

21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR

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I. THE CRITICAL ROLE OF PROSECUTORS

Prosecutors wield enormous influence over the size, focus and operation of the criminal legal system. Prosecutors decide who comes into the justice system; which crimes to charge and prioritize and what conduct will be deflected and treated through other nonpunitive responses; what charges to bring, including who will be charged with offenses carrying mandatory minimum penalties; whether to seek the death penalty; whether to charge young people in adult court and whether to seek their confinement; and whether to offer a plea deal and what form that plea deal takes. Prosecutors also make recommendations about pretrial release and sentencing that are often accepted by the court given the deference and authority the voice of the prosecutor tends to invoke.¹

Elected prosecutors, in particular, have a tremendous impact in shaping criminal justice policy. Because prosecutors are trusted voices on issues affecting public safety, they are often called to testify before legislative bodies or to comment in the media about criminal justice policy – using their “bully pulpit” to

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1. *Unlocking the Black Box of Prosecution*, VERA INST. OF JUST., <https://perma.cc/J3LX-N5DM>.

shape public opinion and, ultimately, public policy.² Additionally, they often use state district attorney associations to influence legislation and public opinion.³ And their opposition can be a deal breaker for efforts to bring about reforms of the justice system.⁴

Historically, prosecutors have used this power to make the criminal legal system more punitive and push back against reform efforts. Decades of policy failures⁵ and prosecutorial overreach⁶ have left the United States a global outlier in punishment, accounting for 22% of the world's prison population while only comprising about 4% of the world's population.⁷

II. A NEW GENERATION OF REFORM-MINDED PROSECUTION LEADERS

There is hope for reform, however. Scholarship and popular writing are creating a growing awareness regarding the decades-long misuse of prosecutorial discretion and power to criminalize and incarcerate vulnerable populations, disproportionately affecting black and brown communities. And communities eager for change, along with advocacy groups spearheading prosecutorial reform efforts, have opened the door for a new generation of elected prosecutive leaders to run and win elections.⁸ These new prosecutors have eschewed the old “tough on crime” rhetoric of the 1990s, and are instead focused on using their position to roll back the excesses of mass incarceration.⁹ In Chicago, Brooklyn, and Philadelphia – some of the most populous jurisdictions in America – reform prosecutors ran and won by promising to *not* charge people for lower level criminal conduct, to seek bail only if absolutely necessary, and to embrace public health

2. Press Release, Off. of the State's Att'y for Baltimore City, *State's Attorney Mosby Testifies Before Congress in Support of Federal Decriminalization of Marijuana Possession* (July 10, 2019), <https://perma.cc/J5CC-9QB8>.

3. Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law—They're Making It*, APPEAL (Apr. 20, 2018), perma.cc/9ESP-23Y2.

4. See, e.g., Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://perma.cc/232W-PMCF> (“From 2012 to 2015, criminal-justice bills backed by the [Louisiana District Attorney's Association] had an 85 percent rate of passage in the Louisiana Statehouse, while criminal-justice bills it opposed passed only 38 percent of the time”).

5. James Austin & Lauren-Brooke Eisen with James Cullen & Jonathan Frank, *How Many Americans Are Unnecessarily Incarcerated?*, BRENNAN CTR. FOR JUST. (2016), <https://perma.cc/MVG9-XAG4>.

6. John Pfaff, *The Cause of Growth in Prison Admissions and Populations*, SSRN (Jan. 24, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508.

7. German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX (Oct. 11, 2016, 1:50 PM), <https://perma.cc/8C55-HNJE>; see also *Lessons Learned from Germany: Avoiding Unnecessary Incarceration and Limiting Collateral Consequences*, FAIR AND JUST PROSECUTION (2020), <https://perma.cc/7C9X-WQXD>.

8. Emily Bazelon & Miriam Krinsky, Opinion, *There's a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://perma.cc/R6S7-RZCF>.

9. Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://perma.cc/834L-GFQA>.

responses to individuals' substance use disorder or mental illness.¹⁰ They also are using their position to hold police accountable for police violence,¹¹ and to promote a justice system grounded in fairness, equity, and compassion.¹² The movement is not limited to big cities, however. Jurisdictions as diverse in size and demographics as Corpus Christi, TX; Oshkosh, WI; and Durham, NC all boast reformers in the elected prosecutor position. And, although the movement is often referred to as "progressive," the principles here are embraced by prosecutors across the political spectrum.¹³

III. THE WORK OF FAIR AND JUST PROSECUTION AND ORIGIN OF THE 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR

Fair and Just Prosecution was founded as a non-profit organization in 2017 in response to an influx of reform-minded candidates winning DA elections around the country.¹⁴ Our organization brings together elected local prosecutors committed to rethinking the traditional role of the prosecutor. We support these leaders through ongoing information sharing, research, opportunities for on-the-ground learning, in-person convenings, technical assistance, and access to criminal justice experts.

As we continued to work with a growing number of elected prosecutors, one question arose with increasing frequency: "what does it mean for a prosecutor to be reform-minded?" Although many of these prosecutors were working with other criminal justice stakeholders to implement different local reforms aimed at lowering prison and jail populations and shrinking the criminal legal system footprint, there was no central unifying description or enumeration of what these prosecutors should be doing to rethink and reshape the criminal legal system.¹⁵

10. *Harm Reduction Responses to Drug Use*, FAIR AND JUST PROSECUTION (2019), <https://perma.cc/R3E4-N4RT>; *Improving Justice System Responses to Individuals with Mental Illness*, FAIR AND JUST PROSECUTION (2018), <https://perma.cc/2NNB-K44D>; *Effective Collaborative Responses to Individuals with Mental Illness: A Compendium of Models from Across the Nation*, FAIR AND JUST PROSECUTION (2018), <https://perma.cc/5WFR-XPVC>.

11. *Promoting Independent Police Accountability Mechanisms*, FAIR AND JUST PROSECUTION (2017), <https://perma.cc/D6EF-LZHH>.

12. *Building Community Trust: Procedural Justice: Enhancing the Legitimacy of the Justice System*, FAIR AND JUST PROSECUTION (2017), <https://perma.cc/7LW3-X5ZM>.

13. See, e.g., Bethanie Gengler, *Land of the Free or Land of the Incarcerated?*, ADVANCE-TITAN (Oct. 31, 2019), <https://perma.cc/958M-T86M> (highlighting the reform agenda of the Republican District Attorney of Winnebago County, WI, Christian Gossett); see also Memorandum from Suffolk County District Attorney Rachael Rollins (Mar. 25, 2019), <https://perma.cc/N6PB-9DVM> (outlining the policy reforms of the Democratic District Attorney of Suffolk County, MA, Rachael Rollins).

14. FAIR AND JUST PROSECUTION, <https://perma.cc/R7YC-JSQ5>.

15. Although slightly contextual, other criminal justice stakeholders might include public defenders, police departments, the judiciary, and corrections, among others.

21 Principles for the 21st Century Prosecutor sought to address that question, while also providing guidance for the field of prosecution overall.¹⁶ We hoped to create a roadmap for prosecutors interested in embracing a new vision of prosecution. We also hoped to give a rubric to communities and advocacy groups who were looking for guidance on how they could hold local elected prosecutors accountable.

FJP collaborated on these principles with wonderful partners at the Brennan Center for Justice, The Justice Collaborative, and Emily Bazelon of Yale Law School.¹⁷ This team of criminal justice experts and practitioners worked collectively for six months over the spring, summer, and fall of 2018 to negotiate, debate, research, and fine-tune these principles. Realizing the list could not be endless, we worked to condense an original list of numerous (and dozens) of issues important to reform down to a core group of fundamental tenets.

The resulting 21 principles are organized around two key pillars – reducing incarceration and increasing fairness and accountability. Once drafted, we sought input from elected DAs, senior staff in prosecutor offices, defense attorneys, legal academics, and advocates.¹⁸ With their feedback, we retooled and refined

16. *21 Principles for the 21st Century Prosecutor*, FAIR AND JUST PROSECUTION (2018), <https://perma.cc/3DRW-U8ZH>.

17. This project was overseen and managed by Emily Bazelon (author of the book *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*), Lauren-Brooke Eisen (Senior Fellow at the Brennan Center's Justice Program and Training and Curriculum Advisor for Fair and Just Prosecution), Miriam Krinsky (Executive Director of Fair and Just Prosecution), and Jake Sussman (Managing Director of The Justice Collaborative). The project also received invaluable support from, and would not have been possible without the work of the following individuals, who were with the following entities at that time: FJP staff Buki Baruwa, Emily Bloomenthal, John Butler, Hannah Raskin-Gross, Courtney Khademi, Liz Komar, Julius Lang, Marie Lively, Meghan Nayak, Scarlet Neath, Rosemary Nidiry, Taylor Phares, Andy Schwarm, and Greg Srolestar; Justice Collaborative staff Jessica Brand, Sarah Lustbader, Jevhon Rivers, and Rob Smith; Bryan Furst, Katz Fellow at the Brennan Center; Columbia Law student David Alpert; Yale Law students Katya Botchkina, Sam Breidbart, and Laurel Raymond; and Yale College student Brett Greene.

18. The project relied on the helpful comments of the following experts and practitioners who served in the following positions at that time: Roy Austin, Partner, Harris, Wiltshire & Grannis LLP, former Deputy Assistant to the President for Urban Affairs, Justice and Opportunity, White House Domestic Policy Council; Dana Bazelon, Senior Policy Counsel, Philadelphia District Attorney's Office; Rose Cahn, Criminal and Immigrant Justice Attorney, Immigrant Post-Conviction Relief Project, Immigrant Legal Resource Center; Lisa Foster, Co-Director, Fines and Fees Justice Center; Karen Friedman-Agnifilo, Chief Assistant District Attorney, Manhattan District Attorney's Office; Seema Gajwani, Special Counsel for Juvenile Justice Reform, District of Columbia Office of the Attorney General; Mac Heavener, Chief Assistant State Attorney, 4th Judicial Circuit (Jacksonville) State Attorney's Office; Kristin Henning, Blume Professor of Law, Director, Juvenile Justice Clinic, and Associate Dean for Clinics, Centers and Institutes at Georgetown Law; Brook Hopkins, Executive Director, Criminal Justice Policy Program, Harvard Law School; Venus Johnson, Assistant District Attorney, Contra Costa County District Attorney's Office; Beth McCann, District Attorney, 2nd Judicial District (Denver), Colorado; Mitali Nagrecha, Director, National Criminal Justice Debt Initiative; Melissa W. Nelson, State Attorney, 4th Judicial Circuit (Jacksonville), Florida; Courtney M. Oliva, Executive Director, Center on the Administration of Criminal Law, NYU

these principles.

These principles are intended to be clear, concise, and practical. Though obviously aimed at changing prosecutor behavior, we also tried to ensure they would be accessible to non-lawyers who might be looking for resources to learn how to hold their local elected prosecutor accountable. We refrained from being overly detailed to allow for differences in jurisdictions, including state laws and local regulation, that may require flexibility in application.

While there is no single policy or reform that automatically makes a prosecutor “reform minded,” these principles provide guidance that pushes prosecutive leaders to be bolder in advancing their efforts to reform the criminal legal system. And with each principle we included a concrete example where the principle has been put into action effectively – thereby underscoring that these reforms are not illusory.

The principles outlined here may not go as far as some would hope, given that they operate in the confines of the current system. The vision outlined here *is* achievable, however, and it pushes the envelope. No office is currently doing *everything* we suggest. Even the most ambitious offices still have work to do to satisfy these recommendations, leaving room for advocates and reformers to hold even the most reform-minded prosecutor accountable for further progress.

The impact of these principles has exceeded our initial expectations. Some elected prosecutors have requested printed copies to distribute to their entire staff, some have used these principles as a guide for interviews when hiring new staff, and candidates running for DA have used them to craft their platforms. These principles have even been used internationally by prosecutors and law enforcement leaders and were used as an anchor for a prosecutor convening in Nairobi, Kenya. With the onset of the COVID-19 pandemic, these principles have also provided the foundation for reforms and recommendations to shrink the carceral population and limit contact with the justice system in the midst of a public health crisis.¹⁹ After the murder of George Floyd, these principles – and further build out of these concepts by FJP – have been instrumental in encouraging changes that promote racial justice and guiding communities towards evidence-based police reform.²⁰

It takes time for cultures to adapt and accept change, and lawyers have never been known to quickly embrace new thinking! And not surprisingly, as adoption of these principles grows, so too does the resistance to change. There are those who continue to stand in the way of reform because they are tethered to the status quo. Some leaders, sadly, continue to stoke fear to drive policy back to a tough-

School of Law; Dan Satterberg, Prosecuting Attorney, King County (Seattle), Washington; David Alan Sklansky, Stanley Morrison Professor of Law, Faculty Co-Director, Stanford Criminal Justice Center; and Joanna Weiss, Co-Director, Fines and Fees Justice Center.

19. See *COVID-19 and Mass Incarceration: Innovations and Solutions at a Glance*, FAIR AND JUST PROSECUTION (2020), <https://perma.cc/926V-J78J>.

20. See *Blueprint for Police Accountability and Reform: A New Vision for Policing and the Justice System*, FAIR AND JUST PROSECUTION (2020), <https://perma.cc/V67J-7K4X>.

on-crime approach of the 1980s and 1990s.²¹ But communities are continuing to seek change and electing leaders intent on moving our criminal legal system in new directions, and more voters are paying attention and recognizing the tremendous clout of these elected prosecutors.²²

We hope these principles will continue to motivate prosecutors to evolve and push boundaries. And to help propel those advances, we are excited to be part of new efforts looking for ways to better evaluate success in light of these principles – both for the office and for individual prosecutors within that office.²³ As reformers continue to get elected, we hope that more and more offices will exemplify this starting point and that graduating law students and young lawyers will join offices motivated to adopt and carry out the mandate and visionary thinking outlined within these 21 Principles.²⁴

21. See, e.g., Attorney General William P. Barr, Remarks at the National Sheriffs' Association Winter Legislative and Technology Conference (Feb. 10, 2020), <https://perma.cc/2YHQ-SGGB>; see also Press Release, Fair and Just Prosecution, *Over 40 Elected Prosecutors Denounce Attorney General Barr's Baseless Rant Against Proven Criminal Justice Reforms Taking Hold in Cities Across the Country*, <https://perma.cc/Y9BL-W9M4>.

22. Miriam Krinsky & Carissa Hessick, *Criminal Justice Reform on the Ballot Across America*, L.A. DAILY NEWS (Mar. 25, 2020, 11:29 AM), <https://perma.cc/26XW-7UR2>.

23. Andrew Pantazi, *What Makes a Good Prosecutor? A New Study of Melissa Nelson's Office Hopes to Find Out*, JACKSONVILLE.COM (Mar. 9, 2018, 5:18 AM), <https://perma.cc/VJQ6-WW3K>; see also *Setting a Vision for the 21st Century Prosecutor*, BRENNAN CTR. FOR JUSTICE (2018), <https://perma.cc/XKP6-CFXM>.

24. *21 Principles for the 21st Century Prosecutor* can be found online, published on FJP's website. See *21 Principles for the 21st Century Prosecutor*, *supra* note 17.