

Public Defenders as Prosecutors: Unanswered Questions

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Opinion

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(photo: the governor's office)

The recognition that prosecutors were a primary cause of mass incarceration has spawned a movement for progressive prosecutors. While exactly what it means to be a progressive prosecutor is far from clear, at a minimum it reflects a change in the way prosecutors approached their work over the past several decades.

Common features of a progressive prosecutor include emphasizing diversion over prosecution for minor crimes; declining to prosecute marijuana arrests in certain circumstances; and reducing or eliminating calls for money bail. While to many these adjustments seem more like correctives than anything particularly progressive, they do signal important changes to the prosecutorial status quo.

As surprising as it is to witness the number of District Attorney candidates running as criminal justice reformers, it is even more remarkable that many of these candidates are current or former Public Defenders campaigning to be the prosecutor in the very court in which they have been defending their clients. To devotees of the progressive prosecutor movement, this development is like manna from heaven; every Public Defender is seen as uniquely qualified by virtue of having been a Public Defender.

In the years since the Supreme Court ruled that anyone facing incarceration is entitled to an attorney, there have been countless reports about the crisis in indigent defense and the effectiveness of government appointed lawyers. Often, the crisis centers around resources; Public Defenders have too many clients and too little funding. Yet there is also the reality that not all Public Defenders are vigorous, dedicated and indefatigably zealous advocates for their clients.

Before anointing any Public Defenders as righteous District Attorneys, it is imperative to discern what kind of Public Defender they were. Did they pound the pavement looking for witnesses? Did they spend hours researching the law and writing novel arguments to expand the law and protect their clients' rights? Did they visit their clients whether in jail, prison, or at home? Did they regularly push back against prosecutors and fight in court with judges who ran roughshod over their clients?

The paradox is that most, if not all, of the fierce and tireless Public Defenders who meet the "test" spelled out above are the very ones who likely could not imagine prosecuting their clients in any way shape or form. And after all the cases are diverted from court, and all the low-level offenses are dismissed, that is what Public Defenders turned District Attorneys will do -- prosecute their former clients. That prosecution will be kinder, gentler, and more attuned to race and poverty, but thousands and thousands of people will still be prosecuted, and many of them will end up enduring the brutality, despair, and violence of years lived in prison cells.

The progressive prosecutor won't ask for money bail very often, or maybe not at all, but will ask that any number of people be held without bail or subject to all kinds of surveillance and restraints on their liberty.

The progressive prosecutor won't seek incarceration except as necessary, or even only as a last resort, but will find that last resort with respect to thousands of people.

The progressive prosecutor won't ask for the maximum sentence all the time, and maybe only in some cases, but will still often ask for jail or prison sentences.

These truths make most committed Public Defenders shudder at the thought of being the elected prosecutor and having people incarcerated, even for a day, in their name.

Public Defenders daily witness all manner of damage, indignity and violence inflicted on clients, their families, and their communities. They argue every day that the criminal legal system is unjust from biased and unconstitutional stops, arrests, interrogations. and line-ups, to rubber stamp Grand Juries, and through plea bargaining and trial processes that promote efficiency and punishment over fairness and decency.

They are called to stand, literally and figuratively, between the awesome power of the government and their clients. Public Defenders as prosecutors will now face their former clients, level accusations against them, and frequently argue against the assertion, let alone expansion, of their constitutional rights. Suddenly, warrants are not always required, the Grand Jury isn't so bad, and police interrogations are a valuable societal tool.

When I was a fledgling Public Defender, I was assigned to assist a supervisor representing a man charged with a particularly brutal crime. Several lawyers from the assigned counsel panel had already declined to take the case, the prosecutor was seeking a maximum sentence, the judge didn't even try to hide his contempt for our client, and the media coverage was dehumanizing.

In his audiotaped confession, our client recounted in graphic detail what he did and why he did it. I asked my supervisor how he felt about representing this client. He responded by saying that it was exactly clients like this, who just about everyone wants to throw away, that most desperately needed a committed Public Defender.

Ironically, this is the very man the progressive prosecutor will prosecute, albeit with greater awareness and sensitivity. His case will not be dismissed or diverted out of court. He will not be released without bail. And the progressive prosecutor will seek a prison sentence.

Accepting for now the current system, the question is not so much whether that man should be prosecuted but who should, or could, do the prosecuting. A consummate Public Defender couldn't be the person standing in court saying that this person, this man standing five feet from me, must, in my name and my role as prosecutor, go to state prison. Maybe the Public Defender who could do that made the right move in becoming a prosecutor. Maybe they didn't have the right stuff to be a Public Defender in the first place.

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