

November 12, 2018

UPDATE

Prosecutorial Reform in 2018

Accountable Justice Action Fund

This report introduces the Accountable Justice Action Fund (AJAF) and gives a high-level summary of what we observed in the field in our first year of operation. It should be read as an intermediate update, not as a final retrospective. We offer an overview of our work, the broader state of play in this space, and reflections on what has been accomplished and what we have learned.

BY MARISA RENEE LEE AND CHRIS CORMIER MAGGIANO



Members of the Clark County (Las Vegas), Nevada community pushing for reform.
photo courtesy PLAN Action Fund

Why Prosecutors Matter

Prosecutors are some of the most powerful elected officials in America. With immense discretion, they decide who is charged with crimes, who must stay in jail prior to trial (when they are presumed innocent), who is offered a plea deal, who is charged as an adult—and who isn't. Yet their role and power have been poorly understood by the public, resulting in very little real accountability.

According to a December 2017 poll,¹ voters continue to be relatively uneducated about their prosecutor—sometimes known as a district attorney, commonwealth attorney, or state's attorney—with nearly half unsure if they elect their prosecutor. The power of incumbency in prosecutors' offices is extreme, with the vast majority of prosecutors running unopposed. In 2018, 963 of the 1,061 (91%) prosecutorial races were uncontested in the general election.²

Without the pressure that can come from an electoral challenger, there is little incentive for prosecutors to change policies to fit the evolving needs of their communities.

According to Fordham Law School Professor John Pfaff,³ most of the 500% increase in U.S. prison and jail populations over the past several decades is due to prosecutors bringing more serious charges for the same behavior—e.g., by charging actions as felonies rather than misdemeanors—which they have complete discretion to do. The unnecessary and destructive costs—in terms of public dollars, diminished freedom, and fractured families and communities—are extreme. Pfaff documents that prosecutors have enormous power to influence these outcomes,⁴ and have used their power to ratchet up charging and sentencing to extreme heights.

Many voters are still getting up to speed on the importance of prosecutors; in that December 2017 survey,⁵ once voters learned about the role that their prosecutors play, nearly three-quarters indicated that their elected prosecutor plays a “very important” role in their community. This enthusiasm has also shown up in elections. For example, in the 2017 Philadelphia District Attorney primary, where voters had a choice between six candidates, including several very reform-oriented ones, turnout was up by 18% over the prior average.⁶ Increasingly, prosecution is a career option for socially conscious young lawyers who are interested in public interest and social justice.⁷

¹ New Polling of Voters' Opinions Towards Prosecutors, ACLU <https://www.aclu.org/fact-sheet/new-polling-voters-opinions-towards-prosecutors>

² Winning Justice Prosecutor Directory <https://www.winningjustice.org/directory>

³ The Causes of Growth in Prison Admissions and Populations https://web.law.columbia.edu/sites/default/files/microsites/criminal-law-roundtable-2012/files/Pfaff_New_Admissions_to_Prison.pdf

⁴ The Perverse Power of the Prosecutor, Democracy Journal <https://democracyjournal.org/arguments/the-perverse-power-of-the-prosecutor/>

⁵ Ibid

⁶ Voter turnout in Pa. primary up slightly from last midterm, WHY? <https://why.org/articles/voter-turnout-in-pa-primary-up-slightly-from-last-midterm>

⁷ Great Power, Greater Responsibility – The Importance of Socially Conscious Prosecutors in Combating “Tough on Crime” Policies, Penn State Law Review <http://www.pennstatelawreview.org/wp-content/uploads/2018/10/122-Penn-State-Law-Rev-Penn-Statim-24-Aboulaflia.pdf>

The Accountable Justice Action Fund

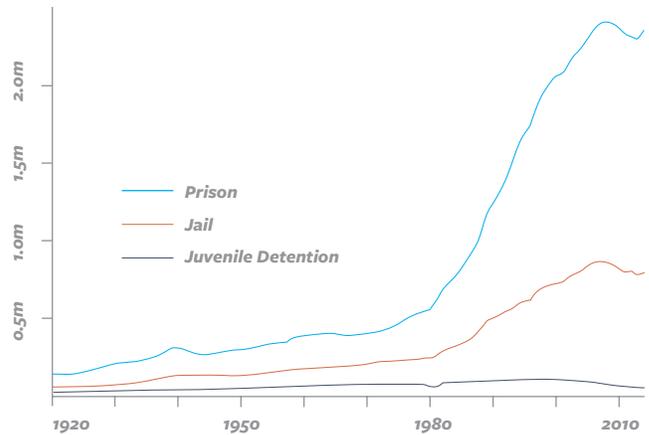
In late 2017, the Accountable Justice Action Fund (AJAF) was created to reform the criminal justice system, with a very strong focus on prosecution, by equipping local and national groups with the relationships and strategic insights to safely and effectively reform their local criminal justice practices, especially those of prosecutors. With a focus on public education and attention to how reform happens, we hope to equip many more members of the public to make well-informed decisions about who their prosecutor should be and what their prosecutor should do with the immense power of that office.

For example, providing resources to community groups to ensure their voices can be heard helps ensure a relationship of accountability between the elected office of prosecutor and the communities most impacted by their decisions.

We believe that strengthening that relationship of accountability is the essential foundation for future policy reforms that keep communities safe and ensure that offices stay well informed and evidence-based in their practices, rather than relying on excessive incarceration for a false sense of security. When we form local partnerships, we choose jurisdictions where there is substantial community leadership and engagement around prosecutorial accountability.

As part of this approach, AJAF seeks to improve the environment for reform-minded prosecutors to emerge as candidates in key jurisdictions, to be well-understood and well-received by the media and the public both as candidates and later as officeholders, and to be well-equipped with the policy knowledge they need in order to make good on reform commitments. We create pressure for all candidates for these offices to commit to reforming policies and practices, and to be held accountable to those commitments before, during, and after elections. We seek to accomplish these objectives through investments in communications, public education, organizing, electoral programs, and technical assistance.

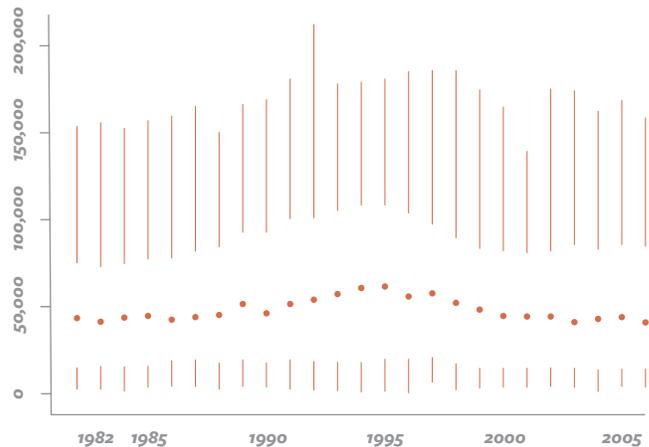
Together with its partners, AJAF is working to support communities to bring accountability to the criminal justice system, with a heavy focus on prosecutors. As we look ahead, we will support and work with local and national partners to hold both incumbents and newly elected officials accountable and work with them to implement the reform policies that were critical to their campaign success.



Incarcerated Americans

1920-2014

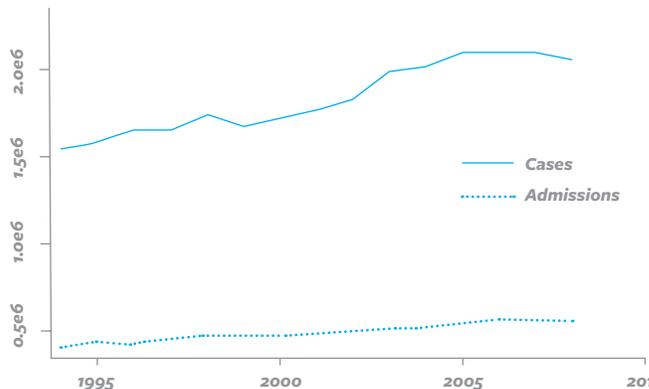
Source: "The Causes of Growth in Prison Admissions and Populations"
Data from the Uniform Crime Reports



Major Arrests

1982-2006

Source: "The Causes of Growth in Prison Admissions and Populations"
Data from the Uniform Crime Reports



Filings and Admissions

1994-2008

Source: "The Causes of Growth in Prison Admissions and Populations"
Data from the National Center on State Courts and National Prisoner Statistics

State of Play in the Prosecutorial Reform Space

Prosecutorial Elections are Important Crucibles for Change

We have observed the following ways that work in this area can advance the goals of increasing accountability of prosecutors to the communities they serve, based on the best evidence and policy learning:

- Community support for a challenger's reform vision can prompt a powerful incumbent to embrace reform-minded policies to maintain their support. For example, in Alameda, California, DA Nancy O'Malley, who had run unopposed in 2010 and 2014, responded to her reform-minded challenger by, just a few weeks before the election, announcing her support for bail reform legislation and releasing her plan to expunge marijuana convictions.⁸
- The existence of a solid challenger increases the chance of robust public discourse during an election. When elected officials become aware of how strongly the community supports reform, which may not have been previously apparent, they may take new reform positions both inside the prosecutor's office and in other government offices. We have seen evidence of this emerging in Prince George's County, Maryland. Aisha Braveboy, the State's Attorney-elect who was not endorsed by local criminal justice reform organizers, initiated a dialogue with organizers on key justice issues following the election.⁹ Braveboy has made early commitments around bail reform and juvenile justice and has also invited members of the local Mass Liberation Project affiliate to join her transition team.
- The intense activity of an election cycle allows for rapid public education and organizing in communities most impacted by incarceration and crime, allowing community members to develop strong positions on policies they want to advocate for going forward. We have seen evidence of this in Clark County (Las Vegas), Nevada. Incumbent DA Steve Wolfson responded to a challenge from a reform-minded candidate by championing a new conviction integrity unit and expressing a new openness to changing his policies on bail, and possibly his approach to the death penalty.¹⁰ Local partners will work with Wolfson's office as he starts his new term as DA.
- A new prosecutor in office has very substantial discretion to make changes that will significantly transform the office, including: declining to request that defendants (often impoverished) produce high money bail amounts in order to be released, making new charging priorities that focus office resources on serious crimes rather than low level offenses, partnering with crime survivor leaders to ensure that survivors receive the support and services they need and that their voices are heard when they request alternatives to incarceration, and more. A recent profile of new Philadelphia DA Larry Krasner, one of the leading reform prosecutors in the country, shows evidence of all of these shifts.¹¹

⁸ Running for Elected Prosecutor Will Never Be the Same, ACLU <https://www.aclunc.org/blog/running-elected-prosecutor-will-never-be-same>

⁹ Aisha Braveboy will be Prince George's County's next state's attorney, The Diamondback <http://www.dbknews.com/2018/11/07/prince-georges-county-state-attorney-aisha-braveboy-election-angela-alsobrooks-damonte-dodd-sean-urbanski/>

¹⁰ Will District Attorney Steve Wolfson be a reformer? Las Vegas Review Journal <https://www.reviewjournal.com/opinion/commentary-will-district-attorney-steve-wolfson-be-a-reformer/>

¹¹ Larry Krasner's Campaign to End Mass Incarceration, The New Yorker <https://www.newyorker.com/magazine/2018/10/29/larry-krasnens-campaign-to-end-mass-incarceration>



The St. Louis community came together for a block party to talk about cash bail, drug offenses, and police violence. photo courtesy Color of Change

Whether a new prosecutor can achieve the goals they set out in their campaign may take months or years to discern. Across the country, all the recently elected prosecutors are in some senses still too green to draw any firm conclusions, though we have seen some promising early shifts in places like Philadelphia, Jacksonville, and Chicago, and we have seen candidates for office in places like Oklahoma adopt language and ideas of reform.

In short, electoral engagement in this context is a tactic for pushing all candidates to adopt more effective policies and practices that are responsive to community needs and prioritize safety over punishment, and to push the public to update its expectations of prosecutors. In our observation, successful strategies for change will seek to support communities to change the terrain on which their candidates compete, and, ultimately, to change prosecutors' policies and practices.

New Reform Candidates Win Elections

The results in 2018 show a continuation of a trend we have seen emerging for the past three years. New emerging leaders who have a different vision of how to serve community safety in the role of prosecutor are winning elections.

- **Wesley Bell** in St. Louis, Missouri, who will become the first African-American prosecutor in county history, ran on a platform of reforming cash bail, expanding diversion programs, and ensuring equitable due process¹² to win a primary race against the incumbent who grossly mishandled the case of the killing of Michael Brown by a police officer in Ferguson and was seeking his eighth consecutive term.¹³
- **Satana Deberry** in Durham, North Carolina, ran on a platform that included ending cash bail, addressing racial bias in the judicial system, and committing to a culture of transparency and trust in the prosecutor's office, defeating an incumbent.¹⁴

¹² <https://www.votewesleybell.com/>

¹³ Prosecutor who led probe of Michael Brown shooting in Ferguson loses primary, CBS News <https://www.cbsnews.com/news/bob-mcculloch-wesley-bell-michael-brown-shooting-ferguson-prosecutor-who-led-probe-loses-democratic-primary-to-black-city-councilman/>

¹⁴ <https://deberry4da.com/platform>

NEW YORK TIMES **U.S.** THURSDAY, OCT. 25, 2018

How ‘End Mass Incarceration’ Became a Slogan for D.A. Candidates

BY FARAH STOCKMAN

- **Joe Gonzales** in Bexar (San Antonio), Texas, defeated an incumbent while running on a platform that included ending incarceration of people who can't afford cash bail, increasing transparency and accountability for prosecutors, and treating addiction and mental illness as health issues, not criminal matters.¹⁵
- **Rachael Rollins** in Suffolk, Massachusetts, made history by being the first woman of color elected DA in Boston's history. She rallied support among local partners to defeat the police-backed candidate to win a difficult five-way primary, all while running on a platform that called out the racial disparities in Boston.¹⁶
- **Diana Becton** in Contra Costa, California, the first woman and the first person of color to serve as district attorney in the county's 168-year history. In one of the largest counties in America, Becton, a judge for more than 20 years, ran on support for victims of crime, destroying the school-to-prison pipeline, and providing second chances to reduce recidivism.¹⁷
- **Jason Anderson** in San Bernadino, California, ran on a platform that included bail reform and eliminating fees and fines for pretrial programs to become his county's first new district attorney in 16 years.¹⁸

Reform-minded DAs also lost in some places, sometimes in a big way:

- **San Diego, California**—Despite support from national and local partners, reform-minded candidate Geneviève Jones-Wright lost to DA Summer Stephan 34 to 66 percent.
- **Washington County, Oregon**—For the first time in 46 years, voters had a choice for district attorney in Washington county.¹⁹ Reform candidate Max Wall lost by a 30-point margin. Nevertheless, his campaign moved DA-elect Kevin Barton on key issues, including admitting that it is better to offer treatment to people addicted to drugs than to incarcerate them.²⁰

Evolving Public Narrative

Locally and nationally, we have seen numerous examples of high-profile people with substantial followings discussing and analyzing criminal justice issues and raising a variety of options for reform, with reference to prosecutors as critical decision makers. Some examples include: the episode of John Oliver's

¹⁵ <https://www.gonzales4da.com/platform/>

¹⁶ Boston's New DA Is a Black Woman Who Is Out to Change the City's Racist Sentencing Disparities, Mother Jones <https://www.motherjones.com/crime-justice/2018/11/a-black-woman-running-for-boston-da-is-out-to-change-the-citys-racist-sentencing-disparities/>

¹⁷ <https://www.becton4da.org>

¹⁸ <https://vote4da.org/wp-content/uploads/2018/04/california-candidate-responses-jason-anderson-1.pdf>

¹⁹ <https://www.aclu-or.org/en/news/kevin-barton-washington-county-da-forum>

²⁰ Kevin Barton's Platform for Washington County DA <https://www.electkevinbarton.com/platform>

popular HBO show *Last Week Tonight* that focused on the power of prosecutors, Kim Kardashian's partnership with the White House to secure the release of a longtime prisoner, and John Legend's ongoing criminal justice reform advocacy, all of whose efforts have reached a wider audience than reformers have seen in the past.

The number of reform-oriented candidates is increasing (we count over 25 in 2018, as compared to around 5 in 2015), signaling that more and more qualified attorneys and communities are binding together to make common cause over these issues.

Conclusion

AJAF has been an experiment in many ways: every aspect of our structure, role, and staffing has been newly created and was pressure-tested in 2018. We made notable progress, which we hope will have a lasting impact on our criminal justice system - and those whose lives are affected by it. Local accountability is critical to long-term reform, so we acknowledge that the real work begins once reform candidates take office in January. As we look ahead, we intend to use the lessons we learned to continue to improve the work we are committed to in 2019, 2020, and beyond. •



Public understanding of the important role of prosecutors is on the rise.
photo courtesy PLAN Action Fund