

TRANSFORMING THE SYSTEM



SOLUTIONS & ACTIONS TO

Enhance Prosecutorial Integrity

Prosecutors should be unbiased, fair, and committed to just administration. Unfortunately, studies show that prosecutors are frequently biased against low-income defendants and defendants of color, and there are currently inadequate systems in place to prevent prosecutorial biases, which may reflect implicit biases. There should be measures in place to promote accountability and transparency, and incentives that encourage diversion and reduction of prosecutions.

1. Be Smart on Crime

The Department of Justice (DOJ) should publish district data concerning the U.S. Attorneys' compliance with the Smart on Crime Initiative, the 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 . . . more efficiently"¹ and review case selection and charging practices to ensure that only the most serious offenses with a substantial federal interest are being pursued.

2. Raise the Charging Standard

Local governments, prosecutors' offices, and the federal and state legislatures should raise the charging standard by requiring that prosecutors consider the social costs of mass incarceration when determining whether it is in the "interests of justice"² to charge for a case and requiring prosecutors to charge crimes according to the likelihood of conviction rather than probable cause.

3. Encourage Diversion

Local governments, prosecutors' offices, and the federal and state legislatures should encourage effective and fair practices including prioritizing the prosecution of more serious offenses; adopting pre-arrest and non-arrest diversion programs and restorative justice initiatives; and creating performance review standards that reward diversion and the removal of racial inequities.

4. Encourage Discretion Not to Prosecute

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.

5. Create Independent Review

Local and state governments, prosecutors' offices, and the federal government should require independent review of the administration of prosecutors' offices to ensure that there is equity in prosecutorial decision-making.

6. Eliminate Bias in Prosecution

DOJ, Congress, local and state legislatures, and prosecutors' offices should ensure that there is fairness in the prosecutorial decision-making process by requiring routine implicit bias training for prosecutors; routine review of data metrics to expose racial disparities with the aim of promptly addressing them; and the incorporation of racial impact review in performance review for individual prosecutors. DOJ should issue guidance to prosecutors on reducing the impact of implicit bias in prosecution.

7. Use Better Metrics

Local governments, prosecutors' offices, and the federal and state legislatures should use recidivism rates, diversion rates, and other metrics to evaluate prosecutor performance rather than the number of prosecutions or the rate of conviction.

8. Elect Better Prosecutors

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.

9. Justify Prosecutions

Local governments, prosecutors' offices, and the federal and state legislatures should focus on the monitoring, training, and development of prosecutors to discourage the use of incarceration, including creating internal guidelines to channel discretion and requiring written justification for decisions to prosecute.

10. Collect Data on Prosecutorial Decision-Making

Local and state governments, prosecutors' offices, and the federal government should call for 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.³

¹ *Smart on Crime*, U.S. Attorney's Office, E. Dist. of Texas, Apr. 20, 2016, <http://www.justice.gov/usao-edtx/smart-crime>.

² 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.

³ Tanya E. Coke, National Association of Criminal Defense Attorneys, "Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System 12," 2013, http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013_racial_disparity_report.pdf.