

TRANSFORMING THE SYSTEM



ENHANCE

Prosecutorial Integrity

Prosecutors represent the government, and therefore must reflect the highest levels of integrity and ethics in their work.²²⁹ We expect our prosecutors to be unbiased, fair, and committed to transparent administration of justice. Unfortunately, studies show that prosecutors are frequently biased against low-income people and people of color.²³⁰ There are currently inadequate systems in place to prevent these prosecutorial biases.

Moreover, prosecutors are often measured by performance standards that prioritize the volume of prosecutions and the rate of conviction over the quality of cases sought for prosecution.²³¹ This creates an incentive to increase prosecutions, and accordingly incarceration, even where prosecution may not be the most approach for a particular matter. This has resulted in prosecutors unintentionally relying upon prosecutions of low-income people and people of color to meet the cultural and political pressure to increase prosecutions and convictions. Prosecutors should instead be incentivized to use qualified and effective diversion programs as a tool for promoting safe communities and ensuring arrestees receive drug and mental health treatment when needed.

While all criminal justice actors should acknowledge their role in creating mass incarceration, prosecutors play a particularly crucial role in ensuring that incarceration is not a used as a substitute for social services.²³²

229 The American Bar Association Model Rule 3.8 provides ethics guidelines for prosecutors and states in part:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense
- (f) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused .
- (g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall é promptly disclose that evidence to an appropriate court or authority, and
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

230 Coke, *supra* note 4, at 11-12.

231 *Ibid.*

232 *See generally* Roberts, *supra* note 2.

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Promoting effective prosecution

Prosecutors should be required to base their decisions on practices that are proven to actually reduce crime and adhere to the highest ethical standards without bias.

To this end, the **Department of Justice** should:

- ▶ Publish district data concerning the U.S. Attorneys' compliance with the Smart on Crime Initiative, a DOJ initiative to conduct a "comprehensive review of the criminal justice system in order to identify reforms that would ensure federal laws are enforced more fairly and é more efficiently,"²³³ and charging in drug cases;²³⁴
- ▶ Issue guidance on reducing the impact of implicit racial bias in prosecutorial decision-making process;
- ▶ Review case selection and charging practices to ensure that only the most serious offenses with a substantial federal interest are being pursued;²³⁵
- ▶ Adopt federal guidelines that advise all prosecutors' offices on best practices to guide prosecutorial discretion, reduce reliance on incarceration, and ameliorate collateral consequences, including internal guidelines that help determine when prosecution should be pursued and a requirement that prosecutors produce internal documents justifying their decision to prosecute;
- ▶ Adopt federal guidelines that advise all prosecutors' offices on best practices for incorporating diversion programs into their offices' work.

Local governments, prosecutors' offices, Congress, and state legislatures should encourage effective prosecutorial practices including:

²³³ Smart on Crime, *supra* note 109.

²³⁴ American Civil Liberties Union, *Letter to Attorney General Lynch, ACLU Recommendations for Attorney General Loretta Lynch* (June 30, 2015).

²³⁵ Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* (January 2016), <http://colson-taskforce.org/final-recommendations/Colson-Task-Force-Final-Recommendations-January-2016.pdf>.

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- ▶ Prioritizing the prosecution of more serious offenses;²³⁶
- ▶ Adopting diversion programs²³⁷ and restorative justice initiatives;
- ▶ Diverting individuals with mental health issues and substance abuse issues to appropriate treatment programs;²³⁸
- ▶ Creating performance review standards that reward diversion and the removal of racial inequities, and prioritize the prosecution of serious and violent offenses;²³⁹
- ▶ Raising the charging standard²⁴⁰ by requiring that prosecutors consider the social costs of mass incarceration when determining whether it is in the “interests of justice”²⁴¹ to charge for a case and requiring prosecutors to charge crimes according to the likelihood of conviction rather than probable cause;
- ▶ Establishing offices of conviction integrity to ensure that credible challenges to convictions are fully reviewed;
- ▶ Focusing on the monitoring and training of inexperienced prosecutors, including creating internal guidelines to channel discretion and requiring written justification for decisions to prosecute;²⁴²
- ▶ Using recidivism rates and other metrics to evaluate prosecutor performance rather than the number of prosecutions or the rate of conviction;
- ▶ Eliminating the practice of adjudicating youth as adults;

236 Department of Justice, *supra* note 109, at 2 (“Given scarce resources, federal law enforcement efforts should focus on the most serious cases that implicate clear, substantial federal interests”); See Eaglin & Solomon, *supra* note 37, at 37 (“Prosecutors are starting to agree that they can and should prioritize reducing violent and serious crime, reducing incarceration, and reducing recidivism instead of focusing on increasing conviction rates and sentence lengths”); Coke, *supra* note 4, at 22 (“The Association of Prosecuting Attorney now advises district attorneys to rethink the prosecution of marijuana possession cases, said David LaBahn of the APA, because it limits, due to volume, their ability to focus on more serious, violent crimes”); CPD, *supra* note 90, at 6.

237 See DOJ, *supra* note 109. See generally CHJ, *supra* note 85.

238 See Coke, *supra* note 4, at 13.

239 See Eaglin & Solomon, *supra* note 39; Chettiar, et al., *supra* note 33.

240 See Coke, *supra* note 4, at 12.

241 ABA Standard recommends that prosecutors consider the interests of justice when determining whether to charge for a particular crime: Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges (a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

242 Ibid.

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- ▶ Promoting a culture for courageous leadership to thrive.²⁴³

The **American Bar Association** should revise Standard 3-3.9, which provides guidelines for prosecutors to dispose of a pending matter, to affirmatively encourage prosecutors to exercise discretion not to prosecute less serious acts.

In addition to pressuring government officials to support the above actions, advocates, activists, cultural workers and artists, and civil society should invest time and resources to engage in prosecutorial elections, highlighting the power of local prosecutors and increasing their accountability to the public.

Encouraging transparency and accountability in prosecutorial decisions

Transparency and accountability measures can provide incentives for prosecutors to uphold the highest standards of integrity. For example, by collecting data about which charges prosecutors decline to pursue, or which sentences they request, supervisors can provide more effective guidance to junior prosecutors. They may discover, for example, that line prosecutors are seeking more severe penalties for some classes of individuals. This insight could be the impetus for focusing more attention on understanding this imbalance and, if necessary, implementing corrective measures. However, there is often a lack of data and transparency in the prosecutorial decision-making process that makes full evaluation impossible.

To remedy this lack of transparency, **local and state governments, prosecutors' offices, and the federal government** should call for the following:

- ▶ Independent review of the administration of prosecutors' office to ensure that there is equity in prosecutorial decision-making;²⁴⁴
- ▶ To address concerns regarding the disclosure of exculpatory material, states should

²⁴³ Ibid.

²⁴⁴ See Coke, *supra* note 4, at 12.

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require open file discovery,²⁴⁵

- ▶ Data collection on prosecutorial decision-making, disaggregated by race, religion, sex, gender identity, age, sexual orientation, ethnicity, sexuality, and religious affiliation, on charging determinations, prosecutions, and diversion.²⁴⁶

The **Department of Justice** should adopt these policies for federal prosecutor offices.

Reducing inequality in prosecution

Prosecutorial practices should uphold our commitment to equal justice for all. This requires an explicit commitment to racial equity in the prosecutorial decision-making process. Frequently, prosecutors do not treat African Americans as well as whites, either as criminal defendants or victims of crime.²⁴⁷

In a series of pilot projects, the Vera Institute of Justice is working with select prosecutors to remedy such discriminatory policies and practices through its Prosecution and Racial Justice Program.²⁴⁸ Prosecutors' office should take affirmative steps to reduce racial inequities.

The **Department of Justice, Congress, local and state legislatures, and prosecutors' offices** should ensure that there is fairness in the prosecutorial decision-making process by adopting the following practices:

- ▶ Routine implicit bias training for prosecutors;²⁴⁹

²⁴⁵ The Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson* (2016).

²⁴⁶ See Coke, *supra* note 4, at 12.

²⁴⁷ Robert J. Smith & Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," 35 *Seattle U. L. Rev.* 795 (2011).

²⁴⁸ Prosecution and Racial Justice Program, Vera Institute of Justice, <http://www.vera.org/centers/prosecution-and-racial-justice-program> (accessed 7 July 2016) (noting that the program is "[p]artnering with prosecutors to analyze the impact of their decisions and develop policies to address unwarranted racial and ethnic disparities").

²⁴⁹ The American Bar Association standard 3-1.6 recommends that prosecutors actively work to prevent bias: Standard 3-1.6 Improper Bias Prohibited (a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

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- ▶ Routine review of data metrics to expose racial disparities with the aim of promptly addressing them;²⁵⁰
- ▶ Increased funding for additional programs similar to the Vera initiative;²⁵¹
- ▶ Incorporation of racial impact review in performance review for individual prosecutors.



For more information on the role of prosecutors in mass incarceration and ways to reform the system, check out:

Human Rights Watch's report ***An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty***, which describes how federal prosecutors use charging decisions to force plea deals in drug cases;

The Vera Institute for Justice's study, ***The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making***, in which Bruce Frederick and Don Stemin analyze the discretion allotted to prosecutors to make pivotal decisions with little public or judicial scrutiny generally.

The **Center for Prosecutor Integrity** is dedicated to strengthening prosecutorial ethics and has published a white paper, ***Roadmap for Prosecutor Reform***, with recommendations for enhancing prosecutorial ethics.

²⁵⁰ One research report by the National Association of Criminal Defense Lawyers discusses the successes of routine examination of charging disparities:

In one district attorney's office with which the Vera Institute worked, the data showed that African American women arrested for drug offenses were prosecuted more frequently, and stayed in the system longer, than white women with the same charges. While some staff proffered justifications for the higher rate (for example, the theory that some of these women were also prostitutes), six months after raising the disparity and asking employees to scrutinize their charging practices, the disparity had disappeared.

See Coke, *supra* note 4, at 11.

²⁵¹ Vera Institute of Justice, *supra* note 248.