

Episode 3: Future
Fight the Power: The Evolution of Prosecutorial Discretion

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ADDIE-GRACE: What comes next? For prosecutors, for the criminal justice system, for our country as a whole? Welcome to episode three of “Fight the Power: The Evolution of Prosecutorial Discretion.” We’re your hosts, Addie-Grace Cook.

MARGARET: Margaret Beimdiek.

DREW: and Drew Harrell. In our previous episodes, we traced the history of prosecution, from the nation’s founding to the civil rights era. We also explored the present landscape of prosecution and the prevalence of plea bargains. In our final episode, we will examine ideas by activists and others designed to hold prosecutors accountable in the future.

First, we’ll discuss legislative strategies for prosecutorial reform. Then we’ll move to an analysis of alternative sentencing, and finally, we’ll discuss the calls for prosecutorial abolition.

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DREW: The first thing we must dive into is prosecutorial reform.

Researchers and legal experts say that two big problem areas that need attention from lawmakers are:

- Laws that carry mandatory minimum sentences
- And plea bargains

Prosecutors wield enormous power with both. They can manipulate a defendant’s ultimate sentence based on the charges that they choose to include in an indictment. By doing so, they handcuff judges, who have no choice but to impose the legislatively mandated minimum sentence for the offense. And that creates pressure for a defendant to enter into a plea bargain -- possibly with lengthy prison time. Maybe not as long as the mandatory minimum. But often, plea bargains require defendants to serve several years in prison.

First, we need to talk about the role of the prosecutor. The prosecutor as a professional is an administrator of justice and a zealous advocate for the government—at the local, state, and federal levels. The primary duty of the prosecutor is to seek justice within the bounds of the law. A prosecutor is not supposed to be single-minded in pursuit of a conviction above all else. That’s because, under the law, the prosecutor serves the public interest and is supposed to act with integrity and balanced judgment. In other words, a prosecutor is supposed to seek justice, while serving as a guardian of justice.

Congress and state legislatures across the country shifted the balance of power in courtrooms when they created crimes with mandatory minimum sentences. In doing so, they stripped judges of their power to decide punishment of defendants—and put it in the hands of prosecutors who

are clever enough to craft indictments that include a crime that requires a mandatory minimum sentence.

Washington and Lee University Adjunct Law School Professor [Juval Scott](#) worked as a federal public defender in the western district of Virginia and dealt with cases in which mandatory minimums played a huge role.

SCOTT: Once the prosecutor has said you will plead guilty to this count with the mandatory minimum, the judge can't say, I think that this is unfair, and so I'm going to sentence him below the mandatory minimum. And so much of where the sentencing outcome is set in the charging decision and the prosecutor's office has complete control over charge and decision.

DREW: But there's more to it than a shift in power from one player in a courtroom to another. Mandatory minimum sentences are blamed in part for mass incarceration in the United States, in which roughly 2 million people are incarcerated. The other issue is fairness. Prosecutors' reliance on charging crimes with mandatory minimum sentences has hit communities of color harder than any other group. According to the [Brennan Center for Justice](#), prosecutors' mandatory minimum charges resulted in Black people spending more time in prison than whites for the exact same crimes. Prosecutors bring mandatory minimums 65 percent more often against Black defendants, all else remaining equal.

SCOTT: We know that crime doesn't only happen in black and brown communities. But if you go to certain districts, you could find that black or brown people are the ones prosecuted to the tune of 60-70%. That gets back to a policing issue, and then it gets back to where they decide that they are willing to prosecute cases from.

DREW: Plea bargaining is another major target of reformists. In the U.S., more than 97 percent of criminal cases end in guilty pleas. When that happens, there is no trial. Defendants do not get their day in court. They do not learn the full extent of the evidence against them. They give up their rights to learn what it is—and to challenge it in open court.

But for many people, the risk is too great. They don't know what a jury will or won't do. But they do know that they are likely to face even longer prison sentences if they take a chance, decline a plea bargain offer, and go to trial.

[Taylor Pendergrass](#), the director of Advocacy and Strategic Alliances for the American Civil Liberties Union of Colorado, is advocating a [solution](#): Lawmakers could require prosecutors to limit the number of plea bargains. Such a limitation could force prosecutors to use plea bargains more sparingly.

Professor Scott says there is another reform—and that's ensuring that there is a more robust mix of people hired to work as prosecutors.

SCOTT: I think that prosecutors' offices need to have diversity, and I mean full diversity and not just having the one black person that they're comfortable with or the one that person that they're comfortable with and then silencing that voice anytime that voice dissents on its policies. We

need more black and brown people in leadership and prosecutors' offices. We need prosecutors' offices to be more creative about what punishment looks like and what it means and what is required.

DREW: Margaret is up next to tell us about a program in St. Louis created by a federal judge to keep some defendants out of prison and help others after they've done their time.

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MARGARET: Thanks, Drew. In recent years, some judges have moved towards alternative programs that address both the front end and back end of sentencing. For several years, [Senior U.S. District Judge Audrey Fleissig](#) marveled at the success of reentry courts—specialty courts—in the Eastern District of Missouri that were designed to help recently released prisoners re-enter society. She wondered if a similar approach would work before an offender went to prison. That's why she created [Sentencing Alternatives Improving Lives, or SAIL](#), in her court.

FLEISSIG: I had interest in starting the SAIL program, probably since early 2010. Our district has been very involved and was a leader early on with respect to reentry courts, um, dealing with specialty courts when people are returning from prison, um, and under supervision, and, uh, to help those who might have the most difficulty complying with the terms of their supervision to be successful. And those courts are wonderful. But I always felt that if the intensive supervision worked well on the back end, uh, to help prevent people from reoffending and having to go to prison again, that it ought to work even better at the front end when people have not yet gone to prison and had their lives disrupted in that manner.

MARGARET: The post-plea, pre-sentence diversion program selects people who are faced with nonviolent criminal charges that judges think will respond to rehabilitation efforts.

FLEISSIG: We do not admit people who have been involved in violent offenses or have had violent offenses in their criminal history. We, um, do not, uh, take sex offenders because we're not in, we're not capable of providing the supervision to them. We also will not accept people into the program who have very serious mental health issues, uh, again, because we are just not capable of providing the level of supervision that they need. And other than that, we are looking for people who if convicted are likely to go to prison, who we believe with intensive supervision, we could assist and that's who we are looking for.

MARGARET: The program requires participation from all parties involved in the criminal justice system including the judge, the Pretrial Services Office, the U.S. Attorney's Office, and the Federal Public Defenders Office. They all cooperate and collaborate in a program that has two paths to rehabilitation.

FLEISSIG: Track two is a track where the defendant would enter into a guilty plea. If successfully completes the program, that defendant's charges would not be dismissed. But rather, they would be promised a reduced sentence if they, uh, completed the SAIL program. In track one, a participant who completes the program, um, has their charges dismissed. So, what happens at their graduation is that the, um, the defendant moves to withdraw the guilty plea. The

government agrees to that. Their guilty plea is withdrawn, and the government moves to dismiss the charges against them. We have had, um, people with very serious charges, um, who are in our program, people who, if convicted, would be facing mandatory minimum sentences, um, and yet the U. S. Attorney's Office has agreed to permit them to participate in the program in Track 1.

MARGARET: Defendants who are not selected for SAIL are still subject to the power that federal prosecutors draw from the [U.S. Sentencing Guidelines](#).

FLEISSIG: What happens with respect to sentencing with those individuals who are not in a diversion program, um, can be strongly affected by the nature of the charges that are brought by the U.S. Attorney's office and whether they are willing to dismiss those charges that carry a mandatory minimum sentence in connection with the defendant's plea agreement. Or sometimes reduced because they can bring a drug charge based upon the quantity, it would carry a mandatory minimum sentence. But they will often allow the defendant to plead to a lesser included offense that does not carry that mandatory minimum sentence.

MARGARET: But Fleissig says alternative sentencing programs aren't appropriate for everyone because of the severity of the charges that many defendants face in federal courts. But, she says, such programs can give other defendants the help they need to save themselves.

FLEISSIG: There are a lot of people in the federal criminal justice system for whom I believe a time in prison is not necessary. Rather, they are people who have had some problem in their lives that have contributed to their being in the criminal justice system. And we can address those problems through intensive supervision and support and give that person the opportunity to put their lives on a different trajectory and earn the right not to go to prison.

MARGARET: SAIL also offers defendants help in learning life skills.

FLEISSIG: Everyone has to, um, participate in and graduate from the Moral Reconnection Therapy Program, MRT. And that is a program that helps people examine, it's a cognitive therapy program, helping people examine all kinds of aspects of their life and their thought processes and how they might change those thought processes. So, everyone has to graduate from the MRT program, um, as well. And the participants find that very, very helpful.

MARGARET: Fleissig says SAIL gets good results—as does other similar programs across the country.

FLEISSIG: At least 75 percent of our participants graduate from the program. And, um, and they have not reoffended since they graduated from the program. Um, understand that the John Jay College of Criminal Justice, um, conducted a study of seven of these types of programs, um, including SAIL in 2019 and found that it works, that the new offenses were significantly less than the control group, that the graduates were working a greater percentage of the time and at better jobs, that many were parents who were responsible for their children. And they are now

completing, um, a new study, a larger study involving 13 federal programs, again, including SAIL, and their results are the same. So, in terms of what we are hoping to achieve through the statutory sentencing objectives, with these folks, we are achieving it better with these alternative-to-incarceration programs. We are doing it at tremendous cost savings, just in terms of sheer dollars. And we are doing it with tremendous societal benefits.

MARGARET: Addie-Grace looked at efforts to involve community members more in all aspects of the criminal justice system.

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ADDIE-GRACE: Advocates calling for change in the criminal justice system essentially divide into two main camps:

- One group believes that the criminal justice system can be reformed through changes in the law.
- Others want to abolish what they call the prison industrial complex, which includes all components of the nation's criminal justice system, from police and prosecutors to judges and prisons.

Activists and researchers [Rachel Foran](#), [Mariame Kaba](#) and [Katy Naples-Mitchell](#) say the only way to [abolish prosecutors](#) is to involve people in the community. They want members of the community to not only serve as watchdogs on prosecutors. They also want members of the community to participate in the decision-making in criminal cases, at all stages of the process.

They argue that abolition requires an “invest/divest” model. They want to divest tax dollars in the current systems of policing, prosecution and imprisonment. At the same time, they argue for investments in social programs.

Foran, Kaba and Naples-Mitchell recommend a [community-centered approach](#) that focuses on raising awareness about how the criminal justice system works among people who live in the most-affected neighborhoods. It also means creating funds to pay bail for people who are arrested. It means involving and engaging members of a community in what's known as participatory defense.

I spoke with Stephen Austin, director of the Participatory Defense Best Outcomes Hub at [Mothers in Charge](#) in Philadelphia.

AUSTIN: It's designed to help people help themselves. That's the main design of participatory defense and participatory defense by its name, it talks about the individual being able to participate in their own defense when they have criminal matters, or they are up against the criminal legal system.

ADDIE-GRACE: A person charged with a crime feels the enormous weight of the government bearing down. A defendant sits alone at a table in a courtroom with a defense attorney. The defendant usually faces forward, toward the judge and possibly a jury.

AUSTIN: You kind of understand and know that you're pretty much alone in the room with people who are accusing you of something and you could lose a significant part of your life if not your entire life. You know, it's very intimidating. And for the most part, people don't understand the language of the court, of the attorneys. They have a tendency to hold you out. It's a network. It's a you have to be a member of the bar to speak. You know, the judge won't, doesn't really want to hear from you. You have a representation. That's what your representation is there for. So, it seems like you're really not even part of the proceeding. You're the subject, but you're not really a part of what's happening in the courtroom.

ADDIE-GRACE: Austin knows what it's like to feel that fear in a courtroom. He shot and killed a man when he was 16 and [received a life sentence](#). In 2017, he was released—42 years later. Today, he says he believes participatory defense could have changed the outcome of his case.

AUSTIN: You know, I was like most folks. I didn't know nothing about the law. I didn't understand my circumstance or situation. You know I couldn't help myself. And that ignorance, that inability to know how to help myself, what to do. Yeah, I see a lot of things that happened, you know, in my circumstance that you know why I received a life sentence. That didn't have to be.

ADDIE-GRACE: Once a base of community members has been created, abolitionists take aim at prosecutors' offices and decision-making in all aspects of a criminal case, from start to finish. The advocates' goals include ending plea bargaining, decreasing detention, and recommending pre-trial freedom in every case.

The final step is shrinking the power of police, prosecutors and prisons overall. A key goal is to repeal laws that criminalize certain drug use.

It may sound far-fetched to create a world without prosecutors. But abolitionists believe it's possible to chip away at prosecutorial power a bit at a time.

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ADDIE-GRACE: [Raj Jayadev](#) started the first participatory defense hub, [Silicon Valley De-Bug](#), in San Jose, California. It is one of 39 [participatory defense](#) hubs across the country. The hubs are run by community activists. They hold regular community meetings for people with pending criminal cases—and people who have dealt with the criminal justice system in the past. In the meetings, they discuss specific cases and guide families and friends who may not fully understand the court process. The approaches differ. But the main idea is that defendants and their loved ones are involved in all steps of their particular court case.

One tool that advocates focus on is the creation of social biography videos. Defendants make a video about their lives, histories and roles in the community to present in court to a judge and possibly a jury. The social biography video is intended to humanize defendants and show that there is more to them than the crime they are accused of committing.

AUSTIN: It helps the person understand what next steps are, what they need to do, and how they need to prepare themselves. And, also how to represent themselves in a way that they're a whole person. They are not just the aggravated assault that they're faced with. Which we know the other side, the prosecutor, that's basically what his concern is, is that it's an aggravated assault. And he doesn't know anything about the person. He doesn't know for example that you might be doing good things in the community, you know, that you might have a good name in the community. That you work and you pay taxes and you, you know, you're doing a lot of things that most citizens are doing.

ADDIE-GRACE: Advocates of participatory defense say it's a way to take back, at least in some part, the prosecutor's power to label and define a person by the crime they are charged with. It presents a whole person, with an informed support network behind the defendant. But Austin says defendants still face overwhelming odds because of the power of the prosecutor.

AUSTIN: I've seen some very honest prosecutors that will put the information out there, not hide anything and battle and take, go into battle there for folks who have criminal matters. I mean, you still have a disadvantage. You're still operating from a disadvantaged position in terms of resources. Any individual who comes up against the prosecutor will find themselves under-resourced. If you're just a layman and you have no real wealth or income to speak of so socially, economically. Those things come into play. While the prosecutor has a wealth of financial support, and apparatus system assistance. You know, the whole apparatus that he's a part of will assist him in the ways that he expects.

ADDIE-GRACE: [Some critics](#) argue that participatory defense could backfire. Disclosing sensitive information, such as substance abuse, could be used against a defendant. But Austin says the approach does not replace the need for a defense attorney.

AUSTIN: Any information that's exposed from the case is exposed from the individual in the case and his team or his attorney. They make those decisions. Participatory defense doesn't make those decisions. We're not in the decision-making process business for folks in their criminal matters. We help them understand their criminal matters. We help point them in the direction that you know, like if we know they need to certain questions, they need to ask their attorney about certain pieces of information. This is solid information that we got. We helped them do that. We put them on that mission. We don't. We don't. It's not our goal to represent them.

ADDIE-GRACE: At its core, participatory defense helps defendants understand the basics of what's happening to them—so they can focus more attention on far more serious issues, like deciding whether they want to accept a prosecutor's offer to plead guilty and what that might mean for them.

AUSTIN: So, your eyes come open and you start to be able to be more focused on what you need to do to survive this situation. It's tough. Some people, you know, they give up and this is why, you know, we have this part of it. This system is so big, this plea bargaining, which is probably 90-something percent of all convictions. You know, people take deals, people take numbers, and the system is designed to push them in that direction.

ADDIE-GRACE: Austin says participatory defense is one alternative that could help people cope with the enormity of the criminal justice system.

AUSTIN: The criminal legal system is huge. It's everything in this country. The idea is that it comes from the methodologies that are being used. You know, across the country. This is a design. This is a design. This is the model and like any model, you know, it has to be taken apart. It has to be taken apart. I mean, that's really pretty much the solution, but you know the folks who are learning how to help themselves are organizing in a way that they really will be able to help themselves. There's a lot more to be done. You know participatory defense is a fledgling, you know, in my eyes, in terms of what I see.

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ADDIE-GRACE: In his novel, [House of the Dead](#), Fyodor Dostoyevsky said “A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals.” By most measures, America has failed. Change must happen in our criminal justice system. We’ve explored several ways to change it.

In our three episodes of Fight the Power: The Evolution of Prosecutorial Discretion, we have explored the past, present and future of prosecutorial discretion.

We’d like to thank [Skilsel](#), [Pixabay](#), [Fable City Radio](#), [Garuda](#), [Iain McCurdy](#) and [White Records](#) for the music and sound effects we used in the podcast. You can learn more about the experts we interviewed and our research by checking out the show’s transcript.

And finally, we’d like to thank you for listening.

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