

The Desired Outcome of the Federal Criminal Justice System: More Statistics or Less Crime?



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(2009–2017)

I. Introduction

Why do we have a criminal justice system? Any fourth grade class could tell you: it is to make their community safer. But sometimes, as with all systems in a bureaucracy, it is possible to lose sight of that ultimate goal and operate in ways that are inimical to it or at least not as well aligned as they could be with desired outcomes.

This is the case with the criminal justice system in the United States, which stakeholders from across the political spectrum have roundly criticized. The criticism was perhaps best summed up in a joint editorial penned by Delaware Democratic Senator Chris Coons and his Republican colleague, Senator Thom Tillis from North Carolina. Noting their disagreement on many issues of policy, they suggested readers might also think they had differences on crime and punishment, but noted, “That’s not the case. We share a strong belief that America’s criminal justice system is broken, focusing far too much on criminalization and incarceration and far too little on rehabilitation.”¹

Concerns about the system proliferated as bipartisan consensus on the need for criminal justice reform increased over the last decade.² Critics have pointed to mass incarceration, the war on drugs, and the criminalization of poverty as elements of the problem.³ Other questions have been more issue specific, focusing, for instance, on whether the federal government should continue to expend resources on investigating and prosecuting marijuana-related offenses.⁴ No one suggests we should back away from the goal of reducing crime; rather, the dispute centers on how best to do that.

II. The Failure of Mass Incarceration to Control Crime

Americans became concerned about crime and personal safety in the 1960s.⁵ With rising crime rates in the 1960s and 1970s, the government commenced a war on drugs in the 1980s and passed laws that would deliver a “tough on crime” message. The result has been tremendous growth in the U.S. prison population.⁶ Today, the United States has 5 percent of the world’s population but 25 percent of its prison population. The prison population has increased five-fold since 1970.⁷

Some have argued this increased removal of people who commit crimes from society makes us safer, but increased incarceration has little to do with controlling crime. As the Brennan Center’s landmark 2015 report on crime, based on

40 years of data from all 50 states and the 50 largest cities, concluded:

Increased incarceration at today’s levels has a negligible crime control benefit: Incarceration has been declining in effectiveness as a crime control tactic since before 1980. Since 2000, the effect on the crime rate of increasing incarceration, in other words, adding individuals to the prison population, has been essentially zero. Increased incarceration accounted for approximately 6 percent of the reduction in property crime in the 1990s (this could vary statistically from 0 to 12 percent), and accounted for less than 1 percent of the decline in property crime this century. Increased incarceration has had little effect on the drop in violent crime in the past 24 years. In fact, large states such as California, Michigan, New Jersey, New York, and Texas have all reduced their prison populations while crime has continued to fall.⁸

A report by the Pew Trust took the analysis a step further, attempting to discern whether longer sentences were more effective in reducing future crime. The report concluded that the answer was no, “These more methodologically sophisticated studies still find no significant effect, positive or negative, of longer prison terms on recidivism rates.”⁹

In light of this statistical picture, it’s difficult to understand why mass incarceration, which is after all very costly in both financial and human terms, has not been curbed more substantially. The prison population has begun to decrease slightly in the last few years. According to Bureau of Justice Statistics, 2009 was the first year in 31 years when releases from prison occurred in a larger number than admissions. Crime did not increase in response, in fact violent crime decreased by 4.6 percent and property crime fell by 7.5 percent during the first six months of 2014.¹⁰ Since 1991, violent crime has decreased by 51 percent, while property crime has fallen by 43 percent.¹¹ Although some numbers reflect an increase in crime in 2016, and will bear careful watching, the Bureau of Justice Statistics reports that differences in sampling make it difficult to compare 2016 data to earlier years.¹²

III. Smart on Crime and the Role of Prosecutors

During the Obama Administration, DOJ’s leadership, including U.S. Attorneys nationwide, embraced a new

Federal Sentencing Reporter, Vol. 30, No. 3, pp. 171–176, ISSN 1053-9867, electronic ISSN 1533-8363.
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approach to defining the role of prosecutors in the administration of justice, called “Smart on Crime.”¹³ Challenged to rethink and redefine their roles, under Attorney General Holder and later Attorney General Lynch, U.S. Attorneys embraced an approach that came to be known as the three-legged stool. Along with their traditional role in enforcing and prosecuting crimes, they determined that prosecutors should play leadership roles in implementing both crime prevention programs and successful reentry support for people returning to their homes from prison. The stool could only be properly supported if all three legs were present, meaning that an office that prosecuted, without engaging with other stakeholders in programs that supported prevention and reentry, would be poorly balanced and less effective at enhancing community safety.

Some commentators have questioned whether prosecutors should play or are qualified to play a significant role in criminal justice reform.¹⁴ Rather than viewing prosecutors as change agents, some communities view them with distrust. One county in Utah, for example, has taken steps to create an oversight board to review its prosecutors’ ethical conduct.¹⁵ Yet the experience of the Obama years suggests that federal prosecutors could be the fulcrum in the system. They are the stakeholder that brings to bear convening power and the bully pulpit, along with their unique authority to determine which cases are prosecuted and how they are charged. Meg Reiss, a former state prosecutor who runs the newly created Institute for Innovations in Prosecution at John Jay College in New York, acknowledged that there are some negatives surrounding prosecutors playing such a role because of the opacity of prosecutorial decisions. Yet she suggested:

[prosecutors] have a real moment at this time to step up and make a big change, to really lead in this effort, to be really innovative and forthright in their intentions, to reduce mass incarceration, to address racial disparity in the system, to look for alternatives to oppressive sanctions. We missed so many things and now is the moment.¹⁶

Reiss pointed to innovations coming out of the Manhattan District Attorney’s Office, where data-driven strategies are being used to promote better prosecution practices.

Why should prosecutors lead these efforts? As the stakeholder that uniquely controls prosecutions, it is difficult if not impossible to implement diversion and other programs that are designed to prevent crime without the support of prosecutors. Although some remain skeptical, Reiss noted, “people came to be prosecutors because they really wanted to ensure fairness and increase public safety.” In practice, prosecutors, and specifically U.S. Attorneys can bring together federal and state partners and build unique coalitions that support community safety.

United States Attorneys do not face election, unlike virtually all of their state counterparts, and thus need not fear being labeled “weak on crime” for initiating prevention and reentry programs.¹⁷ They have the convening clout to

bring together stakeholders from across the system to coordinate and deliver new programs designed to reduce incarceration and conserve space in federal prisons, and encourage their state counterparts to similar efforts. In New England, the six U.S. Attorneys in the region partnered in 2016 to bring together stakeholders in the system to coordinate strategy and service availability, and to build the relationships necessary for successful reduction in crime and safer communities.¹⁸ Participants noted that the novel approach made it easier to understand where resources existed that could be used to benefit people reentering their communities from prison and help them achieve their goal of avoiding recidivism. In 2013, the Alabama U.S. Attorneys met with their state counterparts to develop consensus and launch a review of prison and reentry programs¹⁹ that led to the adoption of state prison reform legislation in 2015.²⁰ When President Obama designated the last week of April 2016 Reentry Week, U.S. Attorneys held 200 events across the country to showcase new programs and raise community awareness to achieve more successful outcomes for people who were formerly incarcerated and to reduce recidivism.²¹

IV. The Return to Tough on Crime and Prosecution by the Numbers

Under Attorney General Jeff Sessions, DOJ has rejected the Smart on Crime approach to prosecutions and adopted an approach characterized as “Tough on Crime.” This approach involves a return to earlier policies of charging defendants with the most serious crimes possible and seeking the toughest sentences.²² The change disappointed those who hoped DOJ would continue to play a key role in criminal justice reform.²³ But some see hope in continued DOJ interest in prison reform.²⁴

Sessions has long favored an approach to prosecution that is based on increasing the numbers of prosecutions. During his confirmation hearing, reporters indicated that while he was the U.S. Attorney in South Alabama between 1981 and 1993, he told his hometown newspaper, the *Mobile Register*, “If I were attorney general, the first thing I’d do is see if I couldn’t increase prosecutions by 50 percent.”²⁵ While a U.S. Senator, Sessions was critical of then-Attorney General Eric Holder’s Smart on Crime policies, which directed federal prosecutors to indict fewer but “more serious” cases.²⁶ Sessions’ criticism stemmed from the fact that the number of prosecutions decreased under Holder’s new policies.²⁷

DOJ’s Tough on Crime strategy is a return to older policies of uniformly charging defendants with the most serious crimes and seeking the toughest possible sentences. This repudiation of data-driven criminal justice reform strategies has been disappointing to those who hoped DOJ would continue to play a key role in criminal justice reform. Some see hope in Attorney General Sessions’ continued interest in prison reform,²⁸ even as he returns to charging policies designed to produce the greatest number of prosecutions and rejects sentencing reform.²⁹

V. What Does the Data Tell Us?

The most recent statistical report on federal prosecutions is from 2016. It reflects the number of cases and defendants charged, and indicates broad categories of crime that those cases represent. In addition, it breaks down some of the data by individual offices.³⁰

These annual statistical reports, however, do not offer a qualitative measure of the impact the cases have on public safety. This type of quantitative data, alone, provides an incomplete picture of the work prosecutors do. It fails to inform us whether those prosecutions succeeded in making communities safer. It fails to inform us whether heroin addiction declined or gun violence was reduced as a result of the cases that are accreted into the annual statistical report. And so, we do not know if increasing, or for that matter decreasing, the number of prosecutions has any impact on the ultimate goal of the criminal justice system. That lack of knowledge is a problem for prosecutors.

As long as the data that is available for assessing the work done in U.S. Attorneys' Offices is essentially a widget count—how many cases indicted, how many guilty pleas obtained, how many verdicts at the end of trial—the system will be detached from its goal of making communities safer. It will continue to focus on easily quantifiable numbers and production metrics. At bottom, the product that those metrics assess is how many people prosecutors are sending to prison. It is not hard to see how this works: because the available measure for assessing prosecutors is how many cases they complete, their focus becomes on doing more cases, which ultimately means sending more people to jail.

Prosecuting 5 percent more cases in each successive year does not mean the system is more just or that it is building communities that are safer for people to live and work. The statistics regarding mass incarceration and its lack of effect on crime suggest the contrary. If we focus on prosecution alone and send ever-increasing numbers of people to prison, we are not focused on public safety as our primary goal, no matter how much convictions and inmate numbers appeal to the Tough on Crime ethos.

Because they are convenient, and other metrics have been elusive, DOJ continues to use statistics regarding criminal prosecutions as a benchmark for allocating resources. It is difficult, and likely costly, to develop outcome-based measures for assessment, but if we want a system that best produces the results a criminal justice system should produce, that commitment will have to be made. As long as the primary statistic used to evaluate U.S. Attorneys' Offices and DOJ prosecutors is production numbers—numbers that are used to assess who gets more resources, which offices are “doing their job”—then prosecutors will focus on the numbers of cases they bring and the number of defendants they indict.

This is problematic in at least two ways. First, if prosecutors want to ratchet up the number of cases they are doing, there is one sure-fire method: do simpler cases that can be indicted more quickly. Complex cartel-linked heroin

distribution cases can take years to come together. But prosecuting small, local dealers for felony drug trafficking consumes less time, and the cases are easier to investigate and prosecute. It is easier to prosecute an individual who is in possession of child pornography downloaded from the internet than it is to successfully prosecute individuals engaged in producing it or enticing children for sexual purposes. It takes time to cull through possible cases to identify and prosecute people in this country without legal status who are involved in criminal activity or have a history of violence. It is easier to prosecute cases agents bring involving people who reentered this country illegally after deportation or who are here illegally, but are living lawfully except for being without status. If numbers of cases are the desired outcome, prosecutors can earn approval by taking an approach opposite that advocated for by Smart of Crime policies, pursuing more, but sometimes less significant prosecutions.

Cases that are less complex are not necessarily unimportant. But because prosecutors operate with limited time and resources, we want them to select from among all potential matters they can prosecute based on the quality and impact of those prosecutions, not whether they will provide a quick performance measure designed to bolster success on the metrics. The emphasis on producing case numbers can rob individual prosecutors of the sound discretion they would prefer to exercise.

Second, when the metric is the number of cases that move through the system, prosecutorial priorities are set and targets are created in a manner that is unrelated to the outcomes we desire—justice and safety. Prosecutors whose direction is to worry less about number and more about positive outcomes will spend time talking with state and local law enforcement and the communities they serve. They will develop an understanding of the problems those communities face and the solutions they need prosecutors to implement. When the goal is safer communities, not more indictments, prosecutors are incentivized to ensure the work they are doing creates the outcomes citizens seek.

VI. Conclusion

How do we know which policies move us closer to the goal of safe communities? The answer at present is that we typically don't, at least not in a systematic, data-driven fashion that links the goal of making communities safer to the metrics by which prosecutors are assessed in the federal system. Moreover, in a system where United States Attorneys have little local real-time data available, it is difficult for them to evaluate the impact prosecutions have on public safety and to determine which prosecutions and other programs they undertake are producing desired results.

One way we can move past the political rhetoric that wraps itself around and through crime control policy is by developing benchmarks for prosecution practices that contribute to safety in the community, and do so in a manner that is just and fair. If U.S. Attorneys know that, for instance, a specific reentry program reduces recidivism

or that prosecutions of a certain type reduce heroin overdose deaths, then they will set priorities in accord with that information, rather than focusing on indicting as many cases as possible on a given grand jury.

As long as the only metrics available are production measures that tell prosecutors how many cases are being indicted, how many defendants are proceeding to trial, and so forth, there is the risk that criminal justice policy will be made on the basis of ideology, not data. If we are committed to criminal justice programs that work to make communities safer, then we will set aside resources to develop data that gives prosecutors better indicators for what programs and initiatives support public safety. Then, instead of relying on notional Tough on Crime or Smart on Crime ideas, they can put in place evidence-based best practices. Since available data indicates that increased numbers of prosecutions and skyrocketing incarceration is not strongly correlated with crime reduction, we should develop data and performance metrics that incentivize the types of prosecutions that benefit communities the most, as well as giving prosecutors credit for participation in other types of programs, whether it be community outreach, crime prevention, reentry, or other proven strategies for making communities safer. Prosecutors need and communities deserve standards for evaluating criminal justice work against the standard of whether it enhances public safety.

To achieve these goals, prosecutors must also have the resources to work with reliable political scientists and public health professionals who can help them better understand the impact of their work. They need the training to become savvy data assessors. A factory would not produce red widgets when blue ones were needed. Just so, we should not lock up people for the maximum amount of time the law permits unless data suggests that will reduce crime. Otherwise, we are merely tying up resources and being poor stewards of taxpayer funds. Prosecutors' work must be linked to the goals of the system.

An example may be instructive. In 2011, while I was the United States Attorney in North Alabama, there was a newspaper report of a sharp uptick in heroin overdose deaths in a couple of counties in the District. Federal and local prosecutors and investigators met and determined, based on experiences in each local jurisdiction, that we faced a serious problem. This was ahead of national awareness that an epidemic of heroin and opioid addiction was developing. At the time we lacked uniformly collected or distributed data to help us identify the problem and understand it. We devised a local strategy of focused prosecutions designed to identify and interdict the major supply chains bringing heroin into the Northern District of Alabama, and sought the most serious charges and sentences we could to deter future sales of the deadly drug. We had success in dismantling these supply chains, but given the laws of supply and demand, new sources of supply developed rapidly. We realized the problem was not one we could arrest our way out of, so we worked with public health

leaders to bring the community together for a one-day summit to build awareness of this emerging new threat.

As heroin and prescription drug overdoses became the leading cause of death in Birmingham,³¹ it also became clear that an effective approach from my office did not mean indicting more cases this year than last year. It meant something entirely different. We engaged with stakeholders in the medical, treatment, education, patient, religious, and business communities and developed a community-engaged initiative for awareness, prevention, and treatment of addiction alongside our core work with law enforcement, prosecuting suppliers. If we had maintained our traditional restrictive focus and evaluated our success based on the number of indictments alone, we would have served our community poorly.

The experiential lesson we learned about how prosecutors must set goals and assess whether they are reaching them could not have been plainer. We could have continued to rack up numbers by indicting small felony drug cases, but that would not have been what was best for our community. And this insight is equally true, even if less forcefully delivered, for gun, immigration, child pornography, corruption, and the full panoply of problems federal prosecutors must address. Prosecutors who engage with communities so that prevention and prosecution strategies are undertaken with coordination have the potential to impact public safety in new and effective ways.

Statistics about numbers of indictments, guilty pleas, and trials may be good productivity measures that help managers discern whether their employees are fully engaged, but alone, they do not tell them whether the system is achieving desired outcomes. Priorities should be set to attain an affirmative answer to the question, Is the work we are doing making our community safer? Only then can prosecutors embrace an aggressive agenda, based on the three-legged stool. Properly conducted, prevention and reentry programs, may have a tremendous, positive impact on the community when prosecutors use them as part of their public safety toolkit.

In an era where trust for law enforcement is an increasingly precious commodity, an effort by prosecutors to understand the community's concerns and embrace their needs, crafting prosecution strategies that are consonant with and designed to solve problems, is a wise approach. In addition to being successful in reducing crime, it may also serve to build public trust and reinforce confidence in a system that cannot function effectively without it.

Statistics for 2017, the first partial year for the new Administration, are not yet available, but consistent with its rhetoric and policies, a sharp increase in the number of indictments and people sentenced to prison is expected. What will not be discernable when these statistics are released is whether an increase in community safety accompanies the rising tide of prosecutions.

Production numbers can tell a part of the story, and there is nothing wrong with collecting and using them. But

federal prosecutors and the communities they serve need more than those figures. We can't afford a return to increased prosecutions and incarceration that are very costly but fail to reduce crime. We need to understand how the actions prosecutors take impact community safety and to move forward with policies that are smart and tough, but also fair. Prosecutors need to do more than put people in jail. They need to be leaders in reform. They can play that role only if their success metrics reflect the achievement of public safety goals that will move us toward a criminal justice system that works for everyone.

Notes

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