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## A LEGISLATIVE GUIDE TO SUPPORTING PROSECUTORIAL REFORM

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### INTRODUCTION

Long a bit player in the growing movement to reimagine the criminal justice system, prosecutors are finally entering the spotlight. Leveraging the tremendous authority of the office, they have begun to reshape the flow of criminal cases and nudge outcomes in a more productive direction.<sup>1</sup> These early successes, however, should not obscure a broader truth: they cannot do it alone. Prosecutorial efforts can only realize their lofty potential for positive change with the active and enduring support of state legislatures.

With unparalleled power over everything from charging decisions to plea bargaining, it may seem as though prosecutors could bend the justice system to their will without any assistance. Yet, the reality is much more complicated. For example, expansive charging and pretrial decision-making is relatively ineffective without the provision of strong alternatives to traditional prosecutorial pathways. Likewise, low funding can stymie individualized consideration of cases,

while poor data collection can get in the way of evidence-based policy.

And here is where the legislature can and must step in. Only they have the power to remove many of these external roadblocks to constructive and beneficial prosecutorial action. Rewriting the law and adjusting appropriations can ensure that prosecutors have the tools, authority and discretion necessary to transform prosecution. Accordingly, this brief is offered as a guide for those legislators who wish to become allies in the prosecutor-driven reform movement by proposing specific actions legislatures can take to support prosecutors who are attempting to improve the criminal justice system in their jurisdictions.

### AMENDMENTS TO THE CRIMINAL CODE

Each state's criminal code is a natural and necessary place to begin a legislative campaign to aid prosecutorial reform. After all, one of the prime directives of prosecutors is to enforce the law and, as a result, every single detected violation of it forces prosecutors to consider whether a response is necessary and what that response should look like. The explosive growth of criminal codes and the sometimes haphazard manner in which new offenses and penalties are introduced into them has therefore greatly complicated the work of prosecutors. In many jurisdictions, case management has come to look like triage rather than careful analysis.<sup>2</sup>

In particular, the addition of so many new misdemeanor offenses over the years, as well as the felonization of relatively minor conduct, adds to these burdens. Whereas a citation may require no prosecutorial response at all, a misdemeanor requires some level of prosecutorial time and attention. Likewise, a felony tends to draw more resources than a misdemeanor. Unnecessary escalation in this regard can starve offices of the time and personnel needed to address much more serious conduct. Depriving prosecutors of sufficient or adequate alternatives to prosecution can similarly redirect prosecutorial resources toward minor transgressions that would be better spent elsewhere.

Of course, this does not mean that prosecutors are helpless in the face of overly voluminous criminal codes. Their discretion allows them to deprioritize certain offenses and leverage whatever alternatives to prosecution may be available to them.<sup>3</sup> Yet, this has its limitations and carries with it its own set of problems. Exercising prosecutorial discretion at the individual level to rid the system of unnecessary cases and prosecutions consumes significant time and resources. At the same time, broader office policies that apply this downward discretion to whole categories of offenses may be overly inclusive or offend political sensibilities about the role of the

prosecutor.<sup>4</sup> Either route will be tough terrain for prosecutors and the resulting outcomes will necessarily be stunted.

### Legislative Recommendations

- Decriminalize low-level offenses: Review misdemeanors and decriminalize any that can be safely handled through citations, fines or community service. Strong candidates include traffic infractions not involving a collision, ordinance violations and potentially simple possession of certain controlled substances.
- Reduce driver's license suspensions: Stop the practice of suspending driver's licenses for non-traffic related reasons, such as unpaid court debt or a missed court date.
- Reclassify certain felonies: Reduce felony offenses to misdemeanors or allow prosecutors to make this downward decision, wherever appropriate. In particular, raise the felony threshold for offenses such as theft, destruction of property or receiving stolen goods so that they reflect inflation and the changing cost of goods.
- Support alternatives to prosecution: Provide additional funding and explicit authorization for alternatives to prosecution, including diversion and community service programs. Consider writing a presumption in favor of these kinds of resolutions for low-level offenses.

### FUNDING

- Although prosecutorial reform can lower costs in the long run by helping to reduce our overreliance on the criminal justice system, strong and consistent funding nevertheless is necessary for prosecutorial operations. It is likewise helpful for the advancement of reform itself. The benefits of a higher prosecutorial budget include the ability to recruit talented individuals and retain veteran prosecutors, create additional training opportunities and reduce individual caseloads. Steady funding, in particular, is critical for these efforts and long-term planning more generally.<sup>5</sup>
- Financial independence is also key. Tying funding to the outcomes of prosecutorial decisions can incentivize certain courses of action, which may not ultimately be the best option available. Even if it does not alter prosecutorial decisions, it can create the appearance of impropriety, which can be similarly damaging to an institution that is so reliant on public support and goodwill.

### Legislative Recommendations

- Provide adequate funding: Prosecutor's offices require sufficient funding to ensure they can meet hiring needs, pay competitive wages, and provide support to victims, witnesses and other individuals who come into contact with the justice system. Limit significant variations in year-on-year funding wherever possible.
- Make funding independent from incentives: Do not allow prosecutors to derive any proceeds from the results of their decisions. This includes the elimination of funding based on felony or other charge rates, diversion fees and civil or criminal forfeiture orders.

### PRETRIAL SUPPORTS

The results of each stage of the criminal process tend to compound; early outcomes often snowball with exaggerated effect. Pretrial decisions—bail and detention foremost among them—have thus naturally been the focus of many prosecutorial reform initiatives. In particular, prosecutors have sought to better match detention decisions with actual risk of flight or dangerousness rather than a defendant's financial status.<sup>6</sup> Generally, this means breaking an overreliance on the use of money bail.

In the short run, prosecutors can certainly come quite close to achieving these ends. They can simply stop requesting bail or institute a policy very near to it for some subset of offenses. But even if a lead prosecutor is willing to issue such a guidance, it is unlikely to be a sustainable solution for the long term without outside supports. Although many individuals currently detained due to an unduly high bail could be released into the community safely, many others need additional supports or monitoring in order to succeed.

Prosecutors generally cannot provide this level of support or supervision without assistance. Practically speaking, this means that either prosecutors will have to curtail their own policies to match existing structures, thereby limiting the impact of the reform, or watch individuals fail following their release without the necessary resources. The latter option will result in blowback for the prosecution and may all be for naught, since judges may simply step into the void to order the same onerous conditions that prosecutors are attempting to avoid. The risk of this outcome may itself be enough to prevent lead prosecutors from altering their policies or line prosecutors from acting less restrictively in a particular case.

Another wrench in pretrial decision-making is the information vacuum within which many of these decisions must be made. High caseloads for prosecutors and defense attorneys alike mean that often neither are able to analyze a case for

a sustained or adequate period of time beforehand.<sup>7</sup> Judges also face court congestion concerns and pressures to speed cases along.<sup>8</sup> With an ill-fated release likely to cause more headaches for prosecutors and judges than unnecessary detention or bail conditions, the risk-avoidant strategy is clear: when in doubt, assume the worst and ask for the most. Yet, this individually rational choice adds up to a bulky and ineffective pretrial system.

### Legislative Recommendations

- **Bolster pretrial services:** Increase funding for and availability of pretrial services that can effectively monitor and support individuals released prior to trial who would benefit from some official supervision.
- **Provide non-invasive supports:** Expand services that do not involve any direct supervision, such as text reminders, to all defendants released prior to trial.
- **Decrease the knowledge gap:** Help reduce caseloads through adequate prosecutor and public defender funding. Ensure that court funding is sufficient to avoid docket backlogs and other time pressures, and require courts to provide sufficient time prior to a pretrial hearing for all parties to review the case and gather the necessary information.

### SUPPORT FOR PUBLIC DEFENDERS

In large part due to its adversarial nature, the criminal justice system requires both the prosecution and defense to be capable and have strong working relationships with each other in order to succeed. Prosecutors able to put aside the occasional tension of the courtroom recognize this fact.<sup>9</sup> It is exceedingly difficult to be a superb prosecutor without talented and well-resourced defense counsel on the other side of the case.

Defense attorneys serve a few vital functions that ultimately benefit prosecutors and help them to fulfill their mission of advancing justice and promoting community wellbeing. Defense attorneys have access to and the cooperation of witnesses, including the defendant, who may be unwilling to engage with prosecutors. This means that reliable, competent defense counsel can provide prosecutors with valuable information, especially that of an exculpatory or mitigating nature. Since prosecutors are charged with seeking justice, not necessarily “winning” a case, this additional information is essential.

Similarly, the absence of defense counsel—either literally or in practical terms—causes its own problems for justice-minded prosecutors. Inadequate assistance of counsel can lead to avoidable errors and wrongful convictions. Prose-

cutors interested in limiting these outcomes can thus find themselves essentially taking over some of the defense’s due diligence. This further drains precious time and resources, and with limited gains, since a conscientious prosecutor is still no replacement for competent defense counsel.

### Legislative Recommendations

- **Improve public defense funding:** Increase public defense funding generally and specifically to allow for the employment of essential non-attorney staff, such as investigators and social workers.
- **Provide early access to counsel:** Ensure that counsel is provided for all defendants at all first appearances and every stage of the case thereafter.

### DATA COLLECTION

Prosecutorial policy currently suffers from a lack of data,<sup>10</sup> which hampers the ability of innovative prosecutors to make evidence-based policy and improve their decision-making. Without information about outcomes, for example, they have to make educated guesses based on personal experience and office anecdotes about which choices and pathways are most effective. On an individual level, they will be unable to see how their own decisions fit into the wider criminal justice picture, making it more difficult for offices to alter culture and address systemic issues.

Once again, while prosecutors can take important initial steps toward resolving these issues, many remain outside their purview. Usually, they only have direct access to information relating to individuals who return to the court system in some capacity. This leaves out essential data such as arrests and probation outcomes. Further, most prosecutor’s offices do not have the capability to collect large amounts of data from diverse sources. And, even if they do, this can be a recipe for the additional balkanization of data, with each county’s prosecutor collecting slightly different information and storing or cataloguing it in different ways. This can make comparison difficult and obscure wider trends.

### Legislative Recommendations

- **Collect statewide data:** Institute statewide data collection requirements that aggregate the same information across all cities and counties for key criminal justice data. Ensure that this does not become an unfunded mandate for local stakeholders.
- **Provide analytical support:** Improve the data analysis capabilities of state-level actors who can assist prosecutors to use the data to improve operations, and

consider additional direct funding support for prosecutors to develop these capabilities in house.

## POLICE REVIEW

Law enforcement is a difficult job that can require split-second decisions with imperfect information that can lead to life-altering consequences. While good hiring practices, training and policy can reduce their prevalence, mistakes are nevertheless inevitable. Further, it can be incredibly difficult to differentiate which tragic outcomes are the result of proper decisions and unavoidable actions, and which entail greater culpability and, with it, a criminal prosecution or other disciplinary response. Even a determination of the side of the line upon which a given case falls is a challenging one.

Requiring or allowing local prosecutors to make this call can complicate their lives unnecessarily and create bad outcomes. Prosecutors regularly work with the law enforcement officers within their jurisdiction; close relationships are useful and trust is essential. Assessing criminal charges against a member of law enforcement can strain these ties in the best of circumstances and subtly influence the decision in the worst of them. The knowledge of this conflict of interest can likewise undermine public faith in the response, regardless of whether it is the correct one.<sup>11</sup>

Many prosecutors choose to outsource these decisions to an independent counsel, grand jury or prosecutor from a neighboring jurisdiction in order to allay these concerns.<sup>12</sup> This represents an improvement in most instances, but it still creates problems for the original prosecutor and potentially the new one as well. The original prosecutor may face allegations that they designed their policy or made a particular decision with an aim toward a certain outcome; this critique is especially common in response to grand jury referrals. Meanwhile, if the new prosecutor normally works with law enforcement, even if from a different department, it may still raise the exact same issues relating to incentives and appearances. The only way out of this no-win scenario is not to play at all: removing the obligation for prosecutors to make this call.

## Legislative Recommendations

- **Mandate independent review:** Establish and require the use of independent review boards and prosecutors to handle all allegations of police misconduct and potential instances of improper use of force.
- **Eliminate other potential conflicts of interest:** Prevent additional conflicts of interest by prohibiting professional moves that can too closely align the interests of the prosecutors and police, such as sharing a union.

## JUVENILE AND YOUTH JUSTICE REFORMS

The prosecution of younger individuals is an especially delicate proposition with an array of special considerations and concerns. Research suggests that the human brain continues to develop well into an individual's twenties.<sup>13</sup> Indeed, spending even a short period of time with most young adults is enough to realize that they have emotional and psychological needs and capabilities that are fundamentally different than older adults. As such, traditional prosecutorial pathways are often inappropriate for youthful transgressions and juvenile justice is correctly considered a distinct part of the criminal justice system.

The law can further complicate this mission for prosecutors. To begin with, a handful of jurisdictions still treat individuals under the age of 18 as adults for criminal prosecution purposes, and many more extend this adult treatment to youthful offenders charged with certain serious crimes.<sup>14</sup> Often, a prosecutor is required to make the determination whether an individual should be prosecuted as an adult or a juvenile.<sup>15</sup> Mandatory adult prosecutions of juveniles strip prosecutors of the ability to utilize more appropriate juvenile justice measures. Likewise, providing prosecutors with excessive discretion to rule over a person's juvenile status forces them to make decisions that are beyond the scope of the prosecutorial function or usual expertise. In addition, legal requirements that center more on the nature or type of an offense rather than the individual's developmental status can prevent prosecutors from making the most appropriate decision in these instances.

## Legislative Recommendations

- **Treat juveniles as juveniles:** Pass legislation that raises the age of criminal responsibility to at least 18. Limit the circumstances in which an individual below that age may be prosecuted in the adult system, eliminate direct file statutes, and require a judicial determination that considers developmental and psychological factors rather than solely the nature of the offense.
- **Support youth alternatives:** Provide funding and authorization for diversion, alternatives to prosecution and correctional environments for individuals aged 18-24 that are designed specifically for that age group. Consider creating a presumption in favor of their use for certain offenses and/or individuals.

## CONCLUSION

Around the country, prosecutors are shaking up the status quo and envisioning a more fair and effective model. The awesome powers at their disposal grant them the ability to make tremendous strides, often acting with a speed and

precision that the legislature can only envy. But these efforts can neither unilaterally bring all of the change that the criminal justice system requires nor even that which a prosecutor's office needs. Each state legislature must work to support and complement these endeavors.

This requires a combination of legal amendments and targeted funding improvements. In particular, legislative action is necessary to alter laws that place undue burdens on prosecutors, such as those criminalizing minor conduct, requiring prosecutors to rule on local police actions and interfering with a defendant's juvenile status. At the same time, external partners like public defenders and programs like comprehensive data collection require legislative action to successfully support prosecutorial reform efforts.

Reimagining prosecution is no small task. It can use all of the friends and allies it can get. With their hands on different levers in the criminal justice system, legislators and prosecutors have the ability to influence its course in distinct ways. If they pull them in the same direction and work together they can accelerate innovation and the reforms already underway—and incentivize their expansion to new areas.

#### ABOUT THE AUTHOR

**Lars Trautman** is a senior fellow of criminal justice and civil liberties policy at the R Street Institute. His research focuses primarily on reforms that affect our nation's jails and the front end of the criminal justice system, including prosecutorial issues. He previously served as an assistant district attorney in Essex County, Massachusetts.

#### ENDNOTES

1. Del Quentin Wilber, "Once tough-on-crime prosecutors now push progressive reforms," *The Los Angeles Times*, Aug. 5, 2019. <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms>.
2. Prosecutor caseloads in some jurisdictions can reach as high as 1,500 cases annually. See, e.g., Peter A. Joy and Kevin C. McMunigal, "Overloaded Prosecutors" *Criminal Justice* 33:31 (Summer 2018). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3359801](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359801).
3. For example, district attorney Rachael Rollins famously declared a new policy that presumptively diverts or dismisses fifteen misdemeanor offenses. "The Rachael Rollins Policy Memo," Suffolk County District Attorney, March 2019. <http://files.suffolkjudicialattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>.
4. See, e.g., Mark Berman, "These prosecutors won office vowing to fight the system. Now the system is fighting back," *The Washington Post*, Nov. 9, 2019. [https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-1e9-a0c9-6d2d7818f3da\\_story.html](https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-1e9-a0c9-6d2d7818f3da_story.html).
5. See, e.g., Quinton Chandler, "The cost of prosecution: DA says defendants pay too much of Oklahoma's criminal justice tab," *StateImpact Oklahoma*, Nov. 29, 2018. <https://stateimpact.npr.org/oklahoma/2018/11/29/the-cost-of-prosecution-da-says-defendants-pay-too-much-of-oklahomas-criminal-justice-tab>.
6. See, e.g., Erica Pieschke and J.R. Stone, "San Francisco DA Chesa Boudin announces policy to end use of cash bail," KRON4, Jan. 24, 2020. <https://www.kron4.com/news/bay-area/san-francisco-da-chesa-boudin-announces-policy-to-end-use-of-cash-bail>.
7. See, e.g., Adam M. Gershowitz and Laura R. Killinger, "The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants," *Northwestern Law Review* 105:1 (2011), pp. 261-301. <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1184&context=nulr>; Richard A. Oppel, Jr. and Jugal K. Patel, "One Lawyer, 194 Felony Cases, and No Time," *The New York Times*, Jan. 31, 2019. <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html>.
8. See, e.g., John Raphling, "Plead guilty, go home. Plead not guilty, stay in jail," *The Los Angeles Times*, May 17, 2017. <https://www.latimes.com/opinion/op-ed/la-oe-raphling-bail-20170517-story.html>.
9. See e.g., Jackson County, Missouri Prosecutor Jean Peter Baker's comments in Katie Moore, "Missouri prosecutors hold all the cards. Public defenders and vulnerable clients fold," *The Kansas City Star*, Nov. 20, 2019. <https://www.kansascity.com/news/local/crime/article237037239.html>.
10. Robin Olsen et al., "How Do Prosecutors Collect and Use Data in Decisionmaking?," Urban Institute, Sept. 25, 2018. <https://www.urban.org/urban-wire/how-do-prosecutors-collect-and-use-data-decisionmaking>.
11. See, e.g., Caleb J. Robertson, "Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police," *Emory Law Journal* 67:4 (2018). <https://law.emory.edu/eli/content/volume-67/issue-4/comments/restoring-confidence-justice-prosecute-police.html>.
12. See, e.g., Kate Levine, "Who Shouldn't Prosecute the Police," *Iowa Law Review* 101:1447 (2016). <https://ilr.law.uiowa.edu/print/volume-101-issue-6/who-shouldnt-prosecute-the-police>.
13. Leah H. Somerville, "Searching for Signatures of Brain Maturity: What Are We Searching For?," *Neuron* 92:6 (Dec. 21, 2016), pp. 1164-76. <https://www.sciencedirect.com/science/article/pii/S0896627316308091>.
14. Anne Teigen, "Juvenile Age of Jurisdiction and Transfer to Adult Court Laws," National Conference of State Legislatures, Jan. 11, 2019. <https://www.ncsl.org/research/civil-and-criminal-justice/juvenile-age-of-jurisdiction-and-transfer-to-adult-court-laws.aspx>.
15. *Ibid.*