

Legislative Strategies for Prosecutorial Reform:
Phase 1, Exploring Possibilities

Prepared for the Open Philanthropy Project

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Summary

This memorandum was prepared for the Open Philanthropy Project to explore possible legislative approaches to prosecutorial reform that could be integrated with existing electoral and advocacy strategies. In surveying the landscape of potential legislative reforms, this research also began to probe two questions of relevance for prosecutorial accountability in a variety of contexts: (1) what makes a “good” prosecutor, and (2) once you know, how do you measure it? The memo aims to serve as a jumping off point for further development by flagging key strategic concerns, providing enough policy-level detail for an informed discussion, and setting the stage for deeper research. The memo proceeds in the following sections.

Section 1 discusses the potential benefits of integrating a legislative strategy into existing prosecutorial reform campaigns. Legislative change is necessary to achieve and sustain certain types of major reforms. Best practices can only go so far with regard to structural reform, and can be rolled back when political winds shift. Legislative reform—particularly reform focused on transparency—can serve as a powerful catalyst for electoral success. Conventional wisdom has long been that major legislative reform altering prosecutorial power is impossible. There is good reason to prepare now for a quickly changing landscape.

Section 2 provides a broad survey of all reforms that might plausibly find their way into legislation, from measures related to transparency to an overhaul of the plea bargaining process. This list of possible changes is contained in Appendix A. This section discusses themes that emerge from the survey and other considerations that should animate a discussion about potential legislative platforms. Pending that discussion, Appendix B illustrates how hypothetical legislative planks might fit together in light of those considerations.

Section 3 explores the question of what makes a good prosecutor and how to measure it, for the purpose of framing legislative priorities and for determining what metrics might be included in legislation focused on mandatory data reporting. This section starts with a survey of what academics and prosecutors themselves have come up with when tasked with defining “good prosecution.” This list can be the jumping off point for zeroing in on a movement-oriented definition of “good prosecution” that emphasizes thriving and healthy communities. Against that backdrop, Appendix C collects a list of possible measures categorized by the goal or objective to be measured (“reducing incarceration,” “fiscal accountability,” etc.). These measures include both quantitative data (“What is the rate that cases are refused by the prosecutor?”) and qualitative metrics (“Does the prosecutor have written guidance on charging practices?”). A discussion of major themes and challenges with regard to metrics

follows, along with Appendix D, a hypothetical set of data points for a mandatory reporting bill to illustrate where this part of the project might go with additional research.

Finally, **Section 4** outlines next steps that prosecutorial reform campaigns could consider for integrating legislative strategies into their work. Short term, elements of this research could be adapted and distributed for immediate use in the field by advocates working in 2016 electoral campaigns. The questions raised in this memo could also be used to inform further discussions about a community-oriented definition of “good prosecution” and potential legislative strategies. Over the medium term, additional phases of research could be completed to take this preliminary work from the conceptual level toward something far more narrow and concrete. Long term, one goal could be the development of model legislative language, and resourced legislative campaigns in target states.

1 What a Legislative Strategy Brings to the Movement

It is clear that long-lasting reform to prosecutorial practices will require a legislative strategy. For many years, however, there has been little hope for major legislative reforms. Academics, advocates and commentators have all acknowledged variations of this reality: “Legislation would be ideal, but it cannot happen because prosecutors are too politically powerful, so the focus should be on elections to alter prosecutorial behavior and hold prosecutors accountable.”¹

Recent history has proven the assumptions underlying this assessment are quickly changing. Electoral strategies, initiated in part because of the difficulty of the legislative landscape and the need to change it, are already proving to be successful in reshaping the narrative framework and unseating incumbent prosecutors. These campaigns are only at the most nascent stages. These early successes suggest that the prosecutorial *status quo*—blindly punitive, racially biased and deeply insular—is vulnerable. As electoral organizing and candidate recruitment becomes more powerful in the 2016 cycle and beyond, now is the time to consider developing legislative strategies. Below are a few thoughts on how legislative strategies could support and expand existing accountability efforts.

1.1 Permanent Structural Reform Requires Legislation.

Even assuming a world where the most progressive prosecutorial candidates have been elected to office and have universally implemented best practices, the actions that prosecutors can or will take are inherently limited by their very role within the criminal justice system, political constraints, and legal structures. Major changes, like effective independent accountability or deep-end reforms to criminal procedure, cannot be achieved without altering existing law. Electoral accountability could be characterized, in part, as an effort to ensure that prosecutors wield their tremendous power for good. That is a critical objective, but it leaves intact prosecutors’ imperial role in the criminal justice system. It also comes with the risk of empowering prosecutors to become social engineers, placing (mostly white, male) adversarial litigators in charge of designing and gatekeeping alternatives to incarceration, when the fundamental issue is that many of these issues should simply not be in the criminal justice system or the prosecutors’ domain to begin with. The long-term end game for prosecutorial reform should be about permanently altering the structures of power, regardless of who is elected. If that is a goal, it will require legislation.

¹ As just a few examples, see Stephanos Bibas, *Prosecutorial Regulation vs. Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959 (Apr. 2009) (stating that legislation is “impossible”); Marc Miller and Ronald Wright, *The Black Box*, 94 Iowa L.R. 125 (Nov. 2008) (“the chance of legislation is nil”).

1.2 Political winds will shift.

It is obvious but worth stating: electoral success and voluntarily-implemented best practices can be reversed unless they are secured by legislation. There is good reason to be optimistic that the electoral projects now underway will build durable community power and lasting electoral accountability in some places, and that best practices may become so engrained that it becomes politically difficult for a district attorney to roll them back. Even so, it may take only one horrific anecdote to engender a backlash against reforms and a return to political dynamics that reward punitive and regressive policies. At the very least, we should anticipate that long-term success will include setbacks along the way. Being poised to strategically push legislative change, at the apex of electoral power, can permanently secure reforms and serve as a bulwark against the inevitable ebb and flow of political support for these efforts.

1.3 Electoral success will create a window of opportunity.

District attorneys have tremendous power to derail meaningful legislative reform. That has been the reality and will continue to be for some time. But, the ongoing electoral work has the potential to change this landscape dramatically, as it was intended to do. If electoral successes continue on the same trajectory over the next few election cycles, prosecutorial opposition to structural change will become more costly, and the unified front at state legislatures may start to reveal some cracks.

Furthermore, there is good reason to start preparing now for the possibility that the legislative calculus will change rapidly in the next few years. For decades, many incumbents have been re-elected by large margins without have to face significant opposition or an educated electorate. In other words, for all the years of incumbency, elected prosecutors are by some measures relatively soft targets, especially for experienced community organizers now starting to train their sights on local district attorney races.

If some significant number of incumbents are dethroned and progressive candidates ascend in quick succession over the next few years, it would catch many by surprise and create disruption that would provide an unprecedented opportunity for structural reform. Prosecutors individually and as a lobby may unprepared to confront a well-organized legislative campaign. That window may close quickly after effective opposition regroups. Campaigns could be well served by having a comprehensive legislative platform ready now, to be deployed when the opportunity presents itself.

Finally, it is worth noting that the landscape may have already changed more than some have realized. A 2013 poll found that 72% of Americans believe that new laws are

required to curb prosecutorial misconduct.² Reform-minded prosecutors have themselves already recognized the benefits of structural changes in the form of opening up funding streams for alternatives to incarceration, providing political cover, and helping to modernize offices.³ Political opposition to legislative reform will remain formidable and in some cases insurmountable in the immediate future, but the tipping point may be closer than many may think.

1.4 Legislation brings scale where it is needed.

Even the most ambitious electoral strategy won't begin to touch the thousands of district attorneys spread throughout all the counties and districts in the United States. Certainly there will be some spillover effect even in counties or districts where no organized prosecutorial accountability efforts exist, but it is reasonable to expect that the bulk of the work will remain concentrated in large urban areas with existing organizing structure. This focus is warranted given existing resources, the devastation in those communities caused by prosecutorial practices, and the sheer volume of criminal cases processed by large jurisdictions.

The trade-offs, however, are worth noting. Research suggests that rural and suburban jurisdictions have a significantly disproportionate impact on incarceration rates, despite relatively low case volume as compared to urban jurisdictions.⁴ These less urban counties may have the most regressive and punitive policies and be the least likely to voluntarily adopt best practices. It is obviously not possible to pursue electoral campaigns in every DA race in the U.S., let alone wise to attempt to do so in geographically isolated counties with no community organizing presence. Statewide legislation, however, is a potential strategy for ensuring that reforms sweep into these districts.

1.5 Legislation can catalyze electoral success and *vice versa*.

There is little hope of passing major legislative reform until on-the-ground electoral dynamics shift, but these strategies can work powerfully in tandem to support one another. The mere existence of legislation can influence prosecutor behavior and electoral dynamics. The possibility of legislation can spur actors to move voluntarily in to avoid new regulation, as has been seen in the criminal justice context broadly and with prosecutors specifically.⁵ An audacious, comprehensive and well-conceived

² Center for Prosecutorial Integrity, *Roadman for Prosecutor Reform* (2013)

³ M. Elaine Nugent et al., *Do Lower Conviction Rates Mean Prosecutors' Offices are Performing Poorly?*, American Prosecutors Research Institute (March 2007) (noting "pro-prosecutor" case for reforms that help prosecutors justify funding requests, counter criticism, and help with office management).

⁴ Pfaff, *The Causes of Prison Growth*, at 18.

⁵ Bibas at 1004 (noting that Florida prosecutors adopted their own guidelines governing the use of a habitual offender statute in order to stave off potential legislation).

legislative platform could send a strong signal to prosecutors about the strength, organization and long-term vision of the movement. Legislation could also directly enhance electoral accountability. Among the smallest legislative lifts might be a transparency bill mandating that all prosecutors in the state collect and make public a uniform set of data metrics, with obvious utility for advocacy and electoral campaigns.

1.6 Formulating legislation can be a movement building exercise.

It is certainly not necessary to have a legislative strategy for campaigns to identify a set of key objectives and to create narrative framework around those priorities. That said, the process of considering legislation could be one possible vehicle for pushing that dialogue forward. A legislative platform is a long-term project that would force campaigns to think about where they want to be 5, 10, 15 years from now with regard to prosecutorial reform. For all the reasons discussed above, 5 years from now we want to be on the way toward fundamentally reshaping the structures of prosecutorial power. But how? Of the dozens of potential reforms in this memo and others that may be developed, what would we prioritize, and why? Working to answer these questions that runs concurrent with electoral strategies could provide the context for thinking about long-term strategic goals.

2 Survey of Potential Reforms and Key Themes

A list of potential legislative approaches, attached as Appendix A, is based on wide survey of academic literature, policies and practices in the field, existing and proposed legislation, and conversations with attorneys and reform movement leaders. It is broader than it is deep, with the goal of identifying a wide range of possible structural reforms for further consideration. The potential legislative approaches in Appendix A are grouped into the following categories:

- A. Transparency
- B. Financial Incentives and Accountability
- C. Mandatory Training
- D. Civil and Criminal Liability
- E. Redefining the Role of Prosecutors
- F. Racial Impact Statements
- G. External Oversight
- H. Internal Oversight
- I. Charging Practices
- J. Plea Process
- K. Sentencing Recommendations
- L. Police Accountability
- M. Discovery and Investigative Procedures
- N. Campaign Rules

The survey focused on reforms that would alter a prosecutors' daily activities and open them up to public scrutiny. For now, the survey excluded areas outside the prosecutors' direct domain, even if they unarguably effect how prosecutors wield their power, such as eliminating mandatory minimum sentences and enacting bail. The manner in which legislative reforms that are squarely focused on prosecutors' daily duties might intersect with other reform efforts that more indirectly (albeit significantly) impact prosecutorial power will be a key strategic issue to consider as legislative approaches are developed.

Finally, the survey is intended to give the reader enough policy detail to convey the gist of the legislative proposition. A full understanding of some of the proposals below and their anticipated impact (or lack thereof) requires an in-depth exploration of policy and law, particularly with regard to reforms focused on altering criminal procedure. Given the scope (and size) of this memo, that detail is omitted here with the contemplation that it would be more closely evaluated in conjunction with narrowing in on main areas of interest for a legislative strategy.

Pulling ideas from this large list for a legislative strategy will ultimately require campaigns to subject each particular proposal, and any package as whole, to much more rigorous examination of a number of different considerations, including: (1) the overarching goals of “good prosecution,” discussed in Section 3 below; (2) the expected impact of each legislative proposal on those goals; (3) the fiscal costs (and savings) of any reform; (4) public perception and potential messaging (including polling and focus group research), and; (5) anticipated political opposition, among other factors. In advance of further discussion and additional research on those questions, a few themes emerge.

2.1 Transparency versus Substantive Reform

One decision point is how much a legislative agenda might focus on transparency versus substantive reforms. There is, of course, no need to choose between transparency or substantive reform, and any likely legislative platform would likely have a mix of each. The overall balance any effort strikes between transparency and substantive reform, however, will be worth further consideration.

A lack of transparency is the most obvious and most oft-cited deficiency within prosecutors’ offices.⁶ In this respect it is similar to other actors in the criminal justice system—police, jails, courts, and corrections—that have long suffered from a lack of transparency that has impeded accountability and evidence-based practices. But in terms of transparency, prosecutors arguably lag behind even relatively unsophisticated police departments and corrections agencies.

Other criminal justice reform campaigns have started by focusing solely on transparency and tactically avoiding substantive reform. As a legislative platform, transparency has obvious strategic appeal. The pro-legislation message is clear, and an effective opposition case is relatively weak. Transparency can facilitate electoral accountability and be a stepping-stone tactic in a long-term substantive reform campaign (for example, consider the campaign to end NYPD’s Stop and Frisk policy, discussed in Section 3, below).

The case for pursuing substantive reform rests on all the same reasons it is difficult. It is a far bigger lift because the benefits in terms of permanent reform are all the more certain. Limiting a campaign to just achieving transparency comes with some risk that all the additional public information floating out there will not end up really changing practices on the ground all that much. Transparency is easier because it avoids harder

⁶ See, e.g., Russell M. Gold, *Promoting Democracy in Prosecution*, 86 Wash. L. Rev. 69 (2011)

conversations about limiting prosecutorial power. On the other hand, perhaps those are precisely the conversations we want to be having (and winning) in the public domain.

2.2 Dictating versus Delegating Standards

Assuming one goal is standardizing prosecutorial practices to increase transparency and to reduce inconsistency, racial disparity and overly severe punishments, one reoccurring question is how best to get there and whether to codify standards in the legislation, or delegate that authority to another body or to prosecutors themselves.

It is often the case that modifying criminal justice practices would be ideally secured with regulatory-like language that leaves very little wiggle room for criminal justice actors, but that type of language is often problematic to legislate. This is a familiar tension in criminal justice reform work with regard to police, courts and corrections. Here, it plays out in a number of potential reform areas discussed in Appendix B (training requirements, CIU standards, internal disciplinary guidance, etc.). Consider three possible approaches, using charging practices as the example:

1. Legislation requires prosecutors to develop and publish their own standards on charging practices. (Perhaps also including: a state body is designated to promulgate non-binding advisory standards that can be adopted in whole or in part by local prosecutors).
2. Legislation empowers a third body (independent commission, Supreme Court, etc.) to create mandatory charging standards that all local prosecutors must follow.
3. Legislation proscribes the precise standard to be followed, e.g., “no charge can be brought unless the prosecutor believes there is proof beyond a reasonable doubt.”

For prosecutors in many jurisdictions, especially rural and suburban districts, public standards of any kind would be a huge step forward. It is also consistent with the view that prosecutors need to maintain discretion to adopt practices that are reflective of the local needs and culture of the district they represent. This argument can certainly be deployed cynically to defend *ad hoc* or biased practices, but it is also a legitimate concern if one goal is ensuring that the prosecutor responds faithfully to local community priorities.⁷

⁷ There is a thorny issue to disentangle here with regard to community priorities. From a reform perspective, the problem with many prosecutors is that they simply ignore community needs and voices. But what about situation in which the community wants vigilante justice or demands

On the other hand, the “create your own standards” approach leaves open the possibility that prosecutors will create ineffective or bad policies. While those can then be surfaced and critiqued, there is no guarantee that advocacy will be successful. It also relegates the fight to a district-by-district battle, with all the resources that would entail, rather than winning the standard across the state all at once.

Delegating standard-making authority is a sensible approach from the perspective of creating dense, regulatory-like standards, and it moots any argument that the legislature is meddling in the weeds of criminal justice policy. It would effectuate all-at-once statewide reform. Much would depend on the composition of the body, but there is a risk of perpetuating the same insular dynamic (lawyers supervising lawyers) that has stymied meaningful reform for decades. It could also result in standards that are subpar and do little at the end of the day to achieve key priorities like reducing incarceration or achieving racial justice.

Writing standards directly into legislation text guarantees a meaningful substantive result. It will likely be quite difficult as a practical matter for all but the most straightforward of standards, and it opens up a flank for attack that the legislature should not regulate by legislation. It would also be likely to encounter the most significant political opposition.

2.3 The Benefits and Limits of Centralization

Another question to examine is how much centralization—removing discretion from county-level prosecutor offices and consolidating that power at the state level—we actually want to try to accomplish. Difficult questions in this area may include substantive reforms like plea bargaining standards, where there may be benefit to preserving variation at the local level.

There is also a question of efficacy. To the extent that we assume that statewide centralization or standardization will necessary result in better outcomes,⁸ that assumption is worth testing thoroughly. At least one study has found that even in a state with a high level of centralization, prosecutorial practices at the county level continued to vary dramatically.⁹ Moreover, mandating standardization across the entire state can potentially result in more regressive practices if not approached carefully. For example, in New Jersey, the Supreme Court’s requirement for an across-the-state standards ended what had been relatively lenient practices in urban jurisdictions, and brought them toward relatively more punitive practices in rural and suburban

punishment based on racial or other animus? Striking the right balance between responsiveness and independence will require careful calibration.

⁸ Bibas at 1001 (positing benefits of consolidating prosecutorial power).

⁹ Wright, *Persistent Localism*, at 226.

jurisdictions.¹⁰ It will be worth evaluating, on a reform-by-reform basis, any assumed benefits of consolidating power at the state level.

2.4 Prosecutor as Social Engineer

Many progressive prosecutors are pursuing novel approaches that are undoubtedly innovative and less punitive than traditional incarceration. It is worth sounding a note of caution, however, about the arguable limits to those approaches at least as it relates to any long-term goals for permanent systemic change.

The current reality in many cities and counties is that prosecution is a severe, counterproductive and racially biased punitive regime that has devastated the communities the prosecutors are elected to represent. Any shift in that *status quo* is an improvement and, from that vantage point, having prosecutors utilize alternatives to incarceration is much better than current practices.

Many of these alternatives, however, continue to route social problems through a criminal justice system designed to judge and punish. The prosecutor—trained as a lawyer and litigator, not as a doctor, or mental health clinician, or social worker, organizer, etc.—acts as gatekeeper and decision-maker. Certainly the overall system and prosecutors' role in it can be made more humane, racially just, and rehabilitative. But we should not lose sight of the goal of reducing the number of cases a prosecutor touches in the first place, regardless of how enlightened the prosecutor is in treating the cases that do come through the door.

Reforms that marginally reduce harm or shift it around without actually shrinking the reach of the system as a whole, are common in many other aspects of criminal justice work (for example, reducing pre-trial incarceration by expanding pre-trial supervision is not a long-term win, if we are just swapping out pre-trial incarceration for intrusive supervision when there is no justification for carceral control of any kind to begin with). But the concern may be particularly important when it comes to prosecutors, because the significant power they wield poses a real risk of abuse or unintended consequences.

One cautionary tale comes from California, where legislation required the creation of a new prosecutorial approach to statutory rape crimes. The approach was less punitive than traditional prosecution. Nevertheless, as one study noted, it actually increased the degree to which prosecutors (in this case, mostly older, white, male lawyers) were required to make consequential value judgements about the sexual behavior of young women of color. These prosecutors, with all their professional and personal biases, exerted a huge degree of control over the young women's lives, even if incarceration

¹⁰ Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 Penn St. L. Rev. 1087, 1104 fn. 74 (2005)

was less likely (the threat of incarceration, of course, was always hanging out there, as is true of many diversionary and probationary programs run by prosecutors).¹¹

One can certainly imagine legislative reforms that would aim to codify some progressive prosecutorial practices into law. Focusing too narrowly on those types of solutions for legislation would be a mistake if it comes at the expense of reducing the cases and issues routed through the criminal justice system in the first place, or if it reinforces the idea that the prosecutor is necessarily the right actor be making initial consequential decisions about health, for example, whether a person needs mental health treatment or prison.

To this end, care should be taken to draw distinctions between reforms that actually affect prosecutorial power and those that preserve it and simply channel it toward better ends. It would also be wise to avoid the temptation to make prosecutorial reform do too much work, by keeping it connected to the broader criminal justice reform movement and remaining cognizant that some fundamental solutions to mass incarceration should come from outside the prosecutorial reform box.

2.5 Envisioning a Legislative Platform

For the purpose of demonstrating where a legislative project might ultimately culminate for a campaign, attached as Appendix B is a one-page description of hypothetical legislation platform reflecting the following assumptions:

1. Possible structure of platform: notwithstanding distinct differences in practices even within local jurisdictions, this platform proceeds on the assumption that further dialogue and research could result in some consensus around core principles for prosecutorial reform throughout a state. There would be model legislative language underlying each of these planks. Another assumption is that it makes sense to present the legislative planks together as a “comprehensive” set of reforms, but that one or more of these components could easily be broken off and pushed as a stand-alone piece of legislation depending on opportunities.
2. Transparency vs. substantive reform: This is what a platform might look like if the consensus view in any state was that transparency is the priority and the most feasible objective, and that it should be emphasized more than any sweeping structural changes. This platform also reflects what it might look like if a decision was made to isolate charging practices as a single area for major substantive reform. Such an emphasis could be justified by research showing charging choices appear to be the biggest driver of incarceration and racial

¹¹ Kay Levine, *The New Prosecution*, 40 Wake Forest L. Rev. 1125 (Winter 2005)

disparity¹² and based on the lack of any existing major campaigns around charging decisions (as opposed to, for example, discovery reforms and sentencing practices).

3. Dictating versus delegating standards: This platform reflects what a legislative approach might look like if there was a decision to take a hybrid approach on the question of achieving standard and transparent practices: (1) promulgating a binding standard in a single priority area (charging) and (2) requiring prosecutors to develop their own written standards in all other critical topic areas, with (3) “best practices” guidance from an independent state agency.
4. Centralization: This proposal reflects an approach that would emphasize centralized oversight, state-wide policy guidance, and big picture principles to be followed for all prosecutors throughout the state, but would still allow for a significant degree of variation in practices at the local level.
5. Fiscal Costs and Burdens: Mandatory data collection and reporting, and creating and staffing the oversight agency, would come with real fiscal costs. The other provisions would arguably have little or no direct costs.

¹² Sonja Starr, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L.J. 2, 4, 7 (Oct. 2013)

3 “Good” Prosecution and How to Measure It

What legislative strategy is sensible will ultimately depend in part on the goals to be achieved. This memo provides the opportunity to take a step back and methodically consider the question, “What defines a good prosecutor?” That definition will not only frame and drive legislative priorities, it would also help dictate what are the best metrics to measure good prosecution—metrics that could find their way into the type of transparency-based data reporting legislation discussed in Appendix A.

This section starts with that question, by exploring the possible defining objectives of good prosecution, and the different reasons we might be measuring it. The memo then explores the universe of possible metrics to measure those objectives, and outlines a hypothetical set of data points that illustrates where a transparency bill might end up depending on how those questions are answered.

3.1 What are we Measuring?

What makes a prosecutor “bad”—harsh punishments, deep inequities, wrongful convictions—is an easier point of consensus than what makes prosecutors “good.” This section explores some of the ways that the professional field, academics, advocates, and prosecutors have already attempted to define “good prosecution.” Consideration of these definitions could be a jumping off point for defining what “good prosecution” means for communities.

3.1.1 Professional Standards and Academics

In the 1990s, Harvard’s Kennedy School convened a summit on prosecution that distilled “five types of prosecutors,” a categorization that is an oft-cited baseline in much of the academic literature:

1. The pure jurist (case processor), whose goal is efficient and equitable case processing;
2. The sanction setter, whose goals are rehabilitation, retribution, and deterrence;
3. The problem solver, whose goal is to prevent and control crime;
4. The strategic investor, whose goal is to bolster the efficacy of prosecution by adding capacities; and
5. The institution builder, whose goal is to restore the social institutions that help to control crime.

Following the development of this typology, academics and professional organizations have continued to work toward a definition of “good prosecution.” For example, the American Bar Association, the largest national professional association for lawyers, has

developed model rules that speak to the question of what makes a “good” (or at least ethical) prosecutor. Most notably, with regard to the prosecutor’s role as a powerful “administrator” within the criminal justice system, the ABA has stated that the prosecutor has a duty “to engage in appropriate law reform activities and to remedy injustices the prosecutor sees in the administration of criminal justice generally.”¹³

More recently, academics have tried to distill the professional standards and other literature into the following overlapping characteristics defining a “good prosecutor”:

1. consistency in the application of the criminal laws
2. adversarial fairness and an outcome worthy of respect
3. fairness in plea bargaining
4. protection of public safety through a reduction of recidivism
5. efficient expenditure of limited criminal justice resources
6. avoid wrongful conviction and unjust punishment
7. neutrality in decision-making, especially with regard to pretrial decisions
8. empathy and honesty¹⁴

In addition, a recent paper on prosecutorial accountability also discussed the growing consensus that a “good” prosecutor should care about identifying and remedying negligence, e.g., unintentional errors that result from sloppiness.¹⁵ This is in contrast to the historically limited focus on intentional or egregious misconduct by prosecutors. Making negligence “count” also accords with literature about transforming institutional culture:

A “just culture” can be defined as “a culture that recognizes that competent professionals make mistakes and acknowledges that even competent professionals will develop unhealthy norms (shortcuts, “routine rule violations”) that must be detected and corrected, but has zero tolerance for reckless behavior.”¹⁶

3.1.2 Prosecutors

Prosecutors themselves have also been engaged in the project of trying to define what it means to be a good prosecutor. These definitions have their obvious limits—they have been developed by prosecutors and, generally, have not included the voices or input of

¹³ ABA Criminal Justice Standards Sec. 3-1.2.

¹⁴ Bibas at 993, 996.

¹⁵ Yaroshefsky and Green at 12.

¹⁶ Root Cause Analysis.

affected communities or other laypersons. Nevertheless, they are valuable to consider. To the extent there is overlap between how prosecutors define “good” prosecution and how impacted communities define “good” prosecution, there is a strategic benefit to framing certain reform efforts as simply asking prosecutors to measure and achieve the objectives they already set for themselves.

The most comprehensive prosecutorial effort identified in this round of research is from the National District Attorneys Association. Over the last decade, the NDAA has attempted to develop an evidence-based set of performance measures for prosecutorial outcomes. The NDAA started by first defining the prosecutorial objectives they would seek to measure, as follows:¹⁷

1. Promoting the fair, impartial, and expeditious pursuit of justice
 - a. Individuals who commit crimes are held accountable
 - b. Laws are enforced equally, without bias
 - c. Case dispositions are appropriate for offense and offender
 - d. Timely and efficient administration of justice
 - e. Serve victims and witnesses
2. Ensuring safer communities
 - a. Reduced Crime
 - b. Reduced Fear of Crime
3. Promoting integrity in the prosecution profession and coordination in the criminal justice system
 - a. Competent and professional behavior
 - b. Efficient and fiscally responsible management and administration
 - c. Consistent and coordinated enforcement efforts and administration of justice

In the same vein, prosecutors have attempted to define “good” prosecution in the community prosecution context. A 2011 survey by the American Prosecutors Association and the Center for Court Innovation examined existing community prosecution models and distilled the following defining objectives:

1. Community Engagement
 - a. Increase community presence
 - b. Increase understanding about community characteristics

¹⁷ M. Elaine Nugent et al., *Exploring the Feasibility and Efficacy of Performance Measures in Prosecution and their Application to Community Prosecution*, NDAA (July 2009)

- c. Solicit and regularly respond to community input
- d. Increase community confidence in the prosecutor's office

2. Problem-Solving

- a. Strengthen programs providing crime prevention, diversion, and alternatives to incarceration
- b. Develop information and support mechanisms for parolees and probationers in communities
- c. Increase crime prevention initiatives
- d. Reduce target offenses
- e. Reduce recidivism of chronic offenders
- f. Identify and reduce nuisance properties and "hot spots" for target interventions
- g. Enhance victim services

3. Effective Case Administration

- a. Improve community communication with prosecutors' office
- b. Increase efficiency of case processing
- c. Identify chronic/problem offenders
- d. Increase vertical prosecution
- e. Increase conviction rate

4. Interagency Partnerships

- a. Improve communication and intelligence sharing with other LEAs
- b. Increase accurate information about cases and neighborhoods
- c. Partner with external agencies to prosecute cases
- d. Use partnerships to develop diversion programs, alternatives to incarceration and community-based prosecutorial responses to crime

3.1.3 Advocates

This first round of research found few comprehensive definitions of "good" prosecution developed by community organizers and advocates, perhaps underscoring the value and necessity of the current effort. One notable exception is the Brennan Center's work to develop a core set of objectives for federal prosecutors, as follows:¹⁸

¹⁸ Lauren Brooke-Eisen et al., *Federal Prosecution for the 21st Century*, The Brennan Center for Justice (2014). The Brennan Center lists the last three as "optional" priorities, but largely based on difficulties with getting the data needed to measure them.

1. Reducing violence and serious crime
2. Reducing prison populations
3. Reducing recidivism
4. Reducing pretrial detention
5. Reducing public corruption
6. Increasing coordination

3.1.4 Toward a Community-Based Definition of Good Prosecution

The ideal next step in constructing a community-based definition would be done in collaboration and in conversation with advocates, organizers and community members. The above materials could easily be adapted to into a framework to guide that discussion, and to explore consensus points on defining good prosecution from a community-based perspective. Some defining characteristics of “good prosecution” will also evolve organically as community organization and electoral accountability proceeds. In advance of those conversations, below are few thoughts.

One, there is an important threshold question to be answered about how communities will define good prosecution in terms the effects on the community itself. Not surprisingly, the existing definitions frame this mostly in the vein of “safety,” “reducing crime,” “reducing fear of crime,” or “reducing serious and violent crime.” None of the standards talk about the goal of increasing community health or creating thriving communities. Perhaps it is acceptable to identify “serious and violent crime” or “public safety” as one measure among many of whether a community is healthy, as long as it is not the only measure nor seen as an end in and of itself. Discussion on this question could be deeply informative for the ultimate direction of legislative strategies and overall campaigns.

Two, many of the defining objectives of “good prosecution” (and the subjects of proposed legislation) are heavily lawyer-driven and focus on questions of procedural justice, adversarial fairness in the criminal process, and conviction integrity. It is not clear how closely these definitions of good prosecution are aligned with community priorities. For example, if a prosecutors’ office had 100% compliance with an open file policy, and all but eliminated wrongful convictions, would that have any measurable impact on incarceration rates or racial disparities? In part this is a research question, and in part it points to the need for more consideration about what some criminal justice insiders have long thought of “good prosecution” as compared to the core objectives of the communities that bear the brunt of prosecutorial policies.

Three, there is no explicit focus on racial justice as a goal of good prosecution. The NDAA endorses the proposition that a good prosecutor enforces the law “without bias,” but that is obviously quite different than an affirmative goal of achieving racial justice.

Four, in a similar vein, there is no defined or explicit goal in these standards when it comes to police accountability. What defines good prosecution with regard to police misconduct is, at best, implicit in these existing definitions (“reducing public corruption” or “increasing consistency in law enforcement”).

3.2 Why Are We Measuring It?

The framework above may help advocates, organizers and community members to develop a community-based definition of what makes a “good prosecutor,” setting the stage to identify metrics that will capture whether or not prosecutors are meeting those objectives. In addition, the purpose for which the metrics are to be put to use will also likely shape what data is appropriate, as discussed below.

3.2.1 Public Transparency

On one end of the transparency spectrum might be considered “public” measures, or basic information that could allow an average person to gain a general understanding of the way the prosecutor is performing his or her duties. Given the starting point—very little public information about prosecutorial practices is widely reported beyond convictions rates—the bar for useful public measures is low. Information about how a prosecutor charges, prosecutes and punishes crimes, including any racial disparities, would significantly increase transparency.

These measures need not be comprehensive or rigorously validated to have significant impact. Any additional transparency is likely to lift up the role and profile of prosecutors. Recent public education work in existing campaigns has already shown that relatively basic information about prosecutors can influence voters and electoral rhetoric. Likewise, there are numerous examples where basic transparency about criminal justice practices is the starting point for major reforms. The campaign to end the New York Police Department’s Stop-and-Frisk practices is an example, where basic information about the scope of the practice, stark racial disparities, and limited effectiveness (in terms of gun recovery) was a major factor in shifting the terms of the debate.¹⁹ Even though the data was arguably rudimentary on some levels, it still had significant impact by opening up the practice to public scrutiny that was previously nonexistent.

¹⁹ For example, see the NYCLU’s 2012 report on the Stop-and-Frisk data, http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

On the other hand, this type of basic data is inherently limited and may continue to leave large blind spots regarding prosecutorial practices. It would likely leave unanswered key questions about prosecutorial outcomes, and would not be adequate to enable real evidence-based analysis.

3.2.2 Performance Measures

At the opposite end of a spectrum from “public transparency” are “performance measures,” comprehensive data points that permit a validated, evidence-based evaluation of prosecutorial outcomes. In contrast to “public transparency,” “performance measures” would provide a very granular and far more accurate assessment of prosecutorial outcomes and how well prosecutors are meeting key objectives of “good prosecution.” The NDAA, VERA, various prosecutors’ offices, and the Brennan Center have been developing prosecutorial performance measures, and some attempts have been made to validate those measures.

If the goal of identifying metrics is to enable something akin to performance measurement, it would probably be a largely hypothetical exercise at this point in time: identifying ideal data points that most prosecutors don’t keep and that could not be obtained. While data points furthering “public transparency” might be drawn from existing data or data that could be captured relatively easily, performance measures would almost certainly require the creation of significant new data infrastructures, with the attendant fiscal costs. While a case could be made for requiring prosecutors in a state to uniformly report out a dozen or so metrics on the statewide level, a set of performance measures would be more extensive than anything that could be legislated on a data-point-by-data-point basis (and there are good reasons to argue that performance measures must be tailored to the particular jurisdiction).

3.3 Other Considerations

3.3.1 Comparisons vs. Trends

When considering the utility of measuring prosecutorial practices, it is also important to consider whether the measurements are intended to allow comparisons across prosecutorial offices. With regard to data metrics, the NDAA argues that prosecutor-to-prosecutor comparisons are not meaningful or possible because outcomes are so heavily dependent on local crime patterns, policing practices, the state and county legislative environment, legal culture, politics, and resources.²⁰ (the NDAA recognizes that accounting and controlling for these variations is an important area for future work). Similarly, for the same reasons, the Brennan Center’s proposed metrics for prosecutorial performance in the federal system emphasize tracking year-to-year

²⁰ *Feasibility of Performance Measures* at 43.

trends, rather than inter-office comparisons, to “ensure that offices are primarily measured against themselves and not against other offices.”²¹

There is no need to choose between comparative measurements or year-to-year trends—one can imagine a set of metrics that allows for some degree of both. But it is worth considering the difficulty of developing valid comparative metrics that adequately control for complex factors like underlying policing practices and arrest rates at the local level. That reality could suggest a few approaches, not mutually exclusive: (1) in an initial phase of a legislative campaign, it may be more strategic to focus on “public transparency”-type measures that do not purport to be definitive comparative measures across prosecutors’ offices, but rather measure whether practices in any one office are improving year-to-year; (2) in a second phase of this research, explore whether controlled comparative measurements are empirically supportable, what data would be necessary to construct them, and whether achieving the collection and analysis of that data is feasible.

Jurisdiction-to-jurisdiction variations present less of a problem when it comes to qualitative measurements: Does a prosecutor have a hiring and retention policy that doesn’t just reward convictions? What percentage of the community reports being satisfied by the prosecutor? Here, the only real variant is office size and resources, and as prosecutors themselves have noted, an office of any size should be expected to have good policies and procedures,²² and variation in office size can be accounted for relatively easily. For example, a small office may reasonably not have dedicated branch offices in the community, but could be expected to have staff time dedicated to the function of community engagement.

3.3.2 Existing Data vs. Building Infrastructure

Ultimately, what data is sought will be informed by an analysis of what data is already available, which can vary office-by-office. If the objective is providing organizers and advocates with a list of meaningful measures immediately available, the focus would be aimed toward data that district attorneys (and other parts of the criminal justice system) already keep. If the objective is achieving “public transparency” as a launching pad for substantive reform, by mandating statewide data reporting, the best strategy may be to strike a balance between existing data and expanding data collection in a few high-value areas that would keep additional costs relatively modest. If the objective is comprehensive performance measures, the approach may require a

²¹ *Federal Prosecution for 21st Century* at 20.

²² *Prosecutors’ Policy Guide* at 20 (noting that prosecutors’ offices of any size can adopt community prosecution principles “at some level”).

mandate for prosecutors to develop that capacity and funding to build and modernize data systems.

3.4 Potential Metrics

3.4.1 Big List of Metrics

Attached as **Appendix C** is a list of potential metrics that could measure prosecutorial practices, reflecting the synthesis of the various different objectives identified above:

- Fair, Equitable and Constitutional Case Prosecution
 - Policies and standards
 - Rigorous case screening
 - Fair charging
 - Fair plea bargaining
 - Fair sentencing
 - Ethical/Constitutional Prosecution
- Healthy Communities
 - Reducing serious and violent crime
 - Reducing chronic crime
 - Reducing recidivism
 - Responding to community priorities
 - Reducing problem behaviors identified by communities
 - Identifying and remedying nuisance properties and hot spots identified by community
 - Victim Services
- Reducing Incarceration
 - Pre-Trial Detention
 - Post-Conviction Incarceration
 - Diversion and Alternatives to Incarceration
 - Crime prevention initiatives
 - Reducing incarceration with regard to particular populations
- Office Integrity and Organization
 - Adequate staffing and training
 - Conviction Integrity
 - Vertical prosecution
- Interagency relationships
 - Accountability for LEA misconduct
 - Partnerships to improve LEA coordination and prosecution
 - Partnerships to reduce incarceration
- Fiscal Accountability
- Addressing systemic problems in criminal justice system

Similar to the list of all plausible legislative reforms, the goal was to be as broad as possible in collecting measures without endorsing any of these metrics, some of which are problematic if they have arguable utility (like crime rates). Some overlap and repetition was preserved where one metric might plausibly be a measure of two different objectives (for example, the total amount a prosecutor spends on incarceration could be considered a measure of “efficient use of scarce resources” and a measure of “reducing incarceration”). As questions like “What are we measuring?” and “Why are we measuring it?” are answered, this list could be used to identify relevant metrics.

3.4.2 Envisioning Data Points

Given the wide range of possible measures, as a demonstrative project, **Appendix C** is a list of 14 data points meant to be illustrative of where a campaign might arrive at if the goal was to achieve mandatory state data reporting through legislation. Like the legislative visioning exercise, provided below are the underlying hypothetical assumptions:

1. This list would be responsive to a situation where the aspects of “good” prosecution a campaign cared about measuring most were (1) fair and equitable prosecution; (2) reducing jail and prison populations; and (4) efficient use of resources.
2. On racial equity, this list assumes racial disparities should be measured at each critical point in the system. This list doesn’t propose a stand-alone “racial equity measure,” but rather enables analysis of racial disparities at various points in the process.
3. This list assumes that including community input is critical. That would almost certainly have to occur through a questionnaire or survey. Of course, if these questionnaires were actually occurring, all the data collected would be used, not just a single data point as proposed in this list;
4. Pre-trial detention is just as important as measuring post-conviction incarceration;
5. The list here does not contemplate any statistically serious attempt at creating a metric that would control across jurisdictions for complicated variations like policing practices. It would, however, be revealing with regard to how prosecutors are making progress on a year-to-year basis. Those trends would be comparable (e.g., “Prosecutor A showed a 15% reduction in crime rates in the last 4 years while increasing use of alternatives to incarceration by 30%; Prosecutor B’s crime rates stayed flat while use of alternatives to incarceration

fell”). It would also allow some comparison on a macro level (e.g., “Are certain prosecutors driving huge chunks of the state prison population that are significantly disproportionate to the county’s size and crime rate? Do certain prosecutors seem to be pleading down a very high percentage of cases as compared to others in the state, suggesting bad case screening and/or overcharging practices at that office?”);

6. Cost-effectiveness arguments for prosecutorial reform are limiting and potentially dangerous (the most humane, equitable and rehabilitative response isn’t always going to be the cheapest one). That said, this list would reflect an approach that decided fiscal accounting was valuable for electoral accountability and for convincing county and state policymakers to reconsider priorities.
7. Finally, this list elides a major problem with existing data: crime categories (felony vs. misdemeanor, violent vs. non-violent, serious vs. non-serious) are often very poor proxies for the actual behavior underlying the charge. For example, there are crimes categorized as “non-violent” where an examination of the underlying behavior crimes reveals violence, and *vice versa*. This list suggests the data produced could be analyzed by “crime type.” In truth, whether these metrics would permit analysis disaggregated by the actual severity of the behavior will depend on resolving this question one way or the other.

4 Conclusion and Next Steps

Whether and how a legislative strategy can be integrated into prosecutorial reform campaigns implicates large questions about the organization and direction of those efforts. This memorandum demonstrates, however, that there are a number of potential benefits to legislative strategies, and a wide range of possible legislative reforms, for advocates and organizers to consider.

In the near term, a conversation among reform leaders about the role of legislative strategies is one obvious next step forward. Portions of this memo could be adapted to help frame questions and issues for further discussion. In addition, the broad survey of legislative strategies, and “what makes a good prosecutor” research, might be useful reference points for those in the field during this election cycle to come up with additional candidate questions or a vetting instrument.

Over the medium term, there are several areas of research that could help take this first stage of research from the largely conceptual to something more concrete. Assuming some general sense of legislative reform priorities, additional research could dig deeper into those areas of interest: conducting more comprehensive research for comparative state legislation and best practices; consulting with criminal justice experts on proposed reforms to develop more detailed policy proposals and an in-depth analysis of potential impact; involving criminal justice researchers and data experts in the process of advancing a “key metrics” project; public opinion research and outreach to prosecutors to shape substantive reforms and to test anticipated points of opposition.

Long-term, given all the benefits of a legislative strategy would support existing campaigns and take them even further, an eventual goal could be to develop model legislative language for distribution to advocates across the country, and to dedicate resources toward aggressively pushing legislation in target state(s).

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A. Transparency

This section groups together a variety of different types of proposals that would be primarily aimed at opening up prosecutorial practices to public scrutiny.

1. Mandatory Data Reporting

Legislation could mandate that all prosecutors' office across the state collect and publish a defined set of uniform data metrics. Section 3 of the underlying memorandum discusses (1) how mandatory data reporting has catalyzed substantive reforms in other criminal justice contexts, (2) how the data sought to be captured may vary based upon its intended purpose, among other factors, and (3) what a set of legislatively mandated metrics might look like.

2. Questionnaires and Surveys

Data points pulled from prosecutors' offices or criminal justice system could also be supplemented by questionnaires that create new data around things like community satisfaction, community fear of crime, community priorities, victim participation, victim satisfaction, defendant satisfaction,¹ and other questions.² Legislation could mandate each prosecutors' office provide the questionnaires to stakeholders throughout the year and publish the result periodically, e.g., annually, or once every election cycle. Public surveys on prosecutorial performance have been used and validated in other studies.³ Conducting such surveys is often a recommend best practice in "community prosecution" models.⁴ Furthermore, the singular value and validity of public surveys has long been endorsed in the community policing context.⁵ While questionnaires may seem less important (and/or less practical) than justice system data, it is worth considering whether there is any other way of systematically capturing and analyzing community-based measures of prosecutorial practices.

3. Mandate that Prosecutors Develop and Use Performance Measures

A different approach might be to require all prosecutors' offices in the state to develop and utilize their own "performance measures." Performance measurement is discussed further in Section 3, but is generally defined as regular evidence-based measurement of outcomes and results, generating reliable data on the effectiveness and efficiency of programs. Such a mandate would require prosecutors to articulate goals and objectives (e.g. "improve public safety," "reduce incarceration") and to develop data infrastructures capable of measuring progress in meeting those goals. A legislative mandate to create performance measures could be tied to an "annual report" requirement, and a provision making underlying data publicly accessible. The type of

¹ Interestingly, a wide ranging survey of prosecutors consistently identified "defendant satisfaction" as among the prosecutors' chief concerns. *Anatomy of Discretion* at 41.

² Bibas, 989.

³ M. Elaine Nugent et al., *Exploring the Feasibility and Efficacy of Performance Measures in Prosecution and Their Application to Community Prosecution*, National District Attorney Association and American Prosecutors Research Institute, p.38 (Jul. 2009)

⁴ *Anatomy of Discretion* at 43.

⁵ Deborah Weisel, *Conducting Community Surveys, A Practical Guide for Law Enforcement Agencies*, Bureau of Justice Statistics Office of Community Oriented Policing Services (Oct. 1999).

legislative approach would necessitate a huge cultural leap, and a major financial investment in data infrastructure and staff, for all but a handful of the most sophisticated prosecutors' offices.

4. Create and Publish Internal Standards

Written standards regarding critical prosecutorial functions such as charging, bail recommendations, plea negotiations, sentencing, investigative techniques, discovery obligations, etc., are widely recognized as a best practice that increases transparency and consistency.⁶ Many (perhaps most) prosecutorial offices, however, do not have comprehensive internal standards guiding their decisions, and even when they do use some standards in-house, they may not be public.

Legislation could require prosecutors to develop and publish standards for a defined set of topic areas. Requiring prosecutors to publish such standards would often force their creation in the first instance, and then permit the public to analyze, compare and critique practices, and identify the most progressive policies. In some prosecutors' offices, there mere creation of uniform standards is likely to alter previously ad hoc behavior, leading to more consistent outcomes and, at least at the margin, less punitive ones.

There is some precedent for this type of reform. Minnesota passed a law in 1995 requiring county prosecutors to create standards related to charging and plea negotiations, and made those standards subject to open records laws.⁷ In New Jersey and Florida, the state attorney general promulgated guidance for line-level prosecutors with regard to charging habitual offender laws.⁸ Other prosecutors' offices have, of course, voluntarily adopted their own internal standards and some of these are publicly accessible.⁹

5. Record Decision-Making Involving Application of Standards

Even with standards, there may be no way to assess a prosecutors' evaluations in individual cases unless some record is kept regarding how the prosecutor applied those standards. Legislation could require that prosecutors make a written record in each individual case regarding their decision-making process when applying the standards. For example, prosecutors could be required to provide a full written rationale about the charges they brought and how they comport with office standards. Full written articulations could be required for bail recommendations, sentencing recommendations, and so on. Making and preserving a record regarding charging decisions already has precedent in prosecutorial offices.¹⁰ In conjunction with setting standards, requiring prosecutors to write down the reasons for their decisions could, by

⁶ Michael Cassidy, *Administering Justice, Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 Loyola U. of Chi. L. J. 981; John Terzano et al., *Improving Prosecutorial Accountability*, The Justice Project (2009)

⁷ M.S.A. § 388.051 Sub. 3(a).

⁸ Bibas at 1004.

⁹ See, e.g., *Charging and Disposition Standards for the Snohomish County Prosecutor's Office* (May 2014) (on file with author).

¹⁰ *Id.*

itself, lead to more consistent outcomes, and enable better internal supervision and greater public scrutiny. It would also be the predicate for additional adversarial testing, judicial oversight, or external review, all of which are discussed further below.

6. Rule-Making Process for Standards

Taking the idea of publicizing internal standards a step further, the standards could be subjected to a public rule-making process pursuant to a state administrative procedure act.¹¹ This would permit the public to comment on draft proposed standards before they are adopted (that creates organizing and advocacy opportunities at each step of the public rule-making process). Research for this memo—certainly not exhaustive—did not uncover any examples where public rule-making requirements are imposed on prosecutors during the formulation of standards. Requiring compliance with public rule-making processes, however, does happen in the criminal justice arena, even for agencies that typically enjoy substantial discretion over their policies, like state correctional agencies.¹²

7. Subject Prosecutor’s Office to Public Records Laws

Many states’ open records law exempt prosecutors (or portions of the records they keep) from public records laws.¹³ In addition to mandating disclosure of particular data or policies, legislation could remove or limit these broad exemptions, so that the public, advocates, researchers, etc., can more easily obtain information about prosecutorial practices on a basis similar to any other governmental agency.

8. Citizen Representatives in Prosecutor’s Offices

Some commentators have proposed “citizen advocates” that would be embedded in prosecutor’s office.¹⁴ The citizen representative would learn more about prosecutorial practices, and provide input to the prosecutor. This may in some respect enshrine citizen participation in offices that practice some form of “community prosecution.” It also may be viewed as a weaker version of citizen participation in an independent oversight body, discussed below.

9. Publicly Identifying Prosecutors That Commit Error

Courts encountering prosecutorial error rarely disclose the name of the prosecutor who committed the underlying error or engaged in misconduct.¹⁵ There is a fair amount of academic writing in support of requiring courts to “name names” when prosecutors commit error, and legislation could require courts that find error to always publicly identify the prosecutor involved.¹⁶ That objective may arguably be better achieved by

¹¹ Ronald Wright, *How Prosecutor Elections Fail Us*, 6 Ohio State J. of Crim. L. 581 (2009); see also Misner at 769; Bibas at 1005 (expressing skepticism of idea as “too rigid”).

¹² For example, the New York state prison system follows the state’s administrative procedure act for all regulations.

¹³ Wright at 582.

¹⁴ Bibas, 989.

¹⁵ Bruce Green and Ellen Yaroshfsky, *Prosecutorial Accountability 2.0*, SSRN 2722791 at 12 (Jan. 26, 2016); Gershowitz, *Prosecutorial Shaming*, 42 U.C. Davis L. Rev. 1059 (2009); Terazno at 10.

¹⁶ *Id.*

requiring courts to always report error to an oversight body, even if the initial report from the court is confidential (or at least does not have the public profile of a written opinion). That could accomplish the accountability objective just as well without having to overcome judicial resistance to “naming names” of prosecutors who appear before them on a daily basis. A requirement that judges “name names” in opinions could arguably result in judges making fewer findings of error.

10. Legislative Study or “Blue Ribbon” Commission

Some commentators have suggested that a legislative study of prosecutorial practices in the state could increase transparency about prosecutorial practices.¹⁷ Potential advantages would presumably be that a commission would not necessarily need legislation to commence (or, if so, the enabling legislation would be a relatively small lift). The commission could make recommendations for further legislative change. These types of commissions have been the springboard for substantive reforms in a variety of other criminal justice contexts for decades, including bail, racial profiling, indigent defense, solitary confinement, etc. On the other hand, there are plenty examples of such commissions coming out with a report and major recommendations that gather dust and go nowhere.

B. Financial Incentives and Accountability

Existing funding structures for prosecutors are deficient in at least two major ways. One, there is no meaningful fiscal accountability for achieving outcomes. Prosecutors’ budgets are largely guaranteed, regardless of whether their decisions drive mass incarceration or fail to improve community health. Two, prosecutors do not bear the financial or political costs of incarceration¹⁸, because the state pays for the prison space. Each issue and potential solutions are discussed below.

1. Success Oriented Funding

As is true across the criminal justice system and for most governmental functions, prosecutorial offices receive their budget regardless of how well they perform their job. In fact, the budget they receive may be largely disconnected from the actual criminal justice needs in the count or district, for example, the budget may be apportioned strictly by the county population size, regardless of arrest rates, crime rates, poverty, etc., in that country.

The idea of “success-oriented funding,” promoted heavily by the Brennan Center, would tie criminal justice funding directly to achieving specific goals, such as reducing the use of incarceration.¹⁹ The Brennan Center’s work focuses on funding structures at the federal level, although the principles would be equally applicable to state and

¹⁷ Bibas, 1005-06.

¹⁸ Excepting the smaller proportion of people who serve a post-conviction sentence in a county detention facility.

¹⁹ Inimai Chettiar et al., *Reforming Funding to Reduce Mass Incarceration*, Brennan Center, 2013.

county funding. This research uncovered at least one example of state-level funding incentives altering prosecutorial behavior,²⁰ and there are probably more.

The Brennan Center identifies three types of success-oriented funding: (1) the general operating budget is dependent on agency meeting specific, measurable goals (If the prosecutor does not reduce the use of incarceration by X%, then some portion of funding is cut); (2) the basic budget is guaranteed, but bonus budget dollars are available for meeting certain goals (the state provides incentive grants for prosecutors that pledge to cut incarceration by X%, and do not receive that money if they don't deliver); and (3) the budget is provided with requirements that recipient collect and report performance data (funding is cut if the data isn't provided).²¹ Making any significant portion of the prosecutors' budget dependent on achieving outcomes defined by the state would require a major change in the funding scheme in most states, re-routing more county dollars through the state before redistribution back to county prosecutor offices in accordance with those outcomes measures (see discussion below). A more modest objective might be making all pre-existing state money provided to county prosecutors (generally 5-20% of the budget for a county prosecutor) come with strings attached that require meeting objectives and/or producing performance data. (There are some interesting potential advocacy, electoral messaging, and legislative strategies to consider at the county and municipal level). Finally, legislation redefining the prosecutor's core duties (see discussion below) could mandate that prosecutors must use the most "cost-effective" means proven to accomplish rehabilitation and/or improve community health.

2. Aligning Incarceration Costs

In addition to the lack of goal-oriented incentives, there is the well-discussed "moral hazard" problem. Half of all state prosecutors' offices in the United States receive more than three-quarters of their operating funds from county government, and about one-third are supported exclusively by county funding.²² As many have noted, this funding structure creates a "correctional free lunch" problem: prosecutors can send as many people to prison as they'd like, without it having any effect on their budget since the state picks up the tab for the costs of incarceration.²³ Politically, prosecutors that cost the state millions in incarceration costs will never hear about it from the county legislatures that provide the bulk of their funding, and they are not meaningfully accountable to the state taxpayers that are footing the incarceration bill.

As highlighted in Appendix C, one approach to addressing this problem is to fold it into a transparency strategy, by collecting and publishing data on which prosecutors' offices

²⁰ Levine at 1141 (discussing that over 90% of California counties instituted new statutory rape vertical prosecution model and collected and reported data on outcomes in order to obtain state funds designated for that purpose).

²¹ *Reforming Funding* at 15.

²² Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 *Crime & Just.* 211, 226 (2012)

²³ Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. Crim. L. & Criminology* 717, 719 (1996); John Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 *Mich. L. Rev.* 1087 (Apr. 2013).

are driving a disproportionate share of the state’s prison population. A more substantive approach would reform funding structures to resolve the misalignment. For example, one idea is to stop funding prisons entirely at the state level, and make the counties pay for incarceration, so that costs are completely internalized at the county level.²⁴ (California is heading down this path slightly by requiring more incarcerating to be done at the county level through Justice Realignment). Another approach would simply be to make counties pay the state for all state prison bed space they use on a per capita basis. Yet another proposal would continue the “free lunch” partially by allocating a certain amount of prison bed space per year to each prosecutor’s office based upon a formula. If the prosecutor’s office exceeds the “free” allotment, the county has to pay extra, creating an incentive to stay under that threshold and some political accountability at the county level if it is exceeded.²⁵

The solutions above would require a major overhaul of existing funding structures, but current schemes are fundamentally flawed from the outset and there are good arguments in favor of significant restructuring. It is worth noting some parallels here with indigent defense reform. At the behest of advocates, many states have been moving away from the traditional county-based funding for public defenders, and toward state-based centralized state funding.²⁶

C. Mandatory Training for Prosecutors

Best practices frequently recommend specialized training or continuing legal education requirements for prosecutors, and many offices have voluntarily implemented their own requirements.²⁷ Legislation could mandate that prosecutors receive a certain number of training hours, and/or proscribe the particular subjects that must be covered in the training. For example, Texas requires mandatory *Brady* training for new prosecutors on disclosing exculpatory evidence.²⁸ Legislation could mandate racial bias training for prosecutors, as it has for police officers²⁹ (racial bias training for judicial officers has also occurred voluntarily in many places³⁰). As an alternative to mandating specific training in legislation itself, a third body, such as an independent oversight commission, Supreme Court, etc., could be required to establish mandatory training requirements for prosecutors.

²⁴ David Ball, *Defunding State Prisons*, 50 Crim. L. Bull. 1060-90 (Fall 2014).

²⁵ Misner at 770.

²⁶ To be sure, the fundamental issues are quite different. With regard to indigent defense, the main problem is that counties consistently underfund the public defender, and the move to centralize funding accomplishes the goal of requiring the state to provide more funds. Nevertheless, it does represent a major shift in the traditional funding structure, and one that gives the state more centralized oversight and control through purse strings.

²⁷ *CPI Roadmap*.

²⁸ HB 1847, Texas Government Code §41.111.

²⁹ For example, see the California Racial Identity and Profiling Act of 2015, codified at Cal. Penal Code § 13519.4 (Racial, identity, and cultural diversity training).

³⁰ See, e.g., National Consortium on Racial and Ethnic Fairness in Court (<http://www.national-consortium.org/Implicit-Bias/Implicit-Bias-Training.aspx>) (detailing 14 states that participated in judicial training on implicit bias).

D. Civil and Criminal Liability

1. Repeal Civil Immunity

Prosecutors enjoy almost complete immunity from civil liability, meaning that people who have been wronged by prosecutors can almost never sue to recover money damages to compensate them for the violation of their rights. Legislation at the state level could repeal that immunity in whole or in part and create viable causes of action against prosecutors that engage in misconduct.³¹ This would provide more accountability for victims of prosecutorial error. In terms of systemic reform, however, it is worth noting that empirical studies in the policing context have raised doubts about the actual deterrent value of civil damages lawsuits.³² It is also worth considering the limited value of a state-by-state strategy on this particular question, given that a single change to federal law could revive a viable cause of action nationwide.³³

2. Compensation Statutes

The roadblocks to civil liability may be also be overcome by legislation that creates or expands a wrongfully convicted person's right to compensation. Currently 30 states have some form of compensation statute, although many of the laws are far too narrow.³⁴ Passing and improving these types of laws is major objective of the innocence movement, and the Innocence Project has crafted model state legislation.³⁵

3. Prosecuting Prosecutors

In addition to civil liability, there is the question of whether prosecutors should face more certain criminal sanctions for committing error. A least one state has made the violation of a prosecutor's discovery obligations a crime (a misdemeanor).³⁶ Legislation could expand the range of prosecutorial errors subject to criminal liability.³⁷ Another avenue to consider would be empowering the state Attorney General to pursue prosecutorial misconduct as a civil rights violation under state civil rights laws.³⁸

E. Redefining the Role of Prosecutors

A far from comprehensive survey of a handful of state statutes found that laws creating district attorneys, and defining their power and their role, say nothing at all how prosecutors are supposed to discharge their duties. These enabling statutes say little

³¹ Roadmap for Prosecutorial Reform.

³² Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023 (2010)

³³ Overturning or limiting the immunity doctrine created by the United States Supreme Court in 42 U.S.C. Sec 1983 civil rights cases in *Imbler v. Pachtman*, 424 U.S. 409 (1976).

³⁴ Innocence Project, *Compensating the Wrongfully Convicted*, Blog (Jun. 4, 2015) (<http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/compensating-the-wrongly-convicted>).

³⁵ Innocent Project, *Model Compensation Legislation* (Dec. 2014) (<http://www.innocenceproject.org/free-innocent/improve-the-law/CompensationModelBill2015.pdf>)

³⁶ Tex. Code. Crim. Pro. 39.14.

³⁷ Assuming one can stomach the irony.

³⁸ Kozinski (proposing DOJ be empowered to bring such actions at the federal level).

more than “the district attorney shall investigate and prosecute criminal cases in the district.”³⁹ Some of the statutes are phrased in a way that arguably commands district attorneys to prosecute all cases presented to their office, regardless of the wisdom of doing so. It is reasonable to expect that most other state laws are similar.

A legislative platform could include (and perhaps begin with) a plank that would fundamentally redefine the role of the public prosecutor. For example, the state enabling statute creating and empowering the office of district attorney could say something like:

The district attorney is responsible for inquiring into alleged public offenses within the county and for seeking a just and equitable result for the accused, victims, and the community. Where the district attorney determines that justice warrants the initiation of a criminal prosecution against the accused, the district attorney shall seek a sanction that utilizes the most cost-effective and least restrictive means to achieve accountability for the victim, rehabilitation for the individual who committed the public offense, and long-term improvements to community health.”

The empowering statute could be even broader based on what the rest of the legislative platform looks like, for example, the “duties” of the prosecutor could also include more explicit commitments to racial justice, transparency, procedural justice, conviction integrity, etc.

Redefining the role of district attorney would have utility in a legislative platform by providing a kind of “mission statement” that frames all the other planks. It is also worth considering whether a redefined prosecutorial role might have more than just rhetorical campaign value. The vague and unbounded definition of prosecutorial duties in state laws has frequently been cited by courts as justifying the enormous power of prosecutors and extreme judicial deference.⁴⁰ It is possible that a more specific and more constrained articulation of the prosecutorial function in state law could result in modest changes to substantive case law.

In addition, there is ample organizational research showing that the “mission statement” of organizations has measurable impact in shaping organizational practices.⁴¹ The success of “new” or “community” prosecution models has depended,

³⁹ See, e.g., Colo. Rev. Stat. 20-1-102; Cal. Gov’t Code § 26500 (the district attorney at “his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses”); Ohio Rev. Code Ann. § 309.08 (“The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party”); 55 Ill. Comp. Stat. Ann. 5/3-9005 (“The duty of each State’s attorney shall be . . . To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county”).

⁴⁰ For example, see the case annotations in Westlaw regarding various applications of California’s enabling statute, Cal. Gov’t Code § 26500.

⁴¹ Bibas, 999.

in some part, on the clear articulation of the expanded mission communicated to line level staff.⁴² One of the most comprehensive surveys of prosecutors reviewed in this research revealed that among dozens of prosecutors surveyed, none of them had a consistent or clearly defined view of their own mission—even among prosecutors in the same office.⁴³ Much of the academic writing about improving ethical practices also laments the lack of clearly defined expectations for prosecutors.⁴⁴

F. Racial Impact Statements

Racial inequities caused by prosecutorial offices would presumably be revealed to some degree through a data reporting scheme. A Racial Impact Statement requirement would go further, by forcing prosecutors to proactively consider the prospective effects of to-be-adopted standards before they are implemented (e.g., “If these are our entry criteria for the drug diversion program, what population(s) will be served by the program, and who will be left behind?”). Racial impact statements for potential legislation are mandated (or available upon request by legislators) in several states.⁴⁵ Broadly speaking, the concept of an “impact” statement has precedent in the criminal justice context with regard to fiscal costs.⁴⁶ Racial Impact evaluations could potentially be incorporated as a component of a public rule-making process--when prosecutors are promulgating standards on case screening, charging, bail, etc., they could be required to examine racial disparities for each proposed policy.

G. External Oversight

Existing oversight of prosecutors by ethical committees, grievance councils and courts has been totally ineffective in achieving prosecutorial accountability.⁴⁷ Two possible approaches are establishing a new independent oversight body or strengthening existing mechanisms.

1. Independent External Oversight

An independent oversight body, with substantial investigatory and enforcement powers, could provide meaningful accountability in individual cases, sanction prosecutors that commit error, and promote systemic changes. Most (or all) states already have this type of oversight body for judicial misconduct. Independent review of criminal justice agencies has gained significant momentum in the past several years, particularly with

⁴² Levine at 1198.

⁴³ Bruce Frederick et al., *The Anatomy of Discretion: An Analysis of Prosecutorial Decision-Making*, National Institute of Justice (Dec. 2012).

⁴⁴ Cassidy, 993.

⁴⁵ *EJI Delaware Study* at 49 (noting RIS requirements in Iowa, Connecticut, and Oregon).

⁴⁶ Mark Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio St. L. Crim. L. 19, 26 (2007) (profiling North Carolina); Michael Leachman et al, *Improving Budget Analysis of State Criminal Justice Reforms: A Strategy for Better Outcomes and Saving Money*, Center for Budget and Policy Priorities and American Civil Liberties Union (Jan. 2012).

⁴⁷ Terazno at 12-13 (summarizing sources); Bibas at 975 (same).

regard to policing,⁴⁸ but also for jails⁴⁹ and in corrections.⁵⁰ This initial round of research did not uncover any state where an independent “prosecutorial review board” has been established. Academics have long advocated for the idea,⁵¹ legislation to create an independent oversight body was introduced in New York last year,⁵² there is some “model legislation” floating around on the issue,⁵³ and a federal prosecutorial review board was proposed in legislation as far back as 1998.⁵⁴ Study and research on what constitutes effective oversight in other law enforcement contexts could further inform what independent prosecutorial oversight should look like.⁵⁵ Key elements might include⁵⁶: (1) formal complaint process available to everyone, including organizations; (2) investigation also automatically triggered by any court report or finding of prosecutorial error; (3) subpoena power; (4) sanctioning power; (5) periodic reviews of closed cases; (6) power to promulgate minimum standards, best practices and or data collection; (7) the findings and operation of the oversight body is transparent; (8) staffed independently and adequately; (9) advisory committee that includes community members and other non-lawyers.⁵⁷

2. Strengthening Existing Oversight Mechanisms

There are numerous ideas for strengthening existing oversight structures, for example, promulgating additional rules of professional conduct specific to prosecutors, improving existing grievance procedures, and involving more lay persons in the grievance committee process.⁵⁸ There is a fairly dense amount of legal literature on this subject.

⁴⁸ Over 200 cities have some form of civilian police oversight. Martin Kaste, *Police Are Learning To Accept Civilian Oversight, But Distrust Lingers*, NPR (Feb. 21, 2015). In 2014, the New York City Council created an Inspector General for the NYPD over the veto of the mayor. Kate Taylor, *New York Police Department’s Oversight Office, Fought by Bloomberg, Gets First Leader* (March 28, 2014);

⁴⁹ See, e.g., Cindy Chang, *LA County Sheriff’s Department to Get Civilian Oversight*, Los Angeles Times (Dec. 9, 2014).

⁵⁰ See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 Pace L. Rev. 1754, 1756 (2010). Legislation in New York to be introduced in 2016 would create a “correctional ombudsman” (on file with author).

⁵¹ See, e.g., Harry M. Caldwell, *Everybody Talks About Prosecutorial Conduct But Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution* (2016). U. Ill. L. Rev. (2016 Forthcoming); Pepperdine University Legal Studies Research Paper No. 10. Available at SSRN: <http://ssrn.com/abstract=2761252>

⁵² New York Senate Bill 2686 (Jan. 14, 2014) (on file with author).

⁵³ The Justice Project’s model legislation is not well-formed or particularly impressive, in my view.

⁵⁴ See H.B. 3396, 105th Congress (on file with author).

⁵⁵ The approach taken in New York would structure prosecutorial oversight similar to existing judicial oversight. It would be important for any state considering a similar approach to evaluate how effective the judicial oversight bodies have actually been. More importantly, perhaps, there are good arguments in favor of structuring prosecutorial oversight bodies in a way that tilts more toward police oversight structures than judicial review commissions.

⁵⁶ This list is an amalgamation of the author’s ideas and other best practices. See e.g., Terzano at 12-14 (collecting resources and listed some best practices); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 S.W. L.J. 965, 980 (1984) (including model bill for “prosecutor’s grievance council); Caldwell.

⁵⁷ Keenan at 243 (noting that non-lawyers comprise a third of grievance boards in nine states).

⁵⁸ David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale Online L.J. 203 (2014).

Suffice it to say, for purposes of this memo, that there is a very strong case to be made that existing oversight mechanisms are fundamentally impaired, and that even with the suggested improvements, they would never be as effective as independent oversight.

H. Internal Oversight

In addition to external oversight, legislation could focus on strengthening internal accountability. Two obvious areas of possible focus would be conviction integrity, and internal discipline of line-level prosecutors.

1. Conviction Integrity Units

When Conviction Integrity Units are tasked with a proper mission and staffed appropriately, they appear to be an effective component of internal accountability. The nature and effectiveness of these units varies widely, however, and they appear to be proliferating in larger prosecutorial offices, leaving smaller offices with no internal conviction integrity review⁵⁹ Legislation could promote the meaningful conviction integrity units in a number of different respects.

Legislation could mandate that every district attorney establish a conviction integrity function within the office. Alternatively, the responsibility to conduct conviction integrity review could be sited with a state agency. A “State CIU” could be responsible for reviewing and investigating all complaints of wrongful conviction, and recommending remedial action where appropriate (including individual discipline or systemic policy-level change). A hybrid model might establish a State CIU that conducts investigations in the first instance for prosecutors’ offices that are too small to have their own CIU, and conducts post-investigation review and oversight of large offices that operate their own CIUs.

Legislation could also codify best practices for all conviction integrity units (or delegate that standard-setting to a third body).⁶⁰ For example, standards could establish an investigative mandate that goes beyond innocence and extends to any issue related to prosecutorial error.⁶¹ Standards could mandate appropriately low threshold criteria for case review (for example, the standard could ensure that cases involving false confessions are considered). Standards could mandate—at least for offices of a certain size—a specific level of expertise in staffing, independence, and an external advisory committee that includes public stakeholders and defense counsel.

2. Internal Supervision and Discipline

Best practices for prosecutors frequently focus on enhancing internal supervision and discipline. Prosecutors rarely have publicly available disciplinary policies that outline the range of penalties for prosecutorial misconduct. Compare this to police and correctional officers where—notwithstanding that internal disciplinary policies may be woefully inadequate—at the very least the disciplinary process and the range of

⁵⁹ *Conviction Integrity Units: Vanguard of Criminal Justice Reform*, Center for Prosecutor Integrity (2014).

⁶⁰ *Establishing Conviction Integrity Units* at 9 (“Top Ten” Conviction Integrity Unit Best Practices).

⁶¹ *EIJ Delaware Study* at 52-54.

potential sanctions are often clearly spelled out in policy or public regulation. Similarly, even small police departments generally have an Internal Affairs function to investigate citizen claims about officer misconduct. While acknowledging the extreme dysfunction of many IAB offices, many prosecutors' offices do not have this minimal internal review structure (at least district attorney has an "ombudsman" deputy DA that is in charge of maintaining compliance with professional standards⁶²). (There is an unsurprising irony here—it is not uncommon for prosecutors' office to have some role in reviewing IAB complaints related to police officers in their jurisdiction, yet they don't perform this function in their own office).

Legislation to address the lack of effective internal disciplinary structure could focus on requiring prosecutors to create and publish internal disciplinary guidelines, or create internal oversight functions like an IA office. If the mandate of a Conviction Integrity Unit extends beyond just looking at wrongful convictions, and encompasses all form of prosecutorial error, the CIU could be charged both with uncovering error by line prosecutors and recommending discipline or termination where appropriate.

I. Charging Practices

Whether a prosecutor decides to bring criminal charges, and what charges are brought, is a critical exercise of prosecutorial power. In almost all jurisdictions it is a decision made unilaterally by the prosecutor. Charging decisions have also been shown to drive significant downstream racial disparities and incarceration rates. This section discusses reforms that would go beyond requiring prosecutors to make and publicize their own charging standards, and would instead set those standards by legislation or otherwise alter the charging process itself.

1. Setting Statewide Charging Standards

Rather than letting prosecutors determine their own standards, legislation could establish standards that all local prosecutors in the state are required to follow when charging cases. As noted in the sections above, many prosecutors' office already employ such standards, and a state-wide standard could be drawn from existing best practices in the state (or elsewhere). Legislation could codify the reported practice of the San Diego District Attorney that requires a "beyond a reasonable doubt" standard for charging a case.⁶³ Alternatively or in addition, the responsibility to develop charging standards could be vested with a third body, like the state Attorney General, Supreme Court a legislative commission, or by an independent oversight agency. Additional strategic considerations regarding standard-setting are discussed in Section 3.

⁶² *Using Root Cause Analysis to Instill a Culture of Self-Improvement: Program Replication Materials*, Innovations in Criminal Justice Summit III (Apr. 20, 2015).

⁶³ *Report of the Ad Hoc Commission on Best Practices for the Baltimore City State's Attorney* (Jan. 2011) (citing San Diego as a jurisdiction that uses a "beyond a reasonable doubt" standard for charging); see also Delaware's Access to Justice Commission's Committee on Fairness in the Criminal Justice System, *A Report on Racial Bias in Prosecutorial Charging Decisions, Plea Bargaining, and Sentencing*, Equal Justice Initiative (Nov. 2015) (same).

2. Adversarial Testing and Judicial Oversight

Other ideas for constraining prosecutors' charging authority might focus on ensuring that defense attorneys have a greater opportunity to review and contest charging decisions. One such reform would be requiring a "joint charging conference," where the defense and prosecution must meet and discuss potential charges, before formal charges are filed.⁶⁴ There is some precedent for additional procedural safeguards regarding charging decisions in New Jersey, where the Supreme Court required prosecutors to create written standards with regard to charging under a habitual offender statute, make a statement on the record if the prosecutor does not seek the enhancement, and subjects the prosecutor's decision to judicial review (albeit under an "arbitrary and capricious" standard.)⁶⁵

Because motions to dismiss criminal charges in some jurisdiction generally turn only on the legal adequacy of the charges, some have suggested there would be a positive impact if defendant had a more clearly defined right to challenge the evidentiary sufficiency of charges, and the court the authority to dismiss factually unsubstantiated charges, at a very early stage.⁶⁶ Some courts have indeed lamented the inability to review prosecutor's charging and plea decisions.⁶⁷

J. Plea Process

Nearly all criminal cases are disposed by plea agreement, and the coercive power of the prosecutor and the near complete inscrutability of the plea process has been the subject of extensive criticism for decades. Like the previous section, discussed below are ideas that move beyond just requiring prosecutors to have transparent plea standards, and toward reforms that would reshape the plea process itself. These ideas raise complex criminal procedure concerns and their utility and effect may vary widely based on the jurisdiction. There is obviously much more to say about the contours, complexities and merits (or lack thereof) of these ideas, should plea bargain reform become an area of focus for legislative reform.

1. Adversarial Testing

Legislation of various forms could ensure that more adversarial testing occurs during the plea process. Legislation could prohibit any plea agreement unless the defendant has actually consulted with counsel (e.g., not just had the "possibility" of that consultation and waived the right).⁶⁸ Counsel could be required to make a more extensive on-the-record presentation regarding the factual sufficiency of the charges. Courts could be required to conduct a more searching analysis of the plea before approval.

⁶⁴ *EJI Delaware Study*.

⁶⁵ Cassidy at 1022, discussing the *Brimage* standards.

⁶⁶ *CPI Roadmap* at 10.

⁶⁷ *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299-1300 (9th Cir. 1992) (Koziski, J.).

⁶⁸ *EJI Delaware Study*.

2. Plea Judge

Some have proposed having a “plea judge” directly involved in the plea process. Judicial involvement in the plea process could increase transparency, serve as a check on prosecutorial power, and detect defense attorney misconduct (e.g. defense attorneys just “pleading out” cases).⁶⁹ Under these proposals the plea judge would be a non-trial judge with no direct involvement in the criminal prosecution that would conduct a plea conference with the counsel and defendant.⁷⁰ The judge could ensure that any necessary discovery has been disclosed prior to the plea, provide institutional knowledge of the “going rate” for the crime, and interrogate the factual sufficiency for the plea.⁷¹ A 50-state survey found that 20 states permit some form of judicial involvement in the plea bargaining process, with Oregon, Arizona, Illinois and Connecticut endorsing active judicial involvement in the plea process.⁷²

3. Plea Juries

A similar proposal would create plea juries to review any proposed plea agreements.⁷³ The plea jury would accomplish goals similar to the plea judge, and require citizen participation in what is otherwise currently an opaque process. Commentators have suggested that plea jury would be empaneled like a grand jury (where people sit on the jury for a number of days or weeks, hearing multiple cases over the course of that time). Like a plea judge, the plea jury would determine (1) whether the facts stated fit the alleged crime; (2) whether the plea was knowing and voluntary, and; (3) whether the proposed sentence was appropriate.⁷⁴ The proposals reviewed suggested the plea jury’s decision would not be binding, but that the plea jury’s findings and recommendation would then be presented, along with the usual plea allocution, to the trial judge.

4. Limit or Abolish Pleas

Finally, there have been numerous proposals to limit pleas or abolish them entirely. Proposals have included prohibiting pleas in crimes involving particularly high sentences,⁷⁵ specifying fixed plea “discounts” as the maximum that a sentence can be reduced in exchange for a plea,⁷⁶ allowing only “open pleas” (where the defendant has to plead guilty to the entire case as charged and the court determines the sentence with no recommendation from the prosecution), prohibiting charge bargaining, or abolishing pleas entirely.⁷⁷

⁶⁹ Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 Ohio St. L.J. 565, 587 (2015).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Batra at 569-70.

⁷³ Laura I. Appleman, *The Plea Jury*, 85 Ind. L.J. 731, 741 (2010); Jazon Mazzone, *The Waiver Paradox*, 97 N.W. U.L. Rev. 801 (2003).

⁷⁴ Appleman at 741.

⁷⁵ *Id.*

⁷⁶ Bibas at 965.

⁷⁷ *Id.*

K. Sentencing Recommendations

When it comes to sentencing, most reform proposals have focused on sentencing and penal law reform—eliminating mandatory minimums and habitual offender statutes, shrinking sentencing ranges, narrowing the number and scope of criminal laws—and rightfully so. For reasons discussed at the outset of this section, however, sentencing reform itself is not addressed in this memo as a “prosecutorial reform” measure.

There may be other reforms to consider outside direct sentencing reform, however, that would result in the less frequent and less punitive use of incarceration. For example, the principle of requiring criminal justice actors to use “least restrictive means” when imposing controls or sanctions has precedent and momentum in other areas.

Bail reform is often premised on the principle that the least restrictive means should be used to ensure the person’s appearance at a future court date (e.g., start by considering release on recognizance, then consider reminder services like postcards or text messages, then consider forms of non-monetary bail, etc., before cash bail and pre-trial detention is imposed as a very last resort). Similarly, the concept of considering and exhausting less restrictive alternatives is familiar in the context of solitary confinement reform (which is essentially a prison official’s decision about when to “incarcerate” someone in their “jail within a jail”). Best practices require prison officials to consider therapeutic interventions and less punitive measures before resorting to the use of solitary confinement, and when solitary confinement is deemed necessary, it is to be used only for the shortest amount of time needed to regain control over a dangerous situation.

A “least restrictive means” standard could be incorporated into sentencing policies for prosecutors. (Some legal scholars have argued that the Eighth Amendment’s prohibition on excessive punishments necessarily implies that the punishment should be subject to a least restrictive means analysis.⁷⁸) When prosecutors seek incarceration, they could be required to state in writing what less restrictive options were considered, and why they were rejected as inadequate. This would force prosecutors to at least think more broadly about incarceration rationales and decisions, and allow some public and judicial scrutiny of the purported justifications for incarceration.

L. Police Accountability

There are a variety of reforms that could effectuate greater prosecutorial accountability for police officer misconduct, civil rights violations, and crimes. On a day-to-day basis, prosecutors could be required to notify police officers and their supervisors whenever a case is refused and the reason for refusal⁷⁹ (e.g., no probable cause for arrest, illegal search and seizure, etc.). This would provide a feedback loop that would let police supervisors know if a street officer is making bad arrests. These

⁷⁸ See, e.g., Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1048 (1978) (reviewing arguments in favor).

⁷⁹ Charging and Disposition Standards for the Snohomish County Prosecutor’s Office at 24 (May 2014) (on file with author).

standards could also mandate a protocol for the prosecutors' office eventually refusing all cases from a problem officer that has a history of repeatedly presenting unprosecutable arrests (this could prompt some police departments to take that officer off the street). Legislation could impose an affirmative duty on prosecutors to report (to a supervisor, police IAB or IG, community oversight agency, attorney general, etc.) any police misconduct they encounter in any aspect of their duties, including police uses of deadly and excessive force. Finally, legislation could require prosecutors' offices to defer to an independent investigation and/or independent prosecution of police in their own jurisdiction whenever deadly or serious force is involved.⁸⁰

M. Discovery and Investigative Procedures

In addition to reforming charging and plea bargaining practices, there have been numerous proposals to curb prosecutorial misconduct by amending the rules that govern what evidence prosecutors have to disclose to defendants and when they have to disclose it, and by reforming investigative practices that are subject to error or manipulation by police or prosecutors. These types of reforms have been the subject of extensive writing and advocacy by the innocence movement and the criminal defense bar. This section is intended to provide a general, non-exhaustive overview of these two categories of reforms.

1. Brady Compliance and Open File Discovery

"Brady" (the name is taken from a U.S. Supreme Court case) requires prosecutors to disclose all exculpatory evidence to the defense, and ignoring this requirement is a major source of prosecutorial misconduct.⁸¹ "Open file discovery" requires prosecutors to allow their entire file to be inspected by the defense, ideally at the earliest stage of the proceeding and before any plea is entered, regardless of what the prosecutor thinks the evidence shows in terms of guilt or innocence.⁸² Legislation might require *Brady* compliance, open file discovery, and create an affirmative duty for prosecutors to make diligent efforts to discover all exculpatory information (e.g., the prosecutor can't ignore leads that, if followed, might lead to evidence casting doubt on the suspect's guilt).⁸³ These requirements could work in tandem with a requirement that there be an on-the-record certification of compliance by the individual prosecutor.

The Justice Project and Innocent Project have model bills on this and other discovery reforms.⁸⁴ North Carolina recently passed a state statute mandating more open discovery, under criminal penalty.⁸⁵ Texas also passed law expanding discovery obligations in 2013.⁸⁶

⁸⁰ This is a major plank of Campaign Zero. <http://www.joincampaignzero.org/investigations>

⁸¹ Terzano at 6; *Expanded Discovery in Criminal Cases, a Policy Review*, The Justice Project (No Date).

⁸² *EJI Delaware Study* (advocating for pre-plea discovery, but not citing any examples of existing practices); *Establishing Conviction Integrity Programs in Prosecutors' Offices*, Center on the Administration of Law, Conviction Integrity Unit (No Date).

⁸³ Alex Kozinski, *Criminal Justice 2.0 Preface*, 44 *Geo. L.J. Ann. Rev. Crim. Pro.* (2015).

⁸⁴ *Expanded Discovery in Criminal Cases, a Policy Review*, The Justice Project at p.21 (No Date).

⁸⁵ N.C. Gen. State. Sec. 15A-903.

⁸⁶ Tex. Code. Crim. Pro. 39.14.

2. Safeguards Related to Prosecutorial Investigation

A number of investigative practices have long been known to be subject to bias, abuse and error (not to mention based on junk science) and are badly in need of reform. These include reliance on eyewitness identification, conduct of interrogations and the taking of confessions, the use of jailhouse informants, the handling of DNA and other forensic evidence, and the use of body camera and dash camera footage. Legislation could put in place safeguards and require best practices in these areas. For example, legislation could mandate common-sense procedures that reduce the risk of line-up misidentification, require videotaping of interrogations, and strictly limit the use of jailhouse informants with full disclosure to the defense regarding the nature of the arrangement.⁸⁷ These types of reforms have long been championed by the Innocence Project and criminal defense lawyers, and several states have enacted laws in these areas.⁸⁸

N. Reforms to Campaign Rules

Commentators have targeted the rhetoric in prosecutorial races, and the focus on anecdotal cases or the prosecutor's severity, as problematic.⁸⁹ Additional transparency (in terms of data and policies) and continued electoral organizing by advocates would presumably improve this dynamic. Some commentators have suggested that reforming campaign rules, like making prosecutors subject to rules similar to those that govern judicial elections, would temper this rhetoric and improve the quality and outcome of electoral races.⁹⁰

⁸⁷ Terazno at 5.

⁸⁸ See, e.g., Expanded Discovery in Criminal Cases (profiling discovery reforms in Colorado, New Jersey, and Arizona); see also Innocence Project Lauds Colorado's Enactment of ID Reform (Apr. 17, 2015) (<http://www.innocenceproject.org/innocence-project-lauds-colorados-enactment-of-eyewitness-id-reform/>)

⁸⁹ *Roadmap for Prosecutorial Reform*.

⁹⁰ *Id.*

A Plan for Transparent, Equitable and Responsive Prosecution in America

The chief prosecutors we elect to represent our communities are powerful gatekeepers in our criminal justice system. Like policing and prisons, prosecutorial practices are badly in need of an overhaul. Prosecutors' daily decisions have enormous impact on the communities they serve, yet are made in the dark, with no oversight to curb abuses, and no accountability for failing to improve our communities. Here is how to fix it: comprehensive reforms to ensure prosecutors act transparently and are held accountable to the communities they serve.

We expect more from our prosecutors in the 21st century.

The laws that created elected prosecutors and granted them sweeping powers were largely written in the 18th century, long before the age of overcriminalization and mass incarceration. These laws should be updated to reflect modern day expectations that prosecutors respond to community needs, use cost-effective approaches to solve problems that lead to crime rather than always resorting to incarceration, and proactively identify and address racial inequities.

Transparency in what our prosecutors are doing.

The number of convictions your elected prosecutor got last year doesn't say much. Is your prosecutor successfully focusing on serious crime of concern to your community? Is your prosecutor treating people fairly and furthering racial justice? Is your prosecutor spending scarce taxpayer dollars on programs proven to improve community health? These reforms will require every chief prosecutor to publicly report the same data and to comply with open records laws, allowing communities to make informed decisions about how elected prosecutors are performing on the job.

Transparency in how they are doing it.

When two people commit the same crime, why does a prosecutor offer probation in one case and a 15-year sentence in the other? When do prosecutors seek to keep a person jailed, separated from family and unable to work, before being proven guilty of any crime? How do prosecutors decide to give one person with a substance dependency issue the option of treatment, and the other prison? Most prosecutors have no public written standards on any of these critical questions. These reforms would require every chief prosecutor to create written standards to guide staff and to inform the public about how these decisions are made.

Common-sense standards for charging people with crimes.

We have thousands of criminal laws on our books. Many are broad and hold the potential of years-long prison sentences. More than 9 out of 10 cases are resolved by a plea bargain where the charges the prosecutor brings are most important decision in the case. Prosecutors bring charges they can never prove in order to coerce pleas to lesser charges. These charging practices have been shown to be major causes of racial disparity and mass incarceration. The upshot: it is now more important than ever that the law is crystal clear about when prosecutors can bring criminal charges. Reforms would require prosecutors to publicly explain their charging decisions and prove to a judge that any charges meet a common-sense standard: you can't charge person with a crime unless you are confident you can prove it at trial.

Independent oversight.

Effective oversight is lacking throughout our criminal justice system, but prosecutors are unique in operating with unchecked power—with disastrous results that have allowed prosecutorial misconduct to fester for far too long. These reforms would establish an independent oversight agency similar to what already exists for judges, police departments, jails and prisons. This new agency would include community members and other non-lawyers, and have the power to investigate citizen complaints of prosecutorial misconduct and impose discipline, address systemic problems within prosecutorial offices, and publish best practices for prosecutors throughout the state.

APPENDIX C: INDEX OF POTENTIAL MEASURES OF GOOD PROSECUTION

Goal	Objective	Possible Measure
Fair, Equitable and Constitutional Prosecution	Policies and standards exist	<p><u>Office-wide standards exist and are public for following (Yes/No):</u></p> <p><u>Critical Decision Points</u></p> <ol style="list-style-type: none"> 1. Case Screening (including diversion) 2. Charging 3. Bail recommendations 4. Plea bargaining 5. Sentencing recommendations (including alternatives) <p><u>Discovery Related Policies</u></p> <ol style="list-style-type: none"> 6. <i>Brady</i> obligations 7. Open File policy 8. Eyewitness identifications 9. Suspect and victim interrogations, including videotaping 10. Dashcams and body cams 11. DNA evidence procedures, “hits” and preservation
	Address racial disparities	<ol style="list-style-type: none"> 12. Race data is available for any measure below and especially at critical points, including charging, plea bargaining, or sentencing practices 13. Proactively looks at racial disparities and tries to identify and address root cause (Yes/no) 14. Considers potential racial disparities that may be caused by standards or practices, before they are adopted (yes/not)
	Rigorous case screening	<ol style="list-style-type: none"> 15. The case screening policy is comprehensive and rigorous with a clear set of objective criteria, written records are kept on

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Goal	Objective	Possible Measure
		<p>each screening decision and rationales therefor (policy evaluation)</p> <p>16. Policy requires feedback loop for police officers that keep referring bad cases (see LEA accountability, below) (Y/N/)</p> <p>17. Case declination/acceptance rate</p> <p>18. Sample audit of case declinations</p>
	Fair charging	<p>19. Charging policies are comprehensive and clear, charging priorities reflect community priorities, high factual threshold for bringing charges, charging rationale is recorded in writing (policy evaluation)</p> <p>20. Number of cases filed with habitual offender, mandatory minimum charges, or LWOP</p> <p>21. Number of those charges eventually dropped</p> <p>22. Percentage of cases charged with most serious crime class where “wobbler” involved (can be charged as a misdemeanor or a felony)</p> <p>23. Percentage of cases where juvenile charged as adult</p> <p>24. Utilizes risk assessment to make charging decisions (yes/no)</p> <p>25. Consults with defense counsel before bringing charges (yes/no)</p>
	Fair plea bargaining	<p>26. Plea bargaining policy is comprehensive, some pleas are “off limits”, full rationales recorded in writing, departures from policy are narrow and subject to supervisory review (policy evaluation)</p> <p>27. Percent of cases that result in plea, by plea type (charge plea, open plea, etc.)</p>

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Goal	Objective	Possible Measure
		28. Percentage of pleas to original charge
	Fair sentencing	29. Policies on sentencing recommendations are comprehensive and clear, with a point system or other objective method for making sentencing recommendations tied to actual behavior, and always includes possibility of no incarceration time (policy evaluation) 30. Average length of sentence recommended by prosecutors as a percentage of the maximum sentence allowed 31. Percentage of cases where maximum sentence sought 32. Percentage of cases where LWOP sought
	Ethical/Constitutional Prosecution	33. Number of ethical complaints against prosecutors arising from county/district 34. Number of findings of prosecutorial error from court arising from county/district 35. Percent of defendants reporting fair treatment from prosecutors 36. Percent of defense bar reporting (in survey or questionnaire) ethical and constitutional practices from prosecutors in county/district
Healthy Communities	Reducing serious and violent crime	<u>Baselines</u> 37. Poverty rate 38. Employment rate 39. Crime rate 40. Arrest rate 41. Cases filed and on docket, by crime type 42. Ratio of convictions/ cases charged

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Goal	Objective	Possible Measure
		43. Dismissal and acquittal rates for violent cases 44. Average time to disposition 45. Average time to restitution payment
	Reducing recidivism	46. Percent of prisoners convicted of a new crime within three years of release 47. Percent of prisoners convicted of a new crime and sentenced to incarceration within three years of release 48. Routine notification to prosecutor of ex-offenders returning to jurisdiction from jail and prison (Yes/No) 49. Routine use of evidence-based risk and needs assessments for all ex-offenders returning to jurisdiction (Yes/No) 50. Results of risk and needs assessments shared with all relevant agencies (Yes/No)
	Responding to community priorities	51. Percent of community reporting feeling safe 52. Number of cases linked to community priorities 53. Percent of cases linked to community priorities that result in convictions 54. Regular updates and opportunity for comment presented to community (Yes/No) 55. Community priority concerns related to crime are identified and updated regularly (Yes/No) 56. Long-term goals of community established, reviewed and assessed annually (Yes/No) 57. Number of identified community concerns that elicit a prosecutorial response or initiative

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Goal	Objective	Possible Measure
		<p>58. Percent of identified communities' concerns that are resolved (i.e., no longer considered problems upon further inquiry)</p> <p>59. Number of formal, community-based subdivisions within prosecutor's office</p> <p>60. Number of staff assigned to community-based subdivision</p> <p>61. Number of community liaison or community affairs staff throughout prosecutor's office</p> <p>62. Number of communities with prosecutor's office staff person on site in community, by frequency</p> <p>63. Updated list maintained of regular community meetings (Yes/No)</p> <p>64. Average number of community events attended by prosecutor staff/month (ideally with a break-down by community and by type of meeting, e.g., Community Advisory Board, tenants' association, etc.)</p>
	Addressing chronic crime	<p>65. Updated list of problem offenders</p> <p>66. Routine use of standardized risk assessment by prosecutor or partner agency (Yes/No)</p> <p>67. Routinely share high-risk defendant flag with relevant agencies (Yes/No)</p> <p>68. Percent of cases that use defendant history and patterns to develop prosecution</p>

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Goal	Objective	Possible Measure
	Reduce problem behaviors identified by community	69. One or more offenses targeted for reduction (Yes/No) 70. Target offense arrests, convictions, and sentences 71. Time to rearrest for targeted offenses, compared to time before initiation of initiative
	Identify and remedy nuisance properties and hot spots identified by community	72. Updated list of nuisance properties and “hot spots” (Yes/No) 73. Number of cases involving nuisance properties and “hot spots” (Yes/No) 74. Number of calls to police relating to nuisance properties and hot spots 75. Number of calls to prosecutor regarding nuisance properties and hot spots 76. Number of nuisance properties and hot spots resolved 77. Community satisfaction with nuisance properties and hot spots as reported on survey
	Victim Services	78. Policy of non-discrimination against victims even if they are alleged to also be involved in illegal activity, e.g., gang members, undocumented immigrants, etc. (Yes/No) 79. Dedicated victim’s liason (Yes/No) 80. Number of victims’ programs 81. Number of partnerships with external agencies designed for victims 82. Victim satisfaction based on survey
Reducing Incarceration	Pre-Trial Detention	83. Number and percent of number of cases recommended by prosecutor for ROR, cash bail, or no bail, by case type and race

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Goal	Objective	Possible Measure
		<p>84. Number and percentage of defendants held in pretrial detention, by length of pretrial detention</p> <p>85. Number and percent of cases referred for pretrial supervision programs</p> <p>86. Average cost per day in county jail, multiplied by total pre-trial jail days “spent” by the prosecutor</p> <p>87. Clear bail policy that prioritizes release whenever possible and alternatives to cash bail (Yes/No)</p> <p>88. Participates in or operates notification programs (text messages, mail reminders, etc.) to encourage court attendance with imposing bail or other restrictions (Yes/No)</p> <p>89. Use of validated risk assessment tool for making pre-trial release recommendations (Yes/No)</p> <p>90. Number of days of missed work, number of jobs lost, etc., due to pre-trial incarceration (survey response)</p>
	Post-Conviction Incarceration	<p>91. Average sentence length</p> <p>92. Number and percent of defendants sentenced to incarceration</p> <p>93. Number and percent of state prisoners that originated from county/district</p> <p>94. Current percent of total state prison population originating from county/district</p>
	Diversion and Alternatives to Incarceration	<p>95. Number and percent of cases that are diverted from traditional prosecution</p> <p>96. Number and percent of cases that are sentenced to alternative sanctions recommended by prosecutors’ office</p>

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Goal	Objective	Possible Measure
		<p>97. Number of diversion or alternative to incarceration programs run by the prosecutors' office; annual caseload per program; annual number of new participants completing each program</p> <p>98. Number of programs providing alternatives to incarceration that are in active partnership with prosecutor's office</p> <p>99. Number and percent cases per year that are mandated to (a) community service; (b) drug treatment; (c) mental health services; (d) vocational or education development; € health services, and (f) other social services</p>
	Crime prevention initiatives	<p>100. Number and type of crime prevention initiatives ongoing, and average length of program operation</p> <p>101. Number of people participating in crime prevention programs</p> <p>102. Percent of crime prevention programs involving non-criminal justice agencies (e.g. social service providers)</p> <p>103. Measures of long-term outcomes for those in initiatives as compared to a control group</p>
	Reducing incarceration with regard to particular populations	<p><u>Juveniles</u></p> <p>104. Policy prohibiting or limiting instances that office will seek juvenile life without parole (Yes/No)</p> <p>105. Number of JLWOP sentences sought, by crime type</p> <p>106. Policy regarding diversion for criminal complaints arising from school setting, (school to prison pipeline) (Yes/No)</p> <p>107. Specific policy on sentencing recommendations (emphasizing alternatives to incarceration) when crime arises from school setting (Yes/No)</p>

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Goal	Objective	Possible Measure
		<p>108. Number of cases presented arising from school setting, and charging decisions (including declining to charge), dispositions and sentencing outcomes for those cases</p> <p><u>Substance Use and Possession</u></p> <p>109. Screening policy regarding diversion for criminal complaints related to drug use or possession (Yes/No)</p> <p>110. Specific policy on sentencing recommendations (emphasizing alternatives to incarceration) (Yes/No)</p> <p>111. Number of cases presented, and screening (diversion) charging decisions (including declination), dispositions and outcomes for those cases</p> <p><u>Mental Health</u></p> <p>112. Policy for identifying and flagging complaints that involve defendant with mental health issue (Yes/No)</p> <p>113. MH training component for prosecutors (Yes/No)</p> <p>114. Policy regarding diversion for criminal complaints where MH issue predominates (Yes/No)</p> <p>115. Specific policy on sentencing recommendations (emphasizing alternatives to incarceration) (Yes/No)</p> <p>116. Number of cases presented, and screening (diversion) charging decisions (including declination), dispositions and outcomes for those cases</p>
Fiscal Accountability		117. Total budget by line item and amount paid for by county, state and federal resources

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Goal	Objective	Possible Measure
		<p>118. Total and average detention costs incurred by county (pre-trial and short post-conviction sentences served in county jail)</p> <p>119. Total and average detention costs incurred by state because of incarceration arising from county/district</p> <p>120. Costs and hours per case by case type</p> <p>121. Cost/hours per case broken down by type of prosecutorial response (e.g., diversion, probation, alternative to incarceration program, or incarceration).</p> <p>122. Connecting recidivism rates to the above (showing effect of less punitive options vs. incarceration on a per cost basis)</p>
Office Integrity	Adequate Staffing and Training	<p>123. Recruitment policies that seek candidates reflective of community characteristics (yes/no)</p> <p>124. Recruitment policies that seek candidates supportive of office mission (yes/not)</p> <p>125. Composition of office staff, by race</p> <p>126. Average turnover rate of staff</p> <p>127. Rewards and incentives for staff prioritize just outcomes over convictions or achieving punishment (yes/no)</p> <p>128. Supervisory structure ensures young prosecutors closely monitored by senior prosecutors with goal of avoiding over-punitive outcomes (yes/no)</p> <p>129. Office-wide professional/legal training requirements (yes/no)</p> <p>130. Training requirements includes training on racial bias (yes/no)</p> <p>131. Percent of staff satisfying training requirements (yes/no)</p> <p>132. Staffing workloads</p>

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Goal	Objective	Possible Measure
		133. Clear written disciplinary policies for staff (yes/no) 134. Number of staff subject to internal reprimand, discipline, or termination, and reasons therefor
	Conviction Integrity	135. Existence of Conviction Integrity Unit (yes/no) 136. Conviction Integrity Unit has adequate staff, meaningful review criteria, and autonomy (evaluative) 137. Number of cases reviewed 138. Number of cases recommended for additional investigation 139. Number of cases recommended for exoneration or other remedial action
	Vertical Prosecution	140. Percent of cases prosecute by single attorney 141. Protocol to improve efficiencies with transferred cases (Yes/No)
Interagency Relationships	Accountability for LEA misconduct	142. Number of cases prosecuted by the district attorney involving police use of excessive force (including deadly force), perjury or corruption 143. Number of convictions secured by the district attorney, in categories above. 144. Arresting officer and his/her supervisor are notified when prosecutors' office refuses a case, and reasons why (yes/no) 145. Policy for addressing situation where arresting officer consistently presents bad cases for prosecution (yes/no) 146. Policy and procedures requiring line prosecutors to refer officers for prosecution when line officer has reasonable belief that arresting officer committed excessive force, perjury, corruption or other misconduct (yes/no)

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Goal	Objective	Possible Measure
		147. Protocol ensuring independent investigation and prosecution for cases involve police use of serious or deadly force (yes/no)
	Partnerships to improve LEA coordination and prosecution	148. Average number of meetings with one or more external agencies attended each month 149. Existence of regularly scheduled meetings (not ad hoc) with multiple external agencies (Yes/No) 150. Routine discussion of local “hot spots” and nuisance properties with local police and other local agencies (Yes/No) 151. Routine discussion of targeted offenders with police and other agencies (Yes/No) 152. Number of location-focused initiatives involving external agencies 153. Number/percent of cases for which external agencies are consulted 154. Number/percent of cases that included partnerships with one or more agencies (either within or outside the justice system)
	Partnerships to Reduce Incarceration	155. External agencies consulted on the appropriate use of diversion and alternatives to incarceration (Yes/No) 156. External agencies partner in implementing diversion and alternative to incarceration programs (Yes/No) 157. Number of partnerships that address community issues (e.g., park clean ups, better lighting, increased security on public transportation)

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Goal	Objective	Possible Measure
Addresses systemic problems in criminal justice system	Addresses systemic issues	158. Policy on when statements/lobbying on proposed legislation are appropriate (Yes/No) 159. Refrains from lobbying (Yes/No) 160. Number of county-level legislative bills supported or opposed last session, by type of bill degree of participation (e.g. legislative testimony, press release, public statements, etc.) 161. Number of state-level legislative bills supported or opposed last session, by type of bill and degree of support

Appendix D: Hypothetical Data Points for Mandatory Reporting Legislation

Objective/Question	Metric	Notes
Fair and Equitable Prosecution	1. Crime rate, by crime type and race	Baseline (albeit problematic)
	2. Case declination rate, by rationale for declination, crime type and race	How well prosecutors are screening out bad arrests by cops or effectively diverting cases away from CJ system
	3. Percent of cases charged as habitual offender, mandatory minimum or LWOP	Some measure of punitive charging practices
	4. Percent of violent/serious crime on docket, by race	Whether prosecutors' dockets are overloaded with petty and non-serious crimes
	5. Pleas to original charge, by crime type and race	How much overcharging by prosecutors may be going on, in order to force pleas.
	6. Average prison term sought by prosecutor as percentage of the maximum sentence allowed, by crime type and race	Some measure of overly punitive sentencing recommendations
	7. Percent of community reporting feeling safe, by race	Community metric on prosecutor's performance
Reducing Jail Population	8. Number and percent of number of cases recommended by prosecutor for ROR, non-cash bail, cash bail, or no bail, by crime type and race	Whether prosecutors are actively seeking non-incarceration pre-trial
	9. Number and percentage of defendants held in pretrial detention, by crime type, length of pretrial detention, and race	How effective prosecutors are with those requests, and how long people spend waiting in jail as a result
Reducing Prison Population	10. Number and percent of cases diverted from prosecution, by diversion type, crime type, and race	How effective the prosecutor is at taking cases entirely out of the CJ stream
	11. Number and percent of cases sentenced to alternatives to incarceration, by alternative sentence type, crime type and race	How effective the prosecutor is at employing non-incarceration alternatives
	12. Number and percent of cases sentenced to incarceration, by sentence length, crime type and race	Where the court ends up; show high degree of control prosecutor has on ultimate outcomes
Use of Resources	13. Pre-trial detention costs to county and post-trial incarceration where sentence served in county jail	How much prosecutors are costing county taxpayers
	14. Percent of all state prison commitments originating from district, compared to district population and district crime rate	What proportion of the state prison population is driven by this prosecutors' office, with some rough controls for the size and crime rate in the jurisdiction

Appendix E: Selected Literature Reviewed

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