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## HOW CONSERVATIVES CAN MAKE PROSECUTION MORE PRODUCTIVE

By Lars Trautman

### INTRODUCTION

As defined by convictions, sentence lengths, and the relentless enforcement of the law, for decades, conservatives have prized “toughness” above all other attributes in assessing a prosecutor’s worth. Indeed, until recently, this same mindset permeated conservatives’ approach to nearly every other aspect of the criminal justice system.

But then something interesting happened. Starting in Texas and quickly spreading to other “red” states and beyond, conservatives began to realize that mentality actually undermined the very goals they were pursuing.<sup>1</sup> From public safety to fiscal probity, individual liberty to human dignity, a “smart on crime” approach that addressed underlying causes of crime proved better able to deliver than the old status quo that all too often relied on incarceration as the antidote to

1. Arthur Rizer and Lars Trautman, “Where the Right Went Wrong on Criminal Justice,” *The American Conservative*, July 6, 2018. <https://www.theamericanconservative.com/articles/where-the-right-went-wrong-on-criminal-justice>.

### CONTENTS

Introduction	1
Ideology	2
Public Safety	2
Fiscal Responsibility	2
Individual Liberty	3
Life and Family	3
Politics and Practice	3
Policy	4
Charging	4
Pretrial Release and Bail	5
Discovery	5
Sentencing	5
Conviction Integrity	6
Transparency	6
Conclusion	6
About the Author	6

societal ills. Reform has followed in nearly every state<sup>2</sup> and even managed to pass a notoriously divided Congress.<sup>3</sup>

The legislative focus of these conservative efforts to date, however, belies the intrinsically local nature of criminal justice. The fates of the overwhelming majority of individuals who come into contact with the criminal justice system are determined by a collection of county, town and city officials. Perhaps foremost among these is the local district attorney.<sup>4</sup> After all, while a judge may act as the king in his court, only the district attorney has the ability to influence criminal proceedings in every single courtroom across her jurisdiction.

The district attorney’s office is thus a natural channel for new criminal justice ideas. This realization has helped to propel a growing movement on the political left to elect “progressive prosecutors” who wield the broad powers of the office to further liberal criminal justice goals relating to decarceration and racial justice, among others.<sup>5</sup> Plaudits have come

2. “35 States Reform Criminal Justice Policies Through Justice Reinvestment,” The Pew Charitable Trusts, July 11, 2018. <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/07/35-states-reform-criminal-justice-policies-through-justice-reinvestment>.

3. Ames Grawert and Tim Lau, “How the FIRST STEP Act Became Law – and What Happens Next,” The Brennan Center, Jan. 4, 2019. <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

4. Jurisdictions utilize a variety of terms for their chief prosecutor, including district attorney, state attorney and prosecuting attorney. For simplicity’s sake, this paper will use district attorney throughout.

5. Del Quentin Wilber, “Once tough-on-crime prosecutors now push progressive reforms,” *The Los Angeles Times*, Aug. 5, 2019. <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms>.

from all corners for many of these efforts<sup>6</sup> and the result is a coherent narrative around what it means to be a liberal-minded prosecutor in the twenty-first century.

Of course, plenty of reasonable and just prosecutors have no aspirations to ever wear the “progressive” label, nor would their constituents want them to. This raises two related questions for prosecutors who reject this progressive mold, yet nevertheless yearn to be smarter and more evenhanded than their predecessors: can the disruption of traditional prosecutorial practices align with a more conservative worldview and what does the center-right path toward more fair and effective prosecution look like?

The answer is that a conservative prosecutor can and should challenge current prosecutorial practices by striving to become a more productive prosecutor in the broader sense of the term. This means ensuring that every prosecutorial decision is productive insofar as it produces an outcome that actually improves community wellbeing. It requires a subtle understanding that a charge, conviction or sentence is not itself the outcome, merely a factor building toward one that includes a safer community and rehabilitated defendant. Ultimately, trading a penchant for tough prosecutors for those who are productive in this manner will allow conservatives to forge a more constructive prosecutorial identity that does a better job of efficiently pursuing justice and keeping their communities secure and whole.

## IDEOLOGY

The conservative appeal of more productive prosecution lies in its ability to advance four overarching conservative criminal justice values and priorities. Specifically, it holds the potential to improve public safety, display fiscal restraint, safeguard due process, and better respect the value of life and individual dignity. In so doing, a conservative approach to criminal justice not only countenances a more productive vision of prosecution, it practically demands it.

## Public Safety

For conservatives, the core prosecutorial function is to pursue justice in a manner that promotes public safety. In this view, one can judge the merits of a particular policy or action, or even a given prosecutor herself, in large part by whether or not the public is safer for it. It is a test that seems simple enough in theory, yet has proven bedeviling in prac-

tice. Without some universal safety measure available—even crimes rates are ambiguous in terms of which crime(s) to count—prosecutors and politicians have traditionally adopted incarceration as a stand-in for safety and cash bail as a proxy for risk in pretrial decisions.

This shorthand may streamline campaign arguments, but it does not always actually achieve its purported goal: safety. For example, even the brief detention of low-risk individuals can increase the odds that they will commit a new offense upon release,<sup>7</sup> and choosing incarceration over probation may lead to only negligible public safety gains.<sup>8</sup> Likewise, cash bail is only roughly aligned with risk. Relying on it to protect the community during the pretrial process raises the probability that dangerous yet wealthy defendants will walk free while harmless, poorer ones will languish in a cell. Prosecutorial policies that utilize alternatives to incarceration and avoid the incessant use of cash bail can avoid many of these pitfalls.

## Fiscal Responsibility

While even some conservatives might be willing to say that cost is no issue so long as a measure improves public safety, the fact of the matter is that most prosecutor’s offices are operating under tight budgetary constraints. Every charge filed and case pursued represents valuable personnel time and resources diverted from another prosecution. This means that policies that reflexively prosecute all violations, however minor, can starve investigations of much more serious conduct. In a world of finite resources, quality and quantity are—to some extent—mutually exclusive. Thus, while it may seem counterintuitive, sometimes the best way to advance public safety is with fewer rather than additional prosecutions.

And, of course, cost is an issue. For many conservatives it is *the* issue. Reigning in the scope of government spending has long been one of the great animating forces for conservatives. Indeed, a looming fiscal crisis was responsible for the initial reforms in Texas that helped kick-start the whole conservative criminal justice reform movement.<sup>9</sup> The imperative to chip away at the breathtaking costs of the criminal justice system has influenced policy ever since.

6. See, e.g., commentary on Philadelphia district attorney Larry Krasner, which includes praise from conservatives and liberals. Arthur Rizer and Alyse Ullery, “What conservatives should like about Larry Krasner’s criminal justice ideals,” *The Philadelphia Inquirer*, Feb. 20, 2018. <https://www.inquirer.com/philly/opinion/commentary/larry-krasner-philadelphia-district-attorney-20180220.html>; Jennifer Gonnerman, “Larry Krasner’s Campaign to End Mass Incarceration,” *The New Yorker*, Oct. 22, 2018. <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>.

7. Christopher T. Lowenkamp et al., “The Hidden Costs of Pretrial Detention,” The Laura and John Arnold Foundation, November 2013. [https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF\\_Report\\_hidden-costs\\_FNL.pdf](https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf).

8. David J. Harding et al., “A natural experiment study of the effects of imprisonment on violence in the community,” *Nature Human Behaviour* 3 (July 2019), pp. 671-77. <https://www.nature.com/articles/s41562-019-0604-8.epdf>.

9. Lars Trautman and Arthur Rizer, “Conserving Criminal-Justice Reform,” *National Affairs*, June 2018. [https://www.rstreet.org/wp-content/uploads/2018/06/Rizer\\_Gal-lev1-1-1.pdf](https://www.rstreet.org/wp-content/uploads/2018/06/Rizer_Gal-lev1-1-1.pdf).

Prosecutors hold many of the levers that either inflate these costs or lower them. Through charging, bail and sentencing decisions, they directly influence the number of individuals entering the system, held in custody or otherwise subject to its supervision. Policies that reduce any of these figures can directly conserve taxpayer dollars and indirectly benefit local economies by keeping defendants in their communities, ensuring that they have a chance to fulfill work and childcare obligations.

## Individual Liberty

In addition to constraining the size of government in terms of dollars and cents, conservatives have long sought to limit its ability to interfere with the freedom and interests of the individual. At first glance, prosecutors may seem a curious choice of agent to advance these tenets—after all, their job entails the assertion of societal interests over those of the individual. But neither conservative views nor those of prosecutors are nearly so narrow. Conservatives balance individual rights with the need to live in an ordered and safe society, while prosecutors take special pride in the fact that their mandate is not merely to win a case, but to reach a just result.

This discretion not only sets prosecutors apart from their defense counterparts, it means that their mission can actually be complementary to the protection of individual rights.<sup>10</sup> For example, unnecessary or unduly serious charges can dramatically increase a defendant's potential sentence, thereby providing an incentive to plead guilty irrespective of their actual guilt. Not only does this inculcate the wrong individual, in some cases, it will allow the real perpetrator to remain at large. Prosecutors can lower the odds of this occurring through more parsimonious charging and restrained plea bargaining policies, thereby serving both the interests of prosecution and individual liberty.

## Life and Family

The final relevant goal of conservatism is an appreciation of life and the value of family. The most common expression of these values in the prosecutorial realm has generally related to a prosecutor's obligation to help keep families safe from the scourge of crime and violence. Although a critical component of a prosecutor's charge, this is only one part of the story.

That is because there are more families to be considered than just those of potential victims. There are also those of potential defendants. As an initial matter, these two groups are not

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10. As part of his articulation of a theoretical framework of prosecutors as "servants-of-the-law," Jeffrey Bellin outlines in detail how prosecutors would inevitably support many of these individual rights simply through rigorous fidelity to the law and constitutional principles. See Jeffrey Bellin, "Theories of Prosecution," *California Law Review* (Forthcoming 2020). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3347939](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347939).

nearly as distinct as popular rhetoric makes them appear.<sup>11</sup> But even when they are, a defendant's family is no more culpable than a victim's in most instances and equally worthy of regard. Using prosecutorial prerogatives to remove a defendant from society necessarily entails his removal from family too, with all the rippling impacts on spouses, parents and children that it involves. Such disruption may be the inescapable consequence of a defendant's actions, but reserving it for only the most egregious cases is one of the surest ways that a prosecutor can support the families under her charge.

## POLITICS AND PRACTICE

Although an updated prosecutorial identity represents a strong principled stand for conservative prosecutors, it potentially neatly aligns with political incentives as well. Put differently, it tends to find that uncommon sweet spot in public life in which the right thing to do is also the popular one. Polls routinely find broad and deep support for all manner of criminal justice reform goals and a system that is more rehabilitative and less punitive.<sup>12</sup> More limited polling suggests that these attitudes are beginning to extend to prosecutorial offices.<sup>13</sup>

This all makes sense. Prosecutors can fulfill many of the desires expressed by potential voters. For example, one national poll found that 80 percent of Americans, including 69 percent of Republicans, agreed that certain crimes do not warrant pretrial detention.<sup>14</sup> Judges may order these detentions, but prosecutors can usually avoid this situation by altering their own requests. Likewise, shorter sentences<sup>15</sup> and an increased use of alternatives to incarceration like probation have proven exceedingly popular,<sup>16</sup> two outcomes over which prosecutorial decisions have enormous influence.

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11. Criminal defendants have especially high rates of prior trauma, meaning that many were themselves victims in the past. Similarly, victims and perpetrators are frequently drawn from the same neighborhoods, further increasing the overlap between the two groups. See Lena J. Jaggi et al., "The Relationship between Trauma, Arrest, and Incarceration History among Black Americans: Findings from the National Survey of American Life," *Society and Mental Health* 6:3 (November 2017). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5079438>.

12. See, e.g., Robert Blizzard, "National Poll Results," Public Opinion Strategies, Jan. 25, 2018. <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-efff82be0001>; "Americans on Sentencing Reform," Program for Public Consultation, School of Public Policy, University of Maryland, August 2018. [http://www.publicconsultation.org/wp-content/uploads/2018/08/Sentencing\\_Slides0818.pdf](http://www.publicconsultation.org/wp-content/uploads/2018/08/Sentencing_Slides0818.pdf).

13. "Voter Opinion Towards Prosecutors Prior to 2018 Elections," David Binder Research, Dec. 12, 2017. <https://www.aclu.org/fact-sheet/new-polling-voters-opinions-towards-prosecutors>.

14. "Americans Favor Expanded Pretrial Release, Limited Use of Jail," The Pew Charitable Trusts, November 2018, p. 6. [https://www.pewtrusts.org/-/media/assets/2018/11/pspp\\_public\\_favors\\_expansion.pdf](https://www.pewtrusts.org/-/media/assets/2018/11/pspp_public_favors_expansion.pdf).

15. "Americans on Sentencing Reform." [http://www.publicconsultation.org/wp-content/uploads/2018/08/Sentencing\\_Slides0818.pdf](http://www.publicconsultation.org/wp-content/uploads/2018/08/Sentencing_Slides0818.pdf).

16. Blizzard. <https://www.politico.com/f/?id=00000161-2ccc-da2c-a963-efff82be0001>.

Yet, however persuasive the case made by principle and public opinion, one mental stumbling block remains between many conservative prosecutors and more assertive actions: namely, the idea that the formulation of Policy with a capital “P” is the province of the legislature. In this view, a prosecutor should strive to insulate herself from these wider policy debates and instead focus on the capable administration of legislatively determined policy.<sup>17</sup>

This may sound appealing in theory, but it is never quite so clean or clear in practice. The legislature proscribes certain conduct, sets out sanctions and helps write the rules under which the system operates. But the law cannot reasonably detail rules and responses for every situation, rendering unanswered a host of important questions. For instance, which cases get priority, how many and which charges ought to be filed and where within a particular bail or sentencing range should a recommendation fall? These are questions that only a prosecutor can answer.

This is actually a feature of the system, not a bug. Far from some usurpation of authority, it represents a wonderful delegation of it that leads to more local control of the criminal justice process. This allows for a system better tailored to local conditions, culture and concerns—an outcome that conservatives generally cheer. As such, prosecutorial-led Policy is not only inevitable but beneficial, and prosecutors ought to embrace their ability to construct local Policy rather than fear how their actions might contribute to it.

## POLICY

Accepting that bucking the status quo can be a conservative act and that a prosecutor can be its instrument is just the start. Good intentions only get one so far; plans and policies are necessary to turn them into reality. Thankfully, each stage of the criminal justice process provides its own opportunities for a more productive prosecutor to improve prosecutorial efficiency and the delivery of justice.

## Charging

For most cases, prosecutorial involvement begins with the charging decision, an instance of almost unfettered discretion in which the prosecutor decides whether an individual will enter the criminal justice system and under what conditions. For these reasons, it also represents one of the most effective areas for reform. When it comes to charging, parsimony is the order of the day. This means, in effect, two

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17. See, e.g., U.S. Attorney William M. McSwain’s comments: “The role of the prosecutor in America today is clearly to enforce the law, and not to make the law and not to pretend that you’re a legislator” in Mark Berman, “These prosecutors won office vowing to fight the system. Now, the system is fighting back,” *The Washington Post*, Nov. 9, 2019. [https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afcl-1le9-a0c9-6d2d7818f3da\\_story.html](https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afcl-1le9-a0c9-6d2d7818f3da_story.html).

things: issue the fewest charges practicable and the least serious charges appropriate.

Although the first concept is relevant for all conceivable cases, it holds the most potential to alter the course of low-level misdemeanor prosecutions. These relatively minor transgressions often clog dockets and draw a level of prosecutorial time not always matched by their seriousness.<sup>18</sup> Even small changes to charging policies can therefore free up significant prosecutorial resources and affect a large number of prospective defendants. At the same time, the minor nature of these offenses makes them more suitable for various alternatives to prosecution, such as diversion, treatment or community service. Indeed, well-constructed alternatives can even prove more successful than traditional prosecution.<sup>19</sup> As a result, policies that favor alternatives to prosecution for these offenses represent an excellent starting point for a prosecutor looking to reexamine her charging policy.

Sometimes, alterations to these policies may not even be as revolutionary as they first appear. For many low-level charges, for example, dismissal or other adjudications short of conviction are already quite common. Using data to identify which offenses are frequently disposed of in this manner can help offices match official policy with actual prosecutorial practice. Instead of diverting or dismissing a case after a few hearings and the resulting prosecutorial time invested, they can do so upfront. Indeed, the district attorney in Mecklenburg County, North Carolina employed this strategy to streamline drug cases, thereby saving hundreds of hours of prosecutorial time and preventing defendants from accruing unnecessary criminal cases.<sup>20</sup>

Of course, numerous offenses do not deserve anything close to an alternative to prosecution. A more restrained charging policy can nevertheless help ensure that a guilty plea reflects actual guilt and that today’s defendants are less likely to become tomorrow’s too. Charging every possible offense for which there is probable cause makes for a straightforward policy, yet it raises the risk that an ensuing plea reflects the weight of the charges rather than the strength of the evidence—a recipe for false pleas.

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18. For reference, around 80 percent of cases filed nationally are misdemeanors, which amounts to over 13 million misdemeanor cases annually. See Alexandra Natapoff, “Punishment Without Crime’ Highlights The Injustice Of America’s Misdemeanor System,” NPR, Jan. 2, 2019. <https://www.npr.org/2019/01/02/681606995/punishment-without-crime-argues-that-americas-misdemeanor-system-targets-the-poo>.

19. Michael Rempel et al., “NIJ’s Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness,” Center for Court Innovation, April 2018. <https://www.ncjrs.gov/pdffiles1/nij/grants/251665.pdf>.

20. Wayne McKenzie et al., “Prosecution and Racial Justice,” Vera Institute of Justice, March 2009, p. 7. [https://storage.googleapis.com/vera-web-assets/downloads/Publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution/legacy\\_downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution/legacy_downloads/Using-data-to-advance-fairness-in-criminal-prosecution.pdf).

Even where a plea rings true, felony convictions in particular can hamstring a defendant's ability to reenter society productively. The stigma and employment barriers erected by this kind of criminal record can make success elusive and a return to the criminal justice system seemingly inevitable.<sup>21</sup> Charging misdemeanors instead of felonies where practicable and only those felonies most suited to a particular case can help to shut this revolving door to the justice system, thereby improving public safety and reducing future prosecutorial burdens.

## Pretrial Release and Bail

Pretrial release decisions do not afford prosecutors the same kind of unilateral control as charging ones, as the final decision is a judge's. Yet prosecutors nevertheless wield incredible influence over the process. Through their pretrial requests, prosecutors can push judges to better match the pretrial decision in each case to the actual risk posed by the defendant. This can help eliminate unnecessary detentions that waste taxpayer dollars and deprive individuals of their liberty. It can also reduce the chances of higher-risk individuals walking free with insufficient conditions to guarantee their conduct.

Cash bail remains a primary contributor to these problems and an area over which prosecutors exert special influence, making it a natural starting point for revisions to pretrial prosecutorial practices. A revised cash bail policy ought to aim to address two things. First, offices should consider eliminating or scaling back their use of cash bail for lower-level offenses. As the district attorney in Winnebago County, Wisconsin discovered, even bail as low as \$500 or less can lead to a disproportionate number of detentions. In his case, these bails were responsible for about 40 percent of his jail's population.<sup>22</sup> In other words, prosecutors should not assume that even low bails are preludes to release.

Second, prosecutors should support pretrial services and other programs that can break the reliance on cash bail as the primary, if not sole, pretrial condition available. Robust pretrial services can provide GPS monitoring and other less-intensive interventions that can serve as a lower cost and more reliable pretrial release mechanism than cash bail.<sup>23</sup> Even something as simple as text reminders for defendants has been shown to significantly improve court attendance

rates; one leading study examining New York City found a 26 percent decrease in failures to appear following their adoption.<sup>24</sup> These kinds of programs and options can better match response to risk, achieving the public safety interests of prosecutors while saving taxpayer money and allowing defendants to remain in the community.

## Discovery

Discovery practices may not receive the same kind of fanfare as pretrial release decisions, but prosecutors should not confuse this lack of visibility with a lack of importance. It can be easy to tailor prosecutorial discovery policies merely to court rulings such as *Brady v. Maryland*,<sup>25</sup> or other legal requirements. Yet this represents only what must be turned over to defense counsel, not what should be provided to them.

Instead, prosecutors ought to design a discovery policy that puts a premium on early and expansive discovery. The quicker discovery obligations are fulfilled, the sooner the prosecution and defense can get on (or near) the same page on the relevant facts of the case, which can save time and money by facilitating earlier case resolutions. Electronic discovery (e-discovery), which allows for the transfer of many forms of discovery online, represents an excellent investment that makes it easier for prosecutors to turn over discovery. It can also create a digital record of everything that prosecutors have provided to defense counsel, preventing any later debate in court over whether the prosecution has fulfilled its obligations. Expansive discovery, on the other hand, is essential to protecting due process and avoiding unbalanced plea negotiations or trials that risk confounding prosecutorial objectives by potentially placing the wrong individual behind bars.

## Sentencing

Moving away from the traditional prosecutorial sentencing culture that tends to associate a longer sentence with a better one may represent one of the more difficult shifts for a prosecutor to make. This means constructing sentencing recommendations that are a bit more forward thinking than many typically are today. In addition to expressing societal outrage at the defendant's conduct or the harm they caused, a sentence ought to reflect its costs to society and its ability to shape a defendant's future behavior for the better. Cost considerations include those of the sentence itself: for example, does it make sense to spend tens of thousands of dollars to incarcerate someone for the theft of a few hun-

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21. See, e.g., "Collateral Consequences of Criminal Convictions: Judicial Bench Book," American Bar Association, March 2008. <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf>.

22. "Failure to Pay Low Monetary Bail," Measures for Justice, last accessed Jan. 23, 2020. <https://measuresforjustice.org/portal/exploration?l=Wl&m=8&sl=Wl139&sm=8&fg=1&f=1&c=m&p=Wl013,Wl139&md=0&ef=8.1>.

23. See, e.g., Courtney Lam, "Pretrial Services: An Effective Alternative to Monetary Bail," Center on Juvenile and Criminal Justice, July 2014. [http://www.cjci.org/uploads/cjci/documents/cjci\\_pretrial\\_reform\\_july\\_2014.pdf](http://www.cjci.org/uploads/cjci/documents/cjci_pretrial_reform_july_2014.pdf).

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24. Brice Cooke et al., "Using Behavioral Science to Improve Criminal Justice Outcomes," University of Chicago Crime Lab, January 2018, p. 4. <https://urbanlabs.uchicago.edu/projects/using-behavioral-science-to-improve-criminal-justice-outcomes>.

25. *Brady v. Maryland*, 373 U.S. 83 (1963). <https://supreme.justia.com/cases/federal/us/373/83>.

dred dollars of merchandise? It ought to also include how a sentence might undermine a defendant's ability to productively reenter the workforce and society: will incarceration or onerous probationary conditions result in a defendant losing his job and with it his ability to pay victim restitution or support a family?

### Conviction Integrity

The pursuit of justice does not always stop at conviction, either. Prosecutors and other actors in the criminal justice system are only human and, as such, they will make mistakes even in the best of circumstances. Unlike many other professions, however, these mistakes can deprive individuals of their freedom and the community of its just result. The establishment of a conviction integrity unit can help redress any errors that may have occurred and, in the process, even save the state money through avoided incarceration or appellate costs.

### Transparency

Throughout the criminal justice process, prosecutors can benefit electorally and in court through enhanced transparency efforts. This means releasing to the public as much information as is feasible, including any case data and written office policies. Potential voters have indicated a preference for district attorneys with these kinds of open office policies,<sup>26</sup> while a better relationship with the community can benefit prosecutors through more cooperative witnesses and receptive jurors. It can also improve the policy and actions of the prosecutors themselves. After all, if they cannot withstand wider scrutiny, then they may be worthy of reconsideration.

### CONCLUSION

The era in which “toughness” alone could serve as the measure of a prosecutor's worth is over. The same winds of change that have swept over nearly every other part of the criminal justice system have begun to blow into prosecutors' offices. Far from a cause of concern, this should serve as a source of opportunity. Just as conservatives helped usher in smarter and fairer policies elsewhere in the justice system, they can be part of the leading edge of revisions to prosecutorial practices and culture.

Adopting a revised prosecutorial identity that prioritizes deliberation and restraint while working to marry prosecutorial goals with conservative principles can help prosecutors promote justice more fairly and effectively. This can

result in a criminal justice system more attuned to local concerns and needs, and which is better able to improve public safety at lower cost, all while supporting families and the community. The public has begun to show that it is ready for this new kind of prosecutor that opts for actual, productive actions over those that simply appear tough. It is time for conservatives to deliver it.

### ABOUT THE AUTHOR

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26. For example, 85 percent of voters indicated in one poll that they favor prosecutors who believe in sharing data with the public. See, e.g., Binder. <https://www.aclu.org/fact-sheet/new-polling-voters-opinions-towards-prosecutors>.