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Prosecutors and Voters Are Becoming Smart on Crime

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How to explain the recent trend of electing reform-minded local prosecutors? It may be that voters are seeing through tough talk to embrace smarter strategies to reduce crime.

In Florida, Illinois, Massachusetts, Missouri, New York, Ohio, Pennsylvania, Texas, and Virginia, prosecutors have been elected on issues such as reducing incarceration rates, treating drug addiction as a public health issue, and eliminating cash bail.

These reform-minded attorneys include Democrats, like Eric Gonzalez in Brooklyn, and Republicans, like Melissa Jackson in Jacksonville. The mayors of 10 cities, from New York to Seattle, have signed on to a smart-on-crime initiative to reform the criminal justice system. The U.S. Congress, in gridlock over most issues, has even passed criminal justice reform legislation known as the First Step Act, signed into law by President Donald Trump. This marks a sea change from past campaigns, when prosecutors and other elected officials wooed voters with their claims of being “tough” on crime, and the worst insult a candidate could hurl at a political opponent was that he or she was “soft” on crime.

As former federal prosecutors, we have dedicated our careers to working shoulder to shoulder with law enforcement officers to hold criminals accountable for their conduct, but we see the tough-on-crime mantra as a cynical ploy that counts on voters to be uninformed. While serious crimes should be punished to protect public safety and deter others from engaging in similar conduct, not all crimes are created equal. Voters have begun to see through the tired trope that locking up all offenders for as

long as possible is in society’s best interest. Instead, voters are learning the facts behind the rhetoric. Various criminal justice reform efforts have advocates at institutions across the political spectrum, from the American Civil Liberties Union to Bill and Charles Koch. Criminal justice reform has appeal whether you value equal justice under law, fiscal responsibility, or limited government.

A number of reasons may explain the change in perspective on how to address crime. First, funds that are used to send someone to prison—about \$30,000 a year per inmate—can be put to better uses in some cases to make our communities safer. Second, as voters are becoming more likely to know someone addicted to opioids or other drugs, they are seeing addiction as a public health issue instead of a criminal justice issue. And, perhaps most importantly, voters are recognizing that over-criminalization and over-incarceration run contrary to our nation’s founding principle of liberty. Although criminals who commit serious crimes must be imprisoned to protect society, not every offender requires the heaviest hammer. So why are many voters moving toward reform-minded prosecutors?

Cost

The first reason is cost. Voters understand that allocating resources to incarceration means fewer funds are available for enforcement and prevention. When we worked at the Department

of Justice (DOJ), we helped implement a program created by Attorney General Eric Holder called “Smart on Crime.” The goals of the initiative were to use scarce resources to address law enforcement priorities, to seek fair and proportional sentences, to increase prevention and reentry efforts, and to surge law enforcement resources to protect vulnerable communities.

The Smart on Crime program was launched to combat an alarming trend. The number of federal prisoners in the United States had increased from 25,000 in 1980 to 219,000 in 2012, an astonishing 770 percent increase, according to the Congressional Research Service. While the United States was home to about 5 percent of the world’s population, we housed 25 percent of its prisoners, the highest incarceration rate in the world. In addition to the costs of incarceration, lengthy prison terms also bring unseen costs to society, such as lost productivity to our economy and the tax revenue that it generates, forgone income for families, and harm to the welfare of the children of incarcerated parents. We saw a staggering increase each year in the portion of the DOJ budget that was going to the Bureau of Prisons to house inmates, jumping from about \$330 million in 1980 to more than \$6.6 billion in 2013, an increase of 1,900 percent over 33 years. By devoting so many resources to incarcerating inmates for crimes

that occurred decades earlier, the DOJ had fewer resources to investigate and prosecute crimes occurring today. The math was simply unsustainable.

A significant driver of this trend was the so-called “war on drugs,” which included a policy of lengthy mandatory minimum sentences for drug trafficking offenses. Mandatory minimum sentences began during the 1980s, a time when violence relating to drugs was ravaging our cities. Congress passed laws that required judges to impose mandatory minimum sentences without regard to the details of the offenses or the particular offenders. Depending on the drug quantity involved in the offense and the defendant’s criminal history, these mandatory minimum sentences might require incarceration for 10 or 20 years or even life, regardless of the offender’s role in the offense. Couriers were often punished as if they were drug kingpins. Each year in prison brought taxpayers the costs of incarceration, and, as inmates advanced into old age, the costs grew to include expensive medical care. As the bills have come due for a war declared decades ago, we have come to realize that it was a poor investment.

The hope was that lengthy sentences would deter people from engaging in drug trafficking and affiliated violence by severely punishing offenders. But research published by the National

Illustration by Saman Sarheng

Institute of Justice shows that a more effective deterrent to crime than the length of the sentence is the likelihood of getting caught. Paying for more officers on the street thus represents a more effective approach to reducing crime than devoting resources to long prison terms. This theory suggests that when individuals see police officers in their neighborhood and know that response times are short, they are less likely to commit a crime.

At the core of the Smart on Crime program was the principle of prosecutorial discretion, the idea that prosecutors should make individualized assessments about the crime and the offender to make charging decisions. The most dangerous offenders were pursued aggressively, but the use of discretion also meant that prosecutors sometimes brought less serious charges against less egregious offenders when justice so required. A guidance memo listed factors that prosecutors should consider in making decisions about whether to seek charges that brought with them mandatory minimum sentences, such as use of firearms, connections to drug cartels or gangs, significant criminal history, and other aggravating factors. Prosecutors charged the defendants who presented these aggravating factors with crimes that brought appropriately harsh penalties. They charged other defendants, who did not present any of the aggravating factors, with crimes as well, but instead of facing mandatory minimum sentences, these defendants received sentences under the federal sentencing guidelines, which govern most other cases. As an example, a defendant in his 20s involved in a drug conspiracy to distribute five kilograms of cocaine, and who had two prior convictions for delivering small quantities of drugs, would receive a sentence of 10 to 12 years under the sentencing guidelines, instead of mandatory life in prison. Taxpayers would save more than a million dollars for that single offender. The 10- to 12-year sentence likely suffices to protect the public, punish the offender, and deter crime. And the impact of a more proportional sentence on the life of the defendant and his or her family is immeasurable.

Clemency Initiative

A related effort under the Smart on Crime program was President Obama's Clemency Initiative for nonviolent drug offenders who were currently in federal prison serving sentences imposed under outdated laws and policies that were far longer than they would receive under the new Smart on Crime program. As a result of the initiative, President Obama granted 1,715 commutation petitions, including the petitions of more than 500 people serving life sentences, most of which involved defendants in drug cases serving mandatory minimum sentences.

For example, an Army veteran with a sixth-grade education was convicted of a street-level crack sale in a case that would not even have been prosecuted federally at the time of the Clemency Initiative. The defendant did not use a gun and had no history of

violence. But because the defendant had two prior state convictions for selling cocaine, one case involving only one ounce, he received a mandatory life sentence. Should this individual be held accountable for his crimes? Absolutely. Should he die in prison for three small-time drug sales? Absolutely not.

The Smart on Crime initiative had an immediate impact. For the first time in decades, in its three years of operation, the federal prison population dropped from 220,000 to 190,000, a 13 percent decrease. In addition, prosecutors were able to use their scarce resources to focus on more serious offenders, resulting in a higher percentage of cases involving firearms and defendants with aggravating roles in the offense, according to a 2016 DOJ press release.

Attorney General Jeff Sessions disbanded the Smart on Crime program in the federal system upon taking office in 2017, but the same ideas that propelled the federal initiative are now sweeping across state systems. Local prosecutors can make a significant impact on the safety of their communities by implementing some of the same policies at the state level, where the prison population of 2.3 million is more than 10 times larger than that of the federal system and the annual prison costs of \$75 billion dwarfs the federal budget of \$6.6 billion. By seeking more proportional sentences or deferring prosecution of minor crimes altogether, prosecutors can free up resources to tackle serious crimes. These thoughtful local prosecutors recognize that taxpayers are no longer willing to pay for a system that locks up offenders long past the useful terms of incarceration. And they are demanding a criminal justice system that is fairer and imposes more proportional sentences. Voters understand that the funds being used to incarcerate prisoners for decades could instead be used to pay for officers on the street or for crucial efforts to prevent crime and reduce recidivism. Rather than mortgage our future, we can reallocate funds to reduce crime today.

Exposure to Addicts

A second reason that voters may be turning toward prosecutors with a vision for criminal justice reform is more exposure to friends and family members struggling with addiction. When the face of addiction is one you recognize, it is harder to turn your back.

There was a time when too many white voters considered drug abuse to be someone else's problem. Crack was an epidemic largely affecting victims in African American communities, making it too easy for white voters to ignore. Drug abusers were regarded as criminals, and the problem was fought with prison instead of treatment. Now that opioid abuse is affecting a largely white population, more voters view drug addiction as a public health issue, rather than a criminal justice issue, and consequently seem to care more about prevention and treatment. While society's

disregard for the victims of prior drug epidemics was wrong, we should not allow our indifference in the past to prevent us from doing the right thing today.

According to the Centers for Disease Control and Prevention, 130 Americans die every day from an opioid overdose. The rate of fatal opioid overdoses is six times higher than it was in 1999. The causes of the problem are complicated and result from a combination of factors, including aggressive marketing tactics by drug manufacturers and a small percentage but large number of unscrupulous health care providers willing to exploit users by overprescribing for profit. Users who become addicted to prescription pills often turn to cheaper but more lethal alternatives like heroin or fentanyl, resulting in overdose deaths.

The opioid epidemic's costs to society have been estimated at \$78 billion per year, according to the National Institute on Drug Abuse. Costs include emergency response, health care and rehabilitation costs, burdens on the criminal justice system, and lost productivity. Some users miss work or leave the workforce altogether. And abuse generates crime because people are desperate for cash to buy more drugs.

Today, there is a growing recognition that opioid users rarely receive the treatment they need in prison to avoid a relapse upon release. Reform prosecutors are seeing opportunities for drug treatment and prevention programs instead of prosecution of drug users, and they are reaching an eager audience.

The National District Attorneys Association has made prevention and treatment part of its plan to combat opioid abuse. The plan, released in October 2018, features prescription take-back programs, rules for prescribers, support for medication-assisted treatment programs, and promotion of follow-up visits after an overdose.

One model that has seen success is the use of “drug courts” in Michigan. In drug courts, offenders whose crimes are driven by addiction undergo treatment, drug testing, and intensive supervision with frequent hearings before a judge who provides incentives for success and sanctions for violations. In a system that builds assistance into accountability or that combines accountability with assistance, offenders are able to overcome their addictions and avoid becoming repeat offenders. The recidivism rate for offenders who have completed a program in Michigan's drug courts is 6.8 percent, as opposed to 30.9 percent for offenders prosecuted in the traditional criminal system, according to the Mackinac Center for Public Policy.

In addition to drug addiction, mental health issues also needlessly send people into the criminal justice system. A disproportionate number of inmates in our criminal justice system suffer from mental illness. Screening and diverting individuals to treatment instead of punishment can reduce crime and the incarceration of the mentally ill. Voters with loved ones suffering from mental illness know too well that their family members

need treatment instead of punishment. Local prosecutors are embracing mental health treatment as a way to reduce incarceration and crime rates.

More prosecutors are coming to see their role as expanding beyond putting “bad guys” in jail. The new wave of prosecutors recognizes a vision that Eric Holder shared with us—that prosecutors should be not case processors but community problem solvers. Voters who have experienced the ravages of opioid abuse are seeing the wisdom of that vision.

Finally, we think that there is one other reason for the appeal of reform-minded prosecutors, an idea as old as our nation—liberty. In our increasingly connected world, the collateral consequences of a criminal conviction have made a prison sentence less a debt to society than a stain for life. For many offenders, a life-long scarlet letter is inconsistent with our values as a free society.

Ideas That Keep People Out of Jail

The effects of arrest and prosecution are hardest on indigent or minority defendants in communities with high crime rates that are heavily policed. As the DOJ found following its investigation of the 2014 shooting of Michael Brown, African Americans made up 67 percent of the population of Ferguson, Missouri, but comprised 93 percent of arrestees. This type of disparate impact tends to delegitimize the credibility of the criminal justice system by calling its credibility into question, particularly in the eyes of members of those communities, which in turn leads to a lack of respect for the law. People are less likely to comply with laws when they believe the system is unfair.

In response to these problems, prosecutors are championing ideas that keep people out of prisons and jails, such as diversion programs; alternatives to cash bail, fines, and fees; and prisoner reentry programs.

Diversion programs typically require a defendant to admit guilt and participate in intensive supervision with conditions of release. The conditions might require the defendant to participate in a program designed to position him or her for success by, for example, undergoing drug treatment or cognitive behavioral therapy. The defendant may be required to complete community service. In exchange for successful completion of the program, the defendant remains out of prison and keeps his or her record clear of a criminal conviction. This strategy allows defendants to maintain employment, a significant factor in avoiding further criminal behavior, and prevents a felony conviction from closing the door to future employment opportunities.

Prosecutors are also working to end financial burdens that create disparities, such as cash bail, fines, and fees. Cash bail has a disproportionate impact on indigent defendants, who cannot afford to pay. When defendants are unable to post bond, they remain in jail pending their trial. While in jail, they may lose their

job or their place in a treatment program. Alternatives to this system exist. The bail system we used in federal court presumes release unless no reasonable conditions can ensure the person's appearance at trial or the safety of the community. In those cases, the defendant is appropriately detained pending trial. If the judge finds that the defendant is not an undue risk of danger or flight, however, the judge permits the defendant to post an unsecured bond, which the defendant pays only if he or she fails to appear or otherwise violates bond conditions. This program has been used successfully in federal court for decades.

Similarly, fines and fees, which are used to fund some state courts, have a disparate effect on indigent defendants. The inability of poor defendants to pay these penalties can result in a return to jail, making it a debtors' prison of sorts. The DOJ investigation into police practices in Ferguson found that the city's focus was on generating revenue from fines and fees rather than protecting public safety. This practice had an adverse effect on minorities, causing "deep mistrust between parts of the community and the police department, undermining law enforcement legitimacy among African Americans in particular."

One solution some state prosecutors are advocating is to use payment plans for those who cannot afford to pay in full. Another solution is to follow the lead of federal courts, where judges waive fines and fees for indigent defendants. Court costs are an essential part of a criminal justice system, but they need not be paid by defendants.

Effective prisoner reentry systems are another way to reduce crime and keep people out of prison. Citizens who have completed their sentences and return to their communities face a number of obstacles to becoming productive members of society. People with felony convictions have trouble finding jobs, qualifying for public housing, and obtaining vital documents, such as driver's licenses, among other challenges. Considering that some states report recidivist rates at more than 60 percent, helping citizens returning from prison to succeed in society is a smart bet.

Under the DOJ Smart on Crime program, prosecutors and other professionals worked to promote successful reentry in a variety of ways, such as connecting returning citizens with job training and placement programs, and finding law students and legal clinics to assist former offenders with issues relating to credit repair, license restoration, landlord-tenant disputes, and outstanding traffic tickets and warrants. State prosecutors, corrections officials, and nongovernmental organizations are doing similar work all across the country. By assisting returning citizens in establishing the basic needs of civilian life, prosecutors can help position them for success, which will, in turn, prevent them from committing new crimes. In addition to reducing crime, reentry programs keep returning citizens out of prison and in our communities, where they are able to contribute to their families, neighborhoods, and society.

Reducing our reliance on prison is not just a smart strategy to manage costs and reduce crime; it is also consistent with our fundamental notions of liberty, that all persons have an inalienable right to be free. While individuals who violate our laws need to be held accountable, that accountability must also be just and proportional. Americans believe in second chances. We should deprive individuals of their liberty only when necessary, and our institutions should adopt policies that promote liberty after a sentence is served.

As the bills have come due for a war declared decades ago, we have come to realize that it was a poor investment.

As societies mature, norms change, but values endure. It may be that the days of "tough-on-crime" chest pounding are coming to an end with higher goals in mind. We are seeing prosecutors making smart choices about how to address the consequences of crime to protect public safety and deter misconduct, and voters are liking what they hear. When we get past overly simplistic rhetoric and understand the facts, we can see the importance of factors like cost, law enforcement priorities, and the human toll of addiction and mental illness. Innovative strategies to reduce incarceration are taking hold across the country as people begin to realize that there are real costs, both fiscal and human, that come with unnecessarily lengthy prison sentences.

And perhaps even more importantly, our views of crime and punishment are shaped by the kind of nation we want to be. Would we rather use our finite resources to lock up millions of our citizens at a rate greater than that of any country in the world, or instead use those resources to enhance public safety, reduce addiction, treat mental health issues, and provide individuals with skills that equip them to contribute to the workforce?

Not only is it a wise strategy to look for alternatives to incarceration, but it is consistent with our founding principles. For a nation that is a beacon for those who yearn to breathe free, we should work harder to live up to the closing words of our pledge of allegiance—"with liberty and justice for all." ■