Center for Court Innovation

Arnold Ventures

FAIR AND JUST PROSECUTION

SUMMARY

The Contradictions of Violence
How Prosecutors Think About the Biggest Challenge to Real Reform

What distinguishes a violent crime from a non-violent one? For the criminal legal system, the line is often shifting and arbitrary, but for the person facing charges, the consequences can be life-altering.

People convicted of crimes classed as violent fill our prisons, yet many of the most common reforms—such as alternatives to incarceration and treatment—routinely exclude them, leaving the system of mass incarceration mostly untouched.

The consequences of being branded "violent" begin the moment you enter the legal process and persist long after a sentence has been served. One scholar contends people convicted of a violent crime are pushed into "a veritable third-class citizenship" (with *any* criminal conviction already a form of second-class citizenship).[1]

Prosecutors occupy a critical "gatekeeping" function in the legal system, with unilateral power over many of the most vital choices in a case—beginning with whether and what to charge. But not enough is known about how they arrive at these decisions, particularly when it comes to cases involving violence.

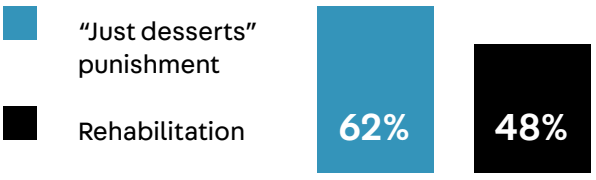
In 2020, the Center for Court Innovation—in collaboration with Fair and Just Prosecution and NORC at the University of Chicago—was awarded a grant from Arnold Ventures to try to get at these questions through an in-depth national survey. (See full results and analysis.)

A total of 274 agencies completed the survey. The results show a willingness to try new approaches—only 7% of respondents described their office's philosophy as "tough-on-crime"—but they also suggest how prosecutors conceive of and prosecute violence can be undercut by inconsistencies.

Those inconsistencies start with how violence is defined. Nearly three-quarters of respondents said their office defined violence by statute—what the law states. But an equal number said violence was defined on a case-by-case basis, underlining prosecutors' gatekeeping role. Emotional harm experienced by a victim and the threat of *future* violence were also cited as important considerations, although both are difficult to codify into clear benchmarks and again risk foregrounding prosecutorial discretion.

When it comes to the goals of prosecuting crimes classed as violent, 62% of respondents emphasized a "just desserts" philosophy of punishing individuals, although almost half also cited rehabilitation as a top priority. As research increasingly confirms that jail and prison sentences *increase* the likelihood someone will experience future criminal justice contact—the opposite of rehabilitation—it is unclear whether

CONFLICTING GOALS OF PROSECUTION?



Percentages do not add up to 100% as multiple approaches could be identified in responses.

the goals of punishment and rehabilitation can meaningfully coexist.

The opinion of survivors is also cited by more than four of five respondents as a leading priority informing their decisions—generally in support of carceral responses—yet prosecutors may not be channeling the "justice" victims actually want. As research has documented, crime victims are frequently members of communities disproportionally impacted by mass incarceration, believe prison is generating *more* crime, and would prefer people be held accountable through alternatives to prison.

The media and policymakers pay outsized attention to crimes involving violence—in particular, decisions related to pretrial release and bail—increasing the scrutiny on prosecutors. Evidence of this emerged in the survey: slightly more respondents reported a lack of support for broadening options for violent cases at the *pretrial* phase than at the sentencing stage (42% vs. 37%), despite the presumption of innocence pretrial.

A third of respondents said there were *no* non-carceral alternatives available to them for cases involving violence, whereas only 4% said the same of non-violent cases. Yet this still means alternatives *are* available in violent cases in two-thirds of prosecutor offices.

This suggests it is often not a question of availability, but of the willingness of prosecutors and others to use the alternatives in place. Our analysis suggests these resources are primarily made available on a discretionary basis rather than through formal mandates.

Recommendations

Our hope is the results are an invitation for prosecutor offices to consider implementing more consistent practices and policies. We also see them as offering insights for advocates who work with prosecutors to meaningfully reform their approach to the cases that make up such a large part of the current system. Three principal recommendations emerge from our findings:

1. **More data, more evidence**
   A lack of data is a barrier to expanding the use of non-carceral alternatives. Very few offices reported tracking compliance with pretrial conditions or the outcomes of alternative-to-incarceration programming. This leaves offices "flying blind," with little opportunity to build an evidence base for alternatives to the status quo. Offices should gather and make public more data related to their handling of cases involving violence and explore targeted partnerships with outside researchers.

2. **Shift status quo thinking**
   It seems clear many prosecutors see themselves as pursuing the goals of both punishment and rehabilitation, an ambition research suggests is elusive. Directed efforts and trainings are needed on the negative effects of custodial sanctions. Further training is also needed on what *works*: only a quarter of offices reported training on effective recidivism reduction. And while implicit bias training is widespread, more pointed interventions—such as training on structural racism—were far less common. Only a fifth of respondents identified "ensuring equity and fairness" as being part of the philosophy of their office.

3. **Better understand the needs of survivors**
   Specific training is required on the extent to which survivors' needs often run counter to the approach of many prosecutor offices. Prosecutors should engage survivors and the communities most impacted by violence to create alternative approaches rooted in the priorities of those who have experienced harm.

For More Information

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For the full report:
courtinnovation.org/publications/prosecutors-violence

1. Michael O'Hear, *Third-Class Citizenship: The Escalating Legal Consequences of Committing a "Violent" Crime*, 109 J. Crim. L. & Criminology 165 (1019).