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Letter from the Editor

Andrew Park, The Criminal Law Practitioner

We are in extraordinary times. Amidst protest and the struggle for a fulfillment of the promises of our democracy, there is still an unalienable truth that remains. That those who had the power to create our system, did not create that system equally for all who were to exist in it. In our criminal legal system, the inequities are laid bare. When we observe the actors that constitute the system, it is clear that those with power are disproportionately white, while those who are consistently crushed by that system are black and brown. That system must change, but not one aspect will realign or reform such deeply entrenched structures. However, one good place to start is with the prosecutor.



The Criminal Law Practitioner is proud to publish a series of papers written by the Institute for Innovation in Prosecution (IIP) from the John Jay College, that is a remarkable discussion for one avenue for reform. I am honored to have Lucy Lang, the Director of the IIP, and Professor Angela J. Davis from the Washington College of Law to further introduce this issue to you.

I am extremely fortunate to have an incredible staff that has done an immense amount of work over the past few months. Without them or their dedication, this issue, and the success of our organization, would simply not be possible. I would also like to thank Michael Kahn, Michelle Mason, ShanaKay Salmon from the IIP and the authors of these wonderful pieces for the opportunity to publish their work.

I hope that these pieces are not only provocative, but can provide a roadmap for students, academics, and practitioners in pursuit of finding what we all seek. A fulfillment of the promise that we must all stand equal before the law. It is one step, and we must continue taking steps forward together.

Sincerely,

Andrew Park

Editor-in-Chief

The Criminal Law Practitioner, Vol. XI



Letter from Lucy Lang

Director, The Institute for Innovation in Prosecution



The works in this series are a product of the Institute for Innovation in Prosecution's (IIP) Roundtable on Prosecutor-Led Pretrial Diversion. This initiative, made possible by the generous support of Arnold Ventures, brought together a focused cohort of criminal justice leaders including elected officials, scholars, directly impacted community members, and academics to explore how prosecutors' power can be used to divert people away from the criminal justice system.

The shadow cast by the criminal legal system stamps out the light of too many in our community. More troubling is that those most affected are people of color, disproportionately swept into the system and treated more harshly once caught in its tentacles. The need to reckon with this reality is urgent. As the nation grapples with the ways in which the criminal legal system has harmed the very communities it purports to serve, it is clear that, while needed, reform within the system alone is insufficient; we must focus on keeping people out of the system entirely and provide communities with services, support, and resources to ensure their safety and well-being.

Diversion—especially innovative and scalable programs which address underlying causes of crime and do not shy away from serious offenses—offers an opportunity to meaningfully and humanely reduce the adverse impact of the criminal legal system and imbue the system with human dignity. While diversion is by no means a panacea for all ills in the legal system, it is a powerful tool that prosecutors must employ to shrink the carceral footprint.

As lawyers, prosecutors should be drawn to the mounting evidence that over-incarceration does not reduce crime. What it does, however, is drain communities of resources and remove people from their families only to return them in more dire straits than when they left. What is less clear though is how prosecutors should best buttress their diversion efforts to ensure safer, thriving communities. This project seeks to fill that knowledge gap and chart the path forward. From exploring culture change within prosecutors' offices to discussing ways in which data has been harnessed to build scalable diversion programs, this series should serve as one of the building blocks of a more humane, dignified, and racially just legal system.

These papers, together with the monograph, create a framework from which prosecutors and the communities they serve can begin to understand what is and what can be. The monograph, *Mapping the Landscape of Prosecutor-Led Pretrial Diversion*, not only examines the state of diversion around the country but also sets forth a vision for what diversion, used appropriately, can accomplish. The three papers cut to the core of creating



an equitable and effective diversion program. By first tackling the issue of office culture in *Prosecution Office Culture and Diversion Programs* McCann, Oliva, and Wright lay the groundwork for cultivating office buy-in implementing a diversion program. Next, the two papers on use of data engage with the lifeblood of any effective program. Concannon and Hemmady explore how prosecutors can use data to inform their decision making in program design while Flynn, Olsen, and Wolk, present a compelling guide for how to build out a meaningful data-based program that provides relevant feedback. Together, these articles lay the foundation for changing the criminal legal system for the better.

The IIP provides a collaborative national platform that brings together prosecutors, policy experts, and the communities they serve to promote data-driven strategies, cutting-edge scholarship, and innovative thinking. This series fits within the IIP's mission to reshape the criminal legal system in ways that have tangible positive effects on those most impacted. We hope that this series will lead to a more just system by helping shape the future of prosecutor-led diversion.

For further information about our work, please write to IIP_JohnJay@prosecution.org and follow us at @IIP_JohnJay.

A handwritten signature in black ink that reads "Lucy Lang". The signature is fluid and cursive.

Lucy Lang

Director

Institute for Innovation in Prosecution



An Introduction by Angela J. Davis

Distinguished Professor of Law, American University
Washington College of Law

The scourge of mass incarceration has plagued the United States for decades. With roughly 2.3 million people in federal and state prisons and close to 7 million people under some form of criminal justice control¹—in prison or jail or on probation and parole—this country maintains the unenviable status of having the highest incarceration rate in the world. Demands for reform have come in fits and starts, resulting in modest changes that have done little to reduce the number of people incarcerated or under some other form of control by the criminal legal system.



Severe and unwarranted racial disparities at all levels of the criminal legal system exacerbate the crisis of mass incarceration even further. Black and brown people are treated worse than their similarly situated white counterparts at every step of the criminal process, from arrest to sentencing.² These disparities exist whether a black or brown person is charged with a crime or is the victim of a crime.

Although the causes of mass incarceration and pervasive unwarranted racial disparities are complex and varied, discretionary decisions by criminal justice officials play a significant role in perpetuating these unjust outcomes. By way of example, when police officers exercise their considerable discretion to make an arrest, they bring individuals into the criminal legal system, and when they racially profile, they produce unwarranted racial disparities at the front end of the system. When prosecutors choose to bring charges, they further entrench individuals in the system, and when they exercise their charging power in ways that produce racial disparities, they further contribute to the problem. Judges, probation and parole officers, and corrections officials also make decisions that contribute to the joint problems of mass incarceration and racial disparity.

There is no one better suited to address these crises in our criminal justice system than the prosecutor. As the most powerful official in the system, prosecutors determine the direction of our criminal justice system through their discretionary charging decisions. They decide whether a person should be charged with a crime and what the charge or charges should be. If prosecutors decide to make charging decisions with the goal of reducing the incarceration rate and racial disparities, they can begin to address these problems in a meaningful way.

1 Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

2 *Report to the United Nations on Racial Disparities in the Criminal Justice System*, SENTENCING PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.



The overwhelming majority of criminal cases are prosecuted on the state and local levels, and most state and local chief prosecutors are elected officials. In the past, most elected prosecutors ran for office unopposed and served for decades. However, in recent years, there has been a noticeable shift in prosecutorial elections. The criminal justice reform movement has inspired a number of individuals to run for district attorney on a platform of using their power and discretion as prosecutors to reduce the incarceration rate and racial disparities pervading the criminal justice system. These so-called “progressive prosecutors” have successfully defeated long-standing incumbents in a number of high-profile races³ and have begun to implement new policies and practices to fulfill their promises to transform the criminal legal system.

Diversion is one strategy that prosecutors can use to reduce the incarceration rate. There are many different types of diversion programs, but all of them seek to provide an alternative to incarceration and/or a criminal conviction. Drug courts and other alternative courts divert cases out of the system on the condition that the accused receive treatment, counseling, or some other form of rehabilitative assistance. Other diversion programs lead to the dismissal of the criminal case if the accused does community service, pays restitution, or participates in some other program that seeks to address the issues that lead to his or her arrest. Criteria for participation in diversion programs vary widely. Some programs only admit first offenders accused of minor crimes while others admit individuals charged with a wider range of offenses and/or who have some criminal history. Courts fund and manage some diversion programs while prosecutors initiate and run others. Diversion programs have been in existence for decades, and most jurisdictions offer some type of diversion. However, despite the widespread use of these programs, the incarceration rate has not declined significantly over the years. All of the newly-elected progressive prosecutors have promised to expand the use of diversion. But without data and evidence, it is difficult to determine what type of expansion holds the most promise of success. Hence, the need for a roundtable to evaluate the collection of data, diversion criteria, and the measurement of success.

On December 3, 2018, the Institute for Innovation in Prosecution (“IIP”) convened a Roundtable on Prosecutor-Led Pretrial Diversion. This day-long roundtable brought together prosecutors, other criminal justice officials, and directly impacted individuals to examine diversion as a strategy to address some of the problems plaguing the criminal legal system. The IIP was uniquely suited to convene this roundtable because of its work with prosecutors across the country to promote “safety, fairness, and dignity” in the criminal justice system. The IIP has sponsored numerous projects and events with the aim of achieving that goal, including an Executive Session on “Reimagining the Role of the Prosecutor in the Community.” The Executive Session convened elected prosecutors, criminal justice officials, academics, formerly incarcerated individuals, and legal experts to discuss the issues, do research, and author papers on some of the most pressing issues in the criminal system, including racial inequities and other injustices.⁴

3 Some high-profile examples of recently elected progressive district attorneys include Larry Krasner in Philadelphia, Pennsylvania and Rachael Rollins in Suffolk County, Massachusetts. See Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (Jul. 23, 2019), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty>.

4 Other IIP projects include a Re-entry Simulation for prosecutors and communities and a criminal justice seminar that connects prosecutors and incarcerated individuals. See *Re-Entry Simulation*, INST. FOR INNOVATION IN PROSECUTION, <https://www.prosecution.org/reentrysimulation>; *Inside Criminal Justice*, INST. FOR INNOVATION IN PROSECUTION, .



This edition of the Practitioner features a report on the IIP Roundtable and three papers that discuss and analyze some of the important issues raised at this event. In “Mapping the Landscape of Prosecutor-Led Pretrial Diversion,” David Noble summarizes the work of the Roundtable and provides a comprehensive analysis of diversion. He also expands upon the work of the Roundtable’s participants by further exploring several important issues relevant to the successful implementation of diversion as a strategy to transform the criminal legal system. “Prosecution Office Culture and Diversion Programs” by Beth McCann, Courtney Oliva, and Ronald Wright explores an important issue that many prosecutors face—how to overcome internal opposition to the successful implementation of new diversion programs in their offices. In “Innovative Approaches to Diversion Data,” Sean Flynn, Robin Olsen, and Maggie Wolk discuss how to collect, analyze, and share data in order to implement an effective and efficient diversion program. Connor Concannon and Shona Hemmady discuss how prosecutors can use data to inform decision-making in “How Data Analysis Can Shape Diversion Policy.” Together these four articles illustrate the promise of diversion while exposing the challenges and roadblocks of implementing diversion programs. The articles demonstrate that diversion, if implemented properly, can be an effective tool in the movement to transform the criminal justice system.

Angela J. Davis

Distinguished Professor of Law
Washington College of Law





Mapping the Landscape of Prosecutor-Led Pretrial Diversion¹

BY DAVID NOBLE

On December 3, 2018, the Institute for Innovation in Prosecution (IIP), with the support of Arnold Ventures, convened for a roundtable discussion on Prosecutor-Led Pretrial Diversion.² The daylong convention brought together an impressive and diverse group of practitioners, academics, and people directly impacted by the criminal justice system to begin building a knowledge base on an understudied area of prosecution. Diversion is generally understood as an “off-ramp” from the harmful effects of traditional criminal justice and can take many forms, such as drug court, mental health treatment, and restorative justice. With discretion in over charging, pretrial recommendations, and plea conditions, prosecutors make decisions that affect a defendant’s³ case at almost every stage of the criminal justice process. Yet, there are significant research and data gaps regarding prosecutorial decision-making, particularly the decision to

divert.⁴ Furthermore, various stakeholders in diversion programs—justice officials, service providers, and participants—all have their own definitions of success. Given these complexities, the Roundtable and the accompanying literature represent necessary first steps in assessing the role that diversion might play in the movement to transform criminal justice in the United States.

The current bipartisan consensus around the need for criminal justice reforms presents an ideal climate for an examination of diversion, and prosecutors are uniquely positioned to lead this effort. As Jeremy Travis, Executive Vice President of Criminal Justice at Arnold Ventures, said during the Roundtable, “because prosecutors are elected, they have to have a conversation with the electorate.” In recent years, as evidenced by the successful elections of so-called progressive prosecutors in cities such as Chicago, Illinois; Houston, Texas; and Philadelphia, Pennsylvania, voters have made clear their desire for public safety strategies that promote healing and wellness over punishment and retribution. People directly impacted by the criminal justice system are making their voices heard as never before. Where does diversion figure in this discussion? In answering this question, the Roundtable’s organizers and participants identified the following objectives:

- To assess the landscape of prosecutor-led pretrial diversion, including existing data and gaps in knowledge;
- To develop knowledge on diversion through scholarly research and informed debate;
- To create a comprehensive “360-degree analysis” of diversion from the perspective of *all* stakeholders—including prosecutors, defense counsel, service providers,

¹ This piece was originally published in the *Criminal Law Practitioner*, Volume X, Issue II as “Executive Summary of the Institute for Innovation in Prosecution (IIP) Diversion Roundtable”

² This monograph is part of a series on Prosecutor-Led Pretrial Diversion, prepared by the Institute for Innovation in Prosecution in Partnership with Arnold Ventures.

³ Throughout this monograph, the word “defendant” is used to refer to the procedural posture of individuals in the position of defendant throughout a proceeding. One theme of discussion at the Roundtable, however, was the importance of the humanization of all people in contact with the criminal justice system. To that end, all criminal justice system actors are encouraged to refer to defendants by their names, an important step in restoring dignity to the system at large.

⁴ While outside the scope of this paper, it should be noted that there are legitimate due process concerns with diversionary programs that must be taken seriously during design and implementation.



community advocates, victims, participants, and defendants who wanted to participate but instead received traditional sanctions.

- To develop a better understanding of how success can and should be measured, based on the perspectives and experiences of people who directly engage with or are excluded from diversion.

In preparation for the Roundtable, the IIP produced a preliminary landscape analysis of prosecutor-led pretrial diversion that featured a brief historical overview, a typology of diversion models, and a review of existing academic literature with an eye towards opportunities for future research. The IIP also administered a survey questionnaire to participants to capture the varying perspectives and approaches for understanding diversion and measuring its impacts. As expected, the survey responses reflected the diversity of participants' backgrounds and areas of expertise, which encompass prosecution, policing, reentry, community advocacy, public health, and restorative justice, among many others. (Appendix A contains detailed biographies of the participants.) Two themes emerged from the surveys. The first is the notion that community engagement is integral to the design, implementation, and ultimate success of diversion. The second is that the field needs to move beyond recidivism as a primary success metric. Both themes reappeared during the Roundtable discussion itself.

The Roundtable comprised a series of individual presentations paired with open conversation that moved back and forth between practical aspects of diversion, such as target populations and performance metrics, and bigger-picture theoretical concerns. Early on in the proceedings, one discussant asked the group to take a step back and consider the larger implications of their work. "What should the criminal justice system look like?" he asked. "How

should prosecutors respond to offending?" From his perspective, to properly frame the potential of diversion, the objectives of the system as a whole need to be considered first. On a related note, several participants objected to the notion of diversion as an "alternative" to "normal" criminal justice processing. Instead, they envision a world in which what is now known as "diversion" is the first response to crime. For this shift to occur, system actors will have to cede space and power to community-based organizations, specifically those located in neighborhoods that have borne the brunt of mass incarceration. This report expands upon the ideas developed at the Roundtable and attempts to locate diversion along a continuum toward transformative change. Sections are summarized below:

Section I: Diversion in the Age of Mass Incarceration

Jurisdictions around the United States began institutionalizing diversion in the early 1970s, at the dawn of a period during which the country's prison and jail populations multiplied several times over. Early academic evaluations showed that diversion produced mixed results on criminal justice penetration and recidivism. Nevertheless, prosecutors and other officials, acknowledging the obvious failures of the wars on crime and drugs, developed innovations such as drug courts and community courts to deal with the explosion in the number of people under correctional control. Today, the majority of prosecutor's offices employ some form of diversion. This section outlines three core values that ought to drive all diversionary efforts: accessibility, efficacy, and equality.

Section II: Culture Change—Inside and Outside the Prosecutor's Office

Following several decades dominated by "tough-on-crime" rhetoric and policies, district



attorneys across the political spectrum have committed to reducing the footprint of criminal justice. Though these prosecutors may have the support of their most engaged constituents, achieving staff buy-in regarding diversion programs is no simple task. To this end, a DA can implement strategies such as rewriting their office's mission statement, creating performance metrics for line prosecutors that align with diversion goals, and bringing in outsiders to head diversion initiatives. Chief prosecutors should also aim to be thoughtful and strategic in their hiring and onboarding processes.

Section III: The Data Problem

Traditionally, prosecutors and other stakeholders have gauged the success or failure of diversion based on the rate of recidivism among participants. This is problematic, in part because it is extremely difficult to draw a causal link between a diversion model's offerings and whether or not a participant is rearrested. Further, recidivism cannot properly account for the progress an individual makes towards strengthening familial and communal ties, furthering their education, or improving their employment prospects. This section considers success metrics that more closely reflect the goals of diversion. It also explores existing evaluations of prosecutor-led diversion and steps that prosecutor's offices can take to improve their ability to measure the impacts of diversion.

Section IV: Looking Ahead

The lack of comprehensive research and data on prosecutor-led diversion should not deter practitioners from experimenting with established models. This is not to suggest that prosecutors should undertake initiatives without careful forethought and preparation. Rather, prosecutors and other stakeholders must recognize two important realities: First, criminal

justice policies of the last 50 years have generated immense human and financial costs. Second, the evidence that will either confirm or invalidate diversion's usefulness will only materialize with broader implementation and evaluation. In the long term, criminal justice stakeholders should acknowledge that public safety issues related to poverty, mental illness, substance abuse, and other social concerns should be handled primarily within the community.

I. Diversion in the Age of Mass Incarceration

A. *Mass Incarceration and the Role of Prosecutors*

The facts of mass incarceration in the United States are stark and well-known. More than 2.1 million people languish in prisons and jails around the country, a five hundred percent increase since the 1970s.⁵ An additional 4.5 million people are on probation and parole.⁶ Disparities abound in the criminal justice system, wherein Black Americans are nearly six times as likely to be incarcerated as whites, and Hispanic Americans are more than three times as likely.⁷ The collateral consequences of incarceration continue long after people leave prison, as they struggle to find housing, secure employment, exercise their voting rights, or otherwise reintegrate into society.⁸ In the face of these realities, diverse

⁵ *Criminal Justice Facts*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/criminal-justice-facts>.

⁶ Danielle Kaebler & Mary Cowhig, U.S. Dep't of Just., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 2 (Caitlin Scoville & Jill Thomas eds., 2018) [hereinafter CORRECTIONAL POPULATIONS].

⁷ See generally The Sentencing Project, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE (2018) (discussing in-depth the racial disparities in the U.S. criminal justice system) [hereinafter SENTENCING REPORT].

⁸ See Catherine E. Forrest, *Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry*, NIJ UPDATE, Jan./Feb. 2016, at 30-31.



stakeholders—advocates, activists, people directly impacted by the system, law enforcement, politicians, voters—have confronted the excesses of punishment, policing, and surveillance. This work, coupled with plummeting crime rates around the country, has undergirded the halting shift from the “tough on crime” era to our current moment, in which appeals for more humane, evidence-based justice come from both sides of the political aisle. To quote public health scholar Ernest Drucker, “the emerging consensus that we simply cannot lock up so many people in prisons and jails stands to be one of the greatest victories for justice in America in our lifetimes.”⁹

The consensus Drucker refers to has produced tangible positive results, though not enough to return the U.S. to anywhere near the incarceration levels of the mid-20th century. As the criminal justice reform movement has gained traction, the total number of people housed in prisons and jails or under correctional supervision has dropped steadily since 2008, according to the Department of Justice’s Bureau of Justice Statistics.¹⁰ As of 2016, “42 states had at least modestly downsized their prison populations from their peak levels.”¹¹ Alaska, California, Connecticut, New Jersey, New York, and Vermont, whose prison populations peaked sometime between 1999 and 2007, have all achieved reductions of more than 25 percent.¹² Further, after reaching a historic high in 2011, the federal prison population has since declined by 13 percent,¹³ thanks in large part to a 2014 change to sentencing guidelines for drug trafficking.¹⁴

Yet even amidst all of this progress, the U.S. still incarcerates more people than any other country in the world. According to a 2018 report by the Sentencing Project, “at the pace of decline since 2009, it will take until 2093 to cut the U.S. prison population by 50%.”¹⁵

In the most basic terms, reducing the number of people under correctional control entails releasing people who are currently imprisoned and sending fewer people to prison in the first place. The former can be achieved through sentencing reforms, among other strategies. The latter will require widespread policy and practice changes across the justice system but particularly within the prosecutor’s office, where attorneys wield the power to file charges, decline to prosecute cases, or offer defendants a pathway to treatment and rehabilitation.

Within the decarceration movement, prosecutors have been cast as both scapegoats and potential saviors. While prosecutors were once able to operate under a shroud of secrecy, in recent years leading thinkers in the field have shone a harsh light on prosecutorial discretion and its potential for abuse. American University law professor Angela J. Davis argues that “because prosecutors play such a dominant and controlling role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.”¹⁶ While acknowledging that race rarely figures consciously in prosecutors’ decision-making, she maintains that they should make efforts to discover the racial impact of their practices and policies and work to institute effective reforms.¹⁷

Fordham University law professor John Pfaff, another vocal critic, primarily blames prosecutors for the rise in incarceration during the 1990s and early 2000s. According to Pfaff’s

9 DECARCERATING AMERICA: FROM MASS PUNISHMENT TO PUBLIC HEALTH 2 (Ernest Drucker ed., 2018).

10 CORRECTIONAL POPULATIONS, *supra* note 6.

11 See generally Nazgol Ghandnoosh, The Sentencing Project, CAN WE WAIT 75 YEARS TO CUT THE PRISON POPULATION IN HALF? (2018), <https://www.sentencingproject.org/publications/can-wait-75-years-cut-prison-population-half>.

12 *Id.* at 2.

13 *Id.* at 2.

14 *Policy Shifts Reduce Federal Prison Population*, UNITED STATES COURTS (Apr. 25, 2017), <https://www.uscourts.gov/news/2017/04/25/policy-shifts-reduce-federal-prison-population>.

15 Ghandnoosh, *supra* note 11, at 2.

16 Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 16-17 (1998).

17 See *id.* at 17-18.



analysis of filings from more than thirty state courts, the percentage of arrests that were filed as felonies rose by one-third during this time.¹⁸ Not coincidentally, he writes, “the probability that a prosecutor would file felony charges against an arrestee basically doubled, and that change pushed prison populations up even as crime dropped.”¹⁹ The policy solutions Pfaff offers—such as instituting stricter charging and plea bargaining guidelines—would rein in prosecutorial discretion. A district attorney could also respond to critiques regarding the influence of prosecutors on racial disparities and increased incarceration by utilizing the practice of diversion to shield defendants from collateral consequences, connect them to service providers and other helpful resources, and offer the community more meaningful involvement in public safety.

B. *The Early Years of Diversion*

Diversion became a formal—as opposed to ad hoc—practice when “the diversion movement was launched during the 1960s within the context of the mounting political concern over poverty and racism, and over their correlates—crime, recidivism, overloaded courts and correctional institutions.”²⁰ For years prior, police and judges neglected to arrest, prosecute, or convict individuals, particularly juveniles, they deemed deserving of leniency. Even if this ad hoc form of diversion decreased incarceration in some places, its implementation depended on the whims of individual actors and was not necessarily subject to external scrutiny. Moreover, it did not always

include the provision of services.²¹ This unchecked discretion opens the door to inconsistent justice and leaves further vulnerable defendants who tend to receive unequal treatment—the poor and minorities. Amidst the social and political upheavals of the ‘60s, marked by the beginnings of a crime spike that would not abate for several decades,²² reformers sought to expand and refine diversion in order to remedy some of the justice system’s failures.

As sociologist Sally T. Hillsman writes, pretrial diversion initiatives of this era focused on “young adult defendants, generally socially disadvantaged, who were being brought before the criminal courts in ever-increasing numbers.”²³ Reformers asserted that the justice system was ill-suited to address behavioral issues related to substance abuse, mental illness, or poverty, and oftentimes made these problems worse. Further, they cast a wary eye towards the charging power of prosecutors, whose ballooning caseloads seemed to present a barrier to fair and consistent decision-making. As an alternative, reformers urged prosecutors to formalize processes for referring defendants to services such as drug and alcohol treatment, counseling, and job training. If defendants completed their treatment successfully, their charges would be dismissed; if not, their cases would be sent back to the court for criminal prosecution. For example, the Manhattan Court Employment Project, which inspired copycats around the country, offered participants group therapy and job counseling in lieu of trial.²⁴ The main objectives of such initiatives were to reduce recidivism and enhance rehabilitation by minimizing defendants’ involvement in the justice system and steering them towards helpful

18 John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (July 12, 2011) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990508.

19 Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, THE MARSHALL PROJECT (Feb. 9, 2017), <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong>.

20 Sally T. Hillsman, *Pretrial Diversion of Youthful Adults: A Decade of Reform and Research*, 7 JUST. SYS. J. 361, 363 (1982).

21 *Id.* at 362.

22 Steven Pinker, *Decivilization in the 1960s*, HUMAN FIGURATIONS (July 2013), <https://quod.lib.umich.edu/h/humfig/11217607.0002.206?view=text;rgn=main>.

23 Hillsman, *supra* note 20, at 362.

24 *See generally* Franklin E. Zimring, *Measuring the Impact of Pretrial Diversion from the Criminal Justice System*, 41 U. CHI. L. REV. 224, 224-41 (1973).



community resources.

In a 1967 report titled "The Challenge of Crime in a Free Society," the President's Commission on Law Enforcement identified "early identification and diversion to other community resources of those offenders in need of treatment"²⁵ as a remedy for inefficiency in local justice systems. This recommendation spurred an influx of federal funding for diversion in the states. As a result, the number of formal diversion programs nationwide multiplied from four in 1970 to 148 in 1976.²⁶ Attempts to evaluate the efficacy of these programs soon followed. Because a sizeable portion of these initiatives were dedicated to juvenile defendants, much of the literature assessed the impacts on this population.

Theoretically, juveniles were an ideal target population for diversion because their offenses tended to be less serious than those of adults and they were less likely to have acquired lengthy rap sheets. Diversion allowed criminal justice actors and service providers to intervene before youthful indiscretion turned into a pattern of criminal offending. Acknowledging the benefits diversion offered young defendants, many observers warned of the potential for "net widening."²⁷ In other words, if programs swept up young people who previously would have eluded criminal supervision, then they were arguably guilty of "incorporating a whole new class of clients inside an expanding justice system."²⁸ Echoing this point, several studies concluded that the existence of diversion programs increased the number of wayward youths referred to the courts by caregivers, social service practitioners, and school administrators. Evaluations of juvenile diversion also produced mixed results on measures

of recidivism. Some programs demonstrated a positive impact while others showed a negligible or even negative impact. Studies that analyzed programs for adult offenders reached similarly murky conclusions about impacts on recidivism, educational or employment outcomes, and the potential for diversion to lead to judicial system overreach.²⁹ While the programs studied shielded a majority of participants from conviction, in many instances the courts probably would have treated these cases leniently and defendants would not have faced severe sanctions, including jail time. Though the results from early evaluations of diversion indicated that the practice was far from "an all-purpose solution to virtually every criminal justice problem,"³⁰ diversion continued to grow in popularity and evolve in form.

One method of diversion that proliferated in the late '80s and beyond was the drug court,³¹ an attempt to "use the criminal justice system to address addiction through an integrated set of social and legal services instead of relying [on] incarceration or probation."³² The first drug court opened in Miami, Florida, in 1989. Over the next 20 years, more than 1,600 other jurisdictions adopted the model.³³ The body of evidence on drug courts suggests that they reduce recidivism and for this reason save money for justice agencies. As with the first generation of diversion initiatives, however, research findings have not been positive across the board. Still, the development of drug court and other innovations, discussed below, evinced that prosecutors and other stakeholders were grappling with the system's failings, even as the tough-on-crime culture persisted.

C. The Present and Future of Diversion

Today, "diversion" encompasses a broad

25 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 134 (1967).

26 Hillsman, *supra* note 20, at 366.

27 Daniel P. Mears et al., *Juvenile Court and Contemporary Diversion: Helpful, Harmful, or Both*, *Criminology & Pub. Pol'y* 953, 954 (2016).

28 Kenneth Polk, *Juvenile Diversion: A Look at the Record*, 4 *Crime & Delinquency* 648, 654 (1984).

29 Hillsman, *supra* note 20, at 363-65.

30 *Id.* at 366.

31 RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, *DRUG COURTS: A REVIEW OF THE EVIDENCE* 1 (2009).

32 *Id.* at 1.

33 *Id.*



range of initiatives aimed at leading people who have been arrested away from traditional criminal justice processing. According to a 2018 report on prosecutor-led diversion published by the National Institute of Justice (NIJ), in contrast to the reformers of the 1970s, modern-day practitioners aim first and foremost to produce cost and time savings and lessen the burden of conviction and collateral consequences.³⁴ A survey conducted by the Center for Court Innovation (CCI) revealed that prosecutor's offices also strive to hold participants accountable through the diversion process.³⁵ Included under the wide umbrella of diversion are models such as problem-solving courts, substance abuse and mental health treatment, educational classes, community service, and restorative justice.

Problem-solving courts address offenses related to individual "problems," such as drug addiction or mental illness; specific offense types, such as domestic violence or prostitution; and certain defendant populations, namely veterans. These courts include so-called community courts, which "combine punishment and help, requiring offenders to pay back the community by participating in restorative community service projects while also participating in individualized social service sanctions, such as drug treatment or mental health counseling."³⁶ With some similarities to community courts, restorative justice practices enhance community participation in criminal justice by facilitating dialogue between crime survivors and perpetrators to repair harm and create accountability for defendants.³⁷

Compared to the traditional process, restorative justice focuses less on retribution than on the healing of victims, offenders, and the community. It is viewed as a particularly suitable intervention for juvenile defendants.³⁸ Restorative justice is generally not, however, considered an appropriate form of redress for serious violence such as rape or murder.³⁹ Prosecutors play a key role within all of the diversionary models.

The responsibilities of the prosecutor within diversion depend on the jurisdiction and the specific characteristics of the program. Programs differ in terms of when individuals are diverted (before or after charging), services offered, and eligibility requirements, such as offense type or criminal history. When diversion occurs prior to charging, prosecutors often determine the eligibility criteria and screen applicants. If diversion is contingent upon a guilty plea, a prosecutor may shape the nature of this plea and ultimately dismiss the charges once the defendant has fulfilled the terms of the agreement. If a participant fails to complete a program's requirements, prosecutors may be responsible for either filing charges or allowing the individual to reenter the program. In community courts, which are typically run by people who are not affiliated with a justice agency, prosecutors sometimes occupy administrative or supervisory roles. A prosecutor's office has the power to create and fund a program without overseeing its day-to-day operations. Whether a given program is led by a prosecutor's office or simply supported by one, diversion generally involves collaboration between justice agencies, service providers, community representatives, and, ideally, outside evaluators.

Before exploring the potential benefits,

34 MICHAEL REMPEL ET AL., CENTER FOR COURT INNOVATION, NIJ'S MULTISITE EVALUATION OF PROSECUTOR-LED DIVERSION PROGRAMS: STRATEGIES, IMPACTS, AND COST-EFFECTIVENESS 1, 35 (2018).

35 MICHELA LOWRY & ASHMINI KERODAL, CENTER FOR COURT INNOVATION, PROSECUTOR-LED DIVERSION: A NATIONAL SURVEY i, iv (2019).

36 JULIUS LANG, CENTER FOR COURT INNOVATION, WHAT IS A COMMUNITY COURT? HOW THE MODEL IS BEING ADAPTED ACROSS THE UNITED STATES 1, 3 (2011).

37 *Common Justice Model*, COMMON JUSTICE, https://www.commonjustice.org/common_justice_model (last visited Dec. 14, 2019).

38 DAVID B. WILSON ET AL., U.S. DEP'T OF JUST., EFFECTIVENESS OF RESTORATIVE JUSTICE PRINCIPLES IN JUVENILE JUSTICE: A META-ANALYSIS 1, 4 (2017).

39 Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES (Jan. 4, 2013), <https://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>.



drawbacks, and challenges of implementing diversion, it is worthwhile to consider the values that can guide policy and practice for all collaborators.

In designing and implementing a diversion program, both to counteract the forces that built mass incarceration and to create a range of proportional responses to crime, prosecutors and their collaborators should strive to uphold three values—**accessibility, efficacy, and equality**. Diversion alone cannot solve an intricate, messy problem that is decades in the making. Through the lens of systems analysis, however, the points of arrest, charging, and sentencing are all potential leverage points, or “places within a complex system ... where a small shift in one thing can produce big changes in everything.”⁴⁰ Practitioners and academics have been trying for years to puzzle out exactly when and how to divert defendants in order to fix a range of issues in the justice system. If there is a place for diversion in a larger, system-wide transformation, the practice must align with loftier goals than time and cost savings or decreased recidivism. The first value—**accessibility**—furthers the idea that diversion should be an option available to prosecutors across jurisdictions for all cases in which it would be a measured and humane response to the offense.

As democratically elected officials, prosecutors have the means and mandate to elevate diversion as a normative response to crime rather than an “alternative.” Accomplishing this requires, in part, an interrogation of prevailing attitudes towards punishment. The consensus among scholars is that, until the early 1970s, the main objective of criminal sanctions in the U.S., at least as professed by justice officials, was to rehabilitate offenders.⁴¹ With the nationwide

crime rise, “criminal justice policy became much more punitive, and the primary goal of prison moved from rehabilitation to retribution and crime control.”⁴² As this shift took hold, the number of offenses punishable by incarceration multiplied and sentence lengths shot up. These were developments that district attorneys not only welcomed but also actively pushed for.⁴³ In doing so, prosecutors reinforced the sentiment, widely held among both voters and justice officials, that the crime spike necessitated an equally strong law enforcement response. More specifically, the proliferation of mandatory minimums strengthened prosecutorial discretion because it allowed prosecutors to hang long sentences over the heads of defendants and force them to accept plea deals.⁴⁴ Now that crime rates are nearing historic lows and the country faces the wreckage of mass incarceration, prosecutors have an opportunity to emphasize the importance of proportionality in punishment, even for violent crimes.

Historically, diversion efforts have excluded violent offenders. Reformers of the 1960s and ‘70s believed that the criminal justice system swept up an inordinate number of people guilty of “crimes having no victims”⁴⁵ that would be better remedied through rehabilitative or educational efforts. Proponents of diversion did not seek to extend a similar leniency to violent offenders, and this tradition remains more or less intact today. From a prosecutor’s perspective, diverting someone who was charged with a violent offense (or has a history of violent crime) poses a public safety risk, as well as a political one. No district attorney wants to have to explain to constituents why they referred a person charged

40 Donella Meadows, *Leverage Points: Places to Intervene in a System*, THE DONELLA MEADOWS PROJECT, <http://donellameadows.org/archives/leverage-points-places-to-intervene-in-a-system> (last visited Dec. 14, 2019).

41 Albert Altschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003).

42 National Research Council of the National Academies, *Principles to Guide Policies on Punishment* (2015).

43 Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 395-439 (2017).

44 Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), <https://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>.

45 Hillsman, *supra* note 20, at 365.



with felony assault to substance abuse treatment rather than jail, only to have that person harm another community member. Properly examining the merits of incarceration as a response to violence would require a much more in-depth discussion. However, it should be noted that practitioners are experimenting with diversion for violent crimes, including in New York City.

New York's boroughs of Brooklyn and the Bronx are among the few jurisdictions in the country that apply an institutionalized restorative justice model to serious violent felonies (excluding rape and murder), through the organization called Common Justice. In an interview with The Marshall Project, Common Justice founder and director (and Roundtable participant) Danielle Sered described the impetus behind her organization's "survivor-centered" approach:

Restorative justice has been demonstrated both to meet the needs of victims and to reduce recidivism, which means we can deliver on healing and safety at the same time What's powerful about those kinds of processes is it forces somebody who has committed harm to come face-to-face with the human impact of what they've done One of the problems with prison is that there is never a time in the prisoner's incarceration where they are required to actually grapple with the impact their choices had on other people's lives.⁴⁶

According to Sered, around 90 percent of survivors who have been given the choice between having their attacker incarcerated or participating in Common Justice have chosen the latter.⁴⁷ In a similar vein to Sered, a 2001 study looking at twenty years of research on restorative justice claims that "victims who seek and choose this kind of encounter and dialogue with an individual who

brought unspeakable tragedy to their lives report feelings of relief, a greater sense of closure, and gratitude for not being forgotten and unheard."⁴⁸ They acknowledge that such work is time, and resource intensive, and staff must undergo special training to perform the work effectively.

For prosecutors skeptical of diverting violent offenders, expanding eligibility to people arrested for nonviolent felonies would be a step towards reversing the staggering increase in felony charges seen nationwide between 1980 and 2010.⁴⁹ (A Center for Court Innovation survey of 220 prosecutors' officers found that a little more than half of jurisdictions offered diversion for nonviolent felonies.⁵⁰) On a related note, rather than only offering diversion for first-time offenses, jurisdictions could seek out people who cycle in and out of the justice system and could benefit most from personalized services and support.⁵¹ Finding the right treatment for people whom the system has failed is a task that calls for rigorously tested, evidence-based practices. Thus, if prosecutors wish to use diversion to break the cycle of incarceration, they cannot lose sight of the second value—**efficacy**.

Like any public safety strategy, diversion is only worthwhile if it is effective. Mass incarceration has failed not only because of its exorbitant financial costs and the untold damage it has done to individuals, families, and communities, but also because it has not improved public safety. According to a report by the Vera Institute of Justice, "somewhere between 75 and 100 percent of the reduction in crime rates since

46 Danielle Sered, *Is Prison the Answer to Violence?*, THE MARSHALL PROJECT (Feb. 16, 2017), <https://www.the-marshallproject.org/2017/02/16/is-prison-the-answer-to-violence?ref=hp-1-111#.PL46MpFmf>.

47 *Id.*

48 Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FEDERAL PROBATION 29, 33 (2001).

49 Sarah K. S. Shannon et al., *The Growth Scope, and Spatial Distribution of People With Felony Records in the United States, 1948-2010*, 54 DEMOGRAPHY 1, 20-21 (2017).

50 Lowry, *supra* note 35.

51 THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, *Launching the Data-Driven Justice Initiative: Disrupting the Cycle of Incarceration* (Jun. 30, 2016) <https://obamawhitehouse.archives.gov/the-press-office/2016/06/30/fact-sheet-launching-data-driven-justice-initiative-disrupting-cycle>.



the 1990s is explained by⁵² factors other than increased incarceration. This fact alone should encourage prosecutors to harness their discretion to implement novel responses to behaviors that cause harm and disturb the public order. However, before utilizing diversion, prosecutors should solicit input from all relevant stakeholders and should draw from evidence-based practice.

A lack of careful forethought and planning may lead to flaws in diversion program design. Participation in diversion should not be so burdensome that it prevents defendants from keeping a job, pursuing education, or attending to other important responsibilities. As the Roundtable participants noted, when the demands of diversion, such as a lengthy time commitment, are particularly onerous, defendants may instead elect to move forward with a plea or trial. Similarly, if practitioners do not account for the likelihood that participants will make missteps, they may establish rules that ultimately set defendants up for failure (and further system penetration). Stringent diversion requirements may appeal to stakeholders and observers with a more hardline stance regarding criminal sanctions, but they contradict the notion that the justice system too often asserts undue control over people's lives. These sorts of unwanted outcomes should be on the minds of prosecutors as they seek inspiration from the available research.

Admittedly, a challenge prosecutors face is, as the aforementioned NIJ report on prosecutor-led diversion states, the body of evidence in favor (or against) diversion is "limited."⁵³ While the report's authors refer specifically to the lack of comprehensive data regarding diversion's effects on reoffending and cost savings, the same could be said for measures of harm reduction, mental health outcomes, survivor perceptions of justice, community wellness, and the extent to

which diversion decreases the amount of contact defendants have with the system. This lack of information limits the spread of potentially transformative practices and compromises public trust in diversion.

Practitioners have a responsibility to understand how diversion can address specific public safety issues and to communicate this information to their constituents, as well as other justice officials. To maintain public support and treat defendants with dignity and respect, prosecutors and other stakeholders should champion diversion as a fundamental part of their vision for public safety; consult experts on the various strategies and their potential impacts; bring in outside evaluators to measure the efficacy of initiatives; and make the results of this evaluation public. In a country still reckoning with the tough-on-crime era, and where public resources are in high demand, transparency and clarity around diversion would serve as a welcome counterpoint to the traditional "black box" of the criminal justice system.⁵⁴ Improved record keeping around prosecutorial decision-making would shed light on how prosecutors contribute to successes and failures of the justice system as a whole, including longstanding inequities. This point connects to the third value—**equality**—which refers primarily to the racial and economic disparities and disproportionalities in the justice system.

Criminal justice stakeholders must ensure that diversion initiatives do not reinforce existing inequalities in the system. In a 2013 study, Traci Schlesinger, Roundtable participant and associate professor in the sociology department at DePaul University, analyzed case data for men charged with felonies in 40 of the most populous U.S. counties, in the even years from 1990 to 2006. Schlesinger discovered that Black American and Latino defendants with no prior record were 43 and 34 percent less likely, respectively, to be offered pretrial

52 DAN STEMEN, VERA INSTITUTE EVIDENCE BRIEF, *The Prison Paradox: More Incarceration Will Not Make Us Safer* (2017).

53 Rempel, *supra* note 34, at 2.

54 See generally Samuel R. Wiseman, *The Criminal Justice Black Box*, 78 OHIO ST. L. J. 349, 349-401 (2017).



diversion for nonviolent drug crimes than white defendants.⁵⁵ (Similar disparities were not found for violent felonies, primarily because prosecutors diverted a significantly smaller proportion of these defendants.⁵⁶) Looking at U.S. justice systems more broadly, the Sentencing Project's 2018 report to the United Nations neatly summarizes how Black Americans are discriminated against at every step of the justice process: "African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences."⁵⁷ Like Black Americans, Hispanic Americans and Native Americans bear an undue burden of arrest and incarceration.⁵⁸ Seeing as these three minority groups experience poverty at higher rates than whites,⁵⁹ ⁶⁰ the racial and economic disparities in the system are intertwined. Moreover, the results of a 2018 analysis published by the People's Policy Project suggest that economic status is a larger predictor of lifetime likelihood of imprisonment than race when comparing Black Americans and white Americans.⁶¹

With an understanding of the

overlapping racial and economic disparities in the justice system, prosecutors should limit fees for enrolling and participating in diversion that may ultimately exclude low-income people. Along with application fees, which can be as high as \$250,⁶² diversion participants often have to pay for counseling, drug tests, supervision, and other costs incurred by justice agencies. A 2016 *New York Times* investigation found that some prosecutor's offices reject applicants who cannot afford program fees.⁶³ Considering that arrest and incarceration exacerbate the effects of poverty, refusing to waive fees for indigent defendants is patently unjust. The *Times* also discovered that in certain programs, participants who are unable to pay restitution within a specific timeframe may have their cases reinstated.⁶⁴ In other jurisdictions, people who otherwise would not be eligible for diversion are allowed to pay their way into programs.⁶⁵ Such policies clearly advantage people of means.

Lastly, a focus on equality underscores the moral imperative behind diversion. Beyond the facts of mass incarceration lie the myriad of ways in which the criminal justice system dehumanizes those who pass through it. From police officers who ignore survivors of sexual assault to prosecutors who churn through plea deals, law enforcement personnel at every step of the process often fail to see the human costs of their actions. Implementing thoughtful and effective strategies to divert people away from conviction and incarceration is one way to honor their dignity and humanity. Furthermore, engaging community members in the creation of public safety practices and policy acknowledges the reality that harms stemming from crime have ripple effects throughout communities.

55 Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies Processed in State Courts*, 3 *Race & Just.* 210, 210-38 (2013).

56 *Id.*

57 SENTENCING REPORT, *supra* note 7.

58 JON MARCUS, *BRINGING NATIVE AMERICAN STORIES TO A NATIONAL AUDIENCE*, NIEMAN REPORTS (FEB. 11, 2016), <https://niemanreports.org/articles/bringing-native-american-stories-to-a-national-audience>.

59 Rakesh Kocchar & Anthony Cilluffo, *Key Findings on the Rise in Income Inequality Within America's Racial and Ethnic Groups*, PEW RESEARCH CENTER (Jul. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/07/12/key-findings-on-the-rise-in-income-inequality-within-americas-racial-and-ethnic-groups>.

60 Jens M. Krogstad, *One-in-Four Native Americans and Alaska Natives Are Living in Poverty*, PEW RESEARCH CENTER (Jun. 13, 2014), <https://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty>.

61 Nathaniel Lewis, *Mass Incarceration: New Jim Crow, Class War, or Both?*, PEOPLE'S POLICY PROJECT (Jan. 30, 2018), <https://www.peoplespolicyproject.org/2018/01/30/mass-incarceration-new-jim-crow-class-war-or-both>.

62 Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html>.

63 *Id.*

64 *Id.*

65 *Id.*



II. Culture Change—Inside and Outside the Prosecutor’s Office

District attorneys have wide latitude to implement new diversion initiatives. To the extent that these initiatives depart from “received norms and practices,” however, DAs may experience pushback from line prosecutors.⁶⁶ After all, a prosecutor’s office comprises of a group of individuals with varying levels of experience and seniority, as well as different understandings of their professional duties. Along with resistance from staff towards diversion, prosecutors may also encounter skepticism from community members, especially those directly affected by crime. Therefore, in elevating diversion as a normative response to crime, DAs must contend with the established cultures that exist both inside and outside their offices. This section outlines strategies chief prosecutors can use to respond to cultural attitudes in their communities towards criminal justice and challenge entrenched norms in their offices.

A. Culture Change Amongst Constituents

District Attorneys should frame diversion as a direct response to the needs and desires of the communities they represent. The tough-on-crime aspects of prosecutorial culture, while still present in most offices, have receded from view as voters have become more aware of the damages of mass incarceration and opportunities for reform. In a 2016 Gallup poll, “45 percent [of respondents said] the justice system is ‘not tough enough’—down from 65 percent in 2003 and even higher majorities before then.”⁶⁷ While the results revealed differences in opinion based on race and

political affiliation (more than half of whites and nearly two-thirds of Republicans said the system is “not tough enough”⁶⁸), it is not uncommon to hear Republicans call for criminal justice reform by invoking “family values,”⁶⁹ Christian doctrine, and fiscal conservatism. This bipartisan agreement around the need for reforms helped pave the way for the elections of “progressive prosecutors” in places as politically disparate as Nueces County, Texas, and San Francisco, California. A number of these newly-elected prosecutors have accepted the mandate from voters and rolled out diversion programs aimed at reducing the system’s reliance on incarceration. To solidify public support for diversion, however, district attorneys—newly elected or otherwise—must reckon with the fact that trust in law enforcement is wanting.

A commitment to diversion is one way to address the public’s lack of faith in criminal justice actors. During the Roundtable, Adam Mansky, Director of Criminal Justice for CCI, noted that the justice system in the U.S. is currently experiencing a “crisis of legitimacy,” especially among communities that have been disproportionately impacted by the system. Prosecutors can help bridge this gap in trust by presenting diversion as one of several methods to right present and historical wrongs. For minority communities, Black Americans in particular, the sources of mistrust and skepticism include mistreatment at the hands of law enforcement; a persistent feeling of being “overpoliced and underprotected”⁷⁰; and highly publicized incidents of police violence for which the officers involved have very rarely been held accountable. According to a 2015 Gallup study, “Blacks’

66 Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 762 (2018).

67 Justin McCarthy, *Americans’ Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <https://news.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx>.

68 *Id.*

69 Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, THE GUARDIAN (Aug. 5, 2018), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform>.

70 Amy Goodman, “Overpoliced and Underprotected”: In Michael Brown Killing, Neglect of Black Communities Laid Bare, TRUTHOUT (Aug. 19, 2014), <https://truthout.org/video/overpoliced-and-underprotected-in-michael-brown-killing-neglect-of-black-communities-laid-bare>.



confidence in police [over 2014-2015] averaged 30 percent, well below the national average of 53 percent.”⁷¹ This was a six-point drop from 2012-13.⁷² Readers may remember 2014 as the year that police officers killed Eric Garner and Michael Brown Jr. and the Movement for Black Lives organized its first public protests.⁷³ Putting aside the difficult question of how DAs should deal with police violence,⁷⁴ prosecutors seeing this data may recognize an opportunity to make amends with the communities in their jurisdiction that have been most negatively impacted by the system and may wish to set a new agenda that involves diverting people who would be better served by treatment and support.

Some DAs, alongside other criminal justice leaders, have set an example for the field by making a direct, public apology to communities their offices have harmed through discriminatory and overly punitive practices.⁷⁵ Such an acknowledgment creates space for soliciting input from community members in the development of initiatives like diversion. In doing so, prosecutors will discover that people directly impacted by the justice system can be strong allies in their efforts to minimize the system’s footprint. As Danielle Sered said during the Roundtable, “the hardest people to persuade that incarceration produces safety are people living in environments where incarceration is common.”

Conversely, some community members will question the appropriateness or effectiveness of diversion. They will accuse prosecutors of caring more about defendants than victims

of crime. In the face of such criticisms, DAs should acknowledge these constituents’ concerns and explain why previous policies failed and how diversion will succeed. Once a diversion program has started, maintaining open lines of communication with both skeptics and supporters in the community will enhance trust.

B. *Culture Change Among Prosecutorial Staff*

The successful implementation of diversion programs requires effective leadership from district attorneys and buy-in from line prosecutors. Based on factors such as seniority, level of experience, and professional motivations, line prosecutors will embrace diversion to varying degrees. Keeping in mind that culture is a “phenomenon that shapes the organization and the mindset and actions of the people who make it up,”⁷⁶ DAs must be thoughtful and strategic in how they attempt to effect culture change. An important consideration at the outset of this process is whether the office’s stated mission and values are in line with those of diversion.

An office’s mission statement might include an intention to “defend public safety and do justice while upholding the values of fairness and accountability.” Depending on one’s interpretation, this office may or may not support diverting some arrestees suffering from mental illness. In the interest of clarity, DAs should consider inserting language in public-facing communications that outlines their vision and goals regarding diversion programs. The website of the Cook County State’s Attorney’s Office, for instance, states the following:

State’s Attorney Foxx is committed to creating safer, healthier communities by using prosecutorial resources strategically, appropriately, and supporting reforms that avoid needlessly bringing people into the

71 Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years* GALLUP, (Jun. 19, 2015), <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx>.

72 *Id.*

73 *Id.*

74 See generally ROY L. AUSTIN ET AL., INSTITUTE FOR INNOVATION IN PROSECUTION AT JOHN JAY COLLEGE, PROSECUTORS AND OFFICER-INVOLVED FATALITIES: A FORCED EVOLUTION FROM TRAGEDY TO ADVOCACY (2019) (describing district attorneys’ developing difficulty in handling police violence).

75 ANGELA J. DAVIS, ET AL., INSTITUTE FOR INNOVATION IN PROSECUTION AT JOHN JAY COLLEGE, *Race and Prosecution* (2019).

76 Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 200 (2008).



justice system. As such, providing effective alternatives to traditional prosecution and incarceration of non-violent offenders is a priority.⁷⁷

This clear, simple statement demonstrates to State’s Attorney Kim Foxx’s line prosecutors that she wants them to appreciate the burden incarceration places on people entering the system and to seek out alternatives whenever possible and appropriate. On this point, Roundtable participant David Sklansky, a professor at Stanford Law School, writes, “staff is more likely to push for what you care about if they know what you care about.”⁷⁸ In making their priorities known, however, DAs should be aware of how this message may be received.

When it comes to resetting goals and priorities, DAs face unique challenges depending on how recently they took office and their relationships with the longest-tenured staff. Newly-elected prosecutors who push for immediate and drastic reforms are likely to encounter significant resistance. In a paper on culture change commissioned by the IIP following the Roundtable, Beth McCann, Denver County (CO) DA; Courtney Oliva, Executive Director at the Center on the Administration of Criminal Law at NYU Law School; and Ronald Wright, professor of criminal law at the Wake Forest School of Law, write, “newly-elected prosecutors who lead with a message of change can also unintentionally create office hostility by suggesting to long-time prosecutors that their ‘old’ way of approaching cases is harmful.”⁷⁹ Even if this person is an office “insider” by virtue of having worked there for many years, the authors add, they “might be perceived as a traitor and

provoke backlash among long-term colleagues.”⁸⁰ To mitigate the possibility of such reactions, DAs should engage staff in dialogue about how diversion fits into the office’s overall mission. Before this conversation happens, prosecutors can conduct a survey to gauge sentiment regarding diversion. The results of the survey can offer insights into whether proposed initiatives appear radical or commonsense to those who will actually be doing the work. Soliciting input from line prosecutors also shows that a DA is not trying to rule by fiat. During these internal discussions, chief prosecutors should aim to lay the foundation for new norms while acknowledging, and perhaps accommodating, staff concerns.

After determining how a diversion program advances the larger goals of the office, DAs and line prosecutors can begin negotiating its practical features. As a starting point, DAs can “encourage line prosecutors to evaluate *all* their cases for potential referrals to diversion.”⁸¹ As part of the Justice 2020 Initiative, Brooklyn (NY) DA Eric Gonzalez has encouraged staff to treat “incarceration and conviction [as] options of last resort.”⁸² By doing so, Gonzalez challenges conventional thinking and opens prosecutors’ minds to other possibilities for their cases. However, taking incarceration off the table will not be enough to convince some prosecutors to embrace diversion. The reality is that culture change takes time and DAs may need to slow down the process for those who are “invested in the ‘old way of doing things.’”⁸³ To appease resistant staff members, McCann, Oliva, and Wright suggest starting small, so to speak, by creating programs for first-time offenders or people arrested for nonviolent crimes, initiatives which may seem less risky than diverting people with significant criminal records. They also note that “programs that provide for visible accountability of the

77 Cook County State’s Attorney, Diversion Programs (2020), <https://www.cookcountystatesattorney.org/resources/diversion-programs>.

78 David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U. CAL. DAVIS L. REV. 25, 28 (2017).

79 Beth McCann et al., INSTITUTE FOR INNOVATION IN PROSECUTION AT JOHN JAY COLLEGE, *Prosecution Office Culture and Diversion Programs* (2020).

80 *Id.*

81 *Id.*

82 ERIC GONZALEZ, BROOKLYN DISTRICT ATTORNEY’S OFFICE, *Justice 2020: An Action Plan for Brooklyn*, (2019).

83 Rapping, *supra* note 76, at 211.



defendant to the victim and the community,” such as restitution payments or community service, “tend to gain quicker acceptance among prosecutors.”⁸⁴ Relatedly, the person the DA selects to oversee a diversion program is instrumental to the program’s acceptance by staff—and its success.

As McCann, Oliva, and Wright explain in their paper, “choosing a well-respected prosecutor with depth and breadth of experience [to lead a diversion program] can show a commitment to the program’s success.”⁸⁵ The authority this seasoned prosecutor holds in the office lends legitimacy and credibility to the program. On the other hand, if the person in charge of diversion does not fully buy in to the practice, they may ultimately undermine the DA and create confusion for junior staff regarding whose lead to follow. Chief prosecutors also have the option of appointing someone from outside the office to lead a program. This can serve as a powerful signal to staff that achieving the program’s goals necessitates direction from someone with a fresh perspective and perhaps a different area of expertise.⁸⁶ The Brooklyn DA’s Office, for example, hired a social worker with experience in criminal justice to lead its youth diversion initiatives. Putting an “outsider” in a leadership role may “expand traditional notions of who should be eligible for diversion”⁸⁷ if this person’s views on punishment and accountability differ from those of office veterans. If this person lacks familiarity with local justice officials, however, they may clash with police and judges who wish to keep certain cases in the system.⁸⁸ Prosecutors must of course weigh the benefits of an outsider’s novel thinking against the challenges of navigating new relationships inside and outside the office.

Along with the question of leadership, DAs have to contemplate how much discretion staff will have in deciding whom to divert.

Cultural resistance around diversion can manifest in individual prosecutors’ decision-making. Again, when diversion initiatives are a major departure from previous policies and practices, they can run up against “inertia among line prosecutors who may not approach reform as zealously as their bosses.”⁸⁹ One remedy to this issue is to give discretionary power to a small group of attorneys who actively support the practice. This is how diversion works in the San Francisco DA’s Office, according to Roundtable participant Katy Miller, who serves as the office’s Chief of Programs and Initiatives. With this arrangement in place, any lack of buy-in from staff who are not involved in diversion does not hamper the office’s various initiatives, which are “more likely to operate in the way they were designed—whether the creators meant for the program to apply to a large or small pool of defendants.”⁹⁰ Alternatively, DAs can tell staff to consider all cases for referral to diversion and allow the person leading the program—whether an attorney or an outsider—to make final decisions about enrollment.

No matter how a chief prosecutor allots responsibilities within a program, if they introduce diversion as a strategy that will succeed where others failed, they must communicate to staff how success (and failure) will be measured. While the next section of this paper focuses on data collection and evaluation, a few relevant ideas are worth mentioning here. Sklansky neatly summarizes the first: “The data you collect should depend, in part, on what you care about.”⁹¹ For example, if a DA wants to use diversion to reduce racial disparities in the system, they would keep track of the race of defendants who are offered diversion programs and share the results with staff and the public. Line prosecutors will be more likely to show enthusiasm for diversion when they can see the fruit of their labor. McCann, Oliva,

84 McCann et al., *supra* note 79.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *The Paradox of Progressive Prosecution*, *supra* note 66, at 762.

90 McCann et al., *supra* note 79.

91 Sklansky, *supra* note 78, at 31.



and Wright believe that “the point of comparison for the success of a diversion program should be the known performance of criminal sentences imposed on defendants who are comparable to the program participants.”⁹² Pitting diversion outcomes against those of punitive sanctions may help win over staff who hold a more traditional view of prosecution.

Another way to bring staff members on board is to incentivize prosecutors to value proportionality over harshness in their decision-making. Even in the era of the so-called progressive prosecutor, career advancement in prosecutor’s offices largely depends on successful criminal convictions. District attorneys can alter this incentive structure by emphasizing diversion in annual performance reviews. They might also use office newsletters or meetings to praise a line prosecutor who fought for a defendant’s admission into a treatment program.⁹³ A less formal strategy employed in the Manhattan (NY) District Attorney’s Office, involves having lead prosecutors call assistant prosecutors to congratulate them on successful diversion cases.⁹⁴ All of these tactics are aimed at securing buy-in and reinforcing behavior change among current staff.

As district attorneys attempt to shift culture, they should also be strategic in terms of hiring. Chief prosecutors can accelerate the pace of culture change by hiring attorneys who will champion their new vision for diversion and cultivating a diverse workforce. During the interview process, applicants should be asked about their views on the use of incarceration, the values a prosecutor should strive to uphold, and what they would change about the system’s response to crime. For offices whose staff is less diverse than the constituent population, hiring more attorneys of color and female attorneys could have an effect on how the office does

justice.⁹⁵ Drawing a parallel between prosecutor’s offices and police departments, Sklansky argues that “the dramatic diversification of police forces in the 1970s and 1980s...helped to open up departments intellectually, making them more vibrant, more receptive to outside ideas, and far less dominated by any single, consensus set of understandings about [how] policing should be done.”⁹⁶ One objective, then, in prioritizing diversity in hiring and promotion is to create space for viewpoints that stray from dogma. As the “progressive prosecution” movement demonstrates, the notion of what it means to be a prosecutor is evolving. District attorneys can take advantage of this momentum by visiting law schools to talk to students about ongoing reforms. They could even work with professors to create a course that serves as an introduction to prosecution. However, it is not enough to recruit and hire a diverse and enthusiastic group of attorneys. The training process should inform incoming staff of the values guiding diversion programs.

District attorneys can bolster cultural norms through the training they offer to new hires. During onboarding, giving people directly impacted by the system an opportunity to share their stories can make the reasoning behind diversion more tangible. In a series of interviews of current and former prosecutors conducted by Harvard Law School’s Charles Hamilton Houston Institute for Race and Justice, respondents “recommended that all incoming prosecutors undergo training that included visiting prisons, speaking with incarcerated individuals, and understanding the full impact of incarceration and criminal control on an individual’s life and on the life of his or her family.”⁹⁷ Another component of this training could be a conversation with someone

92 See McCann, et al., *supra* note 79.

93 *Id.*

94 Lucy Lang, Manhattan, New York District Attorney’s Office’s Informal Strategy, interview by David Noble, August 14, 2019.

95 See Sklansky, *supra* note 78, at 29.

96 See Sklansky, *supra* note 78, at 41.

97 Johanna Wald, *What’s Inside the Prosecutorial Black Box?*, THE CRIME REPORT (Mar. 22, 2018), <https://thecrimereport.org/2018/03/22/whats-inside-the-prosecutorial-black-box>.



whose case the office diverted and who benefited from service offerings. Further, district attorneys can bring in academics to discuss findings on the diminishing returns of long sentences, collateral consequences, and other subjects that hammer home the importance of less punitive policies. This sort of programming would of course be enriching for experienced prosecutors as well. Line prosecutors with this education under their belts would, theoretically, be more eager to spot opportunities for diversion within their caseloads.

Once new staff begin to take on cases, it is crucial that the working atmosphere matches the lofty ideals the office uses to define itself. The chief prosecutor has a responsibility to set standards for language and behavior, particularly where defendants, victims, and others impacted by the system are concerned. A criminal justice system that routinely oppresses those who come into contact with it encourages prosecutors, police, and other actors to view defendants as deserving of callous treatment. This premature judgment may reveal itself in the casual use of dehumanizing language. For district attorneys who want to promote dignity and equity in their office's practices, Sklansky offers this advice:

Don't countenance racist or sexist language, coded or not. ... Don't call defendants "mopes," don't call repeat offenders "three-time losers," don't call people with mental disabilities "wackos," and don't tolerate language like that from your staff. Make it clear, in every conversation you have with your staff, that you take seriously the ideals of equal justice and procedural fairness and expect your staff to take them seriously, too.⁹⁸

Sklansky suggests that a prosecutor who does not see defendants as full people is unlikely to treat each case with the attention and care it deserves. Thus, she may not perceive the value of diverting an individual's case, especially if doing so

would require more work. Similarly, prosecutors who are "from and of" communities that are overrepresented in the criminal justice population may be more attuned to policies and practices that contribute to disparities. Understanding that the language prosecutors use to describe defendants correlates with how an office treats them, chief prosecutors and other leadership should strive to serve as models for staff.

III. The Data Problem

A. *What to Measure*

The Roundtable focused in large part on the question of data collection and evaluation: what jurisdictions typically measure with respect to diversion, what they do not, and what they *should*. Participants drew a connection between shortcomings in the metrics that diversion programs track and more overarching flaws in how prosecutor's offices approach data. At present, most "local prosecutors measure themselves by three core metrics: how many people are indicted on criminal charges, how many cases they try and how many convictions they secure."⁹⁹ These are measures that place a narrow focus on case processing rather than the larger goal of public safety. Of course, prosecutors historically had neither the means nor the incentive to capture data beyond measures of punishment and retribution, but that is changing. As prosecutor's offices look to act on the values underpinning diversion, they should strive to assess the impact of their work in the context of their overall mission and invest greater resources in data collection and evaluation that reflects that mission.

⁹⁹ Rachel Barkow et al., *How We Judge Prosecutors Has to Change*, N. Y. L. J., (Apr. 9, 2019), <https://www.law.com/newyorklawjournal/2019/04/09/how-we-judge-prosecutors-has-to-change/?sreturn=20191114165559>.

⁹⁸ See Sklansky, *supra* note 78, at 39-40.



If Not Recidivism, Then What?

Before creating a data system, prosecutors and other stakeholders must determine what they want to know about diversion. It bears repeating that “[t]he data you collect should depend, in part, on what you care about.”¹⁰⁰ Over the last half-century, the primary metric prosecutors have cared about regarding diversion is recidivism. Roundtable participants agreed, however, that the field needs to move beyond recidivism as a primary performance metric.¹⁰¹ Specifically, the many variables that influence recidivism—race, class, geographic location, level of police presence, and prior criminal history, to name a few¹⁰²—are complex and hard to disentangle from one another. And to quote Roundtable participant Kent Mendoza, who is a policy coordinator at the Anti-Recidivism Coalition and was incarcerated for five years as a teenager, “you can’t expect a kid to change overnight—change is about relapses and further attempts.” In other words, recidivism spotlights an individual’s apparent failure at a specific moment in time while ignoring potential indices of progress and “system-level factors that fail to support desistance.”¹⁰³

In an opinion piece written for *The Marshall Project*, Roundtable participants Jeffrey Butts, Director of Research and Evaluation at John Jay College of Criminal Justice, and Vincent Schiraldi, Senior Research Scientist at the Columbia School of Social Work, define desistance as “the process by which people learn

to become law-abiding.”¹⁰⁴ They argue that “a desistance framework encourages justice agencies to promote and monitor positive outcomes,”¹⁰⁵ such as those related to harm reduction, rather than focusing on a single negative outcome, reoffending. The authors also suggest that decision-makers ask themselves the following questions when analyzing the effects of criminal sanctions:

Are we really helping people convicted of crimes to form better relationships with their families and their law-abiding friends? Are we helping them to advance their educational goals? Are they more likely to develop the skills and abilities required for stable employment? Are we helping them to respect others and to participate positively in the civic and cultural life of their communities?¹⁰⁶

Such an interrogation expands the notion of what prosecutors can accomplish with their discretion and integrates aspects of individual well-being—social connectivity, educational and professional attainment—that bolster public safety.

In a similar vein, Roy L. Austin Jr., former Deputy Assistant to President Obama for the Office of Urban Affairs, Justice and Opportunity, presented the Roundtable with a list of “things prosecutor’s offices can actually count.” An important caveat here is that performance metrics are only valuable to the extent that they connect to program goals, could reasonably be impacted by the program model, and do not overwhelm practitioners’ capacity to capture the most important data. With that acknowledged, the “things” Austin cited include cost savings from removing cases from the system; reductions (or increases) in racial and socioeconomic disparities; and the percentage of defendants suffering from

100 See Sklansky, *supra* note 78, at 31.

101 For a more thorough explanation of the limitations of using diversion to measure the effectiveness of criminal justice policies broadly, see JEFFREY A. BUTTS & VINCENT SCHIRALDI, HARVARD KENNEDY SCHOOL PROGRAM IN CRIMINAL JUSTICE POLICY AND MANAGEMENT, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections*, (2018).

102 *Id.*

103 DAVID NOBLE, INSTITUTE FOR INNOVATION IN PROSECUTION, *Prosecutor-Led Pretrial Diversion: A Review of the Professional Literature* 10 (2018).

104 Jeffrey A. Butts & Vincent Schiraldi, *The Recidivism Trap*, THE MARSHALL PROJECT (Mar. 14, 2018), <https://www.themarshallproject.org/2018/03/14/the-recidivism-trap>.

105 *Id.*

106 *Id.*



mental illness and/or substance abuse who enroll in treatment and the number of hours they complete. Austin also proposed that jurisdictions attempt to track qualitative measures related to procedural justice and legitimacy. Potential areas of interest include participant, victim, and community sentiment regarding diversion, along with a program's impact on relations between community and law enforcement. The question of community-law enforcement relations points to the importance of measuring the effects of diversion not only on participants and the community, but also on the prosecutor's office itself.

Practitioners also draw inspiration from the following evaluations, which span a range of program designs and target populations and focus on metrics related to employment, housing, and mental health, among others. Some innovative approaches to measuring success include:

Drug Treatment Alternative-to-Prison (DTAP), New York, NY. Founded in 1990 at the height of the crack cocaine epidemic in Brooklyn, DTAP was envisioned as a treatment-based solution to an overwhelming influx of felony drug cases. The program accepted "adult defendants arrested for felony, undercover, 'buy-and-bust' drug offenses"¹⁰⁷ with a prior nonviolent felony conviction on their record. Participants were sent to a residential treatment program for 18 to 24 months. A 1995 analysis of DTAP in Brooklyn, along with replication programs in the four other New York City boroughs, discovered that DTAP retained participants at a rate more than one-and-a-half times greater than those of similar treatment programs.¹⁰⁸ A 2005 study found that the participant employment rate increased from 26 percent upon program entry to 92 percent at program completion. Researchers attributed this

rise to "the prosocial living skills"¹⁰⁹ participants gained through attending classes and working jobs in the treatment facility.

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Jail Diversion for Persons with Serious Mental Illness, Union County, NJ. This program is geared towards individuals with a diagnosed mental illness who are arrested and charged with a nonviolent offense. According to the authors of a five-year longitudinal study of this program, "its unique feature was that the prosecutor's office itself coordinated the diversion effort, working with the court, defense counsel, and mental health providers."¹¹³ The analysis showed that

109 *Id.* at 229.

110 Hung-En Sung & Steven Belenko, *From Diversion Experiment to Policy Movement: A Case of Prosecutorial Innovation*, 3 J. CONTEMPORARY CRIMINAL JUST. 225, 225 (2006).

111 *Id.*

112 *Id.* at 229.

113 KENNETH J. GILL & ANN A. MURPHY, BIOMED RESEARCH INTERNATIONAL, *Jail Diversion for Persons With Serious Mental Illness Coordinated by a Prosecutor's Office 2* (2017).

107 Hung-En Sung & Steven Belenko, *From Diversion Experiment to Policy Movement: A Case of Prosecutorial Innovation*, 3 J. CONTEMPORARY CRIMINAL JUST. 225, 225 (2006).
108 *Id.*



participants who completed the program spent significantly fewer days in jail in the 12 months following enrollment than in the year prior to enrollment. (Participants who did not complete the program also spent fewer days in jail but the difference was statistically insignificant.) On a measure of “community functioning and coping with symptomatology,”¹¹⁴ those who stayed in the program for at least six months demonstrated “significantly increased community integration, better overall functioning, and management of symptoms.”¹¹⁵

Law Enforcement Assisted Diversion (LEAD), King County, WA. In contrast to the other initiatives described here, LEAD relies on police officers’ wielding discretion at the point of arrest. That said, LEAD’s National Support Bureau believes that “recidivism and system utilization gains in Seattle/King County [are related] to the King County Prosecutor having dedicated deputy prosecutor(s) who track and manage LEAD participants’ non-diverted cases.”¹¹⁶ Prosecutors are responsible for filing charges if a participant does not complete the program’s intake process and withholding or dismissing charges when a participant demonstrates progress, among other duties. Most people that law enforcement divert through LEAD are low-level drug offenders. A 2017 study showed that enrolling in LEAD increased participants’ likelihood of securing permanent housing by 89 percent.¹¹⁷ The study also found that “participants were 46 percent more likely to be on the employment continuum”¹¹⁸ following enrollment. Lastly, participants

increased their likelihood of receiving legitimate income or government benefits by 33 percent when they enrolled in LEAD.¹¹⁹

In New York City’s Drug Treatment Alternative-to-Prison (DTAP) program, the participant employment rate more than tripled from the time defendants entered DTAP to the time they completed it. Through restitution payments from defendants in San Francisco’s Neighborhood Courts, the city has been able to fund grants for local organizations that share some of the same goals as the DA’s office, namely enhancing community safety and wellness. Participants in the diversion program for people with serious mental illness in Union County, NJ, were better able to function in their communities and manage their symptoms. In King County, WA, low-level offenders who enrolled in Law Enforcement-Assisted Diversion (LEAD) increased their chances of finding permanent housing and a source of legitimate income.

These promising results notwithstanding, an urgent need exists for research and evaluation in the area of prosecutor-led diversion. Even though prosecutors have been diverting defendants since at least the 1960s, the field lacks robust data on this type of discretion. A 2013 report from the Center for Health and Justice states that “relatively little true evaluation exists in national or local literature about the effectiveness of [diversion] programs overall, either in terms of cost savings or in reduced recidivism.”¹²⁰ The potential explanations offered are inconsistencies in program design and inadequate resources for analysis.¹²¹

Announcing their intention “to improve upon the limited state of research knowledge,”¹²² the authors of the 2018 NIJ study evaluated 16

114 *Id.* at 3.

115 *Id.* at 5.

116 LEAD NAT’L SUPPORT BUREAU, *Core Principles for Prosecutor Role* (2017).

117 Seema L. Clifasefi et al., *Seattle’s Law Enforcement Assisted Diversion (LEAD) Program: Within-Subjects Changes on Housing, Employment, and Income/Benefits Outcomes and Associations With Recidivism*, 63 CRIME & DELINQUENCY 429, 435 (2017).

118 *See id.*, at 440 (defining “employment continuum” as “participating in vocational training/internships, being employed, being retired from legitimate employment.”).

119 *See id.* at 435.

120 CTR. FOR HEALTH AND JUSTICE AT TASC, *A National Survey of Criminal Justice Diversion Programs and Initiative 1*, 29 (2013).

121 *See id.* (noting why there is no standard evaluation regarding the effectiveness of diversion programs).

122 Rempel et al., *supra* note 34, at 2-3.



prosecutor-led programs in 11 jurisdictions based on case outcomes, recidivism, and cost savings. Though the authors were unable to analyze each program along the same set of metrics, they come to the general conclusion that these programs help participants avoid conviction and incarceration, reduce recidivism, and produce cost savings for justice agencies.¹²³ The results of this study are encouraging because keeping defendants out of jail or prison shields them from the collateral consequences of incarceration, particularly if charges are dismissed in the process. Additionally, diversion programs that are less costly than normal processing—based on a comparison between the cost of diverting one individual and the work hours spent by court officials when a case goes to trial—allow jurisdictions to reallocate limited resources to the issues that most threaten public safety. More multisite evaluations like this one will greatly bolster the current body of research.

When DAs commit to expand the use of diversion, they should also adjust line prosecutors' performance metrics accordingly. Roundtable participants identified data that could show whether line staff are embracing diversionary policies and encourage behavior change. The simplest metric of this kind would be the number of times prosecutors referred cases for diversion. Digging deeper, one could compare diversion referrals to charges filed and analyze how offense type and prior criminal history, among other variables, influenced decision-making. If diversion is available for offenses that would potentially result in a jail sentence or probation, it may be possible to track instances in which prosecutors prevented defendants from either going to jail ("jail avoidance") or being placed under court supervision. For programs where prosecutors hold discretion over enrollment, breaking down acceptance rates according to race and ethnicity would be one way to ensure that diversion practices do not reinforce existing

disparities. At a more qualitative level, Maggie Wolk, Director of Planning and Management at the Manhattan (NY) DA's Office, offered the idea of judging prosecutors on the frequency and nature of their contact with defendants and victims (communications with service providers could also be informative). Thinking beyond diversion, offices could track "declinations to prosecute arrests that are improper or lack sufficient evidence"¹²⁴ and "dismissals of low-level cases that are better left outside the criminal justice system."¹²⁵

B. *How to Measure*

Once prosecutors have homed in on what they want to know about diversion, they face a potentially daunting question: How does a prosecutor's office—particularly one with limited resources—go about collecting, evaluating, and sharing data?

To begin with, district attorneys can benefit greatly from revealing their office's inner workings to outside evaluators such as academic institutions and think tanks. The average prosecutor's office most likely lacks the capacity and resources to measure the effects of initiatives like diversion. Instead of relying on limited expertise, prosecutors can partner with researchers eager to open this so-called black box. A collaboration of this sort led to the creation of "A Prosecutor's Guide for Advancing Racial Equity," a 2014 report by the Vera Institute of Justice examining prosecutors' contributions to racial disparities in the justice systems of Mecklenburg County, NC; Milwaukee County, WI; and New York County, NY.¹²⁶ The report lays out the steps Vera's Prosecution and Racial Justice Program team took to engage each jurisdiction, capture and analyze data, and work with staff to come

123 See *id.* at vii-viii.

124 Barkow et al., *supra* note 99.

125 *Id.*

126 VERA INST. OF JUST., *A Prosecutor's Guide for Advancing Racial Equity* (2014).



up with strategies for addressing any disparities. Acknowledging Vera's inability to implement this model with offices nationwide, the authors include a thorough checklist for prosecutors interested in embarking upon a similar project in their own unique contexts. Most pertinently, the report lays out the process by which data analysis can facilitate policy and practice change.¹²⁷

In contrast to the offices in Vera's study, prosecutors largely do not document their decision-making internally, let alone make this information publicly available. John Pfaff, who places a fair bit of blame for mass incarceration on prosecutors, told The Marshall Project that "we don't know what [prosecutors are] doing, why they're doing it and what drives their decision process."¹²⁸ The responsibility falls to DAs to own this reality and take active steps to fix it. In Chicago, State's Attorney Kim Foxx is doing just that by following through on her campaign promise of greater transparency.

In 2017, Foxx's first year in office, she created and filled a new position—chief data officer—to help address "big gaps" in knowledge in how the office is handling criminal cases.¹²⁹ While critics had charged that the office had been hiding data, she admitted that "the truth is we just don't have it." The following year, Foxx's office publicly released felony case data dating roughly from 2010 to 2016, as well as a report on 2017 data.¹³⁰ Uploaded to a government website, the dashboard displays the progress of every felony case in Cook County, from intake to sentencing.

While the dashboard does not feature information on diversion (and may not be user-friendly to people unfamiliar with such tools), it can serve as a model for other jurisdictions as they develop methods for documenting and publicizing their diversion policies. In a letter introducing the report, Foxx writes, "our most important conversations around criminal justice—from bond reform to addressing gun violence—require us to make policy choices grounded in data."¹³¹ Line prosecutors need to know *why* their bosses are telling them to divert certain cases, and what the expected results should be. Thus, consulting with data experts to design a diversion program will increase its legitimacy among staff and hopefully improve the odds that the program will work as intended.

Opportunities also exist for data sharing across criminal justice agencies, public health offices, social service organizations, and other entities. Breaking down silos allows prosecutors to share responsibility for the success of diversion with "other stakeholders that have a vested interest in public safety and a critical role in creating it."¹³² The exchange of data between prosecutors, police departments, probation offices, and other justice agencies (not to mention entities outside the system) has traditionally been limited. This phenomenon hampers prosecutors' ability to fully comprehend the upstream and downstream effects of their decisions and obscures the fact that there are social and individual problems that prosecutors cannot and should not try to solve alone. Integrating relevant data on individuals who frequently come into contact with the justice system and other government sectors such as healthcare and homeless services can lead to more effective policymaking. In Camden, NJ, for instance, criminal justice and public health

127 See *id.* at 6 (explaining how data analysis can improve organizational management that effectuates change).

128 Tom Meagher, *13 Important Questions About Criminal Justice We Can't Answer*, THE MARSHALL PROJECT (May 15, 2016), <https://www.themarshallproject.org/2016/05/15/13-important-questions-about-criminal-justice-we-can-t-answer>.

129 Steve Schmadeke, *Newly Elected Kim Foxx Details Plans to Reshape State's Attorney's Office*, CHI. TRIB. (Dec. 5, 2016), <https://www.chicagotribune.com/news/breaking/ct-kimm-foxx-interview-met-20161205-story.html>.

130 *State's Attorney Foxx Announces Unprecedented Open Data Release*, COOK CNTY. STATE'S ATT'Y (Mar. 2, 2018), <https://www.cookcountystatesattorney.org/news/states-attorney-foxx-announces-unprecedented-open-data-release>.

131 KIMBERLY M. FOXX, COOK CNTY. STATE'S ATT'Y, *Cook County State's Attorney: 2017 Data Report* 1 (2018).

132 JOHN J. CHOI ET AL., INST. FOR INNOVATION IN PROSECUTION, *Prosecutors and Frequent Utilizers: How Can Prosecutors Better Address the Needs of People Who Frequently Interact With the Criminal Justice and Other Social Systems?* 4 (2019).



officials worked with researchers to identify those individuals who were both the most frequent utilizers of hospitals and the most frequently jailed. A report examining this effort asserts that “the holistic view provided by integrated data will allow researchers, policymakers, and practitioners to design earlier interventions to prevent crime and the avoidable use of jails and emergency departments.”¹³³

Even with improved collaboration among stakeholders in the justice system and beyond, there are limits to what data can reveal about the effects of any program. As Jeffrey Butts writes, “human behavior ... is enormously complex and not completely measurable.”¹³⁴ He adds, “to say that a program is evidence-based” does not “guarantee that a program will work every time, for every person, and in every situation.” Conversely, diversionary models that are unproven according to scientific evaluation should not be disregarded outright. This is of course not to suggest that data collection and evaluation is a futile endeavor. Rather, practitioners should allow room for ambiguity and experimentation. Prosecutors must be willing to reconsider the incentives they set for staff and their long-held objectives, such as reducing recidivism. Seeing as some forms of diversion may be a departure from established policies and practices, it could be necessary to conceive of novel success metrics. Seeking the input of outside experts will naturally bring new ideas into a prosecutor’s office, as well as greater objectivity in evaluation. District attorneys can then share the insights they glean from all of these efforts with the community so that constituents gain a more thorough understanding of how effectively local prosecutors are providing justice.

133 ANNE MILGRAM ET AL., HARV. KENNEDY PROGRAM CRIM. JUST. POL’Y & MGMT., *Integrated Health Care and Criminal Justice Data — Viewing the Intersection of Public Safety, Public Health, and Public Policy Through a New Lens: Lessons from Camden, New Jersey* 2 (2018).

134 Jeffrey A. Butts, JOHN JAY C. OF CRIM. JUST. RES. & EVALUATION CENTER, *What’s the Evidence for Evidence-Based Practice?* 1 (2012).

IV. Looking Ahead

Questions about the efficacy of diversion puzzled evaluators in the 1970s and ’80s and largely remain unanswered today. Because diversion can occur at several distinct points in the criminal justice process, can involve a range of defendant populations, comprises dozens of unique program models, and is employed differently between jurisdictions, it is nearly impossible to define in a narrow sense. This complicates the task of figuring out which forms of diversion “work” and which do not. Moving forward, interested parties such as those assembled for the Roundtable must collaborate to build a body of research that assesses the impacts of various diversionary models on individual and community wellbeing, educational and employment attainment, justice involvement, and other important outcomes. Examining diversion broadly as well as at the local level will allow decision-makers to choose effectively as they ponder which programs to implement in their jurisdictions.

Although it will take years for a robust literature on prosecutor-led diversion to materialize, prosecutors and other stakeholders need not be discouraged. As Daniel P. Mears so eloquently puts it, “in the face of dramatic growth in America’s criminal justice system and calls nationally for using evidence-based policies there stands an odd fact—precious little evidence exists to claim that the sanctions currently in use are effective.”¹³⁵ While the phenomenon of mass incarceration solidified, those pushing for longer sentences and more invasive policing could not prove that these policies made communities safer. And until very recently, supporters of the tough-on-crime approach have not had to answer for the untold social and financial costs of “the highest rate of human caging of any society in the

135 Daniel P. Mears & J.C. Barnes, “*Toward a Systematic Foundation for Identifying Evidence-Based Criminal Justice Sanctions and Their Relative Effectiveness*,” 38 J. CRIM. JUST., 702, 708-38 (2010).



recorded history of the modern world.”¹³⁶ For far too long, the imperative of harshness in late 20th century criminal justice policies—the amount of retribution exacted on defendants—largely obscured concerns about effectiveness, fairness, and dignity. The current reform movement, in contrast, rejects the premise that the main goal of criminal justice is to punish those who commit wrongs and instead centers the needs of survivors, the community, and defendants themselves. Within this paradigm change, diversion shows promise as a useful tool.

The philosophy of diversion presented here may fundamentally differ from how many experienced prosecutors understand their jobs. To begin with, it contradicts established beliefs about holding people accountable for crime and defending public safety. The idea that a prosecutor would view incarceration as a last resort also conflicts with an incentive structure that prizes convictions over all other outcomes. Acknowledging the power of this entrenched culture, district attorneys can invoke the moral imperative behind decarceration, along with more practical considerations. IIP Executive Director and career prosecutor Lucy Lang makes this point matter-of-factly: “What we’re doing is wrong and where we’re sending people is unconscionable.” This “wrongness” encompasses the cruelty of imprisonment, its ineffectiveness in terms of both public safety and individual and communal rehabilitation, and its inordinate financial costs. After framing the conversation in these terms, DAs can utilize a number of strategies to encourage line prosecutors to consider the underlying issues that lead to an arrest and seek dispositions other than removing someone from the community. They can set performance metrics such as the number of cases referred for diversion or frequency of contact with service providers. They can hire attorneys and other staff who

value a more nuanced, less punitive approach to prosecution. They can partner with other justice officials and community members on problem-solving courts or restorative justice initiatives.

Given the many variables that affect a program’s success, prosecutors must have an appetite for political risk. At some point, a person whose case was diverted will reoffend, perhaps even violently. When this occurs, chief prosecutors must be prepared to defend their office’s policies from the potential blowback from political opponents and concerned voters. Depending on the nature of the offense, it could be valuable to apply the “desistance framework,” which accepts that people will make mistakes as they eventually become law-abiding.

As prosecutors attempt to shift culture and elevate diversion as a normative response to crime, they must keep in mind that certain problems are best addressed outside the justice system. From a reformist perspective, diversion is perhaps a stopgap along a path towards transforming the system. Rather than diverting drug offenders with the understanding that completing treatment means avoiding conviction, some call for decriminalizing all drug use and increasing government investment in mental health and substance abuse services.¹³⁷ Realistically, such reforms would shrink the reach of criminal justice agencies as well as their budgets. In response to a questionnaire distributed prior to the Roundtable convening, one participant noted that when a pretrial diversion program is successful, cost savings may accrue to other justice agencies while the prosecutor’s office foots the bill. How prosecutor’s offices fund these programs is a valid concern, especially in jurisdictions with limited resources. However, if one believes that the benefits of initiatives like diversion should be felt across the system and the community at large, then this is not a zero-sum game.

136 Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About ‘Criminal Justice Reform’*, 84 *YALE L. J.* 128, 849-50 128 (2019).

137 John Washington, “What Is Prison Abolition?” *THE NATION*, (Jul. 31, 2018), <https://www.thenation.com/article/what-is-prison-abolition>.



Prosecutors amassed incredible power during the growth of mass incarceration; reducing the prison and jail populations and doing justice in a fairer, more humane manner will require that prosecutors give some of that power back. A common refrain from law enforcement leaders is that they aspire to one day “put themselves out of business.” In other words, police chiefs and district attorneys want to do their jobs so well that there are no more people to arrest, prosecute, and lock up. This statement carries the assumption that law enforcement is most well-equipped to deal with what society has defined as crime. Diversion embodies the opposite assumption: that criminal justice is an ineffective remedy for issues related to poverty, racism, mental illness, and other social failures. Further, diversion can promote healing by providing opportunities for defendants to repair harms and receive services, such as mental health treatment and job training, that will help them thrive in their communities. Hopefully, in the not-so-distant future, people who today cycle through the system will receive the support they need long before they see the back of a squad car.



Prosecution Office Culture and Diversion Programs

BY BETH MCCANN
COURTNEY OLIVA
& RONALD WRIGHT

A prosecutor's charging power includes the option to divert a defendant out of the criminal justice system entirely.¹ Instead of ending a prosecution with a criminal conviction and sentence, diverted defendants enter a program in order to obtain treatment, compensate victims, demonstrate rehabilitation, or accept some other form of accountability for their acts. If successful, people leave the diversion program with no criminal conviction and with greater prospects for the future, both for themselves and for their communities.

Prosecutors sometimes use diversion programs deliberately to scale back their use of criminal courts or to achieve other policy goals. These prosecutors recognize that some combination of criminal sanctions and non-criminal resolutions will produce the best results for the greatest number of people and institutions, including the most durable forms of public safety.

Diversion programs, however, do not just materialize when a chief prosecutor speaks the words. Several different factors affect the success or failure of a diversion program. A prosecutor who wants to expand the use of diversion programs must find partners in the community to fund

these initiatives and measure their success. They must also achieve buy-in from other actors in the local criminal justice system, including judges and law enforcement. Just as important, chief prosecutors must understand and address the internal culture of their own offices, convincing their line prosecutors to embrace and willingly utilize diversion programs with enthusiasm and sound judgment.

In this article, we describe how office culture can affect the implementation of diversion programs, however well-designed and well-funded those programs may be. There are recurring and predictable situations that create a risk of hostile responses to diversion within a prosecutor's office. We suggest ways for any chief prosecutor—whether newly elected or a long-term incumbent—to identify these risk factors in their office culture and to implement diversion programs in ways that steer clear of these internal office problems.

I. Spotting Risk Factors for Diversion Programs

Successful diversion programs may depend on changing office culture, and the first step in changing office culture is to understand it. There are common indicators that diversion programs will run into trouble when prosecutors start deciding which defendants to place into the programs. These risk factors come from many different sources: (1) the inputs and outputs of the programs, (2) the personnel who get most involved with the program, and (3) the collective office attitude toward change. Chief prosecutors who want to develop robust and effective diversion programs will have greater chances of success if they spot the risk factors for cultural resistance that are likely to arise within their offices.

The first handful of risk factors relate to the inputs and outputs of the diversion programs themselves—that is, the types of defendants

¹ This article is part of a series on Prosecutor-Led Pretrial Diversion, prepared by the Institute for Innovation in Prosecution in partnership with, and with the generous support of, Arnold Ventures. The views expressed in this article are those of the authors and not necessarily the views of Arnold Ventures.



eligible to enter the program and the actions that defendants are expected to take in the program. Prosecutors might be quicker to accept diversion programs that serve defendants with fewer prior interactions with the criminal justice system. Programs that provide for visible accountability of the defendant to the victim and the community also tend to gain quicker acceptance among prosecutors. Programs that declare clear criteria for success or failure also encounter less resistance in the prosecutor's office, particularly when the program includes explicit efforts to measure that performance against the declared criteria for success. For offices looking to build support for diversion programs, it would be helpful to start slowly and conservatively in order to obtain the necessary buy-in and demonstrate success.

The second set of risk factors relate to the office personnel who administer the programs and the steps they follow to roll out a new diversion program. Programs that involve only a few people in specialized cases are less vulnerable to cultural resistance from others in the office. Programs that involve many attorneys and staff members—perhaps even encouraging attorneys to utilize diversion as a starting point in their cases—involve greater risk. They also offer concomitant greater rewards.

Similarly, programs that rely too heavily on individual prosecutors to identify defendants for diversion present many opportunities for resistance. This is especially true where the prosecutors with discretionary authority have not been deliberately selected to administer the program. Conversely, programs that declare specific eligibility criteria or centralize the decisions in the hands of a few people are more likely to operate in the way they were designed—whether the creators meant for the program to apply to a large or small pool of defendants. Thus, when developing program administration, prosecutors must balance line prosecutors' discretion with the need to wield final authority over admission consistently. One possible outcome is to encourage line prosecutors

to evaluate *all* their cases for potential diversion and then to vest final authority for inclusion in the administrator of the program, who will undertake a broader assessment of the referral.

Diversion programs may also include social workers and other non-attorney staff who participate in screening and programming decisions. The working relationship between attorneys and these non-attorney staff in running the diversion program also presents some risk. When attorneys make the program access choices with little input from other staff, there is a greater chance that the attorneys will not adopt the priorities of the program designers as their own, and will likely have different opinions as to what constitutes an appropriate case resolution. More involvement from staff with specialized professional skills outside the law, such as social work, signals to those staff members their value to the program and increases their enthusiasm for the work.

And finally, the professional respect and reputation of the prosecutors involved in the program have some effect on the response a program gets within the office. Chief prosecutors can send powerful signals to the office in their selection of unit chiefs to lead diversion programs. Choosing a well-respected prosecutor with depth and breadth of experience can show a commitment to the program's success. On the other hand, staffing the unit with prosecutors seen as "weak" or ineffective in other aspects of the prosecutor's job reduces the likelihood that the program will be taken seriously. Given that a non-attorney may very well be the administrator of a diversion program, it is even more important that the chief prosecutor select a well-respected prosecutor to help run a diversion program, so that this prosecutor can help the administrator establish credibility with attorneys and other staff.

The final risk factor involves the attitude toward change among the attorneys and other staff in the office. If the chief prosecutor is perceived as an outsider to the office, any initiatives will



face a more skeptical reception. The choices of an outsider might be taken as a repudiation of the prior work of the office, perhaps based on a misunderstanding of the office and what the staff can accomplish. A newly elected prosecutor is especially likely to be viewed as an outsider, although a new chief with a long track record in the office might qualify as an insider, comparable to long-term incumbent in the job. The risk, however, does not run in one direction. An insider who proposes major changes in practice might be perceived as a traitor and provoke backlash from long-term colleagues.

New diversion programs might also be implemented in the midst of other changes to office operations, including those that appear to be completely unrelated to diversion. For instance, an upcoming election might produce anxiety among the staff about their future employment if a challenger were to win. Changes in the office's salary structure could also create resentment or uncertainty among the attorneys. Newly elected prosecutors who lead with a message of change can also unintentionally create office hostility by suggesting to long-time prosecutors that their "old" way of approaching cases is harmful, and this can have spillover effects. These generalized concerns about change in the office can easily bleed over into discussions and attitudes about new diversion practices and create an office culture that is hostile to change.

II. Best Practices for Implementation

After the chief prosecutor diagnoses potential hot spots and pushback in their communities, there are some steps the office leaders can take to improve their chances for local acceptance of a new program. These steps relate to the diversion program features, the personnel that operate the programs, and the larger office culture regarding change.

When it comes to program design features, it pays to identify areas of broad consensus and to build out from those early successes. For instance, in the Denver District Attorney's Office, the use of diversion programs for youth charged with juvenile offenses found support across all segments of the office. The Office has thus built on shared office opinions regarding youth diversion to build out a diversion program, which includes restorative justice programming. On the other hand, expanding diversion programs to include adults accused of violent crimes is a reform that must be approached cautiously. It is likely to prompt resistance within the office unless it is targeted carefully to reach defendants who resemble those that the office already handles successfully through diversion options.

Programs will also achieve broader buy-in from the office if they are transparent and are evaluated on a regular basis. The point of comparison for the success of a diversion program should be the known performance of criminal sentences imposed on defendants who are comparable to the program participants. Prosecutors might build partnerships with local or state research agencies and academics to design a feasible method of program evaluation that compares diversion to traditional case outcomes. The program evaluation could also rest in part on personal stories, derived from interviews with the people who participate in diversion programs, as well as prosecutors, other office staff members, defendants, and community members.

This is what the Manhattan, Bronx, and Brooklyn District Attorney's Offices have begun to do with the creation of Project Reset. Project Reset, developed in partnership with the Center for Court Innovation ("CCI"), is a diversion program that offers a new proportionate, effective, and humane response to low-level offenses.² Project Reset's core goal is to reduce the criminal

² *Fact Sheet: Project Reset*, Ctr. for Ct. Innovation (Oct. 2019), <https://www.courtinnovation.org/publications/fact-sheet-project-reset>.



justice system's footprint without compromising public safety. Participants have the opportunity to complete two sessions of selected programming. If successful, the district attorneys' offices decline prosecution, seal the arrest, and never docket the case. Because of the partnership with CCI, the Offices have the benefit of program evaluation. CCI's evaluation of Project Reset is transparent, relying on data collection and baseline comparisons to analyze the program's effectiveness. CCI has also sought to collect personal narratives from program participants who express positive experiences with Project Reset.

Other sound practices relate more to the personnel who operate programs than to the features of the program itself. Aside from selecting people who are widely respected across the office, the chief prosecutor and executive staff must give them time to create a successful program. For example, they might ask for a five-year commitment from a new unit chief and three-year commitments from deputies. It also helps with the performance and credibility of a new program if the people chosen to work there have experience with other operations in the office. Finally, attorneys selected to work in the program need to have earned respect from both other prosecutors and the defense bar.

On the other hand, the head prosecutor might consider whether to hire an office outsider to head the program, as opposed to promoting someone from within. While promoting from within has its benefits, as discussed above, the selection of an outsider can also send a powerful signal to the office. For instance, the Brooklyn District Attorney's Office named Saadiq Bey, a social worker and former research associate with the Center on Youth Justice at the Vera Institute for Justice, as chief of his office's Youth Diversion Programs.

An analogue to this debate can be seen in the two competing schools of thought regarding conviction integrity units and the selection of those unit chiefs. Some observers believe that

defense counsel—true outsiders—are needed to bring fresh perspective to the reinvestigation of cases for possible error, while others believe that a person with deep experience in the office, as well as experience navigating local judicial norms, is needed to break potential log jams and to access more swiftly the crucial information that must be reviewed during the course of a re-investigation.

Experience with leadership choices in non-traditional settings such as conviction integrity point to some general principles that may apply to diversion units. First, if the goal is to expand traditional notions of who should be eligible for diversion, then it may make sense to hire an outsider. A fresh perspective may be valuable in ensuring that the program operates as intended and does not atrophy due to lack of referrals. On the other hand, an outsider may not be familiar with local office culture and court norms, which could create issues with law enforcement and judges, if they object to certain cases being removed from the system. On balance, then, the chief prosecutor must weigh these competing factors in the local context when deciding whether to hire an insider or an outsider to lead a new diversion program.

The chief prosecutor can also demonstrate a commitment to diversion programs—and encourage broad involvement in those programs—by tracking line prosecutors' use of diversion in annual performance reviews and self-evaluations. For instance, if the offices expect each attorney to write a report summarizing important accomplishments for the year, a written prompt might say something along these lines: "Give an example of a case you identified that would be suitable for diversion or an alternative to prosecution." Offices can also collect and review statistics about the diversion decisions of individual prosecutors to note any patterns in their use of these programs.

The chief prosecutor can also take steps to address broader office culture issues that may affect the internal reception and viability of diversion



programs. It is important to listen actively and early and to give prosecutors the chance to speak out about perceived shortcomings. Direct communication via meetings with smaller groups of prosecutors can prevent problems from gaining speed and strength. It also demonstrates a mutual respect and willingness to listen to people, which itself can blunt any tendency toward resistance.

Finally, the chief prosecutor can publicize diversion “success stories” to the office, using the customary emails, circulars, or announcements during office meetings. Instead of simply sending trial emails publicizing convictions, or emails notifying the office of pleas obtained in a high-profile or hard-fought case, the chief prosecutor can send emails celebrating successful interventions enacted through the diversion program. They might want to highlight the hard work of a line prosecutor in fighting for a disposition to a certain treatment or alternative program. A chief prosecutor should deliberately choose messaging strategies to signal that diversion has value comparable to trials. When talking about the office’s duty to “do justice,” leaders should include diversions and other non-traditional case outcomes as part of the core mission.

unveiling the program, the chief prosecutor must work deliberately to maximize the chances of long-term success. This can be done by choosing staff carefully and crafting consistent messaging to office personnel about the importance of the program, a message the office needs to hear on a regular basis.

III. Conclusion

When implemented correctly, diversion programs present valuable opportunities for prosecutors to create off-ramps out of the criminal justice system without compromising public safety. If successful, these programs can connect people to needed services and link them to treatment that can reduce recidivism and leave them and their communities better off. But these programs will not run themselves, and prosecutors cannot simply wind them up and walk away. They must be implemented with care. This means diagnosing the office culture *before* a prosecutor considers creating such a program, so as to anticipate potential cultural roadblocks. After designing and



Innovative Approaches to Diversion Data

BY SEAN FLYNN
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Prosecutors across the country are collecting and using data to make decisions in their offices¹. At the same time, prosecutors are interested in developing and sustaining prosecutorial diversion approaches. Prosecutors can use data to assist in decision-making regarding diversion case processing choices as well as to make office policy and resource allocation decisions that, in turn, support expanded diversion programs. Data collection can help prosecutors decide if a prosecutorial diversion program will work for them, and if so, what characteristics it should have. Finally, data can help prosecutors see whether they are obtaining their intended outcomes. Prosecutors possess varying levels of data and resources for using data. Using a case study of how the Manhattan District Attorney's Office, a data-heavy prosecutor's office, has incorporated data into its diversion decision-making, this paper will discuss how data can be collected, analyzed, and shared in developing and overseeing a prosecutor-led diversion program to increase transparency, efficiency, effectiveness, and consistency.

Prosecutor-led diversion is a critical component of prosecutorial operations and success, and some data collection on this aspect

of prosecution is widespread. Prosecutors use diversion programs to identify sources of increased efficiency and conservation of resources, both in terms of time and human resources, for more severe cases as well as to reduce the number of convictions and the subsequent impact of convictions on people referred to prosecutors.² While diversion is not new, having been part of many prosecutor's offices in the 1970s, increased caseloads and unease over the impact of homelessness or unemployment as a result of a conviction have renewed interest in a prosecutor-led diversion³. In a 2018 national survey of prosecutors by the Urban Institute, 74 percent of responding offices reported having data on the number of cases disposed to diversion programs; just over half (56 percent) of offices reported having information on whether diversion (or problem-solving court or deferred option used) was successful.⁴ However, less than one third of respondents reported collecting information about compliance with office policies on which cases should be diverted, referred to as a problem-solving court, or deferred.⁵ Just under half of the large and medium offices collect that information in electronic case management files, with the majority using paper files.⁶ Thirty-seven percent of offices reported not collecting any data on compliance with office criteria, while an additional 19 percent reported not having criteria.⁷ While the Manhattan District Attorney's Office is an example of an office with significant data resources, other offices can use different models to incorporate data effectively. This includes hiring data analysts, training for senior attorneys or information technology staff, or working with

1 This article is part of a series on Prosecutor-Led Pretrial Diversion, prepared by the Institute for Innovation in Prosecution in partnership with, and with the generous support of, Arnold Ventures. The views expressed in this article are those of the authors and not necessarily the views of Arnold Ventures.

2 Michael Rempel et al., *NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs: Strategies, Impacts, and Cost-Effectiveness* iv (Center for Court Innovation, 2017).

3 *Id.* at 2.

4 Robin Olsen et al., *Collecting and Using Data for Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices* 8 (Urban Institute, 2018).

5 *Id.* at 12.

6 *Id.*

7 *Id.*



third-party researchers or universities.⁸

Operating diversion successfully and being able to communicate the intent and results of diversion is necessary to prosecutors. In fact, not collecting data on diversions can lead to inaccurate conclusions about an office and its performance. For example, state attorney for the Florida 8th Judicial Circuit William Cervone noted that collecting data on his diversion programs provides evidence of their success and justifies funding for their continued operation.⁹ Stephen Jones, the county attorney in Labette County, Kansas, reported that keeping a record of diversions that his office has implemented allows him to track his operations and examine what is working and what is not.¹⁰ He noted that if his office tracked more information about whether diversions have reduced recidivism, he could adopt strategies that might prevent some of these crimes from happening again.¹¹ In Travis, County, Texas, the district attorney’s office examined case data and found that what were previously thought to be dismissals due to legally or factually insufficient cases were successful diversions prompting the office to allocate more resources to these diversion programs to expand their impact.¹²

This paper will describe the critical decisions that are part of prosecutor-led diversion and how data collection is critical to making those decisions successfully. It will provide examples from the Manhattan District Attorney’s Office of how data collection, analysis, and data sharing are critical to the continued use and improvement of diversion programs. It will recommend approaches for offices to increase their use of data in prosecutor-led diversion decision-making and implementation, first through prioritizing the inventorying of data, identifying jurisdiction-specific decision points, and using data to generate key insights, and second through investing

in technology and improving data analysis capabilities.

I. Key Decisions About Prosecutor-Led Diversion and Role of Data Collection and Use

Three decisions that are critical to implementing prosecutor-led diversion are program choice, eligibility and screening, and success metrics. Program choice includes the decision of whether to have a diversion program and what program to offer. Importantly, this can include the decision about whether the diversion occurs pre-filing or post-filing, as well as what programming or treatment will be a part of the diversion.¹³ Programming can include education, community service, cognitive-behavioral therapy, or restorative justice.¹⁴ Prosecutors can also decide who will deliver the programming and how the contracts are structured.¹⁵ Eligibility and screening include the decision of what eligibility criteria an office will have, if any.¹⁶ Criteria can include restricting diversion opportunities to people referred for specific offenses or with particular criminal history scores.¹⁷ Screening can be evaluated either by legal criteria or by using a “Risk and Needs Assessment tool”.¹⁸ Risk and Needs tools are based on the principles of risk, need, and responsivity. These tools allow practitioners to match services to an individual’s risk of reoffending, to assess and target criminogenic needs, and to tailor interventions to the way a person learns and their abilities.¹⁹ Criminal justice system practitioners use screenings to identify

8 *Id.* at 16.
9 *Id.* at 5.
10 *Id.* at 9.
11 *Id.*
12 *Id.* at 12.

13 Rempel at 1.
14 *Id.* at v.
15 Rempel at 61; Center for Health and Justice at TASC, A National Survey of Criminal Justice Diversion Programs and Initiatives, 16 (December 2013).
16 Rempel at iv, v, 15.
17 Rempel at 22,23, 26; TASC at 18.
18 *See* Rempel et al., at 16.
19 *See* James Bonta & D.A. Andrews, *Risk-Need Model for Offender Assessment and Rehabilitation*, Public Safety Canada, at 1,5,17 (2007).



who is the right candidate for an approach and what services may be appropriate.²⁰ Success metrics include decisions about how an office defines and measures success. Offices can identify the purpose of the diversion and the problem that the approach aims to address. For example, some diversion programs are targeted towards people who otherwise might be sentenced to prison, and successfully completing diversion would reduce incarceration days used. Other programs are aimed at people whose screens indicated that particular services would be useful, such as behavioral health interventions. Accordingly, some programs measure total incarceration days averted, recidivism rates, employment rates, and estimated cost savings.²¹

The collection and use of data can help prosecutors' offices with diversion through four principles: transparency, efficiency, effectiveness, and consistency. Evidence from interviews with prosecutors, along with the following case study of the Manhattan District Attorney's Project Reset program, demonstrates the ways that data collection, data analysis, and data sharing can support these principles.²²

Information about key diversion decisions can allow prosecutors to release information more easily to stakeholders and the public, creating transparency, helping build support, or allowing for constructive feedback. About 25 percent of respondents to the Urban Institute's 2018 national survey of prosecutors' offices reported publicly publishing analyses based on data they collect, and half of the respondents reported encouraging and soliciting input and collaboration with residents and community groups.²³ Meanwhile, through the use of a public data dashboard, Philadelphia

District Attorney Larry Krasner's office has placed data and statistics, such as "incidents, arrests, charges, bail, case outcomes, case length, future years of incarceration, and future years of supervision" online for the public to view.²⁴ The stated goals of the dashboard are to better hold the criminal justice system, including the prosecutor's office, accountable for its policies and procedures.²⁵ In particular, the data dashboard page allows viewers to see the average number of diversions each month, by type of offense, and in comparison to other types of case outcomes.

Data also allows the office to identify bottlenecks in the diversion process, thus improving efficiency. For example, 72 percent of survey respondents reported using data to manage the allocation of time or resources.²⁶ In the Manhattan District Attorney's Office, Project Reset's data collection process (detailed below) allows the office to find delays in the diversion process that could prevent some individuals from being able to enroll.

Collecting and using data can improve the effectiveness of the diversion program by helping prosecutors understand which services are working and which are not. Twenty-three percent of respondents reported collecting data on recidivism results.²⁷ With Manhattan District Attorney Office's Project Reset, the data collection system allows staff to access information on program outcomes, enabling analysis of which programs are more successful with which participants.

Lastly, data collection and use by the prosecutor's offices allow for consistency of offers across the board given by ADAs, including those

²⁰ See Mellow, at (2013).

²¹ See Center for Health & Justice at TASC (TASC) *A National Survey of Criminal Diversion Programs and Initiatives*, at 13,16,19,20 (Dec. 2013).

²² Project Reset, Center for Court Innovation (2020), available at <https://www.courtinnovation.org/programs/project-reset/more-info>; see also Project Reset New York (2020), available at <https://www.projectreset.nyc/about>.

²³ See Olsen et al., at 9.

²⁴ Philadelphia District Attorney's Office Launches Public Data Tool, Medium (Oct. 3, 2019), available at <https://medium.com/philadelphia-justice/release-philadelphia-district-attorneys-office-launches-public-data-tool-9794c086b11c>.

²⁵ See *Public Data Dashboard: About Philadelphia's Criminal Justice System and the Public Data Dashboard*, Philadelphia District Attorney's Office (PDAO) (2020) <https://data.philadao.com/about.html>.

²⁶ See Olsen et al., at 11.

²⁷ *Id.* at 9.



involved in assessing eligibility. Forty-nine percent of respondents reported collecting data related to alternative case processing (like diversions) by the assigned prosecutor.²⁸ This allows for supervisors to track information across different decision-makers. In the case of the Manhattan District Attorney’s Office, the data systems allow for quality control of aspects of Project Reset.

II. Tools for Using Data to Support these Conclusions

In this section, we look at tools for using data to support prosecutor decisions around diversion. We offer a case study from the Manhattan District Attorney’s office in New York. The tools developed by this office as well as the principles and processes put in place for their use provide valuable lessons for all prosecutors trying to implement more data-driven diversion policies.

The diversion program offerings through the Manhattan DA’s office impact cases at many stages of the case path, including both pre-arraignment diversion and post-arraignment diversion. This study will limit its scope to the impact of data on one pre-arraignment diversion program, Project Reset. First, we briefly discuss the program. Then, we discuss the Manhattan DA’s strategy for using data to improve program execution. Their process can be categorized into Data Collection, Data Analysis, and Data Sharing. Each piece plays a vital role in their successful use of data to improve the diversion programs in Manhattan.

A. Project Reset

Through Project Reset, the Manhattan DA’s office agrees not to prosecute individuals arrested for certain misdemeanor offenses in return for their participation in some type of

service intervention.²⁹ The timing of the program is important, because it enables the participant to avoid the collateral consequences of prosecution that would occur if their case followed the traditional case processing path.

Project Reset gets initiated at the police precinct. An individual is eligible for the program only if the arresting officer issues a desk appearance ticket (DAT) for their case. A DAT is a ticket that is issued at the time of arrest, which specifies a date for the individual to come back to court for arraignment, usually in about six to eight weeks.³⁰ DAT cases fit well with diversion opportunities, because the individual has time to complete a program, such as counseling, before they are scheduled to come back to court for arraignment. If the individual completes the required program steps, the Manhattan DA’s office will decline to prosecute their case and no charges will be filed against them. The arrested person will not have to appear in court.

The goals of the program are to promote confidence in the criminal justice system, to help individuals avoid criminal records for low-level offenses, and to keep people out of the court system. The program is offered throughout the county boroughwide for individuals of all ages who are accused of low-level misdemeanors such as shoplifting, trespassing, and drug possession.³¹

After arrest, the intake process ensues. Police issue a DAT for the offense and alert the potential participant that they may be eligible for the Project Reset diversion program. The Manhattan DA’s office manually reviews each case to determine eligibility and refers any

²⁸ *Id.* at 8 (noting “most offices having data on alternatives approaches to traditional prosecution”).

²⁹ Project Reset, Center for Court Innovation (2020); *see also* Project Reset New York (2020).

³⁰ *See* N.Y. Crim. Pro. § 150.40(1)(McKinney 2020) (citing recent changes to the New York State criminal code that went into effect on January 1, 2020 require DATs to be arraigned within 21 days); *Project Reset*, Center for Court Innovation (2020); *see also* *Project Reset New York* (2020).

³¹ The program was first piloted in one police precinct in Upper Manhattan and focused solely on youth aged 16-17. The Raise the Age law now transfers all misdemeanor cases for young people 17 and younger to Family Court, and therefore they are no longer eligible for Project Reset.



eligible case to the assigned program provider. Assignment depends on the individual's age and the precinct in which they were arrested. The individual is offered the opportunity to discuss the diversion option with an attorney. If they choose to participate, program staff conducts an intake interview to assess the person's needs. They are matched with the service intervention that is best suited for them. Some types of interventions include group workshops, restorative circles, arts programming, naloxone training, and individual counseling.³²

In the next section, we begin to explain the tools that the Manhattan DA's office uses to make Project Reset more efficient and effective. We start with their efforts around data collection.

B. Data Collection

Data collection is a foundational piece of any strategy to use information for program improvement. Ensuring the right data is collected at the right time is vital for success. The Manhattan DA's office uses a few tools to help with this process.

General Case Management System

Through its case management system, the Manhattan DA's office captures a rich set of data on cases as they make their way through the court system. This information can be extremely helpful for understanding how initial decisions about the program play out on the ground, and how later changes in program operation can affect its efficacy. For example, an important first step in establishing a new program is the choice of program-eligible charges. Case management data can be used to determine the changes in case flow that would occur under different sets of program-

eligible charges. Prosecutors often have scarce resources with which to operate these programs. Running these program choice scenarios can help identify how resources can be best used to accomplish diversion goals. An effective case management system would facilitate this type of data collection and analysis.

Data collected by the Manhattan DA's office case management system has enabled it to explore new types of diversion, and to expand the age eligibility for existing programs. After the early success with young people in Project Reset, the Manhattan DA's office sought to expand the program to adults. The Office used case data to investigate the impact of such an expansion and assess the resources needed for implementation.³³ As an example, they recently expanded eligibility for Project Reset to include individuals with more serious criminal records.³⁴ Case management data made it possible for the Manhattan DA's office to assess the impact of expanding Project Reset to offer more people a second chance.

Additional Data Feeds

Incorporating data streams from other government agencies can add tremendous value to the internal data that a prosecutor's office collects. A linked feed with information on an individual's arrest record can make recidivism a trackable program metric. This additional metric can greatly enhance a program's evaluation capabilities.

Data streams from other agencies form an integral part of the Manhattan DA's office diversion process. The NYPD online booking system data feed provides a complete list of DATs issued by law enforcement. This DAT list forms the base set of cases that the Manhattan DA's office considers for diversion. Next, the Manhattan DA's office system filters this case list. Note that the minimum

³² Kimberly Dalve & Becca Cadoff, Center for Court Innovation, *Project Reset: An Evaluation of a Pre-Arrestment Diversion Program in New York City* at 8-9 (January 2019), available at https://www.courtinnovation.org/sites/default/files/media/document/2019/projectreset_eval_2019.pdf.

³³ *Id.* at 14

³⁴ The program has enhanced program requirements and is referred to Project Reset+.



eligibility requirements are different for different programs.³⁵ The Manhattan DA's office matches individuals in the NYPD online booking system with individuals in these additional feeds through their NYSID, a unique identifier assigned to an individual the first time they enter the criminal justice system. An individual who is arrested for a second time will be tied to their previous arrest through their NYSID.

The outcome of this process is a set of individuals who pass the minimum criteria and are potentially eligible for one or more diversion programs. Program administrators periodically receive an automated set of reports with the list of cases eligible for each program. The Manhattan DA's office uses SQL Server Reporting Services to generate these reports. Following this automated screening process, cases are assessed on an individual basis to determine if an individual should actually be invited to participate in a diversion program.

Of course, these integrations often are difficult to set up, not because of any specific technology barrier, but because they usually require many layers of bureaucratic approval. The Manhattan DA's office has been able to successfully navigate these bureaucratic hurdles both at the state and local levels. First, it had to convince New York State that its mission and reasons for wanting the data were vital for achieving its goals.³⁶ Then, it used executive relationships and data-use agreements with local agencies actually to add the new data streams.

Customer Relationship Management Platform

Collecting data on the diversion program itself is instrumental for understanding the program's impact and identifying steps for improvement. A jurisdiction can use program data to improve efficiency and increase transparency of program outcomes to criminal justice stakeholders

and the public. To acquire this data, an office needs to track participants through as many stages of the diversion process as possible. Using a program-specific tracking system is extremely important for pre-arraignment diversion cases, as their cases are not tracked by the general case management system. For post-arrest diversion, tracking systems can still add value by capturing detailed program information not contained in the general case management system.

The Manhattan DA's office and its partners developed a novel tracking tool built on top of a Customer Relationship Management (CRM) Platform to accomplish this task. Traditionally, CRMs are used by sales professionals in industry to track and manage relationships with current and potential customers and to improve relations over time. These platforms offer customizable reports for the Manhattan DA's office and its service providers to manage their caseloads and to track participants through their diversion programs. The tracking process can be summarized as follows.

After the automated screen process and individual case evaluation, the final list of eligible diversion program participants is identified. Next, the basic case/participant data is entered into the CRM platform. For some programs, an individual is allowed to participate more than once. If they have another case active at the same time, their information will already be in the system. Participant contact information is entered and can be acquired from a variety of sources, including additional data feeds if they have had previous encounters with the criminal justice system, or internal data from the prosecutor's office.

The office has three weeks to contact the individual and find out if they want to enroll in the diversion program. If they are unable to contact them during that time, the office determines they will be unable to help the individual and their case is closed in the CRM. Once the individual is contacted and agrees to participate,

35 *Id.* at 27.
36 *Id.* at 14.



they must complete the program requirements three weeks before arraignment. The three-week buffer is necessary to give the Early Case Assessment Bureau sufficient time to prepare for arraignment if it is required. However, the Diversion Coordinator can override the program deadline and give an extension to complete the program up until the arraignment date. For Project Reset, once a participant is enrolled, they are assigned to a program provider based on their offense and the area of Manhattan in which they were arrested. The participants are stratified based on location in Manhattan because the Manhattan DA's office wants to address the needs of each participant locally. The program tasks are recorded in the system, along with status reports about the participant's completion of conditions. Once the program is complete, the case outcome is captured. The CRM automatically generates a case outcome letter for the Manhattan DA's office to print, sign, and send by mail to the participant. If the participant fails to complete the program, the CRM ensures that the assigned ADA can seamlessly pick up the case if further prosecution is necessary. The CRM serves as a record of decision for these pre-arrest diversion programs.

The data collected by the Manhattan DA's office tracking system is used to improve program operation in several ways. First, the Manhattan DA's office can track metrics such as the race and age breakdown of participants in the diversion program. This information helps the Manhattan DA's office identify any inequities in participation that inadvertently result from the eligibility screening criteria. Second, the Manhattan DA's office can identify bottlenecks in the diversion process that may preclude certain types of individuals from participating in the program. For example, if a particular geographic area has a consistently high number of repeat offenders, then the Manhattan DA's program partners in that area might not be matching participants with the best treatment options. Finally, data on program outcomes helps the Manhattan DA's

office understand which program providers and interventions are more successful with certain clients. When combined with criminal history data from additional data streams, this information can be used to track traditional success metrics such as recidivism.

The CRM is also designed to improve communication across the stakeholders involved in an individual's case. Through a chat component, similar to Facebook Messenger, the Manhattan DA's office and program providers can trade information about a participant's progress in a secure, efficient way. The Manhattan DA's office can use this data along with more advanced analytic techniques, such as text mining, to further understand issues that arise during treatment. However, they have yet to take advantage of this in a structured way.

C. Data Analysis

With a thoughtful collection of data streams comes the opportunity to generate insights that can improve diversion decision-making within the prosecutor's office. This is the core component of a system that results in data-driven policies and decisions. A traditional business intelligence platform facilitates this type of data analysis. These platforms are designed to provide information on the business from historical, current, and predictive viewpoints. Through the platform, the team can build business intelligence applications that allow for users to analyze multidimensional data interactively and to generate insights. The result is a tool that the team can use to ask and answer questions to inform operations and strategy around the business.

The Manhattan DA's office uses a business intelligence platform to generate insights related to diversion and other prosecutorial functions. The Strategic Planning and Policy team has set up a data warehouse that houses the data on which the insights are based. The team has worked with executives to form standardized data definitions



that enable the correct questions to be answered. The team has built applications using Rshiny and PowerBI that a user can access to slice and dice the data and ask questions to improve the work of the Manhattan DA's office. These steps result in evidenced-based decisions that best support the function of the organization, including its role in the diversion process.

While the strategy team can run complicated customized analyses using R, the main focus of the Manhattan DA's office setup is to support self-driven exploratory data analysis by internal staff to generate the desired program improvements. It is not feasible for the system to collect enough data to automate changes based on feedback from data findings. The prosecutorial function is a complicated process, and its role in diversion oversight is no exception. Analyses must be driven by the individuals who understand the context and can use the data to draw the correct conclusions. If the unit chief for domestic violence offense has a hunch about the pattern of prosecution in certain cases, the office feels they should be able to test their hunch.

The data collected by the Manhattan DA's office makes possible the descriptive analysis of diversion programs across a number of dimensions. The Manhattan DA's office is interested in understanding the participant makeup of the diversion program itself. Data enables the office to answer questions such as:

- Which individuals are receiving what offers? Who are accepting their offers?
- What is the age range of program participants? What are other demographic characteristics of participants?
- For which offenses are individuals referred to the diversion program?
- Has there been an uptick in participation or a decline?
- What are the diversion program

outcomes for different segments of the program population?

- In the precincts where there is a high volume of arrests, is there a high volume of diversion participation?

Studying programmatic options and outcomes is also possible with the comprehensive data that DANY collects.

- Which providers are being utilized most?
- What needs are being addressed most frequently?
- What are the completion rates for each of the programmatic options?

The Manhattan DA's office can also run analyses that shed light on possible process improvements.

- Where do bottlenecks arise in the program?
- How long are individuals remaining in each part of the program?
- Which arresting officers are telling individuals about diversion? Which are not?
- What are the reasons for an individual's failure to comply with the program?

Manhattan DA's office executives and program administrators can use this descriptive information to better evaluate the program and prescribe improvements to program processes going forward. Key questions include:

- Given the descriptive information on race and age, is the program meeting its target population goals? Are groups being inadvertently excluded from the process?
- How can the program help participants better achieve diversion



- program success metrics?
- How can the program improve referrals from precincts that are not referring individuals to the pre-arrest diversion program?
- Are service providers adequately staffed to meet the needs of a growing reliance on a successful option?

Following a thorough evaluation of the diversion program through data, the Manhattan DA's office then can conduct counterfactual analyses of historical data to see what impact any proposed changes would have on the system. For example, the Office has analyzed the potential impact of an expansion of age eligibility for Project Reset. More generally, they use data to ask how they can expand the set of people served by the program. Any changes to program execution are driven by these types of data exercises, which leads to more informed policy decisions.

The Manhattan DA's office also uses data to ensure quality control. If a defense attorney asserts that his client was wrongfully denied acceptance into the diversion program, the Office can access program data to investigate and assess the veracity of the claim. If a certain policy change was not followed during the diversion process because it was not properly communicated to the ADA, supervisors could take proactive steps to intervene.

D. Data Sharing

Data sharing is another essential component of an organization's plan to achieve data-driven decisions. Actionable insights need to arrive in the hands of the ultimate decision-maker. Access to a competent data science team is not enough. If a silo develops around those conducting the data analyses, and the results are not communicated to the proper party, the data team's value will not be realized.

The Manhattan DA's office has developed

a few different methods for facilitating access to data and the insights that are generated by its intelligence platform. The first is DANYnet, an internal web portal. Most applications and reports produced by the Manhattan DA's office strategy team are available to any employee through DANYnet. Users can access interactive program reports, executive dashboards, and data visualizations to obtain a clearer picture of what is happening with diversion. The idea behind the near-universal access to the data is to empower employees to self-serve and find answers to their questions.

To ensure decisions are based on accurate information, all of the information is updated in real-time. If a manager needs to see some Key Performance Indicators (KPIs) for a diversion program before a meeting, they can access the latest information instead of some static report that is outdated the moment it is created. Efficiency increases because staffers can personally tailor the parameters and filters to answer the questions that are pertinent to their decision. The Manhattan DA's office can stay on top of newly updated information by setting up alerts to receive notifications when a new version of a report is available. These internal data-sharing efforts increase the transparency of the programs within the Manhattan DA's office. Involving more people in the data efforts helps to crowdsource the generation of insights and the identification of additional data needs.

The data and policy team generates a set of management reports each month for Manhattan DA's office executives. These reports track executive-level KPIs that help the executive team understand how the office and the diversion programs, in particular, are doing at a high level. Access to these management reports, as well as other documents with sensitive investigation information, is more restricted than regular reports. Email subscriptions ensure that they get to the correct audiences efficiently.

Through the CRM chat component, the



diversion team also can share information directly with the providers that offer the interventions to participants. With program-level data on participant placement, providers may be able to adjust their offerings to appeal to a broader range of clients and thereby improve the diversion program as a whole. Moreover, understanding completion rates and other success metrics across providers can offer valuable feedback to providers who want to remain competitive as an intervention option. The CRM chat also enables providers to give the Manhattan DA's office more detailed information about specific interventions, which can be mined to generate additional insights.

To make the data sharing process as effective as possible, the Strategic Planning and Policy unit conducts outreach to senior-level managers. Their seminars explain how to use the available applications and reports as well as the custom data science capabilities of the strategy team. To realize the goal of data-driven policies, senior managers and higher-level leadership need to be informed about the types of data available and what questions they can answer with the data. These are the individuals who will use the information when making day-to-day decisions within their units. Often, presenting simple facts to this group, such as the numbers of felonies, misdemeanors, and unindicted felonies within a given unit, is enough to pique their interest in accessing and using data more. Involving the individual unit decision-makers in this process also helps to improve the quality of the data available, as they can make suggestions about how to adjust data definitions and the presentation of results.

III. Roadmap for Your Jurisdiction

With the Manhattan DA's experience in mind, here is a list of first steps a prosecutor's office can take to make their diversion program more data driven.

A. First Steps

Step 1: Inventory Data

The first step is to take inventory of the data related to diversion currently available to the prosecutor's office. This set of data may include historical case information as well as more current data such as real-time data coming from the office's case management system. This information is useful for evaluating the case flow impact of a new or altered diversion program. If the program is already in place, then some level of outcome data might also be available. Ideally, other court data feeds or data from other government agencies could also be accessed as a part of the initial data inventory.

Step 2: Identify Key Decision Points

The next step is to identify the key decisions within the jurisdiction's diversion process workflow. Depending on the type of program the office runs or wants to launch, some decisions may include eligibility, offers/referrals, screening for risks and needs, programming choice, determination of program completion, outcomes, overall process efficiency, and cost. From this set, the prosecutor's office should choose two or three decisions that can be improved with better information.

Step 3: Use Existing Data to Generate Insights on 2 or 3 Key Decision Points

The primary determinant for which decision to choose is how well the data identified in Step 1 can inform that decision. Basic work with Excel and pivot tables can accomplish the task. As an example, we could use case data from the case management system to understand how our diversion program has impacted the flow of cases in the court system. How many cases have been



disposed of through the diversion program? Have certain types of cases been dealt with while others have not? These initial insights also can be used to demonstrate the value of collecting additional data to stakeholders. They can also help build the case for additional program investments to collect and use data for program improvements.

B. Next Steps

These additional steps are designed to give a prosecutor's office broader capabilities around establishing data-driven diversion policies.

Use Technology to Improve Data Collection and Quality

Once the use of existing data to improve key program decision points is exhausted, the prosecutor can mark additional parts of the diversion workflow for improvement. Since data is not available for these new parts of the workflow, some improvements in data collection need to be implemented. As identified in the Manhattan DA case study, technology can help here. Technology enhancements can augment the program's capacity to capture information on the selected parts of the diversion workflow. The key step here is to identify technological approaches that are easy to implement and will produce the desired actionable data. The choices are going to depend on needs, appetites, and abilities. With these additional data streams, the prosecutor's office can generate the necessary insights on the chosen diversion workflow components.

Adding new technology also will enable a jurisdiction to understand the drivers of program outcomes at an individual level instead of for the program as a whole. For example, an office may choose to understand new key decision points that include diversion plan creation and the participant's completion of program conditions. Adding technology can help capture an individual's assigned programs at

the time of diversion plan creation. It can also help track an individual's completion of program conditions over time. Prosecutors can gain a better understanding about which providers are used to address which needs. They can see how much time it takes for an individual to go from receiving their offer or referral to participating in a program. This information will shed light on whether the program is minimizing harm to the individual by dealing with their problems quickly. Intervention completion rates can give the prosecutor some information about which treatments are successful in addressing participant needs. If a specific intervention has a low completion rate, the diversion program can talk to the provider to address some of the deficiencies.

Given the nature of cloud computing options on the market, real-time or near real-time access to the data for the selected key decision points are possible with some technology investment. These capabilities are significant for tightening the data feedback loop for the program, and analyzing the additional data in real-time results in program improvement suggestions that are as current as possible.

Improve Data Analysis Capabilities

In addition to collecting more and better data, employing more advanced analytic techniques can help a prosecutor's office generate additional insights with the data they currently have. Moving beyond a purely descriptive use of data can help shed additional light on how the diversion program is operating. Advanced statistical analyses, including derived data elements, predictive modeling, and forecasting, can increase the value of the data collected.

Derived Data Elements

Derived data elements are created when an analyst combines one or more data elements into a single measure. Correlations are one



example; they can help the analyst understand the degree to which two factors are statistically associated with each other. For example, a jurisdiction can calculate correlations to check for racial discrimination in program entry. If an analyst finds a connection between race and the probability of program entry, then the jurisdiction might want to investigate why the identified correlation occurs. There may be some problem with the way offers are given, or there could be some other eligibility factor that is responsible for the identified correlation. Adjustments can be made to rectify the situation.

Another type of derived data element are relative scores. An 80 percent intervention completion rate may not mean much by itself. It is better to have an understanding of the intervention completion rate relative to other treatment options. Establishing relative scores such as deviations from the average completion rate can give the program administrator a more exceptional ability to discern successful treatment providers from unsuccessful ones.

Predictive Modeling

The idea behind machine learning is to automate the discovery and evaluation of patterns from large volumes of data. This information can be useful for prosecutors if it helps to answer questions that are important for a well-functioning diversion program. As an example, suppose the prosecutor's office wants to identify which potential participants have a high risk of not completing the diversion program requirements. This information may be necessary because it can help the office use its limited resources to track these individuals and intervene proactively before they fail out of the program.

As a part of this task, an analyst would want to know who these individuals are and how can they be characterized. One way to attack this problem would be to find common characteristics for this group of participants through a database

query. An analyst would gather information on the individuals who did not complete their diversion program, calculate summary statistics for group characteristics, and compare them to those who did complete their program.

A more in-depth analysis would involve determining which characteristics differentiate these participants from successful ones. This more advanced task would require the analyst to dive into the realm of predictive modeling. Given historical data on participant characteristics and whether they completed the program, an analyst could predict which participants are likely to complete the program. This modeling exercise would result in the identification of characteristics that are important for determining if a participant will be successful. The resulting model can then be used to predict whether a new program entrant is likely to complete the program requirements.

Of course, an analyst could go further. Another useful model would be to predict not only whether an individual will complete the program, but also the probability they will finish. This probability can then be used to assign individuals a risk score for failing to complete requirements. Participants can be ranked in terms of risk, which can help guide the prosecutor's decisions about where they should devote their limited tracking and assistance resources.

Predictive modeling can also help suggest treatment options for a new program participant. Given historical data on participant characteristics, treatment plans, and program success metrics, an analyst can develop a model that determines which interventions are most effective for individuals with certain characteristics to participate in the diversion program successfully. This model can be used as a recommendation engine for new participant treatment based on the known characteristics of the individual. Employing this type of advanced analytics should help to improve the success of the diversion program. These types of predictions can be done at a very granular level depending on the amount of data available.

*Forecasting*

Forecasting is another type of modeling that can be used to inform program operation. With forecasting, a data analyst uses historical data to make predictions about the future value of a variable or set of variables. One place this technique could be useful is understanding future intervention needs at the program level. Based on the previous year's participation, program administrators can predict what the likely level of participation in a given intervention will be the following year. This forecast can help the program line up the resources necessary to ensure a given intervention is available at the levels necessary to meet the predicted participant needs.

sharing can help a prosecutor's office scale up their diversion offerings past low-level misdemeanors and help achieve a vision of effective, efficient criminal justice.

IV. Conclusion

Prosecutors around the country, from the Manhattan District Attorney's Office to the Labette County Attorney in Kansas, are using data to make both operational and strategic decisions about diversion approaches. In particular, the prosecutor's offices are finding that transparency, efficiency, effectiveness, and consistency goals can be achieved through greater use of data collection and analysis. The example of the Manhattan District Attorney's use of data for Project Reset provides a roadmap for immediate next steps as well as longer-term actions. Project Reset shows that offices should inventory data, identify key decision points, and use existing data to generate insights on two to three key decision points. Additionally, advanced statistical analyses, including derived data elements, predictive modeling, and forecasting, can help offices do even more.

Prosecutor-led diversion offers an opportunity to build a criminal justice system that meets the complex needs of the community and moves beyond purely punitive measures. Increased data collection, data analyses, and data



How Data Analysis Can Shape Diversion Policy

BY CONNOR CONCANNON
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Prosecutors have historically enjoyed high levels of discretion and autonomy as a case moves from arrest to disposition and sentencing. Public interest in prosecutors' actions has increased significantly in recent years, along with the recognition that prosecutor's offices act like 'black boxes', or institutions that do not explain their decision-making to their constituents. The black box analogy holds true for data collected by prosecutors as well. In a recent survey, nearly all prosecutorial agencies reported collecting at least some data, and about half the offices surveyed captured data on all phases of the prosecution process, and most use electronic case management software.¹ But to date, many agencies report sharing no information about their caseload with the public, and only the Cook County State's Attorney's Office in Chicago has made case-level data publicly available for download.² The field of policing has been responsive to similar public demands: Many police departments analyze crime data and some make incident-level crime

data available to the public.³

The last decade has demonstrated the transformative power of data analytics when applied to nearly every industry, including state, local, and federal governments.⁴ The field of prosecution is ripe for transformation through the use of data analytics and business intelligence techniques. Research indicates that over 10 million misdemeanor cases are filed annually, representing nearly 80 percent of state caseloads.⁵ These caseloads come at significant cost to taxpayers and it is incumbent on prosecutors to make the best use of limited resources. Not surprisingly, some prosecutor's offices have turned to data analytics to better understand their work and serve the public. The trend is not a panacea—early advances in 'moneyballing' criminal justice have come under serious and well-deserved scrutiny for perpetuating bias.⁶

If most prosecutor's offices are collecting data on their cases, but just one is making it regularly available to the public, what are the remaining prosecutor's offices doing with their data? A survey conducted by the Urban Institute suggests that many prosecutor's offices struggle with collecting high quality data and recruiting and retaining staff capable of undertaking methodologically sound analytical projects

1 See Robin Olsen, et al., *Collecting and Using Data for Prosecutorial Decision-making: Findings from 2018 National Survey of State Prosecutors' Offices*, The Urban Institute (September 2018), <https://www.urban.org/research/publication/collecting-and-using-data-prosecutorial-decisionmaking>.

2 See Kimberly Foxx, *A Commitment to Transparency* (2017), <https://www.cookcountystatesattorney.org/about/data-sao-message-sa-foxx>.

3 See Code for America, *Police Open Data Census* (2017), <https://codeforamerica.github.io/PoliceOpenDataCensus/>.

4 See generally, Dahianna Salazar Foreman, *18F's four favorite projects of 2018* (March 22, 2019), <https://18f.gsa.gov/2019/03/22/18F-5-anniv-fav-project/>; see also Accenture, *City of New York: Using Data Analytics to Achieve Greater Efficiency and Cost Savings* (2013), https://www.accenture.com/t00010101T000000Z__w_/gb-en/_acn-media/Accenture/Conversion-Assets/DocCom/Documents/Global/PDF/Technology_7/Accenture-Data-Analytics-Helps-New-York-City-Boost-Efficiency-Spend-Wisely.ashxla=en-GB.

5 See Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313 (2012).

6 John Bowers, et al., *Technical Flaws in Pretrial Risk Assessments Raise Grave Concerns* (July 17, 2019), <https://cyber.harvard.edu/story/2019-07/technical-flaws-pretrial-risk-assessments-raise-grave-concerns>.



that deliver tangible findings to stakeholders.⁷ This text discusses a variety of approaches of using data to inform decision-making in prosecution and some common challenges.; it highlights several tangible analytical projects from prosecutor's offices around the country.

I. Case Study: Discretion in Manhattan

As legal scholar John Pfaff has remarked, "Prosecutor's [offices] are mostly a black box with little transparency....one exception is the Manhattan District Attorney's Office, which allowed [the] Vera Institute [of Justice] to do a study with their files." Cyrus Vance, during his campaign for Manhattan District Attorney, pledged that during his tenure, the Vera Institute would conduct a study on racial disparities in key prosecutorial discretion points, such as case screening, pretrial detention, plea bargaining and sentencing at the New York County District Attorney's office (DANY). Speaking about the study, Vance said, "My office is proud to be the largest prosecutor's office in the nation to open our books and invite such research. And we are committed to implementing preventative strategies to reduce any unintended racial and ethnic disparities that exist."⁸

The study concluded in 2014, and found that legally relevant factors such as charge severity, offense type, and prior criminal history were key determinants of discretionary decision-making.⁹ But the study also found significant racial disparities at many stages of prosecutions.¹⁰

Black and Latinx defendants were more likely to be detained, given harsher plea offers, and imprisoned than White defendants.¹¹ When the study was released, DA Vance stated "the most important job of a district attorney is to enhance public safety while ensuring fairness for all who come before the court. That is why it is critically important for us to understand where and why disparities occur in the criminal justice system."¹² Although the study was illuminating in many ways, the partnership and resulting research generated new questions and an appetite for insights among the leadership team of the District Attorney's office.¹³ The ways in which DANY collaborated with Vera during the study, and the responses since the study, are a helpful guide on the potential stumbling blocks of research and ways to translate research findings into replicable and tangible projects that eventually lead to policy shifts.

There is a small but growing body of literature on researcher-practitioner partnerships within the criminal justice system, and the traits that make such partnerships successful. One of the main findings from this literature is that successful researcher-practitioner partnerships have two key qualities: trust and time.¹⁴ The presence or absence of these qualities between researchers and practitioners are thought to be key factors in determining the success of a research project.¹⁵ Trust is crucial because researchers are keenly aware of the historical *mistrust* between criminal justice researchers and practitioners.¹⁶

7 See Robin Olsen, et al., *Collecting and Using Data for Prosecutorial Decision-making: Findings from 2018 National Survey of State Prosecutors' Offices*, The Urban Institute (September 2018)

8 DA Vance and Vera Institute of Justice Announce the Release of Study Examining Racial Disparities in the Manhattan Criminal Justice System, VERA INSTITUTE OF JUSTICE (July 8, 2014) <https://www.vera.org/newsroom/da-vance-and-vera-institute-of-justice-announce-the-release-of-study-examining-racial-disparities-in-the-manhattan-criminal-justice-system>.

9 *Id.* at 115.

10 *Id.*

11 See Besiki Luka Kutateladze and Nancy R. Andiloro, *Prosecution and Racial Justice in New York County*, VERA INSTITUTE OF JUSTICE (2014) (outlining that the 2014 study found multiple racial disparities in the criminal justice system that benefitted White defendants).

12 DA Vance, *supra*, note 11.

13 Interview by Shona Hemmady with Lucy Lang (Aug. 30, 2019).

14 Tami P. Sullivan, *The Researcher-Practitioner Partnership Study (RPPS): Experiences From Criminal Justice System Collaborations Studying Violence Against Women Models of Collaboration* 1, 3 (2017),

15 *See id.*

16 *See id.*



For example, if a practitioner’s goals for a research project are significantly different than the goals of the researcher, there may not be a foundation of trust on which the two groups can collaborate successfully.¹⁷ The field has adopted the term *drive by* to describe how practitioners sometimes feel about researchers’ methods and shallow community relationships.¹⁸ For example, although researchers typically have a better understanding of study design and rigorous research methods, practitioners tend to have more experience working directly in the field and a better understanding of the system in which the research is conducted.¹⁹ In addition, practitioners can enhance researchers’ understanding and correct misconceptions, thereby enhancing the study’s credibility and the findings’ utility.²⁰

Another key quality is time. Practitioners’ and researchers’ anticipated timeframes can differ sharply, with practitioners eager for results in far less time than researchers feel is realistic, and both parties underestimating the significant ongoing time commitment necessary to successfully collaborate.²¹ While academic research is incredibly valuable, the results depict a moment in time and may not align with a practitioner’s day to day goals, such as tangible advice on the management of the office.²² Prosecutors should acknowledge and work with these potential pitfalls and learn to recognize which big-picture questions are appropriate for long-term research, and which require short and medium-term projects to more quickly analyze data questions.²³ An ideal approach would be to integrate research findings into practice and to continuously monitor the results.²⁴

The team at DANY attempted to do just that. The Vera Institute’s findings led the internal DANY analytics team to complete several replications and extensions of the original study in close consultation with executive leadership and stakeholders throughout the office. The impetus for repeating the study was a number of policy changes, such as the adoption of a supervised release program and large-scale diversion for many first-time misdemeanor defendants, as well as an ongoing interest in how the office was performing. Choosing to replicate and build upon the existing study held many advantages. The in-house analysis used an existing collaborative relationship between the internal analytics team and key stakeholders and allowed frequent iteration and presentation of intermediate results. Most importantly, extending the discretion study internally allowed DANY stakeholders to offer suggestions about which measures of discretion to study.

For example, the original Vera study examined pretrial detention—specifically, whether a judge set bail for a particular defendant at criminal court arraignment.²⁵ However, this crucial decision in the criminal justice system is made by the judge after hearing arguments from both the prosecutor and the defense.²⁶ The team at DANY built on Vera’s research by instead studying the prosecutor’s bail *request*, which was a more direct measure of prosecutor’s use of discretion and one that could be meaningfully influenced through policy. The data was captured in DANY’s case management systems and readily available for ongoing analyses. These types of alterations to the original study methodology, along with additional data sources and improved measures of criminal history, allowed the extension studies to provide tangible insights for DANY stakeholders.

In general, the extension studies found some evidence of disparities, along with the continued strong influence of key legally relevant

17 See *id.*

18 See *id.*

19 See *id.*

20 See *id.*

21 Stephanie Riger, *Editor’s Introduction: Working together: Challenges in Collaborative Research on Violence Against Women*, 5 VIOLENCE AGAINST WOMEN 1099, 1098 (1999).

22 See Sullivan.

23 See *id.*

24 See *id.*

25 See Besiki

26 *Id.*



factors such as offense severity and criminal history. It also became clear to the DANY team there was a general lack of consistency across the different bureaus of the office.²⁷ The findings spurred significant work towards standardizing decision-making within the different bureaus. While every study has its limitations, the team at DANY found continued research into discretion the most promising and best chance of translating research into action. As a result of the findings, every assistant district attorney receives implicit bias training and statistics about discretionary decision-making are integrated into day-to-day business intelligence reporting, allowing executive stakeholders to continuously monitor the key outcomes of their office. This model of an ongoing research partnership is catching on among prosecutors: Milwaukee District Attorney John Chisholm has continuously examined racial disparities in his office,²⁸ and at one point the San Francisco District Attorney reported having 12 active research partnerships.²⁹

One research partnership is working to actively remove bias from prosecutorial decision-making. To help remove potential sources for racial bias in prosecution, the San Francisco District Attorney's office worked with Stanford University's Computational Policy Lab to develop a tool that redacts information that might indicate the race of involved parties from documents in the case management system.³⁰ This includes names of officers, witnesses, and suspects, as well as officer shield numbers and locations. The modified reports are used during

case screening, after which the full, un-redacted, forms are available for review, as well as any new evidence that has been found.³¹ At this stage, prosecutors may change the charges due to additional information and previously unseen evidence but must specify the new evidence that led to changes.³² In doing so, prosecutors hope to identify what modifications could be made to the tool to improve its functionality and plan other steps to further reduce the role of implicit racial bias within charging at their office.³³

From New York to San Francisco, district attorneys are examining their broad decision-making authority. This brief case study highlights how academic research findings can be integrated into day to day management and translated into policy changes, and how advanced technology can work to eliminate bias and disparities.

II. Why Recidivism?

In order for prosecutors to successfully adopt data-informed methods, they should carefully consider the metrics they choose to focus on and how they measure those metrics. Metrics with long runways or large populations may be difficult to meaningfully influence. Alternatively, prosecutors should seek out actionable metrics, or those that can inform decision-making and guide subsequent action.³⁴ Doing so may give prosecutors the opportunity to meaningfully affect outcome measures that are important to them and the communities they serve.

Historically, the benchmark measure of the criminal justice system has been recidivism. Many reform-minded prosecutors are questioning whether this metric should play such a central role in the future. Across the country, recidivism is measured in different

²⁷ Interview by Shona Hemmady with Lucy Lang (Aug. 30, 2019).

²⁸ Bruce Vielmetti, *Race plays little role in prosecutions carried out by Milwaukee County prosecutors, study finds*, MILWAUKEE JOURNAL SENTINEL (Dec. 9, 2019) <https://www.jsonline.com/story/news/crime/2019/12/09/race-not-factor-milwaukee-da-decisions-report-says/2617984001/>.

²⁹ Interview by Shona Hemmady with Tara Anderson (Aug. 28, 2019).

³⁰ *San Francisco DA Looks to AI to Remove Potential Prosecution Bias* (NPR radio broadcast June 15, 2019), <https://www.npr.org/2019/06/15/733081706/san-francisco-da-looks-to-ai-to-remove-potential-prosecution-bias>.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Lean Startups*, WIKIPEDIA, (last visited Dec. 20, 2019), https://en.wikipedia.org/wiki/Lean_startup.



ways, on different people, at varying intervals.³⁵ This makes comparing jurisdictions, programs, or other entities difficult, if not impossible.³⁶ Recent research recommends carefully measuring recidivism for subpopulations, such as defendants who completed a treatment program, time to recidivism, or severity of recidivism, rather than a binary measure of recidivism.³⁷ As many researchers have noted, nearly half of recidivism events are technical violations of probation or parole conditions. For lofty goals such as public safety, deterrence, and accountability, recidivism alone does not tell the whole story. Public safety, crime rates, and other societal phenomena are the results of many factors, most of which are beyond the control of prosecutors. As opposed to tracking recidivism, prosecutors should focus on changes they can actually make within their community. These smaller-scale actions can have a much bigger impact on both victims' and defendants' lives.

The focus on negative events surrounding recidivism, such as new arrests and convictions, ignores the positive influence prosecutors can have on defendants and their communities. These defeatist measures may be especially harmful for young defendants. Several positive outcomes are associated with a lack of recidivism, including establishment of prosocial relationships, development of cognitive and emotional capacities, academic engagement, and employment training.³⁸ A recent study stresses that only measuring negative outcomes, such as recidivism, or warnings at school, tends to lead youths to focus on those outcomes as well, while measuring positive outcomes encourages the

behaviors that produce those outcomes instead.³⁹ The study found a marked shift in metrics brought successes in general youth programs, and also in diversion programs for youth offenders.⁴⁰ Though recidivism, truancy, drug use, and other negative indicators are still useful measures, emphasis on building positive support systems and tracking markers related to them—as opposed to measuring only the absence of regression or failure—frames youth diversion as actively improving the youth's situation. Several prosecutors and criminal justice researchers interviewed for this manuscript highlighted the same point: Prosecutors should measure the positive impacts of diversion on defendants, such as finding improved housing stability, securing employment, and obtaining bank accounts and identification documents, among other measures.

Despite concerns about the measurement of recidivism, it is also a key variable in many risk assessments and one of the most controversial aspects of data-informed decision-making in criminal justice today. Initially described as a way to eliminate bias in criminal justice, risk assessment tools developed across the country may produce biased outcomes that perpetuate inequalities under the guise of scientific objectivity. A growing number of practitioners and academics are lobbying against further adoption or use of these tools.⁴¹ Specifically, implementation of risk assessment tools has been studied by both investigative journalists and academics alike, and one consistent conclusion is that these tools systematically rate minority defendants as much more likely to be high-risk but not actually re-

35 Ryan King, *There's More Than One Way to Measure Recidivism*, THE URBAN INSTITUTE (Oct. 17, 2014), <https://www.urban.org/urban-wire/theres-more-one-way-measure-recidivism>.

36 *Id.*

37 *Id.*

38 Jeffrey A. Butts, Emily Pelletier, and Lila Kazemian, *Positive Outcomes: Strategies for Assessing the Progress of Youth Involved in the Justice System*, John Jay Coll. of Criminal Justice, (2018).

39 *Id.*

40 *Id.*

41 See John Bowers, et al., *Technical Flaws in Pretrial Risk Assessments Raise Grave Concerns* (July 17, 2019), <https://cyber.harvard.edu/story/2019-07/technical-flaws-pretrial-risk-assessments-raise-grave-concerns>; see also Cathy O'Neil *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*, (2016); Stephen D. Gottfredson & Laura J. Moriarty, *Statistical Risk Assessment: Old Problems and New Applications*, 52(1) CRIME & DELINQUENCY, 178, 178-200 (2006).



offend, compared to white defendants.⁴²

Recent discussions frame criminal records as both under-inclusive and over-inclusive. A defendant's criminal record may be under-inclusive because not all crime is reported to law enforcement, and not all reported crimes result in an arrest, including less than half of violent crimes and less than a quarter of property crimes. Criminal history records are inherently discriminatory at the same time, as Black and Latinx people have been shown to be more likely to be arrested, convicted, and sentenced than their White counterparts.⁴³ The biases in criminal history records can accumulate and result in minority defendants appearing as higher risk and receiving harsher treatment than White defendants. As practitioners and researchers alike know, criminal behavior and detection by law enforcement are not equally distributed among individuals. Finally, the criteria for recidivism in some risk assessment instruments is overly broad and subject to the same shortcomings, which may result in unnecessary detention or incarceration of defendants who pose no true risk to public safety. For example, a risk assessment used in Colorado defines recidivism as 'any new criminal filing,' which includes municipal and traffic offenses.⁴⁴ Similarly, some pretrial risk assessments predict the likelihood of pretrial 'failure,' defined as a failure to appear or a new arrest.⁴⁵ Conflating these two distinct events risks increasing pretrial detention rates and intensifying existing inequalities.

The suspect reliability of data and an

overly-broad definition of recidivism are just two of the issues present in modern risk assessment. Other serious concerns include conflicting data about whether implementation of these tools actually reduced pretrial detention or improved pretrial outcomes, and use of proprietary 'black-box' algorithms which cannot be interrogated about the underlying reasons for predicting a defendant's fate.⁴⁶ To avoid further harm to defendants and the criminal justice system as a whole, a growing number of researchers and advocates are lobbying to halt the reliance on or implementation of these tools.

III. "What Gets Measured Gets Done"⁴⁷

If the traditional metrics of criminal justice performance are suspect, what should prosecutors measure? What are the key performance indicators of an effective prosecutor's office? Uncertainty is making it more difficult to unseat incumbent district attorneys—challengers are unsure what measures to use as evidence of their opponent's shortcomings. On the other hand, the paucity of prosecutorial data can be a compelling argument for challengers making the case against an incumbent, if the challenger can show problems stemming from a lack of data.⁴⁸ Ultimately, when evaluating possible performance metrics, *why* something is measured is almost as important as *what* is measured.

Prosecutors play many roles and have diverse policy goals. The National District Attorney's Association (NDAA) identifies three broad policy goals for all district attorneys: promoting fair and impartial justice, ensuring safer communities, and promoting integrity

42 Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

43 *Id.*

44 *The Colorado Pretrial Assessment Tool (CPAT) A Joint Partnership among Ten Colorado Counties, the Pretrial Justice Institute, and the JFA Institute*, PRETRIAL JUSTICE INSTITUTE (2012), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=64908e23-bf3e-9379-1a1f-f2d5b9e1702f&forceDialog=0>.

45 Kristen Bechtel et al., *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 Am. J. of Crim. Just. 443 (2017); see also IIP Roundtable Discussion.

46 *Id.*

47 A quote from one of the IIP roundtable participants.

48 Katherine K. Moy et al., *Rate My District Attorney: Toward a Scorecard for Prosecutors' Offices*, STANFORD CRIMINAL JUSTICE CENTER, at 5 (January 2018), <https://law.stanford.edu/publications/rate-my-district-attorney-toward-a-scorecard-for-prosecutors-offices-a-report-of-the-stanford-criminal-justice-center/>.



within the profession. Within these lofty goals, the NDAA identifies nine key objectives and thirty-five individual potential performance measurements.⁴⁹ Given the diversity of prosecutors and communities, there are sure to be many more potential performance measures deserving of consideration.

There are two major approaches to gauge the success of prosecutors at achieving these goals: a process-oriented approach and a purpose-oriented approach. The first approach focuses on making the prosecution process better, more efficient, more humane, and more equitable for those who have to go through it and those administering it. This could include internal policy regarding which cases are prosecuted, which charges to bring, how much bail to request, and how to deploy diversion programming. While all of these affect the outcomes for people involved in the criminal justice system, some factors are more closely related to the processing of people through the system that prosecutors manage, and are typically already measured by prosecuting offices in case management systems. In this framework, the metrics used to evaluate the work of a prosecuting office are self-evident and often are already tracked as part of internal case management systems. These factors might include trial lengths, fraction of cases which were prosecuted or diverted to alternative legal paths, the use of certain measures such as bail or pretrial detention, average number of adjournments, and other efficiency-related measures. The efficiency of prosecutors might not necessarily influence the overall safety of an area, but instead improves the experience for those involved in the process. These types of functional measures should be tracked closely by prosecutor's offices to establish baselines, and to identify opportunities for improvement.

Purpose-oriented measures consider the wider impacts of prosecutors' work, such as

increasing public safety and administering justice in a fair and sustainable way. In general, these are hard to measure and even harder to study in the short-term. Some examples of purpose-oriented measures might be measuring victim satisfaction with restorative justice practices, or community feelings on public safety. In a multi-year study on the outcomes of restorative justice schemes piloted by the Home Office in three locations in the United Kingdom, interview responses from victims were included as part of the results of these diversion programs.⁵⁰ The program involved mediated conferences between victims and offenders and potentially changing the sentencing or adding obligations for the offender based on the conference.⁵¹ One of the locations used a randomized experimental allocation of the treatment, while the others used this treatment in all cases.⁵² After implementation, victims were asked about their understanding of the program, their satisfaction with the results, and their willingness to refer others to this form of intervention.⁵³ Overall, victims were very satisfied and, when it was applicable to compare them to the control group, felt that the sentence given was fairer.⁵⁴ Most victims also reported lessened negative effects of the offense after participating in the conferences, and an increased sense of closure.⁵⁵ Tracking victim responses to the restorative justice process showed a positive effect of the diversion program that would otherwise have gone uncounted and the programs' impact was more fully measured when these interviews were included. With the additional information, this study showed the advantages this process had over the standard one, which would be important even if the offenders' recidivism rates remained

49 *Id.* at 5.

50 Joanna Shapland et. al., *Restorative Justice: The Views of Victims and Offenders*, CENTRE FOR CRIMINOLOGICAL RESEARCH, (June 2007).

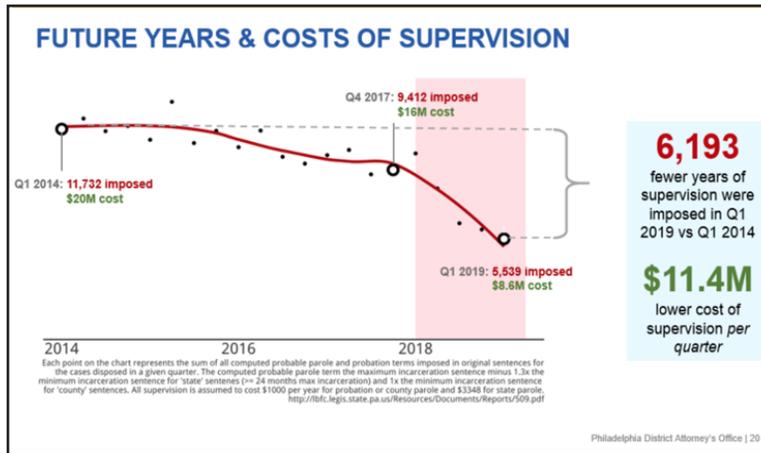
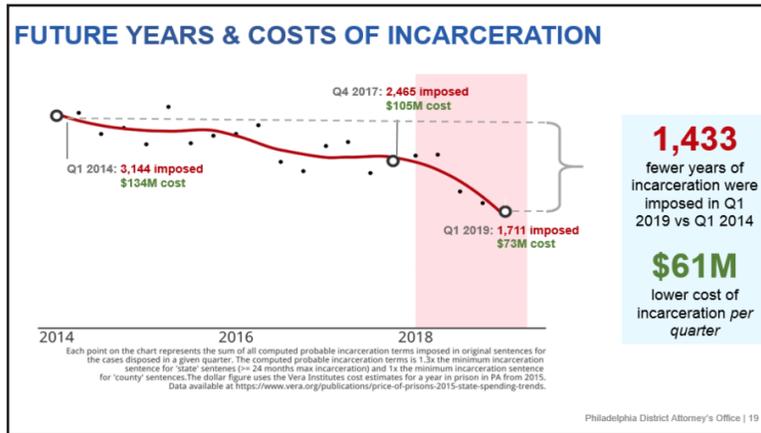
51 *Id.* at 20.

52 *Id.* at 2.

53 *Id.* at 4.

54 *Id.*

55 *Id.*



constant.

The Philadelphia District Attorney, Larry Krasner, developed and publicly emphasized a measure that is both process—and purpose—driven. Shortly after taking office, Krasner sent a memo to his staff instructing them to offer lighter sentences and to take the cost of future incarceration into consideration when making sentencing recommendations.⁵⁶ In a presentation prepared by the Philadelphia District Attorney's office in June 2019, the office highlighted its work towards reducing incarceration and increasing diversion efforts for certain crimes.⁵⁷ The two

graphs below depict the sum of the projected total years of supervision and incarceration that were doled out in each quarter between 2015 and 2019. The annotations detail the decrease in future years of incarceration and supervision, along with their related savings in dollar terms. Over 3,000 years of incarceration were imposed in the first quarter of 2014, compared to 1,700 in 2019—a projected savings of \$61 million, and also a step in the right direction in reducing mass incarceration.

In addition to summarizing the changes in one measure, the Philadelphia District Attorney's Office also came prepared with figures on arrests for violent crime, presumably to head off fears of an increase in crime following the edict in the memo. The charts showed a small decrease in

⁵⁶ *In Philadelphia, a Progressive D.A. Tests the Power - and Learns the Limits - of his Office*, N.Y. Times, (Oct. 30, 2018)

⁵⁷ *Budget Presentation*, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE (June 25, 2019).



violent crime, and a smaller increase in property crime, with all combined offenses showing no change at all. Statistics such as these are useful to show that there are no immediately obvious negative effects from reducing incarceration.

Collecting data and conducting a study to identify the causal effects of less incarceration is a significant undertaking. In lieu of comprehensive scientific evidence, tracking and reporting on important metrics when first implementing changes, particularly those that might face opposition, can help frame the conversations and offer a birds-eye view of the issue and hopefully show that there has been no major immediate negative side-effect.

Similarly, in March 2019, recently elected District Attorney Rachel Rollins of Suffolk County, MA, laid out her vision for the office in a publicly available 65-page policy memo which directed her staff to request less sentences of incarceration and stop prosecution of some offenses altogether.⁵⁸ The memo, which includes the line, “I want this office to be data-driven” on the first page, argued that there are important benefits to be gained by reducing incarceration and using alternative accountability measures, particularly for low-level non-violent crime.⁵⁹ District Attorney Rollins emphasized the benefits of saving county resources and keeping avenues such as employment and education open for those who would otherwise be incarcerated.⁶⁰

These two examples highlight a new approach to prosecutors’ use of data. The benefits of these statistics and policy goals is heightened by their public availability. Everyone from criminal justice practitioners to the general population can access them and work from the same information. Opening up data to all, especially those within the prosecutor’s office, was a theme that was echoed frequently during roundtable discussions hosted

by the Institute for Innovation in Prosecution. Making statistics available and interpretable to practitioners within a prosecutor’s office may help increase buy-in and connect the work of front-line staff to the policy goals of district attorney.

Publicizing policy goals or crafting new measures of prosecutorial performance can also amplify the important work of the prosecutor and reframe the conversation around criminal justice reform in a different light. Initial research performed by analytical staff can be used as a check to ensure that while changing one process or measure, another is not adversely affected. The lack of change in crime rates does not conclusively prove or disprove anything regarding the effect of reduced incarceration and supervision on crime rates one way or the other. Big questions about policy implications and long-term effects are fertile ground for academic partnerships, and the resulting research insights can be valuable to the management of prosecutor’s offices throughout the profession. Future studies can be commissioned to identify potential causal effects of these changes on key criminal justice outcomes, such as the effect of decreased incarceration on public safety and attitudes towards the criminal justice system. Prior to commissioning academic research, prosecutors can derive immediate value by tracking measures that are important to them and their policy goals.

IV. How To

With the above examples of the use of data-informed prosecution in mind, how would a local prosecutor get started in using data to inform his or her decision-making? Is the use of data reserved for only the largest and best-funded offices? Thankfully, actionable findings from data are not restricted to district attorneys in large urban jurisdictions, nor are long-term academic research projects required to begin. This section will detail some general pointers to help implement data-informed practices.

58 *The Rachael Rollins Policy Memo*, SUFFOLK COUNTY DISTRICT ATTORNEY’S OFFICE. (March 2019). <http://files.suffolk-districtattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>

59 *Id.* at 2.

60 *Id.* at 26.



According to a survey conducted by the Urban Institute, most district attorneys are collecting data on at least some critical junctures in the prosecution process.⁶¹ Concurrently, most entry-level positions in district attorney's offices are staffed by young, tech-savvy individuals. We recommend a 'work with what you have' approach to get started on analyzing and learning from your data. With these basic building blocks, district attorneys can begin to ask questions about which defendants are being detained, how that differs by unit, which charges are most likely to be indicted, and so on. Although the data is often not perfect, and the analysts still learning, a building-block approach will allow offices to better understand, question, and ultimately benefit from data.

A complementary component to using what you have is to continuously iterate. The first pass of any analytical project is rarely perfect. This is an opportunity to seek out feedback from stakeholders and improve upon the final result. It is also important to recognize the investment required to make use of data. It is quite common to spend upwards of 80 percent of analyst time in data "janitor work" - acquiring, loading, cleaning, and merging datasets.⁶² Although somewhat unglamorous, this important work allows the downstream analyses to be trustworthy and repeatable. Constant iteration also helps inform future data collection. For example, if future analyses will require data on plea offers, analysts and stakeholders should lobby IT development staff to enable collection of this data through the case management system. Likewise, internal data experts are well-positioned to act as a translator between prosecutor's offices and external researchers.

Data experts in prosecutor's offices who are accustomed to their agency's data are also better positioned to commission and translate targeted academic research. Starting with academic research around basic questions will likely result in frustration and a lack of applicability to practice. Rather than commissioning research with limited knowledge of baseline trends of a particular topic and potentially being surprised at the results, district attorneys can be informed of the broad strokes of the research topic, and engage academic researchers with a good understanding of the question at hand.

Another key component to adopting data-informed practices is to collaborate with others whenever possible. Prosecutors act as a lynchpin in the criminal justice system, connecting crimes with dispositions and accountability. They would also be wise to do so with data. Oftentimes, data critical to prosecutorial decision-making resides with other agencies—the sheriff has detention data, the state has criminal history information, and so on. Prosecutors should seek out data-sharing agreements with relevant agencies to bolster their own data, and assist other agencies in the process. The same sentiment applies to relationships with other prosecutor's offices and related agencies. Prosecutors should seek to share their analyses, best practices, and lessons learned with others to help further the field and network with other like-minded practitioners. Finally, sharing analysis and projects with internal staff is an important way to secure buy-in. A major obstacle to a new approach in a prosecutor's office is resistance to change or being perceived as 'soft on crime' by veteran staff. It is important that analytical work be shared with internal stakeholders, both for transparency and for feedback from experienced practitioners.

These three concepts—starting small, iterating, and collaborating—can go a long way towards implementing data-informed practices in prosecutor's offices.

61 Ryan King, *There's More Than One Way to Measure Recidivism*, THE URBAN INSTITUTE (Oct. 17, 2014), <https://www.urban.org/urban-wire/theres-more-one-way-measure-recidivism>.

62 Steve Lohr, *For Big-Data Scientists, 'Janitor Work' Is Key Hurdle to Insights*, NEW YORK TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/technology/for-big-data-scientists-hurdle-to-insights-is-janitor-work.html>.



V. Looking Forward

The last decade of prosecutorial data-informed decision-making was marked by significant growth and innovation but there are still serious issues to address. Once-promising tools such as risk assessment are now under legitimate scrutiny for exacerbating racial disparities already omnipresent in the criminal justice system. A number of district attorneys are using data in decision-making and publicizing progress towards policy goals, but these efforts are found primarily in large urban jurisdictions, with the nation's other 2,000+ chief prosecutors looking in. Recruiting and retaining talented staff, and capturing quality data on the complex process of prosecution are also key hurdles for any jurisdiction wanting to make use of data.

With increased investment in research and analysis, decision-making in prosecutor's offices can be informed by data with outcomes tracked continuously. Disseminating these results can help engender public and practitioner support for reform and effective policies. This manuscript described a number of data projects at prosecutor's offices across the country but is by no means comprehensive. Prosecutors are entrusted with enormous decision-making authority in the criminal justice system and should seek to become stalwart supporters of using technology and data analysis to inform decision-making and improve the criminal justice system for defendants and communities.





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Beth McCann

Beth McCann was elected District Attorney of Denver in November 2016 and was sworn into office on January 10, 2017. She is the first female District Attorney in Denver's history. Beth brings extensive prosecutorial, legal and managerial experience, proven leadership, and community perspective to the Denver DA's office.

Immediately prior to becoming District Attorney, Beth was the four-term state representative for House District 8 in central and northeast Denver. McCann was a leader in criminal justice matters and health care reform throughout her legislative career.

Beth McCann began her legal career as a law clerk for Colorado's U.S. District Court Judge Sherman G. Finesilver. She then served almost eight years as a deputy and then Chief Deputy District Attorney in Denver, prosecuting hundreds of cases, including child abuse and murders. McCann was Denver's first female Manager of Safety in the early 1990s under Mayor Wellington Webb, and the first director of Denver's Safe City program to help kids stay out of gangs, drugs and violence. Juvenile crime decreased by over 20% following the establishment of this program.

Before becoming a state legislator, Beth McCann was Deputy Attorney General for Civil Litigation and Employment Law in the Colorado Attorney General's Office for 8 years, supervising 33 trial lawyers as well as their support staff.



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Sean Flynn is the Vice President of Product Development at Lex Loci Labs, a legal tech startup. He has designed software to improve the efficiency, transparency, and outcomes of the diversion process. Sean is a data scientist by training. Prior to joining Lex Loci Labs, he worked as an Assistant Professor of Economics and Business Strategy at KAIST, the Korea Advanced Institute for Science and Technology. He earned his Ph.D. in Economics from New York University and his B.A. in Political Science from Duke University.



Robin Olsen

Robin Olsen is a senior policy associate in the Justice Policy Center at the Urban Institute, where she works on criminal and juvenile justice reform. She is leading a project on examining data availability and improvements to prosecutorial decision making. Olsen's research interests focus on using data and evidence and collaborative work across stakeholders to improve criminal and juvenile justice system outcomes.

Before joining Urban, Olsen was a manager with the Public Safety Performance Project at The Pew Charitable Trusts. She led the teams providing technical assistance to achieve comprehensive criminal and juvenile justice reform across several states, leading to significant reductions in prison and juvenile out-of-home populations, as well as investment in evidence-based practices and policies. Olsen has previously been a public safety policy adviser and analyst with city and state governments in Washington, DC, and Illinois. She has also worked and conducted research on issues related to youth and community violence, the use of mapping in criminal justice, and children of incarcerated parents.

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