



Unlocking the Black Box

How the Prosecutorial Transparency
Act Will Empower Communities and
Help End Mass Incarceration

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Acknowledgements

The author of this report is Nicole Zayas Fortier, advocacy and policy counsel with the ACLU's Campaign for Smart Justice. The ACLU would like to thank JustLeadershipUSA, the Urban Institute, Fair and Just Prosecution, and the Brennan Center for Justice for their review and input on this report and model legislation. The ACLU would also like to extend a special thanks to Molly Griffard, Daniel Kugler, Daniela Nauffal, Alexis Nelson, and Matthew Wollin for their invaluable contributions to this report.

Executive Summary

Across the country, voters are beginning to recognize the power of America's locally elected prosecutors, who have played a major role in the mass incarceration crisis and exacerbating racial disparities in the criminal legal system.

Today, the United States has nearly 25 percent of the world's jail and prison populations despite having less than 5 percent of the world's population.¹ This crisis affects people of color disproportionately: one in three Black men and one in six Latino men can expect to be incarcerated in their lifetimes – compared with one in 17 white men.² The imprisonment rate for Black women is about twice the rate for white women.³

An overwhelming percentage of Americans want an elected prosecutor who will prioritize reducing incarceration (89 percent) and racial disparities (88 percent).⁴ Yet, there is far too little transparency in how the roughly 2,400 elected prosecutors in the country operate.

Prosecutor transparency is an essential step in ending mass incarceration policies that have locked up millions of people, ripping them away from their families, and shattering neighborhoods across the nation while deepening racial injustice. It is imperative to collect and analyze information on how prosecutors contribute to these harms in order to hold them accountable and to design solutions to reverse this nationwide crisis.

"I've been covering and reporting on prosecutors for years. The offices are often black boxes—there is little information publicly available, and what they do collect and make public is wildly inconsistent even among prosecutor offices in the same state."

— Josie Duffy Rice, Senior Reporter at *The Appeal*⁵

In most cities and counties, elected prosecutors report very little public data on critical decisions— for example, how they make charging decisions and who is given a second chance, and why. Prosecutors seldom even make public the policies that guide the powers they exercise on a daily basis.

Using open records laws to obtain information from prosecutors' offices is often difficult and time-consuming. While a growing number of prosecutors' offices have started making some information public, these efforts are piecemeal and subject to change depending on who's in office. What's needed is comprehensive transparency from all prosecutors.

People and communities damaged by mass incarceration know all too well the impact of prosecutorial decision-making. Making data and policies transparent is also critical for demonstrating systemic problems, motivating policymakers, and developing effective solutions.

The “Prosecutorial Transparency Act,” attached to this report, is the right solution. This model legislation would require all prosecutors to make their policies public, and to gather and report data.

Prosecutorial decisions are numerous, varied, difficult, and costly to track. But with state and local prosecutors’ offices receiving \$7.02 billion in public funds annually, policymakers have a responsibility to ensure transparency on the decisions made and the impacts they are having on local communities.⁶

Recent laws passed in Florida, Colorado, and Arizona that mandate transparency and data reporting from law enforcement agencies and other actors provide a sound roadmap for similar requirements from prosecutors.

Part I of this report provides an overview of prosecutors’ power, highlighting specific decision points in the prosecutorial process where more transparency is needed.

Part II describes the current landscape of prosecutorial data collection. This section examines how basic information is incomplete, unavailable, or nonexistent.

Part III discusses the benefits of increased transparency, including greater accountability for mass incarceration and racial disparities, better decision-making within a prosecutor’s office, and improved relationships with communities. This section also takes a close look at lessons learned from transparency in policing that should be applied to prosecutors.

Part IV provides an overview of the “Prosecutorial Transparency Act” that should be adopted in every state. This section discusses issues that advocates and policymakers should consider when adapting this model legislation, including potential ways to address costs, privacy concerns, and administrative burdens on small prosecutors’ offices. While states may choose to confront these issues in a variety of ways, an investment in transparency will pay substantial returns for the public and for prosecutors.

I. The Power of the Prosecutor

As the most powerful – and perhaps least understood – actors in the criminal legal system, prosecutors have incredible impact on both individual criminal cases and the criminal legal system at large.

“Prosecutors are the most powerful actors in the criminal justice system. Our power is virtually boundless. In most cases, not the judge, not the police, not the legislature, not the mayor, not the governor, not the President can tell us how to prosecute our cases.”

– Adam Foss, Founder and President of Prosecutor Impact and Former Prosecutor⁷

Today, roughly 2,400 elected⁸ prosecutors across the country make decisions that affect the lives of millions of people every day. They possess formidable powers to carry out justice. They decide whom to prosecute, what to charge, whether to recommend freedom or incarceration before trial, whether to bargain for a plea and its conditions, and whether to dismiss a case altogether. They hold this authority throughout the life of a criminal case, giving them extraordinary power from arrest through trial, conviction and sentencing, as well as during appeals.

Unfortunately, for decades prosecutors have embraced “tough-on-crime” policies and practices focusing entirely on more convictions and harsher punishments.⁹

A. Whom to Charge

Prosecutors decide whether or not to bring criminal charges against a person. This discretion can be affected by racial and socioeconomic bias and is open to abuse.

By overcharging and seeking harsher bail amounts and sentences for certain groups (often Black and Hispanic people), prosecutors contribute to racial disparities and mass incarceration. This can also happen by declining to bring charges against whites or through the selective granting of pretrial diversion, where prosecutors opt to defer or dismiss criminal charges, typically upon completion of a treatment or service program.¹⁰

“Generally, prosecutors are not trained to assess risk, understand the benefits of

treatment, or to utilize non-criminal justice alternatives to regular case disposition.”

— John Creuzot, District Attorney for Dallas, Texas¹¹

Consider, for example, research that has shown that in decisions on pretrial diversion, prosecutors grant the opportunity to white people more often than they do to Black, Latino, Asian and Native American people. For example, one study found that white defendants are 28 percent more likely than Blacks, 13 percent more likely than Latinos, and 31 percent more likely than Asians and Native Americans to receive prosecutorial diversion.¹² By making decisions that consistently benefit white people, prosecutors have contributed to a criminal legal system that effectively creates different systems for white people and people of color, with the latter more likely to have prosecutions pursued against them.

B. What to Charge

When a person is arrested, there may be any number of criminal offenses that person could be charged with, ranging from a misdemeanor or violation that may be punished with a fine, up to a felony that often carries mandatory prison terms. Prosecutors have the power to determine which charges, if any, they will bring. These decisions have major consequences, particularly when they trigger additional sentence enhancements such as three strikes and habitual offender laws.

This power gives prosecutors enormous influence over the growth of prison populations. A 2012 study by criminologist John Pfaff, for example, shows that between 1994 and 2008, felony charges filed by prosecutors rose by nearly 40 percent, even while reported crime and arrests were falling. In fact, the risk of an arrest leading to a felony charge doubled during that period.¹³ This could be the result of prosecutors choosing to seek harsher punishments, with little public safety rationale. Ultimately, Pfaff concludes prosecutors’ aggressive, punishment-first approach to criminal law drove the rise of mass incarceration, which has in turn damaged individuals, families, communities, and the economy for decades.¹⁴

C. What Plea Deal to Offer

Prosecutors can also choose whether to offer a person charged with a crime a plea deal and dictate its terms. These plea deals determine what crime(s) the person is convicted of, which in turn determines sentences, potentially triggering mandatory minimums, dictating release details, and resulting in collateral consequences that last a lifetime.

These practices exacerbate already significant racial disparities. While research on plea-bargaining is limited, a 2017 study has provided the most in-depth review of the connection between race and pleas negotiations. It analyzed over 30,000 cases over a seven-year period in Wisconsin, and found that white people facing misdemeanor charges were 74 percent more likely than Black people to have all charges carrying potential prison time dropped, dismissed, or reduced. Further, it found that white defendants with no prior convictions received charge reductions more often than Black defendants with no prior convictions. The report concludes that these patterns suggest prosecutors use race as a proxy to determine whether a defendant will commit another crime.¹⁵

When prosecutors decide to offer a deal, they retain an upper hand in negotiations throughout the life of a case and they can also threaten to add additional charges along the way. Ninety-four percent of felony convictions in states are resolved with pleas, arguably giving prosecutors more influence on case results, sentence lengths, and prison populations than judges.¹⁶

Exacerbating the problem, more than 80 percent of felony defendants rely on court-appointed counsel — nearly three-quarters of whom are burdened with crushing caseloads.¹⁷ For too many people facing criminal charges, this is a situation in which innocence is irrelevant because overwhelmed public defenders cannot stand on equal ground with prosecutors.¹⁸ For example, many public defenders have limited time and resources to conduct investigations or retain experts, have limited access to the prosecutors' evidence, and do not have the capacity to take most of their cases to trial. Under these circumstances, many people facing criminal charges are forced into impossible choices — either accept a set time behind bars or risk an even longer sentence at trial.

D. Whether to Keep Someone Locked Up While They Await Trial

Across the country, when a person is arrested, they appear before a judge, who sets the terms of their release before trial. Most of the time, release demands a price, commonly known as “cash bail.”

If a person can afford their bail amount, they will be released immediately and get that money back when they appear at court for trial. For those without resources, freedom is likely only possible by borrowing from a bondsman, who charges a percent of the bail amount. Those who cannot afford that fee must stay in jail until the case is resolved — either from the prosecutor dropping the charge(s), by accepting a plea deal, or when the trial concludes. People of color are the most harmed by the cash bail system. Studies have found that Hispanic and Black people are more likely to be detained while awaiting trial. Other studies have found that Hispanic and Black defendants are less likely to be released without some condition they must

meet and are also more likely than similarly situated white defendants to have higher cash bail set.¹⁹

“Prosecutors play a large role in determining whether an individual is incarcerated or under supervision.”

— Dennis Wygmans, State’s Attorney for Addison County, Vermont²⁰

Prosecutors can have a substantial and influential role in this system. While judges are the ultimate bail decision-makers, they regularly seek the prosecution’s recommendation, and judges often rely heavily on those recommendations.

There are strong incentives for prosecutors to seek bail. Studies show that people who are in jail before trial are much more likely to be convicted than those who could afford the amount set for their freedom. For example, one study shows that non-felony conviction rates jump from 50 to 92 percent for those jailed pretrial; for felony cases, it increases from 59 to 85 percent.²¹ Prosecutors, in seeking high bail amounts, know they will likely convince someone behind bars to take a plea deal rather than going to trial. This system forces people who cannot afford bail to choose between sitting in jail for months or years or pleading guilty and having to live with a criminal record.

E. The Result

Prosecutors have immense control over who ends up behind bars and who goes free. The result is that the United States now has nearly 25 percent of the world’s jail and prison populations despite having less than 5 percent of the world’s population.²² The tough-on-crime approach by prosecutors has increased the jail and prison population dramatically;²³ lengthened sentences through aggressive charging and plea bargaining practices; and sent millions of people with addictions, disabilities, and mental health conditions into jails and prisons when they should instead receive treatment or other social services.

“[P]rosecutors, as did every single constituency in our criminal justice system, contributed significantly to mass incarceration. The national war on drugs, which criminalized addiction rather than treating it as an illness, increased mass incarcerations.”

- Spencer Merriweather, District Attorney for Mecklenburg County, North Carolina²⁴

As the gatekeepers of the criminal legal system, prosecutors' decisions contribute to significant racial disparities behind bars. One in three Black men and one in six Latino men can expect to be incarcerated in their lifetimes – compared with one in 17 white men.²⁵ The imprisonment rate for Black women is about twice the rate for white women.²⁶

“Over prosecution of low-level felony and misdemeanors – especially those related to drug possession and substance abuse – have contributed to the mass incarceration of people of color.”

- Satana Deberry, District Attorney-elect for Durham, North Carolina²⁷

Today, voters are beginning to agree that prosecutorial reform is essential and urgent. A significant number of forward-thinking prosecutors have taken up this call for change. Prosecutors from Chicago to Houston, Kansas City and New York have reduced or eliminated cash bail, declined to prosecute cases with stark racial disparities, and established community advisory boards that put them in more direct contact with the communities they serve.²⁸ These prosecutors are leading the way in showing how their power can be used to combat mass incarceration, decrease racial disparities in the justice system, and create community-oriented solutions instead of doling out ever-harsher punishment.

II. Prosecutorial Information: Missing, Incomplete, and Hidden

Despite growing calls for reform, information about how prosecutors make decisions remains largely hidden from public view.²⁹ The few public statistics on prosecutorial decision-making often only collect information at the broadest level,³⁰ making it nearly impossible to uncover individual abuses, systemic discrimination, or patterns that do not align with office policies. This lack of transparency has earned prosecutors' offices the reputation of being "black boxes."

A. Limited Data Collection

Perhaps the most basic and widespread challenge is that many prosecutors' offices do not even attempt to gather basic information about their practices. Nor do they commonly write out and publish policies that guide basic decision-making.

The most comprehensive nationwide survey of state³¹ prosecutors' offices, completed by the Urban Institute in 2018, found limited prosecutorial data collection even for basic case information.³² The survey focused in part on "foundational case information," including the volume of cases coming into an office, the number of charges, and what happens within a case. Results revealed that less than half of the offices interviewed collect all of these basic data points. Even fewer publish the results – only 24 percent reported making their data analyses public.

This lack of data collection has long been the norm among prosecutors' offices for a variety of reasons. First, there are almost no legal requirements that they do so. Laws rarely mandate the recording or public disclosure of substantive prosecutorial data, nor do they require prosecutors' offices to make their policies public.³³ Prosecutors' offices have been particularly slow compared with other law enforcement actors, like police departments and correctional facilities, to accept the need for data collection and to create systems to capture it.³⁴

In addition, citizens demanding change in the criminal legal system have largely focused on the lack of transparency from police, and only recently have turned their attention to prosecutors. In other words, prosecutors have not been subject to much external pressure or political consequences for operating their offices as "black boxes."

Nonetheless, the need for more data to gain insight into prosecutorial practices has been widely recognized even by prosecutors themselves, including the National District Attorney Association, the largest national prosecutor organization in the country:

Although prosecutors endorse concepts of fairness, efficiency, and effectiveness, they lack practical guidance on how best to measure and achieve these goals. There is a need within the prosecution community to articulate prosecution goals and to develop better tools for measuring performance and results . . . relying exclusively on crime, conviction, and recidivism rates to evaluate and define justice overlooks many critical roles and activities of justice practitioners. Moreover, for prosecutors, such traditional measures

often do not adequately address the interests of victims and the community, nor do they adequately explain prosecutorial discretion and decision-making.³⁵

Calls for greater transparency from prosecutors have come from all sides: from voters, academics, public defenders, county legislatures approving prosecutorial budgets, and even from prosecutors themselves. Yet, progress has been halting and inconsistent. Given the historical lack of attention to transparency, many offices have both failed to build the necessary infrastructure or to dedicate appropriate staff time to collect data in this critical area. According to the 2018 Urban Institute survey, a quarter of participating offices said they spent no staff time on data collection or analysis at all.³⁶ This gap is even more severe for smaller offices – more than half reported no staff time spent on data collection or analysis.

Even when prosecutors have tried to be more transparent, the lack of uniform standards in a state has created inconsistencies and other practical problems. Data available in one office in the state can be missing in another office. This deprives residents of any insight into how prosecutorial practices differ depending on where they live, making comparisons among prosecutors impossible.

In addition, the voluntary, patchwork nature of data collection has led to inconsistent, often incomplete, and internally disordered systems for classifying and storing data.³⁷ For example, some offices split data between digital and paper formats, while others store data in different digital systems that do not allow for comparing information.³⁸

The Limited Potential of Measuring Prosecutor Decision-Making with Existing Data

One group, Measures for Justice (MFJ), has made a concerted effort to gather data from prosecutors' offices to supplement other publicly available criminal law data.³⁹ MFJ presents its data analyses on one publicly accessible data website.⁴⁰

But this effort takes time. Beginning in 2017, the group's portal provides county-level information from only six states so far. The data also has limitations. While the data spans 32 categories from arrest to post-conviction — such as “court fees and fines,” “cases not prosecuted,” “time to initial appearance,” “pretrial diversion of nonviolent misdemeanors,” and cases resolved through charge reductions — many of these measures are not available for each county due to problems tracking down the data in each location.⁴¹

The MFJ project demonstrates the promise of uncovering and presenting data from prosecutors' offices and other sources in a way that also provides useful context. The difficulty and expense of MFJ's work underscores the need for a far more comprehensive and efficient solution.

B. What Information Exists Is Hard to Get

Even the limited information that prosecutors do keep is often difficult to obtain. Every state in the country has some type of “open records law” that allows the public to request policies and data from government officials, including prosecutors. But obtaining information from prosecutors’ offices by using a state’s open records law is a lengthy, and often costly, endeavor.

In many ways, there is nothing unique about the difficulty of getting information through open records requests. The numerous exemptions for law enforcement activity in state open records laws, and the willingness of public officials to deflect, delay, or deny these requests, are well-documented across the country with all types of elected officials.⁴²

But there are also difficulties particular to prosecutors’ offices. For example, George Joseph, a staff reporter for *The Appeal*, an investigative journalism website dedicated to criminal legal issues, has filed dozens of open records requests seeking information from prosecutors’ offices in numerous states. He describes the difficulties obtaining data from these offices using existing open records laws:

Whether I can get any information from a prosecutor’s office with an open records request varies widely. For example, I’ve filed identical requests to prosecutors in adjoining counties, and one will provide information while the other does not. Even when I can get a response, it often takes months for the request to be processed. In addition, prosecutors may refuse to provide information even when they have it, claiming that it is protected by the attorney-client privilege or other exemptions in open records laws. Trying to get information from prosecutors’ offices using open records requests takes a long time, and often you end up empty-handed.

Some prosecutors have stonewalled requests to such an extent that the American Civil Liberties Union and other organizations have had to take them to court in order to obtain public information. In 2017, a court found that the elected prosecutor in Cole County, Missouri, had violated the state’s open records laws by denying a request for information about a prosecutor’s communications with another government task force.⁴³ When elected prosecutors in Massachusetts consistently stonewalled requests by journalists for basic case information, like a list of cases they prosecuted, the state’s attorney general sued them for violating the state open records act and won in a suit those elected prosecutors spent \$68,000 fighting.⁴⁴ But that victory took time, money, an outside legal organization, and a gutsy attorney general — resources the average resident does not have.

While some prosecutors have voluntarily made greater transparency a priority, others have worked against such reform. For example, the chief lobbyist for the Florida Prosecuting Attorneys Association frequently lobbied against measures that would require more transparency from prosecutors and other law enforcement agencies.⁴⁵

In Pennsylvania, a district attorney sought to exempt prosecutor records entirely from the state's open records act.⁴⁶ In Arizona, the long-time district attorney in Maricopa County, Bill Montgomery, sought to take control of police records in order to better shield them from public release.⁴⁷ In Georgia, an elected district attorney's proposal to significantly limit access to prosecutor records was ultimately opposed by the state's attorney general.⁴⁸

By gaining access to basic information on how prosecutors make their decisions, the public would be able to better understand how prosecutors' discretion determines incarceration patterns and to what extent their discretion results in a disparate racial impact.

III. The Promise of Prosecutorial Transparency

Information from prosecutors is rarely available and what is public tends to focus on outcomes like conviction and incarceration rates. This makes it nearly impossible to determine how prosecutors use their power in the many other, often more consequential, decisions that precede these end results.

As shown in this section, more information would allow both prosecutors and the public to identify and correct the root causes of mass incarceration and racial disparities in the system. Transparency would also help prosecutors improve outcomes and efficiency in their own offices, and would build trust with, and foster accountability to, the communities they serve. In fact, some policymakers and prosecutors have already taken steps in this direction, proving it is both possible and necessary.

A. Identifying Incarceration and Racial Disparity Drivers

Transparency can help the public better understand our incarceration crisis, and how daily decisions may contribute further to it by more precisely identifying the root causes emerging from prosecutorial offices.

Further, improved data collection and subsequent analyses can provide prosecutors with insights into their office's practices and patterns. These analyses can lead to improved practices, fairer policies, more appropriate sentences, and diminished racial disparities.

Some prosecutors have already begun this type of examination. Since 2005, the Vera Institute of Justice has worked with chief prosecutors from New York County; Charlotte, North Carolina; Milwaukee, Wisconsin; San Diego and San Francisco, California; and Lincoln, Nebraska,⁴⁹ to collect and analyze statistical data on how their discretion affects racial disparities.⁵⁰ These offices understand that finding and correcting disparate outcomes is important for achieving future fairness – a process that begins with transparency.

“The shame is not in finding that we have unconscious biases or that our current policies have a disproportionate racial impact – the shame lies in refusing to ask the questions and correct the problems.”⁵¹

— Cyrus Vance, District Attorney for New York County, New York⁵²

Identifying these disparities also creates opportunities for prosecutors' offices to improve their policies. For example, when the Vera Institute found unanticipated racial disparities within certain drug cases in the Milwaukee County District Attorney's office,⁵³ analysts were able to show that the disparity closely tracked varying levels of prosecutorial experience. Junior prosecutors primarily pursued charges for paraphernalia associated with crack cocaine, while

senior prosecutors declined paraphernalia charges across the board as relatively minor, regardless of the associated drug type.⁵⁴ In response to this revelation, the county’s district attorney adopted a new policy to decline drug paraphernalia charges and offer referrals to treatment, whenever reasonable. . The racial disparity diminished as a result.⁵⁵

B. Improving Prosecutors’ Offices

Prosecutorial transparency is also a component of improving criminal legal practices and policies inside prosecutors’ offices. By collecting, analyzing, and publishing data on how they use their discretion, prosecutors can strengthen their own policies and procedures to ensure their actions and resources are ensuring fair treatment for everyone in the community.

“Trying to do our jobs without data is needlessly difficult at best, catastrophic at worst.”

— John Chisholm, District Attorney for Milwaukee County, Wisconsin and
Christian Gossett, District Attorney for Winnebago County, Wisconsin⁵⁶

Reliably tracking and analyzing more data can lead to vastly improved capacities to make informed decisions about everything from human resources to choosing case strategies. It can assist an office in compiling annual reports and streamlining budget proposals or grant requests for lawmakers or other law enforcement agencies. Managers will be able to measure performance of their staff; they will be better able to locate and supervise attorneys who are not meeting goals or who are frequently violating the civil rights of those accused of crime. Further, prosecutors will more easily track court appearances and filing deadlines.

These efforts can also help prosecutors identify practices that are especially effective and fair. For example, while the District Attorney’s Office in Travis County, Texas, knew it had a high rate of cases dismissed, it had no analysis to provide context on why.⁵⁷ Prosecutors in that office assumed this was the result of line prosecutors charging people only to discover they didn’t have enough evidence to bring the case to trial. But after collecting more information, the analysis revealed that this pattern was in fact the result of successful diversions. In response to these findings, the Travis County District Attorney’s Office invested further in its diversion programs, recognizing its effectiveness.⁵⁸

C. Helping Overwhelmed Defense

Increased access to data can also improve outcomes for people fighting criminal charges, their families, and their communities. For example, if a prosecutor’s office tends to stack charges only to drop them routinely in plea negotiations, or seek higher bail amounts or sentences against certain racial groups, defenders can use this information in plea negotiations, motion practice, trials, and appeals to reduce or eliminate time spent behind bars.⁵⁹ For example, if

defenders know the average time for theft cases to resolve, they can convince the prosecutor charging their clients with theft to offer a better plea deal as that time nears. Further, if a defender knows that local prosecutors convict Black people at a significantly higher rate than whites with similar charges, the defender may be able to make a claim of discriminatory enforcement under the Equal Protection Clause. Further, defense advocates can employ the same data for legislative change and increased funding.

D. Improving Accountability

As elected officials with control of significant public resources and broad powers, prosecutors must be accountable to the communities they have been elected to serve. Yet real accountability is impossible without transparency.

Greater transparency allows voters to evaluate whether prosecutors have followed through on their promises, allowing them to make informed choices at the voting booth. For communities where trust with prosecutors has been eroded by decades of punitive practices, transparency is one small but necessary step to restoring dialogue and ultimately improving the prosecutors' responsiveness to community needs.

Transparency is already transforming other parts of the criminal legal system. With increased attention on police violence after numerous highly publicized police shootings in the past four years, activists and journalists sought police data only to discover law enforcement agencies had no data or that the data was poor quality.⁶⁰ To fill the gap, several news organizations and community organizers gathered and published tallies of police killings from a variety of sources, including civilian complaints, court rulings, independent research, news reports, witness statements, and Freedom of Information Act requests.⁶¹ Their annual estimates generally ranged from 1,100 to 1,400 police killings each year – a total significantly larger than previous government counts.⁶²

Policymakers have since begun to demand broader mandatory data reporting by police departments. President Obama's Task Force on 21st Century Policing recommended in 2015 that local law enforcement should be required to swiftly and publicly report when an officer kills someone.⁶³ By 2016, 11 states passed laws requiring police departments to record and report information regarding officer-involved shootings, deaths, and other uses of force.⁶⁴ Some of these laws required additional information, such as data related to traffic stops, civilian complaints, and investigation outcomes.⁶⁵

Data collection efforts in the policing context show the power of increased transparency to create sustained, meaningful reform in criminal law practices. The lessons learned from these developments and the obstacles involved should be taken into account as advocates and politicians pursue prosecutorial transparency.

When communities understand what prosecutors do and what questions to ask, they can hold prosecutors accountable for their outcomes. The exercise of prosecutorial discretion is best

judged in each specific context – from decisions to modify charges, offer diversion, or engage in plea-bargaining – but that context is often invisible without more information than is currently available. The state attorney for the Eighth Judicial Circuit in Florida, for example, began in 2008 to track his prosecutors’ decision-making throughout the life span of cases.⁶⁶ Along with managerial advantages, data tracking enabled his office to define success as achieving just and fair case outcomes, rather than the number of convictions. New metrics, such as the completion of diversion programs, helped to better explain decisions to drop cases (a statistic that went unexplained before collecting data but produced better community results).⁶⁷ Data tracking also allowed him to share with the public a new definition of “success.”

Provided with greater context drawn from the data, the public would be in a better position to understand prosecutors’ decisions and to hold them accountable for their promises. If a prosecutor promises to reduce prosecution of drug possession, for example, they should be held accountable if that promise is not borne out in the data from their office.

E. First Steps Toward Transparency

While prosecutors across the country have opened data to researchers for assistance with developing data collection and analysis, few publish raw data for the public to broadly access. One groundbreaking exception stands out. In March 2018, State’s Attorney Kim Foxx of Cook County, Illinois, released six years of raw felony criminal case data to the public.⁶⁸ The data was presented in four downloadable excel tables – one each for intake, initiation, disposition, and sentencing – and included 45 million data points. Unique identifiers were provided for cases, defendants, and charges, allowing the user to trace each stage throughout the course of a case, rather than merely offering a “snapshot” view of the data.⁶⁹

Other prosecutors’ offices may follow suit. Besiki Luka Kutateladze, of Florida International University, is heading a project deploying a group of researchers to prosecutors’ offices in Jacksonville and Tampa, Florida; Milwaukee, Wisconsin; and Chicago, Illinois, for deep dives into prosecutorial data. Dr. Kutateladze is requiring that these offices commit to making the final data and measurements public at the completion of the project in 2020. His researchers will focus on collecting data on: 1) how many people reached negotiated plea deals with prosecutors, 2) details on initial offers, 3) how these offers changed over time, and 4) if plea deals varied based on race of the person accused of a crime, prosecutor, or victim. Importantly, the researchers will also look at what additional information prosecutors could record that would be useful to understanding their work and judging their success that they are not recording now.

Voluntary data releases by individual prosecutor’s offices, however, will not be enough to ensure that the public has access to quality, comprehensive data. This goal requires laws explicitly outlining the type of data that gets recorded by prosecutors’ offices, how it is stored, and how it is released. Without this focus on improving recording processes consistently, individual efforts will not provide comprehensive insight into prosecutors’ work.

Fortunately, policymakers are beginning to understand the importance of widespread transparency throughout the criminal legal system, including in prosecutors' offices.

In 2015, Colorado passed the Community Law Enforcement Action Reporting ("CLEAR") Act, which mandated that a wide range of criminal law data be reported by local law enforcement agencies, the Judicial Department, and the Parole Board to a centralized state criminal law bureau that issues annual reports based on that data.⁷⁰ One of the first reports issued by that bureau based on the data revealed statistics showing Black men and women are disproportionately arrested and more likely to be sentenced to prison than any other racial or ethnic group."⁷¹

In 2018, the Arizona state Legislature passed a law focused on prosecutors' data specifically. The law, passed as part of a broader spending bill, requires two county attorneys' offices (Pinal and Yavapai) to publish monthly data on misdemeanor and felony prosecutions on their office websites.⁷² The offices will begin publishing the information for this pilot project in January 2019 and will continue for 18 months, collecting data on demographics, charges, guilty pleas, trials, and prison sentences or other dispositions.

In March 2018, Florida emerged as a national leader with its passage of a comprehensive criminal law data collection and disclosure law.⁷³ Senate Bill 1392 – the first and only statewide data policy of its kind in the country – requires each county to identify and publish standardized, robust information related to pretrial release, bail/bond information, charges, pleas, sentencing, and demographics, including race and ability to afford an attorney.⁷⁴

Until now, much of Florida's criminal law data has been extremely difficult to access, a situation common across all states.⁷⁵ Data has generally been stored in different databases and recorded inconsistently within and across counties, making it difficult to inform prosecutorial decision-making and criminal law policies.⁷⁶

"I thought both as a lawmaker and a resident of Florida, it shouldn't be that difficult for people to understand how our system works and whether it's functioning properly."

— Rep. Chris Sprowls, Republican, 65th District of the Florida House of Representatives and sponsor of SB 1392⁷⁷

The new availability of comprehensive criminal law data will allow researchers, the press, and the public to better understand how the criminal legal system is functioning in Florida. Florida lawmakers anticipate that this data collection and transparency measure will be the first step toward greater data-driven reforms of the criminal legal system.⁷⁸ Others anticipate that the availability of race and ethnicity data will allow watchdogs to more easily and conclusively spot issues of racial bias in the system.⁷⁹

IV. Making Statewide Prosecutorial Transparency a Reality

As this report makes abundantly clear, setting basic minimum transparency standards for all prosecutors in a state is desperately needed and eminently achievable. Statewide data reporting would allow for uniform, public access to prosecutors' policies and to data that would vastly improve accountability, decision-making, and public trust.

The "Prosecutorial Transparency Act," attached as an Appendix to this report, is a model bill that provides a template for state legislatures. This legislation:

- Identifies and defines data points that must be collected and reported by prosecutors, focusing on data that would provide insight into critical decision-making points. This includes the demographics of the charged individual, charge description, initial charge and possible penalties, charge modifications and corresponding penalties, bail type, bail amount, plea offer, date of plea offer, dates of pretrial detention, case disposition, sentence type, sentence conditions and length.
- Requires that all prosecutors' offices in the state provide this data on an annual basis to a central state agency that is responsible for making the data publicly available and issuing annual analyses and reports. The Act empowers the state agency to design a 3-year implementation plan that could include implementation on a rolling basis, for example, by beginning with the reporting of only a subset of data points in the initial years, and/or beginning by reporting by the largest state prosecutors' offices.
- Identifies prosecutors' written policies and makes those policies public — or requires prosecutors to disclose that no such policies exist. This includes, for example, bail and sentencing practices, plea bargain guidelines, discovery practices, prosecuting youth as adults, screening for mental health, and diversion.
- Requires basic reporting on staffing, training, and discipline in the prosecutor's office. This information will allow communities to demand better representation where a prosecutor's office does not have a staff representative of the community and build trust by showing that prosecutors who engage in misconduct are being held accountable.
- Creates an Advisory Board that includes representatives of impacted communities and criminal defense attorneys. Enforces compliance by prohibiting a prosecutor's office from receiving state funding if that an office fails to comply with the Act's provisions.

As states consider this model legislation and how to adapt it to their specific needs, the following issues should to be considered:

A. Privacy Concerns

There are serious privacy concerns that arise with the government's collection and centralization of data that contains sensitive personalized information. These concerns must be weighed carefully, and appropriate safeguards put in place to guard against misuse or accidental disclosure. The Prosecutorial Transparency Act addresses these concerns by (1) assigning a unique identifier (random number) in place of names, (2) providing that only de-identified data is released publicly; and (3) declining to collect some especially sensitive information, such as people's sexual orientation or immigration status.

B. Logistical Challenges

In most states, there are prosecutors' offices of every size: from those with multimillion-dollar budgets and dozens or hundreds of staff, to those with only a few staff attorneys. Ensuring uniform and consistent reporting from offices of so many different capacities presents significant logistical challenges.

The Prosecutorial Transparency Act addresses this challenge by having a centralized state agency, rather than each individual prosecutor's office, take responsibility for designing a uniform reporting system and collecting and analyzing the gathered data. This structure relieves some of the burden on smaller offices, while also creating a state-level body to analyze data provided by all prosecutors' offices in the state.

Nearly every state has an existing state criminal legal agency whose mandate already includes some form of statewide data collection and analysis. The approach of centralized reporting to a state agency was the path taken in states like Colorado and Florida in requiring statewide reporting from dozens, if not hundreds, of local law enforcement agencies and courts.

C. Fiscal Impact

The implementation of the Prosecutorial Transparency Act may require the allocation of additional resources, either to create new capacity within a central state agency or to support prosecutors' offices where additional infrastructure is needed to collect the mandated data.

In response to concerns about cost, the most critical point is that it is a necessary investment. Both the public and prosecutors are largely operating in the dark about decision-making and outcomes. Ensuring that these powerful public officials, who combined received billions of taxpayer dollars, can accurately report and measure outcomes is critical for fundamental transparency, likely to improve efficiency,⁸⁰ and will lead to better results for public health and safety.

Many prosecutors' offices already have substantial budgets and should reasonably be expected to develop additional data infrastructure with existing resources. Indeed, many are already in the process of doing so.⁸¹ Before any fiscal note is attached to a state's Prosecutorial

Transparency Act, a careful assessment should be made of what additional resources, if any, are actually needed to facilitate data collection. It may be that modest investments in smaller offices would be adequate to enable the reporting required under the Act.

Finally, it should be noted that major components of the Act — collecting and publicly sharing policies and staffing information — should not require any additional infrastructure or resources in most cases. These components could be implemented with zero cost.

Conclusion

We cannot end mass incarceration until we transform the practices of prosecutors. Transforming those practices requires a far more complete picture of how they are making their decisions as well as the direct impact of those decisions on individuals and communities.

The Prosecutorial Transparency Act is a long-overdue and needed solution to this problem. Holding prosecutors accountable is impossible so long as prosecutorial power remains hidden from public view.

Passing the Prosecutorial Transparency Act in every state is a necessary step toward reversing the nationwide crisis of mass incarceration and ensuring that communities have the information they need to hold these powerful elected officials accountable.

The Prosecutorial Transparency Act

Section 1 – Legislative Findings and Intent

The Legislature finds and declares the following:

The [prosecutors' offices] in this state, which receive taxpayer funding from and are subject to oversight by this Legislature, are the most powerful actors in the criminal justice system. Among other things, [prosecutors' offices] decide whether to charge people, and with what crimes. They determine, virtually unilaterally, whether individuals will be diverted from the criminal system, thereby avoiding criminal records and attendant collateral consequences. They also make influential recommendations regarding pretrial detention, bail, and sentencing. These decisions and more have a lasting impact on people accused of crime, victims, families, communities, and [state's] economy. Yet basic information and data about these offices and their practices, while nominally publicly available, are exceedingly difficult to access and understand.

All individuals, including voters who determine which prosecutors should hold elected office and taxpayers who fund these offices, deserve unfettered access to this information in a way they can understand and use, unless protected by a recognized privilege or statutory or common law exemption. In addition to educating voters, the information this act requires [prosecutors' offices] to disclose will help identify the drivers of mass incarceration and racial disparities in our criminal justice system. The information will improve accountability for offices that violate the law and individuals' rights. It will help produce fairer outcomes in individual criminal cases, including via better-informed plea negotiations. And it will hasten improvements in prosecutors' offices themselves, creating management efficiencies and cost savings. The Legislature intends these and other salutary results of increased prosecutorial transparency.

In sum, the Legislature finds that it is a compelling state interest to implement uniform information transparency requirements for [prosecutors' offices] around the state, and that the public has a right to know such information. Accordingly, the Legislature enacts the Prosecutorial Transparency Act of [year].

Section 2 – Definitions

For purposes of this Act, the following definitions shall apply:

- A) "Unique Identifier" means a randomly generated number that is assigned in place of a defendant's name;
- B) "Case number" means the unique number assigned to a criminal case associated with a particular criminal charge.

B) “Charge” means any accusation of a crime by the [prosecutor’s office],¹ including but not limited to an ordinance, citation, summary, misdemeanor, felony, or other type of crime, and including but not limited to accusations brought by ticket, citation, information, complaint, indictment, or other charging instrument.

C) “Charge description” means the name of the charge as given by the criminal code; a statement of the conduct that is alleged to have been violated; the associated statutory section establishing such conduct as criminal; the misdemeanor, felony, or other classification of the charge; and any level or tier within the misdemeanor, felony, or other classification.

D) “Charge ID” means the unique identification number assigned to a charge.

E) “Charge modifier” means any aggravating or mitigating circumstance of an alleged charge that enhances, reduces, or reclassifies it to a different classification grade or level.

F) “Disposition” means the conclusion of the prosecution of any charge, including but not limited to nolle prosequi, diversion, dismissal, dismissal as part of plea bargain, conviction as part of plea bargain, conviction at trial, acquittal, or any other means.

G) “Initiation” means the creation or institution of a charge against a criminal defendant, whether by police, prosecutors, grand jury, or other entity.

H) “Policy” means any policy, procedure, guideline, manual, training material, direction, instruction or other piece of information, whether formal or informal and whether or not in writing, that contains any guidance whatsoever for employees of the [prosecutor’s office].

Section 3 – Information to be Collected, Maintained, and Disclosed

A) Except as provided in this Section and in accordance with local and state laws, a [prosecutor’s office] shall collect and disclose the following data for each case prosecuted by such office, and maintain a record all information collected for at least 10 years:

- 1) Case number;
- 2) Indictment number;
- 3) Docket number;
- 4) Unique identifier;
- 5) Defendant race;
- 6) Defendant gender;
- 7) Defendant disability status, if any;
 - a. Mental disability (psychiatric, developmental, intellectual),
 - b. Physical disability (mobility, other),

¹ Choose identifier consistent with state designation, e.g., “District Attorney’s Office,” “County Attorney’s Office,” “Prosecuting Attorney Office,” “State’s Attorney’s Office,” etc.

- c. Sensory disability (vision, hearing, other)
- 8) Source of information in subsection 3(A)(7) above:
 - a. Defendant's advocate or attorney,
 - b. Observation by DA,
 - c. Other
- 9) Incident date;
- 10) Arrest date;
- 11) District or neighborhood of arrest;
- 12) Primary arresting agency;
- 13) Other agencies involved in arrest;
- 14) Charges listed on arresting agency paperwork;
- 15) If [prosecutor] declines to prosecute the arrest, reason;
- 16) Charges brought by the [prosecutor];
- 17) Prosecutor who approved each charge;
- 18) Whether defendant was deemed eligible for court-appointed counsel, and name of the proceeding (e.g. arraignment, first appearance) where such determination was made;
- 19) Arraignment date;
- 20) Charge modification date(s);
- 21) Charge following modification;
- 22) Whether diversion was offered;
- 23) Date diversion was offered;
- 24) Judicial position on diversion, if any was stated on the record;
- 25) If diversion was offered, whether accepted by defendant;
- 26) Diversion terms, including how much defendant must pay (if anything);
- 27) Whether the charge carried a mandatory minimum sentence;
- 28) Whether the charge carried was death-penalty eligible;
- 29) Prosecutor's recommendation on bail or bond, including release conditions;
- 30) Whether bail or bond was imposed on the defendant;
- 31) Whether bond was secured, unsecured, or other type;
- 32) Date bail or bond imposed;
- 33) Release conditions, if ordered;

- 34) Date range(s) of any pretrial detention;
- 35) Whether a risk assessment or other algorithm-based or quantitative tool was used in determining whether pretrial detention was ordered and/or the amount of bail or bond;
 - a. Name of the office or agency that conducted the risk assessment,
 - b. Name of offices, agencies, individuals, or attorneys that received the risk assessment results
- 36) Whether any statutory or constitutional rights of defendants were waived, either by stipulation or on the record;
 - a. The dates of such waiver,
 - b. The rights waived,
 - c. Whether and which rights were waived as a condition of a plea bargain
- 37) Whether a plea was offered;
- 38) Whether a time limit was provided with a plea offer;
- 39) All terms of all pleas offered, including, but not limited to:
 - a. Charges dismissed,
 - b. Sentence ranges for charges dismissed,
 - c. Charges in the plea,
 - d. Sentence ranges for charges in the plea,
 - e. Any charges "covered by" the plea but not part of the conviction,
 - f. Penalties [or sentence] offered for taking plea, if any
- 40) Whether plea was accepted or rejected;
- 41) Whether discovery was offered to defendant before the plea;
- 42) Date discovery disclosed to defense or defendant;
- 43) Presiding judge(s) at pretrial stage;
- 44) Disposition, including:
 - a. Case or charges dropped by [prosecutor] [or dismissed on motion of [prosecutor], and reason for dismissal,
 - b. All charges defendant was convicted of, if any,
 - c. If convicted, whether by plea, jury trial, or bench trial,
 - d. If case was dismissed by judge, reason for dismissal
- 45) Presiding judge at disposition;
- 46) Disposition date;

- 47) Sentence type (prison, probation, etc.);
- 48) Sentence length;
- 49) Presiding judge at sentencing;
- 50) Supervision terms;
- 51) Services required or provided, if any;
- 52) Fines, fees or surcharges required, if any;
- 53) Forfeiture of property required, if any.

B) The [prosecutor's office] shall collect and publish all office policies including, but not limited to, those listed in this subsection. If the [prosecutor's office] does not maintain a policy related to any of the topics listed in this subsection, the [prosecutor's office] shall affirmatively disclose that fact.

- 1) Charge dismissal and charging;
- 2) Bail;
- 3) Sentencing;
- 4) Plea bargains;
- 5) Grand jury practices;
- 6) Discovery practices;
- 7) Witness treatment, including when and how to procure material witness warrant;
- 8) How a decision is made to prosecute [juvenile/youth] as adult;
- 9) How fines and fees are assessed;
- 10) Criminal and civil forfeiture practices;
- 11) Mental Health Screening/Collect Mental Health History;
- 12) Substance Abuse Screening/History;
- 13) Domestic violence survivors;
- 14) Diversion policies and practices;
- 15) Human resources, including but limited to hiring, evaluation, firing, promotion, and rotation among divisions or units;
- 16) Internal discipline policies and procedures;
- 17) Victim Services;
- 18) Restorative Justice Programs;
- 19) List of office trainings in the last year;
- 20) Practices involving tracking and responding to prison inmates' applications for parole or resentencing;

21) Policies specific to vulnerable populations like immigrants, LGBTQ, etc.

C) The [prosecutor's office] shall collect and publish the following information for every attorney employed in the office, with names and other personally identifying information redacted or replaced by an anonymizing identifier (e.g. "Attorney 1," "Attorney 2," etc.):

- 1) Age;
- 2) Gender;
- 3) Race;
- 4) Date hired;
- 5) Title;
- 6) Disciplinary history;

D) [Prosecutor's office] must collect and publish the following information:

- 1) Number of attorneys on staff;
- 2) Cases handled per year per attorney;
- 3) Number of attorneys who worked for the office in a temporary or contract capacity during the previous calendar year;
- 4) Number of paralegals and administrative staff employed by the office;
- 5) Number of investigators utilized during the previous calendar year;
- 6) Number of experts utilized during the previous calendar year, whether on staff or otherwise;
- 7) Number of police or detectives who work directly for the [prosecutor's office]

Section 4 – Reporting Requirements

A) Policies and Staffing Information

- 1) Beginning six months after the Effective Date of this Act, the [prosecutor's office] shall be making publicly available all the information in subsections 3(B)-(D) by posting them on the [prosecutor's office] website and making them readily publicly available to any person who requests them directly from the [prosecutor's office].
- 2) The information in subsections 3(B)-(D) must include the effective date of the policy or the date the information was gathered, and the [prosecutor's office] shall ensure that it posts revised, updated or newly drafted policies or newly collected information on a timely basis, and not less frequently than once each year.

B) Data Reporting to [State Agency] and [State Agency] Reports and Analysis

- 1) [State Agency] shall determine the manner in which data required in subsection 3(A) shall be transmitted by [prosecutor's office]. [State Agency] shall ensure such reporting is done in a uniform and consistent fashion.
- 2) [State Agency] shall determine an implementation schedule and plan by which all [prosecutors' offices] in the state shall be reporting all data under Section (3)(A) no later

than three years after the Effective Date of this Act. That plan may include, at the sole discretion of [State Agency], implementation on a rolling basis that starts by prioritizing a subset of the data in subsection 3(A) and/or starts by prioritizing reporting from larger offices.

- 3) In accordance with that plan, and beginning one year after the Effective Date of this Act, [prosecutor's office] shall begin transmitting data, stripped of any individualized or identifying personal information about any person arrested or prosecuted, to [State Agency] on or before January 31st, for the preceding calendar year.
- 4) Beginning one year after the Effective Date of this Act, on May 1 of each year [State Agency] shall begin publishing online the data collected under Section 3(A) in a modern, open, electronic format that is machine-readable, machine-searchable, and readily accessible to the public on the [State Agency] website. No published data shall contain individualized or identifying personal information about any person arrested or prosecuted.
- 5) Beginning one year after the Effective Date of this Act, on September 1 of each year, [State Agency] shall produce an annual report that analyzes the data received from all [prosecutors' offices], comparing and contrasting the practices and trends among and between [prosecutors' offices] in the state, and identifying any [prosecutors' offices] who are not in compliance with this Act.
- 6) [State Agency] shall also, from time-to-time, but not less frequently than twice per year, publish issue-specific reports that provide a deeper analysis of one or more areas of prosecutorial decision-making. At least one such report per year shall focus on racial disparities in a particular point(s) of prosecutorial decision-making.

Section 6 — Advisory Board

No later than three months after the Effective Date of this Act, the Governor shall constitute and appoint members to an Advisory Board that shall meet from time-to-time, but no less than once per quarter, with the [State Agency] to provide input and guidance to [State Agency] on any and all draft rules, regulations, policies, plans, reports, or other decisions made by [State Agency] in regard to this Act. The Advisory Board shall be comprised of no fewer than seven members, who shall not be compensated, and shall include at least two members who are public defenders or criminal defense attorneys and two members who have direct experience being prosecuted in the state's criminal legal system.

Section 7 – Noncompliance

Notwithstanding any other provision of law, where [State Agency] has made a determination that a [prosecutor's office] is not in compliance with this Act, that [prosecutor's office] shall be

ineligible to receive funding from the [state's general fund or other allocation] and any state grant program administered by the [Attorney General or other entity controlling grants to the prosecutor's office]. Funding shall be restored only after full compliance with the requirements of this Section, after the [prosecutor's office] provides the required information from the date of non-compliance through the current date, and upon a compliance review by [State Agency] and certification that the [prosecutor's office] is in compliance with this Act.

Section 8 – Relation to [public records acts]

A) If the [prosecutor's office] is in compliance with this Section and receives a request for information under [insert name of public records law] that the [prosecutor's office] reasonably and in good faith believes can be satisfied by reference to data made publicly available under this Section, the [prosecutor's office] may satisfy its obligation under [public records law] by referring the requesting party to the [State Agency] website containing the data. In such circumstance, the [prosecutor's office] need not collect and disclose the particular data requested.

B) If the requesting party does not believe that its request can be satisfied with data collected under this Section and published on the relevant website, the requesting party may file suit in accordance with the [public records law] to compel disclosure.

Section 9 – Effective Date

This legislation shall take effect on [MONTH], [DAY], [YEAR].

Section 10 – Severability Clause

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby.

End Notes

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- ¹ ROY WALMSEY, WORLD PRISON BRIEF & INST. FOR CRIM. POLICY RESEARCH, WORLD PRISON POPULATION LIST, 11th Ed., http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf.
- ² REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.
- ³ E. ANN CARSON, PRISONERS IN 2016 t.10 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.
- ⁴ Americans Overwhelmingly Support Prosecutor Reform, Poll Finds, ACLU Blog (Dec. 12, 2017) (reporting on national poll conducted by David Binder Research) (<https://www.aclu.org/news/americans-overwhelmingly-support-prosecutorial-reform-poll-finds>).
- ⁵ Phone Interview with Taylor Pendergrass (Dec. 2018) (notes on file).
- ⁶ Bureau of Justice Statistics, Prosecutors in State Court: 2007 Statistical Tables (2011), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf> (adjusted for inflation from 2007 to 2018 dollars).
- ⁷ Adam Foss, A Prosecutor's Vision for a Better Justice System, Ted Talk 8:50 (Feb. 2016), https://www.ted.com/talks/adam_foss_a_prosecutor_s_vision_for_a_better_justice_system/transcript?language=en.
- ⁸ Some states appoint chief prosecutors, rather than electing them. These include Alaska, Connecticut, and New Jersey well as Washington DC. Steven W. Perry, Bureau of Justice Statistics, Prosecutors in State Courts, 2005 (2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf>.
- ⁹ See Adam Foss: Can Prosecutors Stem The Tide Of Mass Incarceration?, NPR TED RADIO HOUR (Mar. 16, 2018), <https://www.npr.org/2018/03/16/593875641/adam-foss-can-prosecutors-stem-the-tide-of-mass-incarceration>.
- ¹⁰ See, e.g., *Diversion Programs*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice/diversion-programs>.
- ¹¹ John Creuzot, Dallas County District Attorney General Election Candidate Questionnaire 2, <https://dallasda.org/wp-content/uploads/2018/08/GeneralElection2018-Creuzot.pdf>.
- ¹² Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3(3) *Race & Justice* 210- 238, 228 (July 2013), <https://journals.sagepub.com/doi/pdf/10.1177/2153368713483320>.
- ¹³ See generally John Pfaff, *The Causes of Growth in Prison Admissions and Populations* (2012), https://web.law.columbia.edu/sites/default/files/microsites/criminal-law-roundtable-2012/files/Pfaff_New_Admissions_to_Prison.pdf.
- ¹⁴ *Id.*; see also Hanna Kozlowska, *The US Mass Incarceration Crisis Can't Be Fixed Until We Realize We've Been Looking at the Problem All Wrong*, Quartz, Mar. 6, 2017, <https://qz.com/923037/americas-mass-incarceration-crisis-cant-be-fixed-until-we-realize-we-have-been-looking-at-the-problem-all-wrong>.
- ¹⁵ See Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 *Boston College Law Rev.* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036726.
- ¹⁶ See MATTHEW R. DUROSE, DAVID J. LEVIN, & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, *FELONY SENTENCES IN STATE COURTS, 1998 (2001)* <https://www.bjs.gov/content/pub/ascii/fssc98.txt>; see also LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, *PLEA AND CHARGE BARGAINING 3* (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.
- ¹⁷ Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, GUARDIAN, June 17, 2015, <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked>.
- ¹⁸ Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC, Sept. 2017, <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171>.
- ¹⁹ See John Wooldredge, *Distinguishing Race Effects on Pre-Trial Release and Sentencing Decisions*, 29 *Justice Quarterly* 41 (2012) (finding that African American males age 18–29 experienced lower odds of ROR, higher bond amounts, and higher odds of incarceration in prison relative to other demographic subgroups); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black, and White Felony Arrestees*, 41 *Criminology* 873 (2003) (finding Hispanic defendants are most likely to be required to pay bail to gain release, receive the highest bail amounts, and are least able to pay bail); Ian Ayres & Joel

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- Waldfogel, A Market Test for Race Discrimination in Bail Setting, 46 STAN. L. REV. 987, 992 (1994) (finding 35 percent higher bail amounts for Black defendants after controlling for eleven other variables besides race).
- ²⁰ ACLU Vermont, Addison County – Dennis Wygmasn, <https://www.acluvt.org/en/addison/wygmans> (presenting survey responses from the Vermont Department of State’s Attorneys & Sheriffs on behalf of a group of current Vermont state’s attorneys).
- ²¹ See Mary T. Phillips, Pretrial Detention And Case Outcomes, Part 1: Nonfelony Cases (2007), http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=669&doc_name=doc; see also, Mary T. Phillips, Pretrial Detention And Case Outcomes, Part 2: Felony Cases (2008), https://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=597&doc_name=doc.
- ²² ROY WALMSEY, WORLD PRISON BRIEF & INST. FOR CRIM. POLICY RESEARCH, WORLD PRISON POPULATION LIST, 11th Ed., http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition_0.pdf.
- ²³ See John Pfaff, The Causes of Growth in Prison Admissions and Populations (2012), https://web.law.columbia.edu/sites/default/files/microsites/criminal-law-roundtable-2012/files/Pfaff_New_Admissions_to_Prison.pdf.
- ²⁴ Spencer Merriweather, North Carolina District Attorney Candidate Questionnaire 2, https://www.acluofnorthcarolina.org/sites/default/files/nc_da_questionnaire_spencer_merriweather-meck.pdf.
- ²⁵ REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), <https://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf>.
- ²⁶ E. ANN CARSON, PRISONERS IN 2016 t.10 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.
- ²⁷ Satana Deberry, North Carolina District Attorney Candidate Questionnaire 2, https://www.acluofnorthcarolina.org/sites/default/files/nc_da_questionnaire_satana_deberry-durham.pdf.
- ²⁸ Emily Bazelon and Miriam Krinsky, NEW YORK TIMES, There’s a Wave of New Prosecutors. And They Mean Justice (Dec. 11, 2018).
- ²⁹ *Hidden Injustice: The Prosecutor’s Paradox*, AM. BAR. ASS’N., Nov. 20, 2017, https://www.americanbar.org/news/abanews/aba-news-archives/2016/08/hidden_injusticeth.
- ³⁰ See, e.g., *Prosecution*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=tp&tid=63>.
- ³¹ State prosecutions account for 98% of the incarcerated population in the United States. Nevertheless, it should be noted that the federal government plays a small role in prosecutorial data collection. Data published by the Federal Bureau of Justice Statistics, for example, records overall case statistics, office budgets and salaries, number of felony cases closed, felony jury trial verdicts, and the use of DNA evidence. While the federal government’s national collection has potential to collect detailed and consistent information, it lacks detailed data on discretionary points in cases and has not been updated since 2007. See *Prosecutors Offices*, Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=tp&tid=27>.
- ³² See Robin Olsen, Leigh Courtney, Chloe Warnberg, Julie Samuels, *Collecting and Using Data for Prosecutorial Decisionmaking*, Urban Institute for Justice (Sept. 2018), https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking.pdf.
- ³³ In researching this report, we found just one state – Minnesota – that currently requires prosecutors to maintain and make publicly available some limited policies. See M.S.A. Sec. 388.051.
- ³⁴ Marc Miller and Ronald Wright, *The Black Box*, 94 Iowa L. Rev. 125 (Nov. 2008).
- ³⁵ National District Attorneys Association and American Prosecutors Research Institute, *Prosecution in the 21st Century* (Feb. 2004).
- ³⁶ See Robin Olsen, Leigh Courtney, Chloe Warnberg, Julie Samuels, *Collecting and Using Data for Prosecutorial Decisionmaking*, Urban Institute for Justice (Sept. 2018), https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking.pdf.
- ³⁷ Josh Salzman, *Will Florida’s Data Collection Bill Make It the Most Transparent State in the Nation?*, Government Technology, Mar. 13, 2018, available at: <http://www.govtech.com/public-safety/Will-Floridas-Data-Collection-Bill-Make-It-the-Most-Transparent-State-in-the-Nation.html>.
- ³⁸ See, e.g., Besiki Kutateladze et al., *Race and Prosecution in Manhattan* (2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan>; see also, e.g., Cook County State’s

Attorney, 2017 Data Report 2 (2018), https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao_2017_data_report_180220.pdf.

³⁹ Overview, Measures for Justice, <https://measuresforjustice.org/about/overview>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The State of Open Records Laws: Access Denied, The Center for Public Integrity (Jan. 2012), <https://publicintegrity.org/state-politics/the-state-of-open-records-laws-access-denied/>; Reporter's Committee for Freedom of the Press, Introduction to the Open Government Guide (2019) (<https://www.rcfp.org/introduction-to-the-open-government-guide/>).

⁴³ Bob Watson, Prosecutor owes \$12,100 for Sunshine Law violations, St. Louis News Tribute (Oct. 18, 2017) (<http://www.newstribune.com/news/local/story/2017/oct/18/prosecutor-owes-12100-for-sunshine-law-violations/696285/>).

⁴⁴ Brad Petrishan, Worcester DA, two others lose records request lawsuit brought by AG, Worcester Telegram (Nov. 30, 2018) (<https://www.telegram.com/news/20181130/worcester-da-two-others-lose-records-request-lawsuit-brought-by-ag>).

⁴⁵ Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal Justice Reform*, THE NATION, Oct. 18, 2017, <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform>.

⁴⁶ Carmiah Townes, *Scandal-prone DA wants prosecutors shielded from public information requests*, INJUSTICE TODAY, Aug. 30, 2017, <https://medium.com/in-justice-today/scandal-prone-da-wants-prosecutors-shielded-from-public-information-requests-66018958ba7a>.

⁴⁷ Jason Pohl, Uriel J. Garcia, Perry Vandell & Michael Kiefer, *Maricopa County attorney seeks to usurp police control of records, video*, THE REPUBLIC, May 20, 2018, <https://www.azcentral.com/story/news/local/phoenix/2018/05/21/maricopa-county-attorney-bill-montgomery-police-records-video/624111002>.

⁴⁸ Arielle Kass, *Georgia AG's office opposes proposed Fulton change to open records law*, ATLANTA JOURNAL-CONSTITUTION, Dec. 13, 2015, <https://www.ajc.com/news/local-govt--politics/georgia-office-opposes-proposed-fulton-change-open-records-law/1640aAOfKaEwkaEze1uGeJ>.

⁴⁹ Press Release, Vera Institute of Justice, Nebraska's Lancaster County Attorney's Office Launches Groundbreaking Initiative to Promote Racial Equity in the Criminal Justice System (Mar. 25, 2014).

⁵⁰ WAYNE MCKENZIE ET AL., PROSECUTION AND RACIAL JUSTICE: USING DATA TO ADVANCE FAIRNESS IN CRIMINAL PROSECUTION (2009), <https://www.vera.org/publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Wayne McKenzie, Don Stemen, Derek Coursen & Elizabeth Farid, *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution*, VERA INSTITUTE OF JUSTICE 6 (March 2009) (finding prosecutors declined to prosecute 41 percent of white defendants initially charged with possession of drug paraphernalia, while they chose not to prosecute only 27 percent of non-white defendants charged with the same offense), <https://www.vera.org/publications/prosecution-and-racial-justice-using-data-to-advance-fairness-in-criminal-prosecution>.

⁵⁴ *Id.* at 6-7.

⁵⁵ *Id.* at 7.

⁵⁶ John Chisholm & Christian Gosset, *Chisholm, Gossett: Law Enforcement Needs Better Data*, Journal Sentinel, May 30, 2017, <https://www.jsonline.com/story/opinion/contributors/2017/05/30/chisholm-gossett-law-enforcement-needs-better-data/354433001/>.

⁵⁷ See Robin Olsen, Leigh Courtney, Chloe Warnberg, Julie Samuels, *Collecting and Using Data for Prosecutorial Decisionmaking*, Urban Institute for Justice 12 (Sept. 2018), https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking.pdf. Robin Olsen et al.

⁵⁸ *Id.*

⁵⁹ In 2012, the Justice Management Institute and the American Bar Association released a study on the benefits of data to public defenders. See https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_defense.authcheckdam.pdf. The study contains a poll on data that defenders “wish they had ready access to but do not.” *Id.* at 6. The list includes, among other things, “court and prosecutor data on number of case types filed [and] average days to disposition,” “actual time devoted to trials,” and “data on race and ethnicity compared to case outcome.” *Id.* In other words, precisely the type of data the attached model legislation would unearth.

⁶⁰ ABOUT THE UNIFORM CRIME REPORTING (UCR) PROGRAM, US DEPT. OF JUSTICE 2 (2017), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/resource-pages/about-ucr.pdf>.

⁶¹ See, e.g., *The Counted*, THE GUARDIAN, <https://www.theguardian.com/us-news/series/counted-us-police-killings>; *Fatal Force*, WASHINGTON POST, https://www.washingtonpost.com/graphics/2018/national/police-shootings-2018/?utm_term=.25ed11d81a7f; *Killed by Police*, Facebook, https://www.facebook.com/search/str/%22killed+by+police%22/keywords_pages.

⁶² Compare Carl Bialik, *The Police Are Killing People As Often As They Were Before Ferguson*, FIVE THIRTY EIGHT, July 7, 2016, <https://fivethirtyeight.com/features/the-police-are-killing-people-as-often-as-they-were-before-ferguson> with Reuben Fischer-Baum, *Nobody Knows How Many Americans The Police Kill Each Year*, FIVE THIRTY EIGHT, Aug. 19, 2014, <https://fivethirtyeight.com/features/how-many-americans-the-police-kill-each-year>.

⁶³ OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, FINAL REPORT OF THE PRESIDENT’S TASKFORCE ON 21ST CENTURY POLICING 13 (2015) available at: <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf>.

⁶⁴ RAM SUBRAMANIAN & LEAH SKRZYPIEC, TO PROTECT AND SERVE: NEW TRENDS IN STATE-LEVEL POLICING REFORM, 2015-2016 33 (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/protect-and-serve-policing-trends-2015-2016/legacy_downloads/041417-PolicingTrendsReport-web.pdf.

⁶⁵ *Id.*

⁶⁶ See Robin Olsen, Leigh Courtney, Chloe Warnberg, Julie Samuels, *Collecting and Using Data for Prosecutorial Decisionmaking*, Urban Institute for Justice 5 (Sept. 2018), https://www.urban.org/sites/default/files/publication/99044/collecting_and_using_data_for_prosecutorial_decisionmaking.pdf.

⁶⁷ *Id.*

⁶⁸ Press Release, State’s Attorney Foxx Announces Unprecedented Open Data Release, Cook County State’s Attorney (Mar. 2, 2018) <https://www.cookcountystatesattorney.org/news/states-attorney-foxx-announces-unprecedented-open-data-release>.

⁶⁹ Foxx’s data release still comes with limitations. The most glaring gap in Foxx’s raw data release is the absence of misdemeanor data, as well as data on juvenile cases and civil actions. Foxx’s office explained that this results from discrepant electronic case management systems, which made it too difficult to extract further information.

⁷⁰ Colorado Senate Bill 2015-185, https://cdpsdocs.state.co.us/ccjj/meetings/2015/2015-03-13_CCJJ_%20SenateBill2015-185-intr.pdf.

⁷¹ Blair Miller, CLEAR Act Report Says Black Men and Women Arrested, Imprisoned Disproportionately, Denver Channel, Dec. 21, 2016, <https://www.thedenverchannel.com/news/local-news/clear-act-report-says-black-colorado-men-and-women-arrested-imprisoned-disproportionately-to-pop>.

⁷² Ariz. S.B. 1523 (2018).

⁷³ 2018 Fla. Laws. 127, <http://laws.flrules.org/2018/127> (amending FLA. STAT. § 900.05); Fla. CS/CS/SB 1392: Criminal Justice (2018), <https://www.flsenate.gov/Session/Bill/2018/01392>. See also, Issie Lapowsky, *Florida Could Start a Criminal Justice Data Revolution*, Wired (Mar. 13, 2018) <https://www.wired.com/story/florida-criminal-justice-data-sharing/>.

⁷⁴ FLA. STAT. § 900.05(3)(a).

⁷⁵ Issie Lapowsky, *Florida Could Start a Criminal Justice Data Revolution* (2018) <https://www.wired.com/story/florida-criminal-justice-data-sharing>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Elected officials and agency employees should view this investment as an opportunity to modernize and create multiple systems simultaneously. Cobbling together technological upgrades piecemeal is not a sustainable software solution. Since the majority of prosecutors' offices likely need to upgrade other software, from data-sharing systems with law enforcement to word-processing and document management, offices can find solutions that solve multiple problems at once. For instance, implementing a rigorous data-collection system through case management software can be synchronized with the digitization of paper case files. While the initial investment may be substantial, the long-term cost of storing these files is far less when they are scanned and stored in a cloud-based drive than when they are taking up space in a warehouse – and they can be more easily retrieved and used when not in a filing cabinet.

⁸¹ In this flourishing tech economy, there are many viable providers that can assist prosecutors' offices wishing to modernize their systems – many offer reduced rates to government clients. Many software companies will offer a wide range of customizable options for case management, enabling prosecutors to collect all of the data that makes sense for their jurisdiction's needs. The U.S. Department of Justice routinely grants Byrne JAG resources to law enforcement for improvements to record-keeping systems designed to share data across agencies. Indeed, large nonprofit organizations exist solely to help government agencies resolve data-collection and sharing problems. Lawmakers collaborating with law enforcement to upgrade systems in one dimension can and should support prosecutors' offices in updating their case management systems so that they can collect the important data.