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The Progressive Prosecutor's Handbook

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Faced with the November election results and the initial steps taken by the new Administration, many criminal justice reformers are turning their eyes to state and county officials, especially to the growing number of local prosecutors who have won office by promising a more thoughtful and evenhanded application of criminal statutes. Suppose you are one of those prosecutors. Imagine you defeated an incumbent you successfully argued was too tied to the past — too much a champion of harsh, racially disproportionate punishment, too heedless of the risk of convicting innocent people, too protective of the police, too lackadaisical in supervising his or her own staff. Since criminal justice is mainly a state and local responsibility, your policies could mean much more for the quality of justice in your jurisdiction than anything that takes place in Washington.¹ You swept to victory promising reform. What do you do now?

Perhaps like Kim Ogg, the new District Attorney in Houston, you pledged during your campaign to restore prosecutorial integrity and

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¹ See Eli Hager, *Against the Trump Tide*, MARSHALL PROJECT (Jan. 25, 2017), <https://www.themarshallproject.org/2017/01/25/against-the-trump-tide>.

protect constitutional rights.² Maybe you echoed the promise of Charles Todd Henderson, the new District Attorney in Birmingham, to seek justice, not just convictions.³ You probably do not have “Not Guilty” tattooed across your chest, like Mark Gonzalez, the new District Attorney in Corpus Christi, but possibly you sympathize with his call for prosecutors to be more thoughtful and selective in filing charges and more scrupulous about disclosing exculpatory evidence.⁴ You may have the same goals as Kim Foxx, the new State’s Attorney in Chicago: restoring public confidence in the criminal justice system, reducing racial disparities, and improving the investigation of police misconduct.⁵

Until quite recently, incumbent prosecutors running for reelection never lost to challengers like Ogg, Henderson, Gonzalez, or Foxx. In fact they rarely lost, period. District attorney races focused overwhelmingly on the candidates’ characters, not on questions of policy, and to the extent that policy questions *were* discussed, the debate often sounded like a bidding war: which candidate would call for the highest sentences and the most aggressive policing? Over the past few years, though, a growing number of chief prosecutors have won office by pledging a more balanced approach to criminal justice — more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration.⁶ That trend continued last November, notwithstanding the national election results.⁷

So assume you are one of these new, reform-minded district attorneys.⁸ You likely have some excellent ideas for changing how

² Brian Rogers, Ogg, *Anderson Locked in Contentious DA Race*, HOUS. CHRON. (Sept. 30, 2016), <http://www.houstonchronicle.com/article/Ogg-Anderson-locked-in-contentious-DA-race-9517875.php>.

³ Sam Prickett, *District Attorney-Elect: We’re Seeking Justice, Not Just Convictions*, WELD FOR BIRMINGHAM (Nov. 30, 2016), <http://www.welddbham.com/blog/2016/11/30/district-attorney>.

⁴ Christopher Hooks, *Is the Best Offense a Good Defense Lawyer?*, TEX. MONTHLY (Nov. 2016), <http://www.texasmonthly.com/politics/best-offense-good-defense-lawyer/>.

⁵ Steve Schmadeke, *Kim Foxx Promises “New Path” of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016), www.chicagotribune.com/ct-kim-foxx-states-attorney-met-20161201-story.html.

⁶ See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. (forthcoming 2017) [hereinafter *Political Landscape*], <https://ssrn.com/abstract=2828803>.

⁷ See Hager, *supra* note 1.

⁸ Your official title may be “State’s Attorney” or “County Attorney,” but for the sake of simplicity I will follow common practice of using the term “district attorney” to refer to any locally elected prosecutor.

your office operates; that is how you got elected. But odds are you also know that being a progressive district attorney is trickier than most outsiders appreciate. That is true for at least two reasons. First, prosecutors' offices are complicated organizations. The largest employ hundreds of lawyers, investigators, and support staff, and even the smallest have cultures that are difficult to change. Second, and more fundamentally, the public expectations for prosecutors — especially chief prosecutors — are varied and often conflicting. We want prosecutors to be dispassionate champions of justice, but we also want them to be zealous and skillful advocates. We don't want prosecutors to take advantage of defendants with weak or overworked lawyers, but we don't want them to be steamrolled by good defense attorneys, either. We want prosecutors to follow the law, but we also want them to exercise discretion and to show mercy. We look to prosecutors — especially chief prosecutors — to work as law enforcement leaders, advising and directing police departments and sheriffs' offices. But we also expect prosecutors to act, at times, like judges, assessing guilt and responsibility objectively and impartially.⁹

If you are a newly elected, reform-minded prosecutor, heavy expectations ride on your shoulders. Some of those expectations are likely your own. Even before last November, activists across the country increasingly blamed prosecutors for much of what is wrong with our criminal justice system — its cruelty, its violence, its wastefulness, its biases and its unreliability — and they increasingly turned to prosecutors to fix those problems.¹⁰ You ran for office because you wanted to fix those problems, or at least make a dent in them. How do you start?

There is no roadmap for progressive district attorneys. There are no generally agreed-upon “best practices” for prosecutors' offices — partly because the expectations for prosecutors are so mixed, and partly because different offices serve different communities and face different challenges. Here are ten suggestions, though, for chief prosecutors who want their offices to do a better job pursuing justice. They are far from comprehensive. They ignore, in particular, the critical roles that elected prosecutors can provide in advocating for systemic reform and in pushing other agencies, especially police departments, to change their own practices. The focus here is on how to improve the day-to-day functioning of a district attorney's office.

⁹ See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 117 J. CRIM. L. & CRIMINOLOGY (forthcoming 2017), <https://ssrn.com/abstract=2770815>.

¹⁰ See *id.*

Think of this as the skeletal first edition of a progressive prosecutor's handbook.

1. *Make clear how you want to be judged.* What do you want to have achieved by the end of your time in office, and how will you know if you have succeeded? You will not focus on your conviction rate; that is too easy to inflate by picking easy cases, or by cutting corners with constitutional rights. You want to “do justice.” But how will you know if you’ve accomplished that — not in isolated cases, but day in and day out? Unless you think about that now, you are likely to wind up managing your office rather than leading it. Your decisions will be largely reactive. Your reforms will be piecemeal and, more likely than not, superficial. You will launch pilot programs and symbolic initiatives — maybe a few “neighborhood prosecution” offices, or a crime analysis unit — but leave the bread-and-butter operations of the office largely unchanged.

The problem will not be that you lack ideas, or that you care about the wrong things. The problem will be that you have too many ideas and care about too many of the right things. You need priorities, and everything can't be a priority. You need to decide what you care most about. There are serious problems that afflict prosecutors' offices throughout the United States; we will talk about those shortly. But some of your priorities will and should depend on what your community cares about, and on what most needs fixing in your office and your locality. In Chicago, Kim Foxx has inherited — along with other problems — skyrocketing homicide rates and a broken system for investigating police shootings;¹¹ unless she makes inroads on both of those crises, it will be hard for her to claim success no matter what else she does. In Corpus Christi, Mark Gonzalez campaigned heavily on a pledge to reduce prosecutorial misconduct;¹² making good on that promise needs to be one of his highest priorities.

It is not enough to determine how you will measure your success. Tell your staff and the public what you have decided. It is easier to stick to goals you have publicly embraced, and your staff is more likely to push for what you care about if they know what you care about. There are dangers in telling the public how to judge you, of course. You may fall short, and it may not even be your fault. Homicide rates could rise for reasons beyond your control. The police may sabotage investigations of officer-involved shootings. Judges can criticize your

¹¹ See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 3, 6-9 (2017), <https://www.justice.gov/opa/file/925846/download>.

¹² See Hooks, *supra* note 4.

office for misconduct when none, in fact, occurred. But you may be judged unfairly even if you *don't* announce in advance how you will measure your success, and if you don't pick the measure, others will pick them for you.

2. *Evaluate and reward your attorneys for what you care about.* It is important to tell the prosecutors you supervise that you want them to seek justice, not just convictions and high sentences. It is important to tell them how you will know if the office as whole is succeeding. But none of this will do much to alter their behavior if, as individuals, they are evaluated and rewarded based on how many guilty verdicts they rack up and how many decades of imprisonment they convince judges to impose. And that is how line prosecutors earn respect pretty much everywhere in the United States — even, most of the time, in offices headed by district attorneys committed to reform.

Litigation in this country is famously, intensely competitive; we pride ourselves on our “adversary system.” Most prosecutors choose their jobs in part because they like the challenge of a courtroom battle. And it is a challenge: even a strong prosecution case can fall apart in court, particularly when attacked by a good defense attorney. Prosecutors work hard to learn the art of trial advocacy. They *need* to. So it is natural and inevitable that they assess each other, and are assessed by their supervisors, in large part based on their success in the courtroom.

Criminal litigation doesn't need to be so competitive. The outcome of criminal cases shouldn't turn so heavily on the relative skills of the opposing lawyers.¹³ (Neither should civil cases, probably,¹⁴ but that is a topic for another day.) As a leader of the bar, you will have influence over the development of the rules governing criminal adjudication, and it would be good if you used your influence to push for rules that make the skills of the lawyers at least a little less important. Realistically, though, progress on that front will be slow. The competitive nature of litigation in the United States — our “adversary system” — is almost universally seen as a feature, not a bug, and a supremely important feature at that. Success in the courtroom — particularly at trial and in sentencing hearings — will continue to be a

¹³ See David Alan Sklansky, *Autonomy and Agency in American Criminal Process*, in *OBSTACLES TO FAIRNESS IN CRIMINAL PROCEEDINGS: INDIVIDUAL RIGHTS AND INSTITUTIONAL FORMS* (John Jackson & Sarah Summers eds., forthcoming 2017), <https://ssrn.com/abstract=2849226>.

¹⁴ See David Alan Sklansky, *What Evidence Scholars Can Learn from the Work of Stephen Yeazell: History, Rulemaking, and the Lawyer's Fundamental Conflict*, 61 *UCLA L. REV. DISCOURSE* 150, 159-62 (2013).

large part of how the prosecutors measure each other and measure themselves.

But it needn't and shouldn't be the only part. You can and should evaluate the attorneys in your office in part based on how scrupulous they are in honoring constitutional rights, how thoughtful they are in crafting fair plea bargains, and how measured they are in exercising their discretion. Some of this can be formal: you can work it into regular performance reviews. But much of it will be less formal, a matter of what line prosecutors are asked about and praised for. For example, most large or mid-sized prosecutors' offices bring prosecutors together every week to discuss significant cases. Sometimes the whole office will assemble; sometimes prosecutors will meet only with the attorneys in their unit. Either way, the meetings are important: they build *esprit de corps*; they also help prosecutors develop their craft. The meetings tend, though, to focus almost exclusively on courtroom battles and preparing for those battles. They shouldn't. Prosecutors should talk about, and be asked about, the evidence they are choosing to disclose or not to disclose, the dispositions they are offering, and the sentences they are advocating. They should be asked to reflect on what a just outcome would be, and why.

Pushing the conversation in this direction will sometimes be difficult. Undeniably, the drama and excitement of the courtroom has a magnetic pull, especially for lawyers who have chosen to be prosecutors. But that just makes it all the more important to ensure that considerations of fairness and proportionality get attention, too. And most prosecutors, fortunately, are attracted to their jobs not just because they like competition but because they want to pursue justice.

3. *Collect and share data.* Justice is a noble goal, but how will you know if you are achieving it — not just in isolated cases, but day in and day out? How will you know if you are being fair? How will you know if you are treating black defendants the same as white defendants, poor defendants the same as rich defendants? How will you know if you are securing sentences that are proportionate? How will you know if you and your prosecutors are complying with your discovery obligations and avoiding unfair comments in closing argument? How will you know if you are building trust in the criminal justice system? How will you know if your charging practices are fueling mass incarceration?¹⁵ How will you know if you are treating

¹⁵ For an extended argument that prosecutorial charging practices have played an outsized role in dramatically increasing rates of incarceration in the United States over the past several decades, see JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

victims and witnesses with dignity and compassion? You won't know any of these things unless you look — which is to say, unless you measure your performance objectively.

Numbers can't tell you everything, but they can tell you a lot more than your gut impression. The great problem with relying on your gut impression is that it will almost certainly be positive, no matter what you do. You will spend so much time defending your office and your record, to judges, to reporters, and to the public, that it will become second nature to focus on whatever has gone well under your watch. You may tend to focus, too, on particular, high-profile cases, neglecting the quality of justice your office dispenses day and day out. The best protection against both of these biases is data.

Fortunately, the criminal justice system is awash in data. Some of it is highly prominent: Kim Foxx will not have to do any digging to know if Chicago's homicide rate falls. But most of the data that would be helpful in knowing how well your office is performing is less accessible. Some of it is information your office may already collect: caseloads, declination statistics, sentence lengths, how long it takes cases to reach disposition, and demographic data on defendants. Some of it is information your office may not be collecting but probably should: job satisfaction ratings by your attorneys, for example, and evaluations by victims and witnesses of how the system has treated them. If your office does not keep track of how often judges conclude it has committed prosecutorial misconduct, it should start; ditto for judicial findings that the police agencies you work with have violated constitutional rights. A good deal of useful information is already being collected by other agencies: the courts in which your cases are filed, the police departments you work with, the probation and parole offices in your jurisdiction. Probation offices, for example, can help you assess how often defendants stay in jail because they are too poor to post bond, and parole offices can help you determine how the defendants you prosecute fare after they are released from prison and how likely they are to return to crime. These other agencies may be wary of sharing their data. (As are you, probably, but more about that shortly.) It is worth trying to win them over.

The data you should collect should depend, in part, on what you care about — how you have chosen to define success for your office. It is harder to measure the fairness and effectiveness of your office than it is to measure its conviction rate, or to tally up the years of incarceration it has convinced judges to order. But you can find proxies for the things you care about: statistical measures of racial discrimination in charging, for example; recidivism rates for offenders

you have prosecuted; rates at which your prosecutors strike racial minorities from juries; satisfaction surveys of victims, witnesses, and your own attorneys. And you can and should compare your charging practices, your plea dispositions, and the sentences you obtain with comparable data from neighboring jurisdictions. If you charge juveniles as adults more often than your counterparts elsewhere in your state, or if you send defendants to prison for longer, or if you convince judges to set bail higher, you may not be doing anything wrong. But you may want to think about it.

All of this will be easier, and vastly more productive, if you don't do it alone. Outsiders — academic researchers, public policy think tanks — have more experience than your office collecting and analyzing data, and will be more objective in drawing conclusions from what you discover. You should invite them in. That goes against prosecutors' instincts, which are to hoard information or, more often, not to collect it in the first place. Police departments used to have the same instincts, but the best of them learned several decades ago to be more inquisitive and less secretive, and they are better off for it. Prosecutors need to learn the same lesson.

4. *Build in second looks.* Mistakes are inevitable. A good prosecutors' office needs to correct them and to learn from them. To do that systematically, you need to build in opportunities for second looks. That means allowing for internal appeals, objectively reviewing claims of wrongful conviction, and learning from missteps and near misses. Even the best of us are prone to tunnel vision and hindsight bias, so a genuine second look will require the involvement of prosecutors separate from and independent of the prosecutors who make the initial decision.

Line prosecutors have significant discretion in charging and negotiating plea bargains, even in offices with detailed charging guidelines. That is one reason that staff meetings should address charging decisions and plea negotiations, not just courtroom battles. It is also why every prosecutorial office should have procedures that allow defense attorneys to seek a second look from a supervisor, or at least another line attorney, in cases where the defense attorney thinks the charging decision or plea offer was inappropriate.

Internal appeals are a kind of real-time second look. Conviction integrity units, found in a growing number of prosecutors' offices across the country, allow for a correction after-the-fact when a credible claim of wrongful conviction is raised. These are vital institutions. Innocent people get convicted, and the Supreme Court has made clear that just being innocent doesn't entitle a defendant to

judicial relief.¹⁶ Most governors, meanwhile, have gotten out of the business of granting pardons.¹⁷ So your office needs a conviction integrity unit — or, if your office is too small, you need to pool your resources with neighboring offices to create a regional conviction integrity unit. Either way, the unit should be well staffed, well funded, and structurally independent. The process will be meaningful only if the prosecutors who run it are not the ones who bring the cases in the first instance, and only if they have sufficient seniority and respect within the office to challenge the judgments of the prosecutors who initially brought the case.¹⁸

Independent reviews of credible claims of wrongful conviction are important not just to ensure that justice is done but also so that your office can learn from its mistakes. An exoneration should be an occasion for root cause analysis: what went wrong, and how can your office avoid similar blunders in the future? That kind of analysis is common in many fields: doctors have morbidity and mortality conferences; the military has after-action reviews; the aviation industry studies near misses. Prosecutors rarely engage in anything of the kind. Since 2011, the National Institute of Justice has been exploring the use of “sentinel event” analysis in the criminal justice; that initiative has produced concrete guidelines for building systems that will allow your office, along with the other agencies you regularly interact with, to learn from their mistakes.¹⁹ The main idea is to conduct reviews that are routine and ongoing, that are non-blaming, and that involve not just prosecutors but also judges, defense attorneys, and law enforcement officers. You should take the lead on bringing this kind of analysis to your jurisdiction, and there is no reason to limit it to instances where a conviction has been set aside. Mistakes that are caught earlier and do less damage can be opportunities for learning, as well.

5. *Have a clear, generous, and administrable disclosure policy.* Every prosecutorial office aims to comply with *Brady v. Maryland*,²⁰ the Supreme Court decision requiring the disclosure of material,

¹⁶ See *Herrera v. Collins*, 506 U.S. 390 (1993).

¹⁷ See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Decline of Mercy*, 121 HARV. L. REV. 1332 (2008); Maggie Clark, *Governor's Pardons Are Becoming a Rarity*, GOVERNING (Feb. 8, 2013), <http://www.governing.com/sl-governors-balance-politics-with-pardons.html>.

¹⁸ See Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 385 (2015).

¹⁹ See U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS (2014), <https://www.ncjrs.gov/pdffiles1/nij/247141.pdf>.

²⁰ 373 U.S. 83 (1963).

exculpatory evidence. But if that is your benchmark for disclosure, it is way too low, and almost certain, sooner or later, to cause a miscarriage of justice. The Supreme Court calls evidence “material” only if there is a reasonable probability that its disclosure would have changed the outcome, which means that in order to decide whether something needs to be disclosed under *Brady*, a prosecutor needs to imagine the case has already gone to trial and the defendant has been convicted, and then decide whether, if the evidence *had* been disclosed, there is “reasonable probability” — whatever that means — that the result would have been different. That is an impossibly murky standard. In the competitive heat of litigation, it is easy for even a conscientious prosecutor to become convinced that some inconvenient piece of evidence does not need to be disclosed under *Brady* — and that it *shouldn't* be disclosed, because it would embarrass a witness, say, or because defense counsel could use it to throw up a smokescreen. On top of that, the Supreme Court has never made clear whether *Brady* requires *any* evidence to be disclosed if a defendant chooses to plead guilty rather than proceed to trial.

Brady is supplemented by statutory rules of disclosure, but most of these apply to only narrow categories of evidence, and many of them are triggered only by an explicit demand from defense counsel, triggering reciprocal obligations of evidence in the hands of the defense. Some defense attorneys choose not to request discovery in order not to trigger their own, reciprocal discovery obligations. But in many cases the failure to request discovery is a strategic mistake, or simply oversight.

The result is a steady, dismal stream of cases in which convictions are reversed, years after they are handed down, because courts conclude that prosecutors failed to disclose exculpatory evidence. *Brady* violations are among the most common forms of prosecutorial misconduct identified by the courts,²¹ and probably no other form of prosecutorial misconduct contributes to a larger number of wrongful convictions.

The key to preventing *Brady* violations is to forget about *Brady*. Stop worrying about what the Supreme Court requires you to disclose, and focus instead on what you *should* disclose. The disclosure rules you adopt for your office should be clear, easy to administer, and generous. (They should also meet or exceed the discovery obligations imposed on your attorneys by the applicable rules of professional

²¹ See, e.g., KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 36 (2010), <http://digitalcommons.law.scu.edu/ncippubs/2/>.

conduct in your state.²²) At a bare minimum, you should instruct your attorneys to disclose (a) any evidence that might qualify as relevant at trial, regardless whether it seems inculpatory or exculpatory, and regardless whether it seems likely to qualify as “material” under *Brady*, and (b) any information they become aware of that might lead to the discovery of relevant evidence. You will need to make exceptions for disclosures that might endanger witnesses or compromise ongoing investigations, but those exceptions should be applied only with the approval of a supervising attorney not personally involved in prosecuting the case. Your disclosure policy should apply in all cases, not just cases that go to trial. You should not take guilty pleas from defendants before providing them with discovery. You should have detailed checklists for prosecutors to follow when providing discovery.²³ And the default rule should be: when in doubt, disclose.

A growing number of prosecutors' offices boast that they provide “open file” discovery to defendants. That is admirable, but the devil is in the details. The “file” needs to include, at minimum, all potentially relevant evidence and all information that might lead to potentially relevant evidence. And the file should be provided to all defendants, not just to those who decline to plead guilty, and not just those who request it.

A word needs to be said here about informants. It is little surprise that the snowballing scandals associated with the District Attorney's Office for Orange County, California — now the subject of a federal investigation²⁴ — have, at their core, suppressed evidence about jailhouse snitches. An utterly disproportionate number of *Brady* violations involve informants, and it is not hard to see why. Informants are rarely fully candid with their handlers, officers often find it prudent to keep information about their informants to themselves, law enforcement agencies are wary of sharing information about informants with prosecutors, and prosecutors readily conclude that disclosures about informants will endanger ongoing investigations and the informants themselves. Informants have complicated pasts.

²² The American Bar Association's Model Rules of Professional Conduct, for example, require prosecutors to disclose, in every criminal case, “all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.” MODEL RULES OF PROF'L CONDUCT r 3.8(d) (AM. BAR ASS'N 1983); see ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 09-454 (2009).

²³ See *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1974-79 (2010).

²⁴ See Jennifer Medina, *U.S. Examines Whether Orange County Violated Defendants' Rights*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/orange-county-justice-department.html>.

They often lie. They are good actors, skilled at appearing to be something other than what they are. That is what makes them valuable to law enforcement, but it is also what makes them unreliable, and what makes information about their convoluted backgrounds so important to disclose.²⁵

This means that a discovery exception for information that could endanger a witness or compromise an ongoing investigation can easily be invoked — almost certainly *will* be invoked — to suppress evidence about informants that fairness, and probably the dictates of *Brady*, require to be disclosed. One implication, obviously, is that you should be especially vigilant about ensuring that defendants receive full discovery about informants. This is supremely difficult to do, though. The information about informants that prosecutors, police and the informants themselves often think is most vital to keep secret is often the very information most valuable, and most legitimately valuable, to the defense. So the larger lesson is to minimize your use of informants, and in particular jailhouse snitches — a wise step for other reasons, as well.²⁶ (Earl Warren, who was in a position to know,²⁷ warned that building a criminal case on the testimony of a jailhouse informant was building it on “quicksand.”²⁸) There are few other steps you can take that will do more to ensure your office complies with *Brady*.

6. *Don't turn a profit.* Fines, forfeitures, and fees are some of the worst things ever to happen to prosecutors' offices. More precisely, what has been damaging has been the practice of allowing prosecutors to keep all or a share of the proceeds from these financial measures, or of judging prosecutors' offices based on how much revenue they generate for state or local coffers. Very few organizations can resist strong financial incentives. Once the funding of a prosecutors' office becomes dependent, even in part, on how much it collects, it is very hard for the office to stay committed to pursuing justice evenhandedly, as opposed to squeezing defendants for money.

The Manhattan District Attorney's Office has funded many worthy initiatives with the hundreds of millions of dollars it has collected in criminal penalties against international banks,²⁹ but more commonly

²⁵ See ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2011).

²⁶ See *id.*

²⁷ See, e.g., Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11 (2005).

²⁸ *Hoffa v. United States*, 385 U.S. 293, 313-21 (1966) (Warren, C.J., dissenting).

²⁹ See James C. McKinley Jr., *Cyrus Vance Has \$808 Million to Give Away*, N.Y. TIMES (Nov. 6, 2015), <https://www.nytimes.com/2015/11/08/nyregion/cyrus-vance->

finances, forfeitures, and fees have wound up warping the mission of the prosecutors' offices that benefit from them. For example, the *New York Times* recently documented the extent to which pre-trial diversion programs in many jurisdictions have become get-out-of-jail-cards for the wealthy,³⁰ while the poor are priced out of them by the fees that many prosecutors' offices have made a condition of entry into the programs.³¹ Don't allow your organization to be placed in a position where it has strong financial incentives to pursue agendas that are at best orthogonal to justice.

7. *Reduce case delays.* Local jails throughout the United States hold hundreds of thousands of people, the vast majority of whom are awaiting trial rather than serving sentences.³² Most arrestees booked into jail are released within a few days, but a grossly disproportionate share of the jail population at any time is composed of the "long tail" — the minority of arrestees who constitute, confusingly, a majority of jail inmates; people who wind up serving weeks, months, sometimes even years in jail without being convicted of anything.³³ They languish in jails that rarely have the medical and mental health services, let alone the rehabilitation programs, provided in prisons. Some of this problem can and should be solved with bail reform, but much of it also can and should be addressed by reducing case delays — a problem that, ironically, seems to worsen as crime rates fall and caseloads decline.³⁴

has-dollar-808-million-to-give-away.html.

³⁰ Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html>.

³¹ Shaila Dewan & Andrew W. Lehren, *Alabama Prosecutor Sets the Penalties and Fills the Coffers*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/us/alabama-prosecutor-valeska-criminal-justice-reform.html>.

³² See Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLY INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html>.

³³ See *Beware of "Average Length of Stay!"*, COMMUNITY RESOURCE SERVS., <http://www.correction.org/Secondary%20Pages/AverageLengthOfStay.html> (last visited Feb. 18, 2017).

³⁴ See, e.g., Michael Jacobson, Opinion, *The Next Mayor Should Help End Extensive Pre-Trial Imprisonment*, N.Y. TIMES (July 25, 2014, 1:13 PM), <http://www.nytimes.com/roomfordebate/2013/08/22/how-the-next-mayor-should-deal-with-crime-in-new-york/the-next-mayor-should-help-end-extensive-pre-trial-imprisonment>. Prosecutors also have a role to play in bail reform. They should avoid instinctive opposition, for example, to new procedures that reduce jail populations by making release less dependent on ability to pay and more dependent on an individualized determination of risk. See HARVARD LAW SCH. CRIMINAL JUSTICE POLICY PROGRAM, *MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM* (2016).

Delays in the processing of criminal cases are controlled first and foremost by judges, but prosecutors have a lot of leverage to address the problem. If you and your staff work in a sustained and focused way to reduce case delays, you will reduce them. And the benefits will not flow just to jail inmates. Your county will save money: jails are expensive. Victims will see justice sooner. Truly dangerous defendants who manage to be released on bond will have less time to commit more crimes before they are convicted. Witnesses will be easier to locate for trial, and their recollections will be fresher. It is true that you will lose something in the bargain: your plea rates may decline, or you may have to offer defendants more favorable deals. Staying in jail is coercive and demoralizing, so cutting case delays means weakening a lever your office uses, purposely or not, to get defendants to cooperate. But that is an illegitimate lever; it isn't one you should be proud of employing.

Here is another reason to focus on case delays: they are easy to measure, and — compared to many other problems you face — easy to analyze. You can figure out what is driving delays, and you almost certainly will be able to cut them significantly. This is a tangible, measurable improvement you can bring to the criminal justice system, and take credit for.

8. *Investigate police shootings independently and transparently.* The problem of police shootings is not going away, and it isn't clear that anyone has figured out the best way to investigate and prosecute them. The challenge is to design a process that balances three different and often-conflicting objectives: independence, accountability, and professional competence. It is easy to design a process that is fully independent if you are willing to sacrifice accountability and competence. It is relatively straightforward to design a process that is fully accountable if you sideline concerns about independent judgment and investigatory competence. Protecting all three values simultaneously is difficult. But continuing to handle these cases the way most jurisdictions do — allowing the agency that employs the shooting officer to lead the investigation, and then taking no special steps to ensure the independence and credibility of the charging decision — virtually guarantees disabling conflicts of interest, or at least the appearance of them. And failing to address this problem successfully can easily cost you your office, no matter what else you accomplish. Just ask Tim McGinty, who lost his 2016 bid to be reelected the head prosecutor of Cayahuga County, Ohio, largely

because of his mishandling of the fatal police shooting of 12-year-old Tamir Rice in November 2014.³⁵

There is no established set of best practices for handing the criminal investigation of police shootings, but “business as usual” is almost certainly the wrong strategy. At a minimum, you should work to avoid having the investigation led by the police agency that employs the shooting officer, and you should not duck responsibility for not prosecuting by hiding behind a grand jury.³⁶ If you decide not to file criminal charges in a fatal police shooting, you should explain why. You should also explore the possibility of having the state attorney general’s office supervise the investigation, make the charging decision, and handle any prosecution. Alternatively, you may want to ask a neighboring district attorney’s office to supervise the investigation and to make a public recommendation about whether criminal charges should be filed — the procedure recently recommended by the Stanford Criminal Justice Center.³⁷

9. *Pay attention to office culture.* No matter how thoughtful your office guidelines, no matter how strong your mechanisms of supervision and oversight, the quality of justice your office administers will depend strongly on the attitude that your staff brings to its work. The systematic *Brady* violations by the Orange County, California, District Attorney’s Office have been attributed in part to the office’s “win-at-any cost mentality,” a mentality that is not unique to that office.³⁸ The workplace ethos of many prosecutors’ offices is overly combative, overly cynical, and overly dismissive of defendants’ interests. Those attitudes can be transmitted through and reinforced by the casual use of language that consciously or unconsciously indulges in racial, ethnic, and sexist tropes.³⁹

Attitudes start at the top, and they circulate through everyday conversations. Don’t countenance racist or sexist language, coded or not.

³⁵ See Sklansky, *Political Landscape*, *supra* note 6 (manuscript at 15-16).

³⁶ See Debbie Mukamal & David Sklansky, Opinion, *The Way Forward After Black Men Are Shot Dead*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/e2df0e2c-9553-11e6-9b7c-57290af48a49_story.html (suggesting that police shootings should be investigated by state-level officials or a neighboring law-enforcement agency unconnected to the shooting, but that the ultimate prosecution decision should be made by the democratically chosen district attorney).

³⁷ AMARI L. HAMMONDS ET AL., STANFORD CRIMINAL JUSTICE CTR., *AT ARM’S LENGTH: IMPROVING CRIMINAL INVESTIGATIONS OF POLICE SHOOTINGS* (2016), <https://law.stanford.edu/wp-content/uploads/2016/09/At-Arms-Length-Oct-2016.pdf>.

³⁸ See Medina, *supra* note 24.

³⁹ See, e.g., NICOLE GONZALEZ VAN CLEVE, *CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT* 54-91 (2016).

Don't countenance jokes about evading *Batson*. Don't echo or implicitly endorse cynicism; it leads to corner cutting. Don't call defendants "mopes," don't call repeat offenders "three-time losers," don't call people with mental disabilities "wackos," and don't tolerate language like that from your staff. Make it clear, in every conversation you have with your staff, that you take seriously the ideals of equal justice and procedural fairness and expect your staff to take them seriously, too. Make it clear, as well, that you want your supervisors to view modeling and transmitting the right attitudes to be part of their jobs.

10. *Diversify your staff*. The odds are that the prosecutors in your office are, as a group, significantly less diverse than the population of your district. They probably include significantly fewer members of racial minorities, and, at the supervisory levels, they probably include significantly fewer women. In California, where Latinos are 39% of the population and whites are 38%, 70% of prosecutors are white and only 9% are Latino.⁴⁰ Additionally, 48% of California prosecutors are female, but the figure drops to 41% in supervisory ranks.⁴¹ There is little publicly available data on the demographics of prosecutors in other states, but the underrepresentation of minorities among California prosecutors is unlikely to be exceptional; neither is the underrepresentation of women in supervisory ranks.

This matters, not because minority prosecutors or female prosecutors are better than white, male prosecutors — or differ from them in any predictable way — but because diversifying an office tends to change its culture. Diverse offices are less insular and less subject to group think, more open and vibrant. Offices with significant numbers of minority prosecutors and female prosecutors, both on the trial line and in supervisory positions, are likely to be less tolerant of racism or sexism, coded or explicit. Research suggests that increasing the number of minority prosecutors in an office decreases sentencing disparities based on the race of the defendant.⁴²

There is a strong parallel here to the diversification of police forces. A half-century ago, nearly all police officers in the United States were white and male. Partly as a result, policing was an ideologically

⁴⁰ See KATHERINE J. BIES ET AL., STANFORD CRIMINAL JUSTICE CTR., STUCK IN THE '70S: THE DEMOGRAPHICS OF CALIFORNIA PROSECUTORS 6 (2015) [hereinafter STUCK IN THE '70S], <https://media.law.stanford.edu/organizations/programs-and-centers/scjc/Stuck-in-the-70s-Final-Report.pdf>.

⁴¹ See *id.* at 14.

⁴² Amy Farrell et al., *Race Effects of Representation Among Federal Court Workers: Does Black Workforce Representation Reduce Sentencing Disparities?*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 121 (2009), <http://ann.sagepub.com/content/623/1/121>.

homogeneous occupation as well: police departments were insular, politically reactionary, and largely free from internal debate. The dramatic diversification of police forces in the 1970s and 1980s — largely attributable to affirmative-action litigation — helped to open up departments intellectually, making them more vibrant, more receptive to outside ideas, and far less dominated by any single, consensus set of understandings about policing should be done.⁴³

That transition is still incomplete: many departments, especially smaller ones, are still disproportionately white and male.⁴⁴ And diversifying a police department is not a panacea; just as minority officers can be racist and female officers can be sexist, integrated departments can still have problems delivering public safety evenhandedly and securing the trust of the communities they serve. But it is hard to imagine that the other major reforms of policing over the past several decades — the community policing movement and the widespread formation of civilian oversight bodies — would have taken place without the earlier, demographic revolution in American policing.

Prosecutors' offices lag behind police departments in this regard, at least with respect to race and ethnicity. (With respect to gender, prosecutors are a good deal more diverse than police officers.) This is partly because, when it comes to hiring and promoting a diverse workforce, prosecutors' offices face some obstacles that police departments do not, chiefly the requirement that prosecutors have to be lawyers. Although prosecutors in California are significantly whiter than the state population, prosecutors in California are more racially diverse than lawyers in general in California — more racially diverse, that is to say, than the labor pool from which prosecutors are drawn.⁴⁵

Nonetheless there are steps that prosecutors' offices can take — and that some prosecutors' offices *have* taken — to hire, retain, and promote more women and minorities. These include community outreach to address the “pipeline” problem and to reduce the stigma that can be associated with the job of prosecutor in many minority communities.⁴⁶ The most important steps, though, are to make inclusive hiring and promotion explicit priorities of the office, to

⁴³ See David Alan Sklansky, *Not Your Father's Police Department: Making Sense of the New Demographics of Law Enforcement*, 96 J. CRIM. L. & CRIMINOLOGY 1209 (2006).

⁴⁴ See *id.*

⁴⁵ See BIES ET AL., STUCK IN THE '70S, *supra* note 40.

⁴⁶ See KATHERINE J. BIES ET AL., STANFORD CRIMINAL JUSTICE CTR., DIVERSITY IN PROSECUTORS' OFFICES: VIEWS FROM THE FRONT LINE (2016), <https://law.stanford.edu/wp-content/uploads/2015/07/Diversity-Case-Studies-Final-3.12.16.pdf>.

monitor progress through the regular collection of demographic statistics, and to be open and transparent about the composition of the officer's workforce. Police departments have been collecting demographic data on their officers — and making that information publicly available — for decades. Most prosecutors' offices, though, either do not keep track the comparable information about their employees, or they keep it secret. Accordingly, while diversifying your office will help to change its culture, one key to diversifying your office, conversely, is changing its culture — making it less secretive, more focused on explicit goals, and more committed to collecting and sharing information about how it looks and how it operates.

Prosecutors' offices are complicated places, and the public's expectations for them are complicated, too. But prosecutorial offices can and do change, and the difference between a good prosecutors' office and a bad one is vast. Voters who ousted incumbent district attorneys in favor of challengers promising reform cast their ballots in the belief that a progressive district attorney could make criminal justice fairer, more humane, and more effective. They were not mistaken. A good district attorney can in fact do a great deal to improve the functioning of the criminal justice system. But the path is not well signposted; there is, as yet, no consensus set of "best practices" for district attorneys, let alone for progressive district attorneys. Developing such a set of best practices is an urgent priority. The ten suggestions outlined here would be a good start.