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# Prosecutorial Culture Change: A Primer





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## Introduction

The killings of Breonna Taylor, George Floyd, and others, have invigorated a long-simmering public conversation about American policing, including around the need to change the culture of law enforcement in America.<sup>1</sup> Prosecutors' offices should and must be part of this conversation. Prosecutorial culture has evolved alongside police culture, and warrants comparable scrutiny. At a time when faith in American institutions is at an all-time low, it is vital that prosecutors earn the trust of the communities they are sworn to serve.<sup>2</sup>

While some prosecutors in recent years have adopted novel views concerning what it means to be ministers of justice, others continue to rely in part on outdated notions for achieving public safety, including draconian criminal statutes, racialized notions of criminality, and a culture that rewards achieving convictions rather than solving problems. The progressive prosecutor movement has put an emphasis on alternatives to incarceration and diversion programs. Some prosecutors across the country have pledged to reduce their jail and prison populations and have made meaningful improvements in that direction. But whether or not an office identifies as progressive, all prosecutors can benefit from assessing and improving their internal culture. Like doctors, teachers, and others who operate in sprawling bureaucracies subject to wide-ranging public pressures, prosecutors need not be racist to perpetuate racial disparities, and they need not be ill-intentioned to make decisions that may harm the communities they serve. The American legacies of white supremacy, homophobia, sexism, and the culture of law enforcement are obstacles to prosecutors' potential to fulfill their public service mission, and warrant thoughtful attention and conscious dismantling.

The local victories of some prosecutors, alongside broader cultural progress nationally, have created an opportunity for all prosecutors to consider how their office cultures – developed over many generations – shape their work and its impact. The recommendations in this guide are meant to encourage prosecutors to confront the histories of the institutions they operate, and to elevate the culture of their offices to align with their mission. Line staff and head prosecutors alike should think deeply and speak candidly to one another and to communities about what it means to do justice, and to collaboratively build cultures within their offices that enable them to better serve as public servants and guardians of justice.



**Lucy Lang, Director,**

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## Common Culture Problems

- I.** A narrow view of the prosecutor's role.
  - a. Attorneys believe their responsibilities end with processing cases efficiently and in accordance with the law.
  - b. Prosecutors do not appreciate the power that they have to use their position to positively influence the individuals and communities they serve.
- II.** A narrow view of "success."
  - a. "Success" is tethered to trial statistics and "winning," rather than holistic investigation and disposition of cases.
  - b. Performance reviews do not reward creative dispositions or dispositions involving alternatives to incarceration.
- III.** Limited awareness about the broad effects of the criminal legal system.
  - a. Lack of mindfulness about the broader consequences of prosecutor actions, including long-term and collateral impacts of incarceration, supervision, and monetary penalties.
  - b. Prosecutors do not discuss race or law enforcement's history of perpetuating racial disparities.
  - c. Lack of representation of communities most affected by the criminal legal system.
- IV.** An aversion toward admitting mistakes.
  - a. It is very difficult to repair the harm caused by mistakes because attorneys are reluctant to admit, discuss, or examine them and because the law favors finality.
  - b. Because of the broad protections of prosecutorial immunity, prosecutors are often insulated from long-term consequences of bad actions.
  - c. The lack of a culture of protocol around discussing mistakes makes the admission of mistakes seem more personal and less permissible.
- V.** Intractability toward change in an office populated with career employees.
  - a. Career staff, especially managers, may react negatively to policies that break from tradition. They may quit, double down on bad practices, or undermine morale.
  - b. Managers fail to enforce policies they do not support or understand.
  - c. Junior attorneys are discouraged from contributing to innovation and policymaking. Junior attorneys fear that their immediate supervisors do not support, and may penalize them for, leniency, evidence/data driven alternatives to traditional prosecutorial approaches, and innovation.
  - d. Analyzing, developing, and implementing office policy is exclusively the domain of senior leadership.
- VI.** Leadership is reluctant to pursue or enforce innovative policies.
  - a. Political considerations may take priority over principles of harm reduction, fairness, and justice.
  - b. Leadership fears that firing or sanctioning employees who resist reforms will create a toxic office culture.
- VII.** Reliance on tradition and instinct, rather than data and evidence, drives decision-making.
  - a. Sentences are often decided arbitrarily, without consideration of scientific evidence or input from behavioral experts such as substance abuse counselors.

- b. Prosecutors lack awareness of research and evidence that indicates the harm caused by harsh punishments and the benefits of alternatives.

**VIII.** Prosecutors' complicity in law enforcement's shortcomings and abuses.

- a. Prosecutors are reluctant to give feedback or take actions that could damage their relationship with police.
- b. A close working relationship with police can make it difficult to assess credibility appropriately.

## Overview of Recommendations to Improve Office Culture

1. Define the role of the prosecutor beyond exceptional lawyering to include empathy, compassion, and awareness of how prosecutors' actions impact the community they serve.
2. Increase staff exposure to communities most affected by the criminal legal system.
3. Normalize the idea that prosecutors are fallible; destigmatize acknowledgements of wrongdoing and apologizing for mistakes.
4. Require participation in policy research and policymaking from junior and senior attorneys.
5. Make the head prosecutor and senior staff more accessible and visible to junior attorneys.
6. Counter the effects of destructive speech. Condemn pejorative comments about defendants or language that celebrates unethical prosecutorial tactics. Raise voices expressing compassion for defendants and victims, and cite evidence based prosecutorial innovations.
7. Ground sentencing, bail, and policy decisions in evidence and data, not instincts and tradition.
8. Hire from the community, including individuals who have personal experience with the criminal legal system.
9. Take an active role in the police reform movement by providing constructive feedback to police and prosecuting bad police conduct.
10. Regularly communicate office goals, policy positions, and successful uses of non-incarceratory dispositions through the head prosecutor.



## Goals

### I. Prosecutors Are Educated About and Engaged in Communities They Serve

Prosecutors' offices should encourage awareness about how the criminal legal system impacts individuals, their families, and communities—presently and historically. The criminal legal system disproportionately impacts communities of color and poor communities, in particular, Black and brown people. At the same time, prosecutors' staff are disproportionately white and economically privileged. Few have interacted with the legal system as defendants.

Prosecutors' offices should endeavor to hire more staff who have had personal or family contact with the criminal legal system, including formerly incarcerated or justice-involved individuals. Prosecutors must make regular efforts to engage with, learn about and understand the communities they serve. Those who lack personal experience with the criminal legal system should work to understand its effects comprehensively: What harm is caused by arrest, incarceration, probation, and fines? What is it like to be incarcerated, on probation, or to wear an ankle monitor? What are the collateral effects of sentences such as fines and fees, lost jobs, trauma, stigma, criminal records?

Leadership can support staff education and outreach by encouraging community engagement, bringing speakers and trainings to the office and distributing literature and art that illustrates the experience and consequences of interaction with the criminal legal system. Prosecutors must also be educated about community-based restorative justice, trauma-informed prosecution, alternatives to incarceration, and other innovations in prosecution.

#### Actions Items

1. Hire staff that reflects the makeup of communities affected by the legal system.
  - a. Hire staff with personal or family contact with the legal system, including formerly incarcerated and justice-involved individuals.
  - b. Consider personal familiarity with the legal system and its effects on families and communities as a hiring qualification.
  - c. Increase recruiting efforts to attract candidates of color and candidates affected by the criminal legal system.
2. Get out into the community and meet the people you serve.
  - a. Incentivize and encourage staff to regularly attend community events.
  - b. Train staff on how to get the most out of community interactions.
  - c. Brief and debrief attorneys who attend community events. Encourage staff to regularly attend the same meetings to develop and strengthen relationships within communities.
3. Invite community members into the office.
  - a. Host open houses and community gatherings at the office.
  - b. Host meetings with community leaders to discuss their ideas and concerns.

- c. Invite schools, camps, and youth programs.
4. Mandate that prosecutors visit prisons and jails.<sup>3</sup>
  - a. Engage in conversations about conditions of confinement and raise awareness and engagement in prison and jail issues and abuses.
5. Require and facilitate education and awareness about the impacts of the criminal legal system.
  - a. Distribute literature, articles, profiles, etc. that illustrate the experience and consequences of interaction with the legal system. [see Appendix 2]
  - b. Host lectures by formerly incarcerated people and compensate them for their time and contributions.
  - c. Observe and participate in restorative justice circles and community-based dispute resolution programs.<sup>4</sup>
  - d. Increase exposure to art, writing and culture that expresses feelings and experiences of people impacted by the criminal legal system, including the artistry and nuance of hip hop and rap music.
    - i. Invite artists, curators, and experts to introduce and explain their work and lead discussions.
    - ii. Put visual art by formerly incarcerated and justice-affected artists on the office's walls.
    - iii. Distribute poetry and writing that discusses the criminal legal system from the community's point of view.
6. Train prosecutors about the significance of language.
  - a. The way we refer to people determines how we think about them, and in turn, how we act toward them. Circulate research and train prosecutors on the importance of language in the criminal legal system.<sup>5</sup>
  - b. Use language that respects dignity by referring to "people first."<sup>6</sup>
  - c. Discourage language indicating that people who commit crimes are incorrigible such as bad guys, felons, prisoners, criminals, murderers, convicts, addicts, offenders, etc.
  - d. Censure derogatory comments about community members, defendants, victims, and their families.

## II. Prosecutors Are Informed about Innovations in Prosecution

All staff should be educated about ongoing efforts to reform the criminal legal system and the role prosecutors play in that movement. Staff are more likely to comply with and support new office policies that they understand, and offices are more likely to innovate if all prosecutors contribute to the process of innovation. To the extent that they have the resources, offices should develop a culture of research and exposure to cutting-edge criminal legal scholarship.

Leadership should signal the importance of innovation using internal communications and events and be active participants in the conversation about positive change. Host guest speakers and fellows from thinktanks, foundations, and research organizations. Lead discussions, both big and small, on criminal law topics in the news. Circulate innovative

policies from other prosecutors offices and highlight new scientific research relevant to prosecutors.

## Actions Items

1. Host talks and discussions on innovations in prosecution.
  - a. Host guest speakers from organizations like the Institute for Innovation in Prosecution, Vera Institute for Justice, Prosecutor Impact, Fair and Just Prosecution, Brennan Center, Center for Court Innovation, Prosecutor's Center for Excellence, or other local criminal justice reform organizations.
  - b. Host talks by the head prosecutor and senior staff about policy and reform issues.
  - c. Organize roundtables where staff share policy proposals.
2. Disseminate materials related to prosecution innovation and criminal legal research. [For examples, see Appendix 3]
  - a. Subscribe all staff to PCE newsletter, IIP publications, Prosecutor Impact and FJP issue briefs.
    - i. For PCE, contact Kristine Hamann [khamann@pceinc.org](mailto:khamann@pceinc.org) and Lynzie Adams [ladams@pceinc.org](mailto:ladams@pceinc.org)
    - ii. For IIP, signup via [www.prosecution.org/contact](http://www.prosecution.org/contact)
    - iii. For FJP, signup via [http://eepurl.com/c2\\_9sj](http://eepurl.com/c2_9sj)
    - iv. For Prosecutor Impact, visit <https://prosecutorimpact.com/>
  - b. In all staff emails, share content from criminal legal reform-orientated publications like the Marshall Project, The Appeal, and the Crime Report.
  - c. In office-wide emails, distribute scientific research on prosecution-related issues so staff can familiarize themselves with ways of thinking about innovation.
3. Maintain a spirit of collaboration with the defense bar.
  - a. Host defense attorneys to educate prosecutors about innovations in prosecution.
  - b. Leadership should encourage a friendly adversarial relationship with defense counsel – rather than “us v. them” – to support a spirit of goodwill that may help to prevent inequities.

### **III. Prosecutors Are Aware of Law Enforcement's Potential to Perpetuate Racial Disparities**

The criminal legal system disproportionately sends Black and brown people to prison and jail; searches, arrests, supervises, and monitors them; and subjects them to harsher prison sentences. Even when sentencing statistics appear balanced by race, prosecutors' actions still disproportionately affect communities of color: People of color are more likely to be arrested and charged than their white counterparts. Because many communities of color are disproportionately low income, consequences of prosecution such as fines, court costs, license suspensions, loss of work, and childcare costs can be unduly punitive.

Prosecutors can only begin to fix these problems if they honestly confront their role in a historically racist system.<sup>7</sup> In an improved prosecutor's office culture, discussions about

race are not taboo. It should be recognized that disparate criminal legal system outcomes are not only the results of individual racist acts, but a system founded on white supremacy. The office should commit to explicitly pursuing an anti-racist agenda and routinely discuss its efforts toward that end. Data should be used to discover evidence of, and begin to correct, racial disparities in charging and sentencing—comparing both defendants of color to their white counterparts, and volume of charges against people of color compared to the constituency as a whole.

## Actions Items

1. Foster a culture of open discussions about race and institutional racism.
  - a. The head prosecutor should initiate and hold space for conversations about race.
  - b. Share research, evidence, and data on how prosecutors' policies and decisions have racially disparate impacts.
2. Host trainings and roundtable discussions on how racially disparate outcomes can emerge even without deliberate racism, e.g.:
  - a. Income discrepancies can lead to differences in defense-attorney quality.
  - b. Greater police presence in neighborhoods leads to higher risk of arrests.
  - c. People with more wealth and connections are more likely to have their cases dismissed or diverted.
3. Bring in credible outsiders to teach and train.
  - a. Bring in community members of color to discuss their experiences with law enforcement and the prosecutor's office.
  - b. Hold implicit bias and cultural competency training facilitated by experts who can explain and help interpret, learn from, and adopt changes based on the results.
  - c. Mandate trauma-informed prosecution training.<sup>8</sup>
4. Track and share data on the office's outcomes by race, e.g.:
  - a. Raw numbers of cases opened.
  - b. Charges for "quality of life" crimes like resisting arrest and public drinking.
  - c. Pre-trial release and bail requests and outcomes.
  - d. Percentage of cases dismissed or diverted by race.
  - e. Percentage of incarceratory dispositions by race.
5. Develop an anti-racist agenda—a set of policy changes specifically designed to reduce the office's disproportionate burden on communities of color.
  - a. Set goals and policies to eliminate racial disparities in charging and sentencing.
  - b. Set goals to reduce the disproportionate volume of cases filed against people of color.
  - c. Reduce or eliminate reliance on monetary conditions that disproportionately affect poor people and people of color e.g.:<sup>9</sup>
    - i. Monetary conditions for pre-trial release (money bail).
    - ii. Fines.
    - iii. Defendant-paid probation, monitoring, mental health treatment, domestic

violence courses.

- iv. Drivers license suspensions for non-driving related offenses.

#### **IV. Prosecutors Are Community Servants**

The prosecutor is a public servant—her charge is to use public resources and the power of government to improve everyone’s wellbeing. While the vision of the prosecutor as community servant is articulated in the law and ABA guidelines, it often takes a back seat to efficiency and competition. The correct tone must be set from the top, and articulated broadly and frequently. The prosecutor’s role goes beyond merely following the letter of the law and keeping up with paperwork. Her job is not to “win” cases, impose long sentences, or “beat” the defense. Instead, it is to promote safety, accountability, healing, trust, and empowerment.

The head prosecutor must shape her line prosecutors’ understanding of their responsibilities through frequent and consistent internal communications and formal office policies. Leadership should telegraph to staff that positive relationships with the defense bar will improve the fair adjudication of cases and decrease wrongful convictions. Prosecutors must be encouraged to be leaders and champions of justice who consider and protect the rights of criminal defendants, as well as the rights of survivors.

Keeping in mind the trauma suffered by survivors and the impact of trauma on the accused, it is critical that prosecutors employ trauma-informed prosecution strategies. Prosecutors are responsible for critically evaluating how their decisions affect defendants, their families, victims, and the community that they are entrusted with serving. This responsibility entails understanding the individuals in each case, and how the prosecutor’s decisions will affect them. Done properly, it can require leniency over harshness: creativity and innovation in charging decisions, the dismissal of charges in the interest of justice, and the usage of community dispute resolution and other alternatives to traditional prosecution.

#### **Action Items**

1. Leadership communicates the comprehensive nature of the prosecutor’s role.
  - a. Encourage line assistants to evaluate the effects of their decisions on defendants, victims, and the community at large.
  - b. Track and distribute statistics on the effects of alternatives to incarceration and supervision.
  - c. Organize roundtable events and meetings between leadership and line assistants to discuss how their decisions affect victims, defendants, and their families.
2. Leadership communicates the potential for prosecutors to promote positive outcomes.
  - a. Celebrate stories of attorneys who handled a case creatively, including diverting or dismissing a case to benefit victims, defendants, families, or the community at large. These should be circulated and discussed as frequently as trial victories.
  - b. Highlight stories of people who responded well to diversion, got their drivers’

- licenses back, had their cases dropped and have stayed out of trouble, completed parole/probation and have been incident-free since, had a positive experience in a restorative justice conference, etc.
3. Hire employees who think comprehensively about the prosecutor's role.
    - a. Amend job postings to note that prosecutors' responsibilities include critically evaluating how her decisions affect the community at large.
    - b. Ask questions in interviews designed to determine whether the candidate will bring a public service mission to his/her job.
      - i. "Is it the prosecutor's job to consider the impact that his/her decisions will have on victims, defendants, and their families? Explain."
      - ii. "Discuss the effects that requesting a high bond for John Doe might have on a) the defendant b) the defendant's family c) the victim and his/her family d) the community at large."
      - iii. "Discuss a prosecutor's office policy you have read about that you think is good. Discuss one that you think is bad."
      - iv. "If you were elected head prosecutor, what is a change you would make on day 1?"
  4. Shift to holistic investigation: Understand why events happened and know the people involved as three-dimensional human beings.
    - a. Encourage prosecutors to learn about defendants as three-dimensional human beings, not just names on a page.
    - b. Meet with victims, their families, and families of the defendant as part of regular casework.
    - c. Host events where attorneys can observe experienced facilitators conduct discussions with defendants, victims, and families.
  5. Facilitate holistic prosecution training.
    - a. Arrange office-wide and department-wide trainings with topics including:
      - i. Trauma-informed interviewing and prosecution.
      - ii. Impact of sentencing on defendants, victims, their families and the community.
      - iii. Incorporating community priorities into decisionmaking about individual cases.
  6. Create opportunities for junior staff to get trial experience.
    - a. Partner junior staff with senior staff to try cases.
    - b. Discourage refusal to plea bargain for trial experience.
  7. Evaluate job performance to reinforce the prosecutor's role as public servant.
    - a. Example criteria to add to employee evaluations:
      - i. "This employee thinks critically about the impact his/her decisions have on defendants, victims, their families, and the community at large."
      - ii. "This employee dismisses cases when it is reasonable to do so."
      - iii. "This employee strives to ensure that her work has a positive impact on victims, defendants, their families, and on the community at large."
      - iv. "This employee frequently attends and participates in community events."
      - v. "This employee has strong community engagement."

- b. Stand strong behind promotion criteria: do not elevate staff based on seniority alone.
- 8. Assign line assistants policy projects and provide opportunities to present their findings.
  - a. Allow prosecutors to apply for a full week or month to focus on a policy project.
  - b. Involve junior assistants, not just senior policymaking staff, in work with external researchers and auditors.
  - c. Include work on policy projects on performance evaluations for line prosecutors.
- 9. Encourage going the extra mile to assist community members.
  - a. Many community members are not aware of what exactly the prosecutor's office does. When you walk the halls of the courthouse, remember that you are a public servant. If approached and asked for information by a member of the public, assist him or her directly or refer them to the appropriate city agency.

## **V. Prosecutors Handle Case Dispositions Carefully and Deliberately**

Prosecutors must carefully deliberate about appropriate case dispositions and draft memoranda to memorialize the reasons for their decisions. Supervisors should review sentencing memoranda to ensure that they are thoughtful, deliberate, and consistent. They should especially scrutinize any sentence involving incarceration because of its particularly grave risk of causing permanent harm to individual defendants and their communities.

Rather than reflexively advocating for the harshest sentence, prosecutors should propose sentences that reflect the goals of sentencing: safety and deterrence, protecting the public from further crime, and rehabilitation. Punitive sentences such as those involving incarceration, supervision, or fines should be offered only after determining that restorative sentences (mental health, substance abuse or other treatment, community service, and community based restorative justice) are inappropriate.

When proposing a sentence or plea agreement, prosecutors should carefully consider why the particular type of response, as well as the length or severity of that response, is appropriate. Advocating for the appropriate sentence requires familiarity with the defendant and the considerations beyond crime elements including family, mental health, an substance abuse history. No sentence should be advocated for without input from specialists in the prosecutor's office, including mental health, juvenile, and domestic violence experts.

### **Action Items**

1. Set the expectation and allocate resources to permit line assistants a certain number of hours per week to focus on diving into the policy considerations of each case.
2. Mandate that line assistants draft sentencing and plea memos that explain why they chose a particular sentence. Memos should demonstrate:
  - a. Familiarity with the defendant and his or her unique circumstances.
  - b. Appropriateness of the particular sanction and the length or severity.<sup>10</sup>
  - c. Insights from specialists such as social workers, substance abuse counselors,

- and mental health treatment practitioners.
- d. Consideration of what is likely to happen to the defendant after completion of the sentence.<sup>11</sup>
  - e. Justification for punitive sanctions in lieu of diversion or other non-punitive outcomes.<sup>12</sup>
  - f. Financial considerations, including ability to pay for monetary conditions of release such as fines and fees and costs associated with supervision or treatment programs.<sup>13</sup>
  - g. Consideration of the high monetary cost of incarceration, where applicable, and a justification of this use of resources over other options such as outpatient rehabilitation.<sup>14</sup>
  - h. Whether the resolution provides ongoing support for substance abuse and/or mental health problems.
3. Supervisors review sentencing memos—reward thoughtfulness and check in on employees who are too formulaic.
    - a. Maintain a database to track sentences for similar crimes. Evaluate these metrics quarterly and discuss with the office to attempt to unify the way things are done.

## VI. Prosecutors Acknowledge and Learn from their Mistakes

Prosecutors are human beings and, therefore, fallible. Mistakes are inevitable, and these mistakes can have real, permanent consequences. It is the prosecutor's obligation to acknowledge and seek to correct their mistakes. Honest and rigorous self-examination and public correction of errors must not be stigmatized, but encouraged. Recognizing and studying past errors is the only way to address wrongs, learn, and improve. Because prosecutorial immunity may shield prosecutors from penalties, it is especially important that prosecutors create a culture of honest and rigorous self-investigation.

### Action Items

1. Destigmatize acknowledging mistakes.
  - a. Senior staff regularly share stories of their own past mistakes.
    - i. For example: charging the wrong defendant, overlooking exculpatory evidence, or delaying dropping a non-viable case.
    - ii. Highlight the types of errors they made and how they discovered those errors as well as the methods they used to correct them.
    - iii. Discuss what was done to rectify the harm caused including, where applicable, apologies and restitution.
  - b. Reassure prosecutors they will not be penalized for good faith mistakes so long as they are promptly reported and reversed.
  - c. Emphasize that figuring out defendants are innocent is as important as proving that they are guilty.
2. Help attorneys discover their mistakes.
  - a. Institute an open-door policy for supervisors to discuss mistakes with their



- attorneys.
- b. Develop protocol and training materials for what an prosecutor should do when she is concerned she made a mistake such as sentinel event reviews.<sup>15</sup>
  - c. Create a mechanism for prosecutors to comfortably raise concerns about the merits of an ongoing case and to step back and critically assess the merits of a case.
  - d. Test every case from the defense's perspective in order to discover fundamental weaknesses and oversights.
3. Enhance the conviction integrity unit.<sup>16</sup>
    - a. Reinvestigate cases involving untested forensic evidence.
    - b. Review all requests for reevaluation by defense counsel or incarcerated individuals carefully.
    - c. Combat the toxic narrative that law enforcement can do no wrong.
    - d. Share stories about wrongful convictions with staff; discuss what went wrong and what could have been done to prevent it.
  4. Embrace more open discovery practices.<sup>17</sup>
    - a. Rigorously investigate "weaknesses" in cases and evidence that appears exculpatory to encourage early discovery and disclosure of exculpatory evidence.
    - b. Embrace discovery obligations and turn over materials to defense counsel in an organized manner, without complaint or delay.
    - c. Innovate ways to work with law enforcement to provide discovery efficiently.
    - d. Rigorously endeavor to disclose early to the defense to enhance credibility when requesting protective orders for vulnerable victims.
    - e. Ensure robust discovery training, including training about Brady.
  5. When a mistake is discovered, devote substantial resources to ameliorating its effects.
    - a. Invite interested individuals, community members, and institutions to participate in discussing the harm that was caused, and develop ideas for restitution.
    - b. Devote financial and other resources to mending harm from wrongful charges, convictions, and trauma associated with prosecution.
    - c. Maintain a database of sanctioned officers / officers with previous violations—consider these issues before charging cases.

## VII. Prosecutors Hold Police Accountable

Prosecutors work closely with police. They must both foster a productive working relationship with them and hold them accountable for misconduct. Prosecutors must not endorse bad practices by charging cases involving unlawful search and seizures or unnecessary arrests. Prosecutors must set expectations for police conduct, give actionable feedback to promote good practices, and, where necessary, censure and prosecute harmful conduct. Reforming the way police work with the community will require changing the way prosecutors work with them.

### Action Items

1. Take proactive steps to prevent police misconduct.<sup>18</sup>
  - a. Thoroughly evaluate the circumstances of arrest before charging a case.
  - b. Require prosecutors to order and read all discipline and complaint records related to an officer before relying on him or her for critical evidence or testimony.
  - c. Train prosecutors on reading and interpreting police disciplinary records.
  - d. Set up a specialized unit or task force within the office dedicated to identifying and tracking police misconduct.
  - e. Maintain a public list of officers with adverse credibility findings.<sup>19</sup>
  - f. Reject arrests or warrants based on trivial violations or pretextual stops and discuss with the officers involved your reasons for doing so.<sup>20</sup>
2. Educate police.
  - a. Inform officers of inappropriate conduct such as illegal searches and seizures.
  - b. Report patterns of inappropriate conduct to police leadership.
  - c. Celebrate and support good police conduct, such as:
    - i. Facilitating community dispute resolution instead of arrest.
    - ii. Deescalating volatile situations and avoiding force whenever possible.

## VIII. Prosecutors Rely on Data and Evidence

Prosecutors must ground their decisions in data and evidence, not in “the way we’ve always done it.” A prosecutor’s office should track all measureable actions, especially those related to charging, pre-trial release, diversion, and sentencing. Attorneys should be familiar with, and invested in recording and interpreting data. Consultants or, where feasible, staff data specialists should assist with designing fast, easy to use, and reliable data management systems.

### Actions Items

1. Track and publicize data on office outcomes.
  - a. Create publicly accessible data to increase transparency. For example, the Philadelphia District Attorney’s office maintains a publicly accessible database that includes: number of cases opened and closed, years of incarceration and supervision in sentences, and pre-trial release conditions and bail amounts.<sup>21</sup>
  - b. Partner with local universities and research institutes to develop tools and protocols for tracking and publishing data.<sup>22</sup>
2. Encourage attorneys to review their own charging and sentencing statistics.
  - a. Arrange meetings between attorneys and data specialists to help them interpret their metrics and compare them with office priorities.
3. Consider and study data beyond traditional criminal justice metrics like charging and sentencing.
  - a. Track education, employment, and public health data by neighborhood to determine the effectiveness of office initiatives.
4. Expand data literacy among all attorneys.
  - a. Give CLE credits for learning how to track, interpret, and manage data.

- b. Regularly distribute articles on relevant evidence and research.

## **IX. Create the Conditions for Changes to Take Hold**

Creating an innovative culture is not only about clearing roadblocks to change, but also creating fertile ground for reforms to root. In order to adhere to policies, all attorneys must be informed about them. Get staff invested in implementing changes by involving them in policymaking decisions and rewarding leadership. Finally, it is only possible to assess the implementation of a new policy if there are ways to measure it. All new policies should have objective mechanisms for tracking their implementation and effectiveness.

### **Action Items**

1. Ensure that office initiatives are known.
  - a. Use internal office communications to remind staff about new office policies.
  - b. Use performance reviews to evaluate knowledge of, and adherence to new policies.
2. Develop metrics to track whether new policies are being implemented and whether they are achieving their intended objectives.
3. Create systems for attorneys to report failures to implement office initiatives.
  - a. The reporting system should have the option for junior attorneys to bypass their supervisor and go straight to head prosecutor or other senior staff.

## **X. Counteract Active and Passive Obstruction**

Many prosecutors grew up in a system with a different culture than the one that this guide envisions. Some attorneys may obstruct reform by actively resisting change, behaving inappropriately, and celebrating unethical conduct. Others may stand in the way not as deliberate obstructionists, but through inertia: continuing to do things the way they always were done. Office policies must clarify the type of conduct that will not be tolerated. Offices should create avenues for attorneys to safely report obstruction and bad behavior. As supervisors and senior attorneys are the most likely to be inflexible to policy changes, junior attorneys should have a direct line of communication to the head prosecutor and policymaking staff.

### **Action Items**

1. Confront known obstructionists. Their conduct interferes with the office's mission, and if they cannot execute office policy, they should leave the office.
2. Dismiss obstructionists when necessary and be transparent about why, so as to mitigate impact on office morale.
3. Create a list of prosecutorial actions and strategies that will not be tolerated, and note why they are harmful. For example:
  - a. Punishing a defendant for not taking a plea.
  - b. Overcharging in order to secure a plea.
  - c. Requesting a high bond in order to secure a plea.
  - d. Bluffing on being ready for trial.

- e. Treating victims who have themselves committed crimes with disrespect.
  - f. Deliberately withholding or delaying turnover of evidence.
  - g. "Winning" mindset when it comes to discovery.
  - h. Offering victim services and support only as a condition for cooperation on a case.
4. Create an anonymous system for whistleblowers to report bad conduct such as:
    - a. Inappropriate behavior and language toward defendants, victims, and community members.
    - b. Actions to obstruct implementation of a reform policy.
    - c. Efforts to manipulate accurate data-gathering.
  5. Create mechanisms for junior attorneys to bypass their immediate supervisors to report non-compliance with office policies.
  6. Create an accountability council that reviews reports of prosecutorial misconduct and obstruction, investigates those reports, and takes action where appropriate.
  7. Assign policy projects to attorneys who have been resistant to change.
    - a. Signal that thinking about, and participating in innovation it is an expectation of everyone in the office.
    - b. Expose people to evidence that may change their minds and generate more buy-in for office initiatives.

## Appendix 1: Summaries

### Summary Action Items

1. Encourage junior attorneys to take part in office policy initiatives, and create opportunities for them to take on and submit policy research projects.
2. Assign experienced attorneys to misdemeanor court to mentor newer attorneys, demonstrate good practices, and share ways of thinking informed by experience and perspective.
3. Assign junior attorneys to shadow senior attorneys. Senior attorneys are more likely to have relationships with defendants and victims and to think broadly about the implications of their decisions.
4. Do not fill high-level positions based on years of service alone.
5. Expose attorneys to defendant success stories—for example, people who responded well to diversion, who had their cases dropped and have stayed out of trouble, who completed parole and have been incident-free since, or who had a successful restorative justice conference. These should be circulated and discussed as often as trial victories.
6. Hire more staff and attorneys from diverse backgrounds, especially people who have personal contact with the legal system.
7. Require sentencing memos that justify every requested sentence. The memo should demonstrate familiarity with the defendant and explain why the particular sentence will best serve him/her and their community. Sentences with incarceration should only be offered after consultation with staff specialists on mental health and substance abuse.

### Categories of Actions Applicable Across Many Contexts

1. Distribute criminal reform-focused reading materials via all-staff or all-APA emails.
2. Host training and educational events for all staff or all APAs.
3. Host guest speakers and discussion leaders.
4. Organize roundtables and small group discussions.
5. Censure bad behavior and language.
6. Reward and incentivize behavior consistent with the values espoused by the office.
7. Mandate attendance and participation in community events.
8. Integrate new behaviors, metrics, and criteria into staff performance reviews.
9. Draft and distribute office guidelines.
10. Hire open-minded, empathetic staff, including those with experience in the justice system.

## Appendix 2: Examples of Inappropriate Language and Behavior

1. A mid-level prosecutor discussed an instance where a defendant rejected a plea for a relatively small amount of cocaine possession. The prosecutor recalled, with glee, how he won at trial and sought the maximum sentence because the defendant had been uncooperative.
  - a. Sentencing should be based on what is just, and what is best for the community, not vengeance for annoying the prosecutor.
2. A senior prosecutor referred to her job as putting “bad guys” in jail.
  - a. Casting defendants as “bad guys” blunts sympathy for them and contributes to a “negative feedback loop.” All defendants, victims, and community members deserve respect and sympathy. In the words of Brian Stevenson, “Each of us is more than the worse thing we’ve ever done.”
3. In the weekly homicide roundtable, a senior attorney advocated for filing a notice of intent to seek the death penalty in order to extract a life plea from the defendant. He also noted the need to “get the victim’s family on board” because they did not approve of the death penalty.
  - a. Sentences should be proposed and sought in the interest of justice, not strategically.
  - b. Human life should always be treated with respect—the specter of taking it away should not be viewed or discussed trivially.
4. A tired prosecutor on an eight-hour arraignment shift fails to consider the merits of a particular drug case, stating that she was “just going to ask for bail in all drug cases” today.
  - a. The issue of bail is a case-by-case consideration of the risk of flight and danger to the community that must be taken very seriously.
5. A prosecutor argues aggressively for bail in a case involving a single mother defendant even though it was agreed that she posed no public safety or flight risk.
  - a. Pre-trial detention is not punitive and defendants are presumed innocent until proven guilty. They should only be detained before trial if they pose a public safety or flight risk.
  - b. Defendants, and especially their families, deserve sympathy. It is inappropriate to ignore the impact that prosecutors’ decisions have on a child who did nothing wrong.
6. In court, a defense attorney misses an argument that amounts to ineffective assistance of counsel. The prosecutor capitalizes on this advocacy mistake which causes a less-than-fair case disposition.
  - a. Despite the adversarial nature of the criminal system, prosecutors are charged with supporting justice, above all.
7. In a training event for interns, a senior attorney complains about having to attend community meetings, commenting that most of the time people just ask her about potholes and parking tickets. The prosecutor remarks that, with such low pay, her entire job is public service and she should not be tasked with doing more work.
  - a. Even if it is not directly within the office’s portfolio, community engagement is necessary to effective prosecution and the broader public service mission. It should not be regarded as trivial or “busy work.”
8. After securing a conviction, two prosecutors fist bump to celebrate their victory in front of the defendant and their family waiting in the audience.
  - a. Convictions are grave moments for everyone, especially defendants and their families. Prosecutors should be mindful of this and avoid celebrating in public.

## Appendix 3: Samples Materials to Distribute

### **Ted Talks**

- » *A Prosecutor's Vision for a Better Justice System*, Adam Foss.
- » *How We're Priming Some Kids for College and Others for Prison*, Alice Goffman
- » *What Prosecutors and Incarcerated People can Learn from One Another*, Jarrell Daniels
- » *We Need to Talk About an Injustice*, Brian Stevenson

### **Fines, Fees, and Collateral Consequences of Convictions**

- » *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Marc Mauer & Meda Chesney-Lind
- » Profile of a young woman demonstrating that relatively small amounts of restitution can trap young people in poverty for years after an offense. ([Marshall Project](#))
- » The practice of jailing people for failing to pay relatively small amounts of fines and fees is widespread and very harmful for the people who get trapped in a cycle of debt and incarceration ([NYTimes](#))
- » Fees from programs required as part of diversion can trap people in poverty or prevent them from getting the treatment they need. The article also documents how a conditional plea can show up in background checks and make it hard to stabilize your life while you're in a diversion program. ([NYTimes](#))
- » Craighead County judges forgave or reconfigured debts owed to a private probation company. The company trapped people with mountains of debt, and could get them sent to jail when they didn't pay it – at its peak there was one outstanding warrant for every two people in the county. The company sued but the case was thrown out by the 8th Circuit Court of Appeals. ([Arkansas Times](#))
- » Alabama's requirement that people convicted of felonies carry special identification cards and the burden it places on an already burdened population ([ProPublica](#))
- » In Mississippi, people who cannot afford to pay restitution, court costs, or fines are incarcerated while they work to earn money to pay these balances. ([Marshall Project](#))
- » Criminal legal system fees are pervasive and a leading factor leading to re-incarceration. Fees are more prevalent in places with high proportions of people of color ([Brookings Institution](#))
- » Juvenile offenders whose sentence includes a financial component (fines and fees or financial restitution) recidivate at higher rates than those who don't. Greater amounts of money owed are related to higher rates of recidivism. (The study controls for severity of offense.)
  - » Piquero, A. R., & Jennings, W. G. (2016). Justice system-imposed financial penalties increase the likelihood of recidivism in a sample of adolescent offenders. *Youth Violence and Juvenile Justice*, 15(3), 325–340. ([Link](#))
- » 25% of people, and 40% of single parents, do not have access to \$400 in savings ([Federal Reserve, 2018](#))
- » San Francisco recently announced a program to largely eliminate fees for defendants. The article notes that LA spends more to collect fees than it gets in revenue ([NYTimes](#)).

## **Bail and Pre-Trial Detention**

- » Failure to appear is often caused by either mundane forgetfulness, or life issues that pop up that are more important than a court date. People almost always show up by their 2nd or 3rd appointment if reminded (this article is a little radically left leaning) ([The Appeal](#))
- » Text message reminders are a very cheap and effective way to get people to show up for their court dates [Link](#)
- » Philadelphia's bail reform, eliminating monetary bond for nearly all non-violent offenses has resulted in no increase in failure to appear or arrest among those released.
  - » Ouss & Stevenson, "Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail," George Mason University Working Paper (2019) ([Link](#))
- » New Jersey has reduced its pre-trial detention population dramatically (>40%) with a negligible increase in FTA and dispositions (note, this was a legislative reform). ([Link](#))
- » Orlando SA got rid of cash bail for most low level offenses ([Orlando Rising](#))
- » Philadelphia's DA got rid of cash bail for most non-violent offenses with no increase in failure to appear or arrests awaiting trial. ([Link](#))
- » 25% of people, and 40% of single parents, do not have access to \$400 in savings ([Federal Reserve, 2018](#))

## **Incarceration and its Effects**

- » *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, Emily Bazelon
- » Before Angel Sanchez was a successful law student, he was a gang member in South Florida. He went to prison for 12 years for crimes committed when he was 14. The essay describes his experience in prison and the struggle to succeed afterward.
  - » Angel Sanchez, "In Spite of Prison," Harvard Law Review (2019) ([Link](#))
- » Jails are often more poorly resourced than prisons, leaving inmates without adequate medical care or essential resources. ([Marshall Project](#))
- » Narrative of a daughter growing up with an incarcerated father and how it impacted her upbringing. ([Marshall Project](#))
- » After 5-7 years without an arrest, young offenders are no more likely to commit crimes than the rest of the population
  - » Blumstein, A., and K. Nakamura (2009). "Redemption in the presence of widespread criminal background checks." *Criminology* 47(2):327-359. ([Link](#))
- » There is no evidence that incarceration has a rehabilitative effect or leads to a reduction in recidivism. Evidence shows that if anything, incarcerating someone has a criminogenic effect.
  - » [The Crime Prevention Effects of Incarceration](#) in Travis, Western & Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* pp. 146–152
- » For juveniles, even a short amount of time in custody is associated with dramatically lower rates of high school completion and higher likelihood of being incarcerated as an adult. The study relies on a quasi-random assignment analysis based on judges' sentencing tendencies.
  - » A. Aizer & J. J. Doyle, 2015. "Juvenile Incarceration, Human Capital, and Future Crime:



Evidence from Randomly Assigned Judges,” *The Quarterly Journal of Economics*, vol 130(2), pages 759-803 ([Link](#))

- » For violent offenders who may be eligible for incarceration or probation (typically robbery and assault offenders), incarceration does little, if anything, to enhance public safety. People who were incarcerated are no more or less likely to commit future crimes, and the “incapacitation” benefits are limited – you have to incarcerate many people who would not commit crimes in order to stop a crime from being committed.
  - » Scientific American writeup ([Link](#))
  - » DJ Harding et al. (2019), “A natural experiment study of the effects of imprisonment on violence in the community,” *Nature Human Behavior*, vol 3 671–677. ([Link](#))
- » Prisons are very expensive, ranging from roughly \$20,000 to as much as \$50,000 per year per inmate, depending on the state. ([Link](#))

### **The Experience of Going through the Criminal Legal System and Prosecutors’ Influence**

- » *Usual Cruelty: The Complicity of Lawyers*, Alec Karakatsanis
- » *Prisoners of Politics: Breaking the Cycle of Mass Incarceration*, Rachel Barkow
- » *Locked In*, John Pfaff
- » Emily Bazelon, *Charged*, Introduction ([Link](#))
- » Before Angel Sanchez was a successful law student, he was a gang member in South Florida. He went to prison for 12 years for crimes committed when he was 14. The essay describes his experience in prison and the struggle to succeed afterward.
  - » Angel Sanchez, “In Spite of Prison,” *Harvard Law Review* (2019) ([Link](#))
- » Serial Podcast, Season 3 Episode 1 follows a case as it moves from intake through to a plea deal. It shows how even short term pre-trial detention, small fees, and minor charges can have a major impact on someone’s life.
  - » [Link on Apple Podcasts](#); [Link to MP3](#)
- » Marshall Project on bitter-sweetness of leaving prison ([Link](#))
- » Meek Mill analyzes his music and how it reflects the trauma of growing up in a violent environment ([Podcast](#))
- » Sex offenders and their families, trapped by the restrictive terms of sex offender registries, turn to hotlines ([Vox](#))
- » “Juvenile Lifers” are still serving their sentences in spite of admonitions by the Supreme Court. One story about someone who’s found comfort in gardening ([Marshall Project](#))
- » San Francisco tries blind charging to reduce risk of racial or other unconscious biases ([NYTimes](#))
- » Under the leadership of Kim Foxx, the District Attorney’s office of Cook County, Illinois has released substantial data on its charging and sentencing decisions. ([The Pudding](#))

### **Problem Solving Courts and Alternatives to Incarceration**

- » Fees from programs required as part of diversion can trap people in poverty or prevent them from getting the treatment they need. The article also documents how a conditional plea can show up in background checks and make it hard to stabilize your life while you’re in a diversion program. ([NYTimes](#))

- » Photo-narrative of a woman’s recovery from addiction with aid from a court-sponsored program ([Link](#))
- » In Brooklyn, sentences to community service can be satisfied with job training, GED classes, rehab sessions, etc. ([Link](#))
- » Overview of the controversy and plans around closing Rikers Island in New York ([New Yorker](#))
- » Cato Institute research report on the effects of free, safe injection sites ([Link](#))

## **Community Engagement**

- » *Just Mercy*, Bryan Stevenson
- » *How to Be an Anti-Racist*, Ibram X. Kendi
- » Oakland law enforcement transformation to being less punitive and more community driven ([Link](#))
  - » After their equivalent of Targeted Prosecution makes an arrest, law enforcement + social services goes back to the area and talks to residents and community members about what happened, explain why they did it, try to understand the impact it will have on the community, and offer help where it can.
  - » The article describes an evolution in thinking from “eliminating gangs to eliminating gang violence.” The theory is that dismantling social structures is harmful and leads to the vacuums that create violent gangs in the first place. “Gangs” aren’t a problem when they’re not violent – they’re just cliques.
- » In Philadelphia, the DAs office has convened a panel of 20 victims of crime to review the office’s policies concerning victims, the services that they’re offered, and the experience of victims who get processed through the office. ([Philadelphia Tribune](#))

## **Other**

### **Restorative Justice**

- » Story of a DC restorative justice program for juveniles that has shown early signs of success. It’s converted prosecutors who were at first very skeptical about it. They use it for any charges except sexual assault and gun crimes. ([NPR](#))

### **Racial bias**

- » San Francisco tries blind charging to reduce risk of racial or other unconscious biases ([NYTimes](#))

### **Officer Involved Shootings / Deaths**

- » In Chicago, officer involved shootings have dropped dramatically over the past 10 years (from 124 per year to 37). But incidents of police being shot at, and charges for assaults on officers have stayed flat. ([WBEZ](#))

### **Motion for Justice**

- » Historical and practical guidance for prosecutors and community members on reducing racial disparities in prosecutorial decision-making. (<https://motionforjustice.vera.org/>)

## Endnotes

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- 2 <https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/>
- 3 <https://www.prosecution.org/inside-criminal-justice>
- 4 <https://www.themarshallproject.org/2017/02/16/is-prison-the-answer-to-violence>
- 5 Criminal Justice Matters, Debating Bad Language in Criminal Justice (2010), <https://www.tandfonline.com/doi/pdf/10.1080/09627251.2010.525933>; Lauren M. Broyles et al., Confronting Inadvertent Stigma and Pejorative Language in Addiction Scholarship: A Recognition and Response, 35 SUBSTANCE ABUSE 217 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6042508/>; Misa Kayama et al., Use of Criminal Justice Language in Personal Narratives of Out Of-School Suspensions: Black Students, Caregivers, And Educators, 51 CHILDREN & YOUTH SERVICES 26 (2015), <https://www.sciencedirect.com/science/article/pii/S0190740915000377>.
- 6 Nancy G. La Vigne, People First: Changing the Way We Talk About Those Touched by the Criminal Justice System, URBAN INSTITUTE (APR. 4, 2016), <https://www.urban.org/urban-wire/people-first-changing-way-we-talk-about-those-touched-criminal-justice-system>.
- 7 <https://www.prosecution.org/s/Executive-Session-Race-and-Prosecutors-FINAL.pdf>
- 8 <https://www.prosecution.org/traumainformed-prosecution>
- 9 [https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief\\_Fines.Fees\\_.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief_Fines.Fees_.pdf)
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- 21 <https://data.philadao.com/index.html>; <https://github.com/concannon/CookCo>
- 22 E.g., the Data Collaborative for Justice at John Jay College of Criminal Justice <https://dashboard.datacollaborativeforjustice.org/cccptree/>