

THE LAURA FLANDERS SHOW

REFORMING PROSECUTOR POWER — ESPECIALLY AFTER ROE

LAURA FLANDERS: Prosecutors are immensely powerful. They can change the trajectory of people's lives. They pick which cases to bring, which charges to make, and what sentences to ask for, and they can't be sued. In most states, the only way to bring a complaint is through an internal grievance committee that rarely results in any prosecutor being punished. New York has a new independent commission of prosecutorial misconduct. It's the first of its kind in the nation. After some challenges, it was finally signed into law in 2021 and funded for the first time this year. It is a step in the right direction, but it's not all activists wanted and the story of how it came about shows just how hard it is to shift our justice system. Coming up, I will talk with two women who are deeply involved in the effort for structural change at the national level. Especially right now, they say prosecutors are in the hot seat. With the overturning of Roe, they will be deciding how, or whether, or even to what extent to prosecute people who have abortions and their doctors, and maybe their friends under the mess of new laws that are just now kicking in. Who is holding those prosecutors to account? We'll talk about it. But first, for more on what happened in New York, the Laura Flanders Show reporter Kizzy Cox produced this report.

KIZZY COX: Criminal justice reform advocate, Derrick Hamilton, spends his days researching cases and speaking to people who are trying to prove their innocence. The work is personal because 30 years ago, he was in their shoes. In 1993, he was sentenced to 25 years to life for a murder he didn't commit. He spent more than two decades behind bars.

DERRICK HAMILTON: Without liberty, you have nothing. The freedom to go to a corner store, the ability to provide for your family, the relationship with my children. Being a son, being a father, being a brother, you know, being a sibling, I lost all of those things. I mean, you lose every single aspect of your dignity when you walk into a prison.

KIZZY COX: Prosecutors are responsible for overseeing the evidence police bring to the court, and Hamilton believes that's where the prosecutor failed him, which is why Hamilton threw his support behind an independent commission on prosecutorial conduct. Bill Bastuk, founder and national chair of It Can Happen To You, was also wrongfully charged with a crime — the rape of a teenage girl. His lawyer told him that his life would be turned upside down.

BILL BASTUK: He said, "Well, this is what's going to happen to you. You're going to be arrested, you're going to be indicted, you're going to go to trial, and I'm going to have to fight like hell to keep you out of prison for the next 25 years." And at that point, my wife broke down crying and said, "How do you know this? You know nothing about the case." And he said, "That's the way the system works."

KIZZY COX: Bastuk had to pay his lawyer \$150,000. He was found innocent, but became convinced the system needed to change. So he pulled together a coalition to push for a commission. Roger Clark, who spent 15 years in prison, is still trying to prove his innocence. He's also a community activist in VOCAL New York. A coalition member, he walked the halls of Albany with It Could Happen To You.

ROGER CLARK: I'm not trying to indict every district attorney. I'm sure that there's probably some good ones who really go to work to do their job and be fair. But for those, there should be a system in place to make those bad district attorneys terrified to do anything wrong. Like if I do that and then they find out, now I'm going to be out of a job, I could possibly go to jail. Like, there needs to be something there to dissuade them from misbehaving.

KIZZY COX: Another key to the creation of the commission was the power of exonerees telling their stories.

BILL BASTUK: We created a speakers bureau called The Freedom Tour, and the exonerees as the convictions got more and more reversed, the span of exonerees would increase year after year after year.

KIZZY COX: Ultimately, Bastuk garnered the support of both Democrats and Republicans by pointing out how expensive it is to keep the wrongfully convicted in prison. For example, adding up time spent in jail and civil suits, 11 wrongful convictions cost over \$118 million.

BILL BASTUK: The exonerees literally broke down crying. I broke down crying, but they had put so much passion. To them, to many of these exonerees, this was a sign of redemption, a sign of correction. Regardless of all the money out there and everything else, they wanted to change the system so that this was not happening to other people.

KIZZY COX: But the prosecutor pushback was immediate. The District's Attorney's Association of the State of New York sued to stop its creation. The bill was amended and passed again in 2021. Meanwhile, exonerations continued to pile up. According to the National Registry of Exonerations, between 1989 and 2019, there were 2,400 exonerations. Of those, 30% were due to prosecutor misconduct, but only 4% of prosecutors were ever punished. David Soares, former president of DAASNY, who led the lawsuit, claims these numbers are misleading.

DAVID SOARES: Many of the advocates, they say prosecutorial misconduct, prosecutorial misconduct without ever distinguishing between the two. When it's good faith error, right? You're going to be admonished, you're going to learn just like with defense attorneys or judges,

and that won't be repeated, right? So there should be a process for that. But when it's intentional wrongdoing, there is no tolerance for that in our practice.

KIZZY COX: But it's the enforcement of standards advocates say is lacking, and the new commission doesn't have the power to punish prosecutors. Though it falls short of what some advocates were hoping for, they see it as a start.

BILL BASTUK: So whenever we win a piece of legislation, that's important, right? It's like this is one little peg that we're removing from the foundation of this corrupt house. So that's one piece, I think. The other side of it is there's so many more problems that we need to address that this one little piece is helpful, obviously, in bringing transparency, but it's not going to change people's lives overnight, right? We need many, many more wins.

KIZZY COX: Bastuk is prepared to pursue an amendment to New York State constitution to give the commission power to punish prosecutors if necessary. But for now, he's taking the lessons he learned in New York and using it as a blueprint for the establishment of commissions nationwide. As for Derrick, he challenges anyone who opposes the commission to consider this.

DERRICK HAMILTON: I would say to the people, the fear mongers, if you were in these defendant's positions, right? If you were in our positions, what would you want? What would be the accountability that you want? What's the appropriate accountability to somebody to lock you up for 25 years and take away your whole life, destroy you being able to provide for your families, being the father of your children, or the bread winner in your family? What is the appropriate sanction? This commission is the right thing. I'm proud of it. I'm hoping that it evolves. They become much bigger, they get much more power than they got right now.

LAURA FLANDERS: Welcome to the show, Kizzy. Glad to have you on this side of the camera. Do we have any idea of where the process stands right now? It's newly in the budget. The commission, is it up and running? Do we know who's sitting on it yet? Has it seen any cases so far?

KIZZY COX: It's absolutely not up and running. It's still in the process of having its members. It's supposed to be an 11 person body. We're still waiting for people to be named to the commission. So it's not up and running yet, but there's hope. Of course, everyone I spoke to was very hopeful that it will be soon.

LAURA FLANDERS: So this was a rough process with lots of ups and downs. Were the people that you spoke to confident that they were getting somewhere?

KIZZY COX: I would've thought that they'd look at this and say, wait a minute, the commission that we wanted isn't necessarily the commission that we got. We don't really have the power to sanction people, punish people. That's terrible. Yes, people acknowledged it. Yes, it wasn't all that they wanted, but they were really hopeful that they got something. You know, that gave them the impetus to keep going. You know, Derrick was like, yes, I'm proud of this commission. It's the right thing to do. Let's make it stronger. Let's give it more power than it has now. Bill Bastuk, he also was like, look, this is great. We're going to spread this all across the land. He wasn't like, oh, we get it. He was like, this is great. We have learned lessons that are going to be key that will speed up this process moving forward. And if we have to, like you saw on the piece, he's willing to get a constitutional amendment in New York State. Plus, he's willing to fight for that in order to give power back to that commission.

LAURA FLANDERS: So he likes long struggles. Thank you for your reporting, Kizzy. It's great. Well now, turning to our guests, I am joined by Andrea James, executive director of the National Council for Incarcerated and Formerly Incarcerated Women and Girls, which advocates for transformative change in our approach to community safety and care. And Sakira Cook, co-interim vice president at Color Of Change, which has been pursuing prosecutorial reform as part of a multifaceted campaign for criminal justice. Welcome back to the program, Andrea. Let me start with you, Sakira. At Color Of Change, how high of a priority do you all put on prosecutorial misconduct as part of your slate of things to change?

SAKIRA COOK: Well, Laura, thank you for having us and thank you for highlighting this important topic. For Color Of Change, prosecutorial misconduct or transformation, I would say, reform, is a high priority for us in our movement to reimagine safety in America and redefine, or I would say transform, the way that the criminal legal system operates in our country. Prosecutors wield enormous power. They have the power to make charging decisions, they have the power to decide who gets detained pretrial, or who has to pay a money bail to be released. They have the power to determine plea bargaining negotiations, and really can affect sentencing as well. Because of that power, there's a great responsibility from our perspective for prosecutors to use their power in a positive way. To divert people away from the criminal legal system, to reduce mass incarceration, and really funnel people out who don't belong there to begin with. So we've been fighting for a long time to educate people about the role of prosecutors. Not only their role, but also to push prosecutors to make policy change that will support decarceration in the criminal legal system.

LAURA FLANDERS: How do you, Sakira, divide up the responsibility of the prosecutor from the legal framework? Because there are a lot of prosecutors who would say, my hands are tied by our mandatory minimums. There's nothing I can do. And there are judges that say the same thing too.

SAKIRA COOK: Well, I think that's actually not true. People don't realize, and this was part of our campaign when we launched Winning Justice, people don't realize the vast amount of discretion that prosecutors have. They can decide which charges to bring, which laws, quite frankly, to prosecute, right? They don't have to take every case. A police department might go out and arrest people for vagrancy or people who have mental health issues or for drug cases. But the prosecutor's office doesn't have to bring those cases. Those are choices that they are making, and so we are demanding that they make different choices. We're demanding that they use their discretion, that they use the immense power and the tools that they have to create policies that divert people away from the criminal legal system. And they can in fact do that, and we've seen it done in jurisdictions across this country, and we will continue to fight for prosecutors to wield their power in a more just, and equitable, and fair way.

LAURA FLANDERS: And coming to you, Andrea, I mean, this was personal for you. No bail when you were standing accused. Can you talk about your own experience and what difference gender made?

ANDREA JAMES: Absolutely. We have women right now even in our federal system who are going on their 30th year of incarceration. Women like Michelle West, women like Danielle Metz, who we were able to get her sentence commuted by President Obama. But at the age of 26, because she was the wife of a drug dealer out of New Orleans, she was sentenced under conspiracy to three life sentences plus 50 years. Now that for us is prosecutorial misconduct. That is something that we don't usually discuss in the realm of prosecutorial misconduct. But when you actually sentence women in a way that completely strips them of their ability to start a family or to have more children simply because of conspiracy, and that they are swept up in this web of a case that they just have these very fringe engagements or involvements in, but yet because of conspiracy and because prosecutors are asking for sentences that preclude their ability to start a family or have children, that in itself, I mean, we think this is timely to talk about because it includes the conversation we're having right now about losing the right to choose to have an abortion in this country. Well, the right to choose and *Roe V. Wade* also included our thoughts about the right to have a family if we chose to do so. And so all of these things when prosecutors demand these types of draconian sentences, that create this further egregious harm, to us, that too is prosecutorial misconduct.

LAURA FLANDERS: We've just seen a whole new pregnancy to prison pipeline open up, if you like, with the overturning of *Roe* at the Supreme Court. Sakira, turning to you, what are you seeing at the level of prosecutorial action across the country given the discretion that you've just described?

SAKIRA COOK: In the aftermath of *Dobbs*, of the *Dobbs* ruling, the role of prosecutors and district attorneys in this fight have an extremely important role for ensuring reproductive justice.

Let me say it that way. And what happens next on the issue of abortion, but also on the issue, it's not just abortion and the right to exercise reproductive freedom, but it's also unfortunate circumstances that women face with respect to pregnancy outcomes, right? Women are often prosecuted for still births, for miscarriages, and it's important for us to see the full gamut of the unintended consequences of prosecution of women and girls with respect to their reproductive health can have on our community and our society. So we are demanding as part of our work around prosecutorial accountability and transparency, and using prosecutorial discretion in a way that funnels people away from the criminal legal system. Demanding those prosecutors also dispel any notion that they should use their offices in this manner, that they should use their offices to prosecute women in this way. It is not right, and we can't stand up for that.

LAURA FLANDERS: Andrea, last time we talked and I encourage people to check that out, we were talking about the historic roots of our criminal justice system and the policing, especially, of Black women's bodies in slavery. Given that long miserable history, do you think our system is actually fixable with things like commissions and so on?

ANDREA JAMES: Even though we have a criminal legal system in this country that churns up and chews up everybody that gets entangled in it who are poor and Black, or white and poor, or anybody else poor, commissions are absolutely necessary because who else but the people who are most directly affected, the people like myself who have been to a prison, the people like Sakira who have family, who they have been caring for and loving who have been in prisons for decades. But the fact of the over policing of Black women and their bodies, it's not something again that just started with the rollback of Roe V. Wade.

LAURA FLANDERS: Of course, one person who knows this story well is Chesa Boudin, who grew up with incarcerated parents and became an advocate for children in his situation. Chesa was elected as San Francisco District Attorney in 2019 and went on to serve two and a half years in which he eliminated cash bail, and fired roughly half a dozen prosecutors from his office. But this summer saw Boudin recalled in a backlash campaign. Sakira, given all of that, how do you assess this national strategy that Color Of Change has been part of, of prioritizing electing progressive DAs?

SAKIRA COOK: All communities deserve to feel safe. But for too long, we've allowed politicians, law enforcement, and the media to define what safety is. And to use safety to justify our overspending in policing, prosecution, and prisons, quite frankly. And that hasn't led to more safety, that's actually led to less safety, which is why we've pushed for prosecutorial reform. Which is why we've stressed prosecutorial transparency and accountability. So anytime we make vast changes and are winning, we have winning strategies, we see a movement of retrenchment. We see powerful forces come back to try and steer us away from progress, and bring us back to

the status quo. But we're undeterred and we have to be undeterred. This movement for prosecutorial reform across the country will continue.

LAURA FLANDERS: And you, Andrea, how do we do both at the same time? Both the reform kind of work and the transformation kind of work.

ANDREA JAMES: Many people still in our communities that are most directly affected don't understand that we elect prosecutors, district attorneys. There are district attorney races. Color Of Change has done a vast amount of work over the years to do just that, to raise awareness that district attorneys are elected positions. And so we do our job as boots on the ground organizers. We really don't believe that this system is going to dismantle itself or dial itself back.

LAURA FLANDERS: Before we let you go Andrea, we have one more question. Lots of people work in our broad criminal justice system in different capacities with different perspectives, and a whole lot of them really want to do the right thing. So given that, what is your message to those people? Especially perhaps the prosecutors out there.

ANDREA JAMES: I did a whole segment with new lawyers at the Committee for Public Council Services here in Boston yesterday. And the last thing that I left him with was, it's not enough for you to just be a public defender. It really isn't. Public defenders are lawyers who came out of law school. I'm a former lawyer, I went to law school, it was a very elite experience, it was a very privileged experience. The majority of the people that got that training were not of Black and Brown communities that are most directly affected by this issue, and so we challenge people who are currently working within the criminal legal system to expand your view, come in and get involved. Get involved with Color Of Change, get involved with the National Council and phenomenal organizations such as Free Hearts in Tennessee, Families for Justice as Healing in Roxbury, and countless other organizations around the country. It's what we do at the National Council. We're that network facilitator for all of that work being done by formerly incarcerated women, and we can steer you in the right direction. You have to become politicized. It's not enough for you to get lucky enough to get a good job that gives you benefits, and you can build a career out of, and keeps you safe, and helps you pay your mortgage, and put your kids through college. You have to actually learn. Become politicized, read Michelle Alexander's "The New Jim Crow" as an entry point into the history. The historical context of this criminal legal system. And then connect yourself. Doesn't matter what your role is. Even if you're a judge, connect yourself to the people on the ground who are doing the work to create significant shift and change in the criminal legal system.

LAURA FLANDERS: I know it's hard to follow Andrea, but Sakira, I'm going to ask you to do it. What's your message?

SAKIRA COOK: For us it's thinking about, we've spent too much time and too much money, quite frankly, investing in tough on crime policies and practices that have only led to more violence and more incarceration, especially for Black people in this country. And it's time to reverse course. It's past time that we reverse course. We can't allow elected officials and politicians to determine what safety is. Communities have to own that for themselves, as Andrea has said, and we have to invest. We have to determine how our dollars, right — budgets are moral documents, and they reflect the values that we say we hold and the values that we say we want to infuse into our society. But too often, our budgets reflect a value system around prisons, prosecutions, and policing, especially in Black communities. And that has to change. Instead, our values need to reflect education, need to reflect health, right outcomes, economic justice. All of the things that we know create safer, healthier thriving communities for everyone. And so while we do that, as part of that transformation, we have to change law and policy. We have to hold prosecutors accountable, judges accountable, police accountable. Everyone from the very entry point all the way through the end, accountable to a system, to a new vision, I would say, and a new approach, and a new way of thinking about how we manifest safety in America. And that's really important and critical, and that's what our work has been and what our work will continue to be.

LAURA FLANDERS: So I'm hearing independent commissions and a whole lot more.

Prosecutors have tremendous discretion as we've learned, and 84 of them this summer declared in a letter that they would not be using the resources of their offices to prosecute individuals for what should be their private medical decisions. 84 prosecutors saying that whatever their personal or moral opinions of abortion may be, they weren't going to be prosecuting under these new laws. Why? They were afraid that people would die for fear of calling police and being prosecuted. They feared that their resources would be overstretched and used in biased ways. They feared that the most vulnerable would be hurt in these prosecutions, and they want no part of it. And they declared that the standing of their offices in their communities would be hurt by enforcing laws that in some states criminalize people who are victims of incest and rape. So we're not doing it, they said. They used their discretion to sign off this way. "Criminalizing and prosecuting individuals who seek or provide abortion care makes a mockery of justice. Prosecutors should not be part of that." So will they be joined by others? Does this open up a whole new avenue for collaboration? We'll continue to follow this story. In the meantime, you can find my full uncut conversation with our guests through a subscription to our podcast. And I thank you for joining us. 'Til next time, stay kind, stay curious. I'm Laura.

For more on this episode and other forward thinking content, subscribe to our free newsletter for updates, my commentaries, and our full uncut conversations. We also have a podcast. It's all at lauraflanders.org.