and individuals. They should affirmatively seek to influence public policy and public institutions with a reasonable degree of activism. These new ways of thinking and operating should be central to their day-to-day operations, not exceptional and marginal.

Culture

Traditionally:

Prosecutors have been acculturated to consider themselves to be the "us," and the "good guys," in an "us vs. them" and "good vs. bad" world.

The prosecution of crime, the imposition of a criminal sanction, and the application of state authority have been seen both as the doing of justice and ends in themselves. There has been a norm that the weight of the office should be on obtaining plea bargains, convictions, and sanctions, and that legal and operational discretion should be exercised toward those outcomes. A premium has been put on reaching dispositions in cases—"winning"—and having those dispositions remain settled. Victims have been seen primarily in terms of their role in helping prosecutors produce those outcomes.

We believe the future of prosecution requires that:

Prosecutors recognize the complexity of the people with whom they engage and of the matters to which they attend.

Prosecutors should recognize and elevate core human dignity for survivors of crime and those accused of crimes. They should recognize that no one should be defined by their bad conduct alone. In their daily discourse, prosecutors should affirm that labels such as "offender" and "victim" carry real normative and social weight and should substitute language respecting the humanity of survivors and the accused. Prosecutors should squarely face the reality that in practice "offending" and "victimization" can coexist in the same person, the same communities, and the same situations

in complicated and important ways. They should recognize that victims of crime deserve and desire services, compassion, and justice. Ideas of effective disposition should be separated from the application of punishment and state authority. Punishment and the application of state authority should not be, implicitly or explicitly, ends in themselves, but should be deployed as minimally as is consistent with public safety and commensurate with the harm caused. The commitment to “winning” should be replaced with a commitment to just and effective outcomes. Prosecutors should recognize that system and human error are inevitable, and that fact patterns will inevitably change over time. They should build in an openness to and processes for revisiting dispositions when appropriate. Victims should be understood and engaged with in terms of their experiences, needs, and preferences, and not simply as means toward obtaining legal convictions and outcomes.

Accountability and Metrics

Traditionally:

Prosecutors have relied on internal, narrow, and often ill-defined standards for judging their performance.

Those standards have generally focused on office activities and outcomes, and not on external issues such as public safety, community impacts, costs of incarceration, or impacts on persons brought before the office. They have overwhelmingly revolved around case processing, such as numbers of cases handled and conviction rates. Most matters of office practice—such as the exercise of discretion in filing charges, recommending bail, deciding on plea bargains, the conduct of such negotiations, the setting of office priorities, the establishment of “going rates” for cases, and the like—are not tracked or reported, and are effectively invisible to the public. Prosecutors see themselves as fundamentally local officials, operating in the context of the criminal justice system, accountable primarily for system efficiencies, and rarely engage in broader public discourse on issues of justice. For the most part, prosecutors concern themselves with the disposition of cases presented at intake, not with the broader impact of those case dispositions.

We believe the future of prosecution requires that:

Prosecutors develop broad, explicit and transparent standards and expectations for their actions and outcomes.

Prosecutors should develop these standards through engagement with a wide range of constituencies and stakeholders. These should explicitly include those communities and demographics most affected by crime and public safety problems and by the application of the criminal law and state authority. Office guidelines and practices in addressing important policy matters and exercising discretion should be tracked and reported. Key overarching issues that transcend the local—such as high rates of incarceration, excessive supervision, racial and ethnic disparity, and persistent concentrations in certain communities of violent victimization—should be noted, and offices’ positions and actions with respect to such articulated. Offices should articulate strategies for engaging with key public safety and other issues that go beyond their internal case processing activities.

Prosecutors must make violence and violence prevention a top priority.

No social setting – a neighborhood, a family, a romantic relationship – can be healthy, and those within it thrive, in the presence of violence or fear of violence. Prosecutors must make preventing and addressing violence a top priority, and should exercise independent judgment and action to do so. In so doing, they should recognize that such judgment should take into account the historic and present actions that have undercut official legitimacy, and led to the withdrawal of public cooperation. They should also recognize that official actions taken in the name of public safety have caused harms. New approaches to preventing and addressing violence should seek to build trust and legitimacy; avoid and repair harms; and recognize both the critical need for accountability and the fact that accountability does not require, and often is not produced by, draconian sanctions.

Conclusion

These challenges may seem daunting in the face of strained resources, multiple stakeholders with different agendas, and ongoing demand for a traditional response to sensational crimes. Yet, it is the prosecutor who is chosen by the people with a view to the broadest conception of justice and safety, and thus must respond to the urgency of this moment to address racial and all injustice. The prosecutor is the community's elected minister of justice. That is why we do what we do.

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