CICERO INSTITUTE

The "Special Prosecutor"

by Jakob Dupuis

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The "Special Prosecutor"

The public prosecutor in the United States today is vastly different from its origin and, indeed, vastly different from any government official in the world. However, two recent trends could threaten this public office's longstanding operation and function: progressive prosecution and limited resources.

- "Progressive prosecution" (a phrase that could be characterized as a misnomer—I prefer the terms "de-prosecution" and "regressive" prosecutors) broadly refers to an approach taken by some prosecutors in which they refuse to prosecute certain crimes—and sometimes entire categories of crimes—for personal or political reasons under the guise of prosecutorial discretion. Yet prosecutorial discretion has never been understood to allow prosecutors to decide which laws to enforce for these reasons.
- Prosecutors' offices are no different than any other public office that relies on available resources to accomplish its objectives. The capability of a prosecutor's office to prosecute crime and represent the public's interest is directly correlated to the quality and quantity of resources it can deploy. These resources include money, personnel time, and capabilities (personnel experience, available technology, etc.) that can be utilized. A lack of resources in prosecutors' offices limits both the effectiveness and efficiency of these offices. Prosecutors who face a lack of resources must sometimes prioritize the enforcement of some crimes over others; usually, this means reducing enforcement on "lesser" crimes, such as trespassing and public nuisance offenses, to have the resources available to combat other serious violent crimes.

At the bottom, both trends generally result in fewer minor crimes being prosecuted, which erodes public faith in the criminal justice system, incentivizes individuals to commit additional (and likely more severe and violent) crimes, and weakens the criminal justice system's effectiveness overall.

Some states have been quick to introduce or enact laws intended to combat regressive prosecutors. Still, in practice, these laws may only impede traditional prosecutorial discretion and create friction between prosecutors' offices and state legislatures. Few proposals have been introduced to support the resource-constrained prosecutors, but none have typically committed to fully funding these prosecutors' needs. Both situations illustrate the need for a more innovative solution to ensure that laws are enforced as intended.

The Cicero Institute's Special Prosecutor proposal is unique because it supports prosecutorial discretion and leaves autonomy undisturbed. It is non-partisan, supports accountability, and serves to *support* rather than *punish* already struggling communities. Under the proposal, a state may appoint a prosecutor to oversee a narrow range of crimes if a district's homicide rate is at least twice as high as the state's average for two consecutive years. This narrow option does not restrict prosecutorial discretion but still holds accountable those who are unable to protect public safety in their community—regardless of cause or fault.

History of the American Public Prosecutor

From Private to Public Prosecution

The American public prosecutor is a government actor unlike any other in the world—a so-called "distinctive and uniquely American contribution" to the field of law[1] with roots in English common law tradition yet greatly influenced by French and Dutch civil law. [2]

The English model for prosecution dates to the 11th century and is fundamentally based on the understanding that crime "was a personal matter to be dealt with through private vengeance."[3] Thus, it was the responsibility of the wronged party to make an accusation and prove the guilt of the accused, though the state eventually provided the venue for the suit. Throughout the next several hundred years, state officials were slowly inserted into criminal proceedings.

In the 16th century, justices of the peace were given the power to compel the accused, accuser, and any witnesses to attend court proceedings and could represent the Crown's interests if necessary,[4] and by the mid-19th century, the new London Metropolitan Police began investigating crimes and initiating prosecution, though only as "private citizen[s] interested in the maintenance of law and order," not as an official duty.[5] It was not until 1985 that the United Kingdom had any office that could initiate criminal prosecution on behalf of the state,[6] and as late as the 1950s, only eight percent of criminal prosecutions had any state involvement, the remainder being entirely private suits.[7]

Meanwhile, the European Continent had some form of public prosecution as early as the 13th century.[8] The continental Europeans adopted the idea that "crime was [not only] a private affair, but a public wrong as well" much earlier than the British.[9] By the 16th century, France and Germany had a fully-public system of criminal prosecution, with private suits only allowed for damages,[10] and Napoleon's expansion spread the system across the remainder of the continent.[11] Unlike the London Police, the Dutch *schout* "had the power to make an arrest and present the alleged offender before the court" as official duties, much like the early American sheriff. [12]

The 16th-century model for criminal prosecution found on the Continent more closely resembled the modern American process than the British system did as recently as the early 1980s and would lend itself toward the development of the American prosecutor. Despite the vast historical differences between English and American modes of prosecution, the colonial Americans began by adopting several English inventions, including the English adversarial court structure, grand and petit juries, sheriffs, justices of the peace, and even the tradition of private prosecution.[13]

Private prosecution, viewed as a "system favoring people of wealth and status," would eventually fall out of favor.[14] Even from the beginning, private prosecution was viewed differently in the United States than in their former colonizer. Holistic views on the purpose of prosecution began the divide: whereas a British resolution focused mainly on "recompense to the victim,"[15] Americans veered toward enacting due punishment on the offender. Within the differential lens of who is the primary victim, be it the person harmed or the state more broadly, this schism exposes why private prosecution began its inevitable decline in the United States.

Private prosecution works mainly to provide restitution to the private accuser, while public prosecution works to provide restitution to society through the incapacitation and rehabilitation of the offender. Private prosecution would be banned outright in nearly all states over the next few centuries, as critics argued, among other reasons, that its use in criminal cases violates the accused's due process right to be tried by an "impartial prosecutor" under the Fourteenth Amendment. However, this has yet to be directly addressed by the United States Supreme Court. [16]

The influence of French and Dutch civil law jurisdictions in the United States proved a more ideologically aligned model of prosecution, broadly speaking, and, beginning in Virginia in 1643, the colonies began appointing attorneys general to handle "almost all prosecutions and trials involving serious crimes."[17] Historical analyses have shown that private prosecutions in the early United States were initiated primarily over crimes against property; the state saw "little need to involve itself [in these suits], except to provide its citizens with a forum to settle disputes."[18] More serious crimes, such as crimes against persons, were prosecuted by the attorneys general. As the colonies grew in land and population, attorneys general appointed assistant attorneys to prosecute local affairs—soon, the American tradition of holding animus towards a centralized, distant government moved assistant attorneys to be appointed by the local courts instead,[19] and thus, the locally-selected public prosecutor was born.

Elections

Beginning in the mid-19th century, voters became "dissatisfied with the appointment process" at a time when public prosecutors' powers expanded greatly alongside the decline of private prosecution.[20] Prior to the 19th century, prosecutors served a mostly non-discretionary role. This changed as "district attorneys began to make administrative decisions which determined whether or not a case was prosecuted," especially once prosecutors began to "screen criminal charges" brought to them by newly formed police departments,[21] exercising formal discretion. The "lack of documentation" of prosecutorial decisionmaking and the choosing of prosecutors "for their political connections, not their mastery of law" rightly bred mistrust in the system.[22] Their opportunity for electoral reform followed the wave of Jacksonian democracy: Mississippi's 1832 constitutional convention brought forth the first elected office of public prosecutor, and by the early 20th century, almost every state had adopted the model.[23]

Yet simply electing prosecutors at a time when party bosses dominated local elections did little to solve the issue of questionable allegiances. Progressive Era reformers saw criminal courts as a "tool of party machine politics,"[24] and the prosecutors being elected as too similar to the appointed prosecutors, "lack[ing] independence from political bosses and the criminal element."[25] The office needed complete cultural reform. Concurrently, private prosecution was experiencing its final decline.

Dr. Yue Ma, Associate Professor of Law at the John Jay College of Criminal Justice, notes that the advent of constitutional and elective statuses of prosecutors paired with a "growing public demand for greater state responsibility in repressing crime" during the period of rapid urbanization were the most important reasons contributing to public prosecutors' "acquisition of monopoly over

[criminal] prosecution."[26] This meant that public prosecution *must* work as intended, as private citizens had lost other (legal) avenues for justice.

Professionalization

Progressive Era reformers such as William Travers Jerome of Manhattan "challenged office holders who were beholden to a political party and dedicated to powerful and moneyed interests."[27] These reformers sought to "professionalize" the office, insisting the officeholder act "like the executive of a large business or the managing clerk of a law office."[28] They envisioned the public prosecutor as one "possessing skill and training, but also the capacity and inclination to resist public influence,"[29] who could apply "the law to facts rather than basing their decisions on impermissible personal, partisan, or political considerations."[30] In sum:

> The Progressive Era ideals of criminal prosecution included various related concepts—for example, that prosecutors do not take direction from, or serve the interests of, private parties; that prosecutors serve the public, not the parochial interests of their political parties or patrons; and that prosecutors pursue justice in a disinterested manner, exercising power based on the law and evidence, not personal whim.[31]

The Fiduciary Model

This professional model of prosecution envisioned and achieved by reformers could be called the "fiduciary model" of prosecution. "Fiduciary," though often invoked in a pecuniary sense, refers to any individual who assumes significant power over a beneficiary and is required to act in the beneficiary's best interest, not their own. The fiduciary model of prosecution rests on the understanding that prosecutors have a "fiduciary" responsibility to pursue justice for victims of crime, including for the abstract "harm" done to the state. This is especially true with the decline or outright ban of private prosecution. In the fiduciary model, the two central actors are the fiduciary (in this case, the prosecutor) and the beneficiary (the public). Legal scholars Bruce Green and Rebecca Roiphe, from whom this section will heavily draw, recognize that "all fiduciaries have discretionary power over the beneficiary, who is inherently vulnerable [from the lack of private prosecution]. Beneficiaries are asked to trust their important interests [public safety] to the fiduciary."[32]

The inherent benefit of the fiduciary model is that it separates the prosecutor from allegiance to any individual (such as a donor) or even a majority of people (such as their voting supporters) and requires the prosecutor to pursue justice in the abstract, which extends "beyond the personal view of the prosecutor" and encompasses "developed traditions and practices of prosecutors' offices,"[33] such as those instituted by Progressive Era prosecutorial reformers. This protects the vulnerable beneficiary, assuring that the developed traditions and practices "will limit discretion and confine the process in a way that ought to reassure [the beneficiary] that [they] are not simply subject to any one prosecutor's idiosyncratic view of justice."[34] The last point is essential to keep in mind when considering the ramifications of prosecutorial elections. The "idiosyncratic view of justice"

may be the prosecutor's own view of justice, yet it can also be derived from the political party of that prosecutor, which under the fiduciary model would remain an "impermissibly partisan [act]: promoting the interests of a political party—a private group—at the expense of the general public."[35]

The high degree of concern regarding how prosecutors will act results from the massive range of discretion afforded to the position. In fact, on a case-by-case basis, the prosecutor has nearly exclusive authority when deciding whether to pursue a criminal conviction.[36] There is an amount of freedom required by the fiduciary to act in the beneficiary's best interest, even if that entails acting against the beneficiary's desires. In a prosecutorial setting, this freedom finds normative justification in the development of prosecutorial discretion, rooted in "deference to prosecutorial expertise, administrative necessity, and individualized justice."[37]

The Necessity (and Expectation) of Discretion

No state expressly requires prosecutors to charge an individual with a crime, for which there are reasonable justifications. Prosecutors may choose to refrain from enforcing outdated laws that have lost legitimacy in the ever-evolving societal understanding of what *should be* criminalized versus what *remains* criminalized.[38] Prosecutors may believe the cost of prosecuting any individual case (whether economic or social) is not in the beneficiary's best interest (thus acting as the responsible fiduciary) or that the cost of prosecution in a world of limited resources is best employed elsewhere.[39] Prosecutors may make a determination that giving one defendant favorable treatment in exchange for their assistance in furthering a case against another more dangerous or powerful defendant better accomplishes the public's desire for justice.[40] Prosecutorial discretion is nearly as old as public prosecutors themselves and is undoubtedly necessary for the proper functioning of the office. Even beyond the minutiae of individual cases, structural needs exist for discretion.

Legislatures almost exclusively pass new criminal codes without repealing others. This incessant expansion of the criminal code is only possible with the understanding that individual prosecutors will use discretion in enforcing the code. Incarceration is costly—averaging over $80 billion per year in the U.S. alone[41]—and even if we could afford to do so, charging every violation of the law to the maximum extent would cause the entire criminal justice system, from prosecutors and judges to prisons and parole, to collapse under the caseload burden. For these reasons, legislators who pass tough-on-crime legislation do so with the understanding that prosecutors will ultimately determine the extent of enforcement.

Legislators may also pass harsher penalties, expecting prosecutors to use them as leverage in plea bargaining. 94 to 97 percent of state and federal convictions now result from plea bargains.[42] The threat of a harsher criminal sanction, called a "trial penalty," is often enough to coerce defendants into accepting more lenient plea bargains and alleviates the courts of lengthy trials.[43] This understanding between legislatures and prosecutorial offices has worked to both parties' advantage: individual legislators can enforce their constituents' will while keeping actual incarceration costs manageable and prosecutors may employ vast discretion free from nearly any oversight.

Regressive Prosecution

Identifying Prosecutors of Concern

Recently, some prosecutors have adopted a new prosecutorial approach that has upended centuries of tradition and threatens the institution's legitimacy, directly affecting over 40 million Americans and indirectly affecting millions more.[44] This movement includes adopting prosecutorial policies that avoid prosecuting certain crimes altogether,[45] abdicating the fiduciary model, and advocating for offenders over victims. To ensure consistency and clarity, it is essential to identify what exactly "regressive prosecution" means.

This paper uses two frameworks to identify the types of prosecutors that present the most concern and serve to separate liberally oriented "progressive" prosecutors from the more destructive regressive prosecutors. The first framework, which focuses on ideology, was developed by Associate Law Professor Benjamin Levin of Washington University School of Law, a supporter of the reformist movement. Levin characterizes four "ideal types" of the "progressive [regressive] prosecutor": (1) the progressive who prosecutes, (2) the proceduralist prosecutor, (3) the prosecutorial progressive, and (4) the anti-carceral prosecutor.[46] In brief, the anti-carceral prosecutor warrants the most concern, but reviewing each model is helpful.

The **progressive who prosecutes** is characterized by Levin as "the progressive who … doesn't necessarily bring her politics to her job or the administration of criminal law… [S]he views her function as prosecutor to be a role in and of itself, divorced from other political battlegrounds."[47] In practice, a prosecutor's private political views should be of little concern if she maintains separation between her voting decisions and her application of law as a public servant.

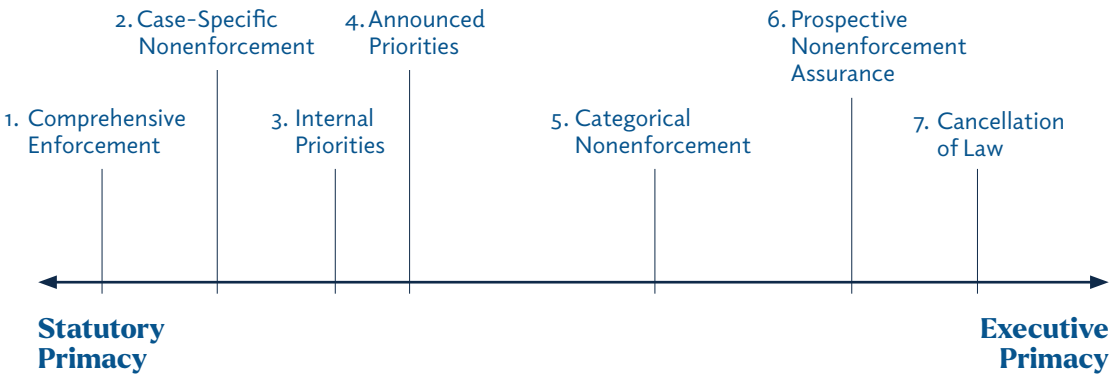
Next, the **proceduralist prosecutor** is one who is "concerned about corruption and misconduct," ensures "defendants deserve fair process," and expects her subordinate prosecutors to comply with constitutionally required procedures, such as turning over exculpatory evidence.[48] Like the first type, this prosecutor is not a threat to the legitimacy of the office—rather, this prosecutor acts within the public's expectations of proper prosecutorial conduct and is the mantle-bearer of the hard-fought professionalization of the Progressive Era.

The **prosecutorial progressive** begins to act in a manner that calls back to the party-boss days of American politics. Levin says this type of prosecutor will "[embrace] her role as prosecutor … but she does so with an eye toward *advancing political ends favored by progressives and the political left*."[49] The concern is that, just as corrupt district attorneys of centuries past turned a blind eye toward some criminal behavior and vigorously prosecuted others, Levin says this type of prosecutor may "[pursue] cases against more privileged defendants while scaling back prosecutions of less privileged defendants."[50] While privilege-selective prosecution may appear to be a noble cause to some, most public safety concerns would fall unanswered under this model.[51]

Lastly, and of most concern, is the **anti-carceral prosecutor**, whom Levin says believes "criminal law and the carceral state [to be] fundamentally flawed" and perceives her "job [as doing] away with [prosecutorial institutions] altogether."[52] To the anti-carceral prosecutor, "'doing justice' … entails not prosecuting at all… a sort of double-agent committed to *destroying the system from within*."[53] Obviously, very little needs to be said about the danger to the criminal justice system posed by prosecutors who are committed to "destroying the system from within." Still, a prosecutor who sees the position as inherently corrupt will give little regard to the procedural rights owed to the victims of crime (both the individuals harmed and the public), and advocate for de-prosecution or significantly reduced penalties for serious criminals. This, in effect, makes the anti-carceral prosecutor far more similar to a criminal sympathizer than a public servant at the bulwark of upholding public safety.

The next framework was developed by Zachary Price, Associate Professor of Law at the University of California College of the Law, San Francisco.[54] This model focuses on action rather than ideology and can serve as a helpful litmus test for prosecutorial policies. Price identifies seven stages on a spectrum ranging from statutory primacy to executive primacy,[55] and examining each will provide a greater understanding of the degrees to which a non-enforcement policy may be instituted. In short, anything beyond "internal priorities" is of grave concern.

Enforcement Discretion Spectrum[56]



The first stage, closest to statutory primacy, is **comprehensive enforcement**, wherein "prosecutors might seek to fully enforce every substantive law by punishing every known violation to the maximum extent."[57] Price rightfully acknowledges that this is impossible, considering resource scarcity. Further, most would agree this ideal is, simply, not ideal. If the primary goal is public safety and justice, simply questioning, for example, a juvenile shoplifter, even if they clearly broke the law, is likely to be enough to scare them away from future criminogenic behavior—of the other possibility, fully sanctioning the juvenile might do little more than introduce them to the

criminal justice system, expose them to more extensive or violent criminogenic influences, and may act as the inflection point toward a life of crime and flippant disregard for authority.

The next stage is **case-specific nonenforcement**, which is the normative role the public generally expects the prosecutor to assume. In this ideal, the prosecutor decides, after accounting for all aspects of the case in a holistic, individualized basis, whether prosecution is the best option available. Unlike the stages that follow, there are not any specific charges that are declined as a matter of policy.

Internal priorities, the third type of prosecutorial action, "[establishes] internal guidelines about how recurrent types of cases should generally be treated," or that "certain offenses … are low priorities for use of enforcement resources."[58] While in most cases this may not be ideal, it is likely that the prosecutor is subject to resource constraints outside of their control, such as not receiving enough funds to properly run their office. Put simply, it is understandable that a prosecutor may believe they are better able to ensure public safety by prosecuting, for example, an assault case rather than a case of someone driving without a license.

Internal guidelines may also extend into unannounced de-prosecution of some offenses that many have characterized as outdated, such as marijuana possession. A forgiving reading of this action would argue it is the result of an ossified legislature failing to decriminalize certain behaviors that society no longer deems aberrant. While the prosecutor is technically no longer upholding the law as written for certain offenses as a matter of policy, they may choose not to announce these decisions to the public, acting to keep some level of societal pressure in place. In other words, even if the prosecutor chooses not to penalize the behavior, the public's belief that they *would* be charged may keep some people from engaging in the prohibited behavior.

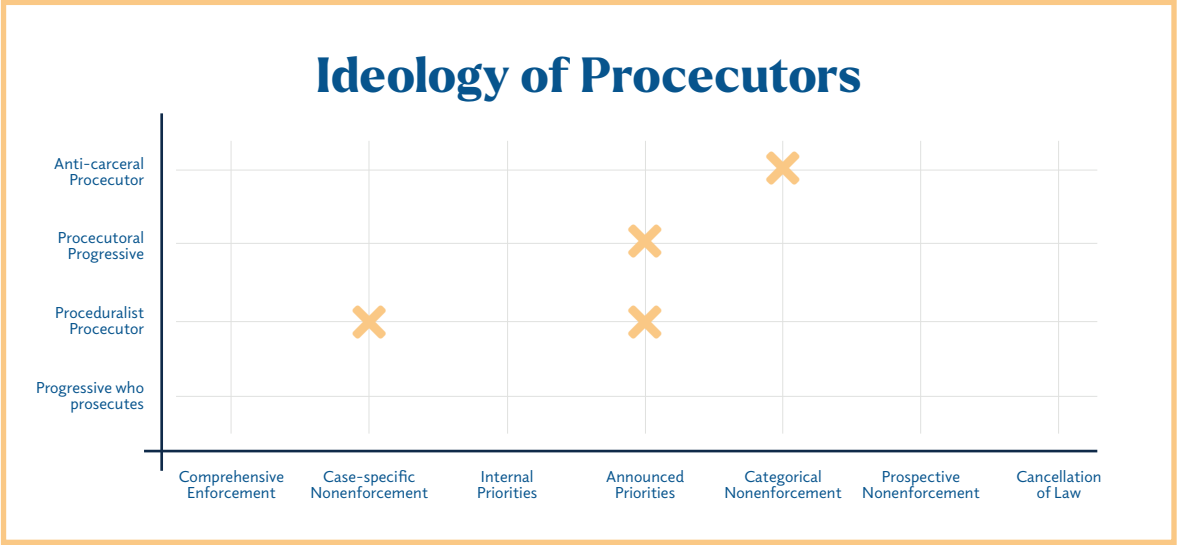
The fourth type, **announced priorities**, refers to internal priorities that are made public, and should evoke some amount of concern.[59] Price notes that this action "makes clear that the priorities are only that—priorities—and not ironclad guarantees about how particular cases will be handled."[60] Even in the absence of any guarantee, announcing to the public that the office will focus resources on more serious crimes gives the illusion that an individual has a higher chance of avoiding prosecution even if caught committing a crime outside of the "announced priorities," and to that extent, undermines public safety and respect for the rule of law.

The fifth category, **categorical nonenforcement**, is the first of several seriously concerning policies that can be adopted by prosecutors.[61] Under categorical nonenforcement, a prosecutor will announce that some crimes will, as a matter of policy, not be prosecuted except under "exceptional circumstances."[62] To the extent that announced priorities will incentivize the public to believe they can get away with certain crimes, categorical nonenforcement all but guarantees it.

The sixth category, **prospective nonenforcement**, is differentiated by the prosecutor's announced "prospective assurances that those who engage [in the crime] will face no repercussions."[63] In other words, the prosecutor has, by fiat, decriminalized certain behaviors without the legal authority to do so.

In the seventh category, which is the most extreme example, **cancellation of legal obligations**, the prosecutor will announce certain criminal acts to be "affirmatively lawful"; this is akin to suspension of a law and is generally "excluded from Anglo-American understandings of executive power."[64]

In sum, these two frameworks—an ideological test and an actions test—can be used to identify through what lens a prosecutor runs their office. Of the ideological types, prosecutors of concern would be the **prosecutorial progressive** and the **anti-carceral progressive**—the prosecutors who allow for discriminatory prosecution or subscribe to the idea that prosecution itself cannot be trusted to maintain law and order. Next, prosecutors of any ideological bent who adopt policies of **categorical nonenforcement, prospective nonenforcement**, and certainly **cancellation of legal obligations** are failing in their sworn duties and could pose a grave threat to public safety.



Public Safety Concerns

In the only robust, peer-reviewed research article covering the de-prosecution phenomenon, Thomas P. Hogan identified that the de-prosecution of felonies is directly linked to an increase in homicide deaths. After a policy of prospective nonenforcement was adopted in Philadelphia under regressive prosecutor Larry Krasner, felony drug convictions dropped 72 percent, and felony weapons convictions dropped 53 percent. As a result, it is estimated that the community suffered 75 additional homicide deaths *per year,* an increase of 15 percent. In two other cities that adopted de-prosecution regimes, Baltimore and Chicago, the already-vulnerable communities suffered an additional 71 and 170 additional homicide deaths each year, respectively - an increase of 27 percent for both cities.[65] Testing policy decisions against homicides is significant as homicide crime rates are among the very few that cannot be artificially repressed through data manipulation or crafted reporting. It is undeniable that reductions in felony prosecutions result in homicide spikes.

Although it may be an uncomfortable truth for many, crime is highly concentrated in certain places and among certain offenders. 50 percent of crimes are committed on just five percent of street

blocks, and the incapacitation of one high-volume offender abates an estimated 9.4 additional felony offenses.[66] Worse still, these regressive prosecutors seem blind to the reality that low-income people and racial and ethnic minorities are disproportionately the victims of crime.[67] Sociologist Patrick Sharkey noted that the drop in violent crime post-1990s had the comparative positive health effects on black men as "eliminating obesity all together."[68] Even still, since 2008 in New York City, "a minimum of 95 percent of the city's shooting victims have been either Black or Hispanic," the same constituting over half of all homicide victims nationwide.[69] In 2020 alone, the black homicide rate of 25.3 per 100,000 was "almost 10 times the white rate of 2.6 per 100,000."[70] Reformers *must* take the disproportionate share of victimhood into account when creating effective public safety policy, and policies that increase homicides in vulnerable communities, such as de-prosecution, should be rejected outright.

Structural Concerns

Putting aside strong evidence that de-prosecution harms our communities, there are significant structural concerns with the practices of categorical nonenforcement and prospective nonenforcement by regressive prosecutors. These prosecutors are abandoning their fiduciary duties and professional expectations, upending the traditional expectation of discretion, and essentially performing the legislative function by rewriting laws of their choosing.

The hard-fought prosecutorial traditions of professionalization and the adoption of the fiduciary model are crucial to the central functioning of the prosecutorial role in our government. Prosecutors who commit "impermissibly partisan" acts as an agent of their party, their donors, or to garner political points to further their careers have abandoned their fiduciary duty (public safety) to the vulnerable beneficiary (the public). As a reminder, the lack of access[71] to private criminal prosecution in the United States means that victims have no recourse other than relying on their government to deliver justice on their behalf. In districts with these kinds of prosecutors, victims are simply abandoned.

These prosecutors also upend centuries of prosecutorial tradition and expectations of behavior by ignoring the "disinterested expert" model of prosecution in favor of unaccountable and partisan behavior far outside the norms of appropriate prosecutorial conduct. If a judge decided unilaterally to dismiss charges for driving under the influence, the public would be rightly outraged. The act would be an impermissible departure from the judicial tradition and the public's expectations of justice. The same theory can and must be applied to expectations of prosecutorial conduct. Prosecutorial professionalization serves as a guardrail of appropriate behavior, and dismissing this expectation of conduct is unprecedented.

What's more, these prosecutors are intruding into the legislative branch's domain by unilaterally suspending specific laws. Within the American model of federalism, the elected legislature deems certain behavior to be disruptive enough to deserve carceral punishment, and it is the executive branch's duty to *execute* that will. Proponents of regressive prosecutors claim that the election of

such individuals doubles as a referendum on their de-prosecution policies and thus offers a shield of legitimacy for their illegal actions. However, this is patently dismissible. The legislative branch, composed of members whom voters also elect, determines what behavior will be sanctioned or criminalized under the separation of powers. Under ordinary separation-of-powers principles, prosecutors *enforce* the laws enacted and are powerless to change them. If voters desire criminal code reform, they must elect legislators who will act on this desire.

Similarly, this model of de-prosecution is applicable to far more sinister crimes. Imagine a prosecutor who decided to adopt a policy of de-prosecution of hate crimes or child abuse—now consider: what differentiates this imaginary prosecutor from the real prosecutors who decline to prosecute other felony charges? Further still, through the adoption of radical policies of de-prosecution, these prosecutors make the mistake of upending their half of the discretion understanding. The expectation of legislatures was that prosecutors would utilize the threat of harsh penalties to extract sufficient justice on a case-by-case basis, and in exchange, the legislatures would allow prosecutors to retain their nearly unchecked discretion. Distorting case-by-case discretion to so-called "blanket declination policies" is an unacceptable overreach by individual prosecutors and invites an equally unprecedented legislative response.

Occasionally, prosecutorial nullification is claimed to be an heir to the outdated process of "jury nullification."[72] Because jury nullification is seen as part of a "once-robust American tradition of localized, populist control of criminal law," while recognizing the incredible decline of the jury—remember, 94 to 97 percent of state and federal convictions now result from plea bargains[73]—it is argued this underutilized power is the prosecutors' to absorb. Yet even the proponents of this argument seem to be oblivious to how their own arguments in favor of the theory disprove the validity of the same. Pro-declination Columbia Associate Professor of Law Kerrel Murray claims the understanding of jury nullification at the time of the Founding applied to cases where "the law in question [was thought to be] morally illegitimate, or … generally applicable but wrong to apply in cases of a certain sort, or to a specific defendant."[74] Murray's justification is based on, fundamentally, two things: (1) the law is severely outdated, or (2) a case-by-case basis for de-prosecution is appropriate. Declination, when founded on one of these two principles, is already (non-controversially) within the prosecutorial toolkit, and the proxy of jury nullification provides little justification for any blanket declination policies. Across the country, outdated laws criminalizing certain behavior remain on the books yet are never enforced (Section 13A-14-4 of the Code of Alabama, 1975, allows for anyone dressing as a nun to be jailed for up to one year, even on Halloween)—truly "morally illegitimate" to prosecute. Nobody would argue that breaking and entering is a similarly morally illegitimate crime, yet that crime and others have fallen under the blanket declination policies of prosecutors across the country.[75] Case-by-case prosecutorial discretion has already been discussed and justified as a vital resource to be used by prosecutors in achieving some other prosecutorial directive, or in rare cases when the prosecutor feels it would disproportionately punish certain individuals, such as minors, in a way that exceeds the appropriate dose of corrective justice.[76]

Approaches to Prosecutorial Reform Policy

It's a common trope that an unspoken rule can only last until it's broken and thereafter becomes an official policy. Thirty-one successive presidents served a maximum of two terms before President Franklin Delano Roosevelt broke with tradition and was elected four times to see the nation through the Second World War—not yet two years after his death was the 22nd Amendment introduced by Congress which formally limited the presidency to two elected terms. For nearly two hundred years, local public prosecutors have derived their power from their state constitutions and self-policed their behavior, carefully existing within established guardrails of professional conduct and public expectancy, upholding the expectation of discretion, and respecting the limitations and responsibilities of their role as a fiduciary. With the rapid replication of the de-prosecution prosecutor, that tradition has been broken. Prosecutors must no longer be allowed to operate without accountability, oversight, or transparency.

There have been many attempts to introduce oversight and accountability to the prosecutor. Illinois' 102nd General Session brought forth HB 1914 (2021), which would have removed tort immunity from any elected prosecutor who adopts a blanket declination policy. The 92nd Session of the Minnesota Assembly saw the introduction of SF 3478 (2022), which would have required a public prosecutor to prosecute a probable-cause felony or be guilty of a misdemeanor and suffer removal from office. Other attempts, such as SB 563 (2022) in Virginia, would have introduced attorney general oversight to the local prosecutor and allowed for an investigation with untold consequences into possible policies of nonenforcement. Each measure, however, failed for one reason or another. Many were too aggressive in limiting prosecutorial discretion; some carried such harsh consequences that even law-and-order[77] prosecutors opposed them. It is crucial that any oversight policy be narrowly crafted and defensible if it is to become law, with a focus on protecting public safety rather than punishing any individual prosecutor.

Three bills were significant in the 2023 legislative year: SB 92 in Georgia, which was signed into law on May 5th; HB 17 in Texas, which was signed on June 7th; and HB 301 in Missouri, which faltered in the final week of the state's legislative session.[78] SB 92 works by establishing a "Prosecuting Attorneys Qualifications Commission (PAQC)" which shall have the power to "discipline, remove, and cause involuntary retirement" of a district attorney for failing to uphold their official duties, which the same bill amends by clarifying the duty to "review *every individual case* for which probable cause exists, and make a prosecutorial decision available under the law based on the facts and circumstances of each individual case…"[79] While there are benefits to establishing a positive requirement for case-by-case discretion, in practice, it is difficult to enforce and limits historical uses for discretion. Even if a prosecutor adopts an announced policy of categorical nonenforcement, a relatively aggressive de-prosecution strategy, it would be difficult for the commission's review panel to prove that any individual case was not given a case-by-case review, and instead dismissed as a matter of policy. On the other hand, requiring that a prosecutorial decision be based solely on the law as it is written severely limits prosecutorial discretion as a means for advancing other prosecutorial goals (such as seeking informants on more serious criminals) and threatens the office with resource constraints by

effectively disallowing internal or announced priorities and the non-controversial de-prosecution of laws that have fallen into desuetude. A lawsuit has been filed challenging the legality of the measure by several Georgia attorneys, and the state's district attorney and prosecutor associations "have warned that the panel could unfairly target prosecutors for making independent judgments about which cases to pursue."[80] The only accomplishment with this bill is the wholesale chilling of prosecutorial discretion, even for traditional prosecutors and for discretionary tactics which are crucial to the proper functioning of the office.

Similarly, HB 17 in Texas expands what is considered "official misconduct" by prosecutors, and thus grounds for a petition for removal from office, to include the adoption of a "policy of refusing to prosecute a class or type of criminal offense," though this measure includes an exception for diversion. While this bill is slightly more specific than the Georgia bill, in that it concerns the "adoption of a policy" of nonenforcement, this is easily avoided by adopting internal priorities versus announced priorities. It will be difficult to prove that a prosecuting attorney has adopted any measure as an official policy if it has not been explicitly publicized as such. In effect, the result is the same as in Georgia: prosecutors are less likely to exercise reasonable discretion in their charging decisions.

HB 301 in Missouri contains the best solution to rogue prosecutors introduced to any legislature thus far. The bill, if adopted, will give the governor discretionary authority to appoint a "special prosecutor" who will have exclusive jurisdiction over all cases involving first- and second-degree murder, first- and second-degree assault, first- and second-degree robbery, and vehicle hijacking.[81] This special prosecutor may only be appointed to districts that have a murder rate of over 35 per 100,000, would serve for five-year terms, and would be paid by the state. The special prosecutor will have exclusive jurisdiction of all cases concerning the aforementioned seven crimes and all other charges which may stem from the same criminal event. This approach is superior to all others because it does not place any limit on prosecutorial discretion but establishes a trigger mechanism wherein the state can intervene if any individual prosecutor's decisions result in extreme degradations to public safety. In other words, individual prosecutors are free to experiment with varying approaches to justice, and the state is allowed to interfere only when those approaches fail, and the prosecutor refuses to correct their mistakes. This approach satisfies the limitations required for effective prosecutorial reform policies: it is narrowly crafted and focuses on protecting public safety rather than punishing individual prosecutors—our reform therefore draws heavily on the structure of Missouri's HB 301.

It is important to state in clear terms that the state has broad discretionary powers in the functioning of subsidiary jurisdictions (such as towns, cities, counties, parishes, etc.),[82] and has a fiduciary duty itself to protect the safety of all its inhabitants. A historical example of a state's requirement to protect its citizens taking priority over the actions of individual prosecutors is found in the Reconstruction Era of the South. At this time, mass lynching was commonplace and functionally sanctioned "under the color of the law"—the local prosecutors, sympathetic to the racist motivations of the lynchers, refused to prosecute the crime. In effect, this was a form of de-prosecution. President Grant remarked that "the failure of local committees to furnish" the

"restoration of peace and order" required of the national government "the duty of putting forth all its energies for the protection of its citizens."[83] In this analogy, it was the federal government superseding state jurisdiction, which is a far more contentious situation than a state intervening in its at-will subsidiaries' jurisdiction. Even scholars sympathetic to de-prosecution agree that there is little recourse in responding to state preemption.[84] In sum, the concept that the higher-level government has an obligation to intervene to protect the rights of life, liberty, and property when a lower-level government refuses to do so has a far-more robust precedent than is needed when concerned with locally elected prosecutors. At the same time, Zachary Price identifies some states where supersession might be legally ambiguous.[85] Illinois, Mississippi, Nevada, and Texas pose the most significant challenges to state supersession of district attorneys. Supersession is a state-by-state issue, which will depend on the constitutional and statutory powers delegated to district attorneys and the governor and attorney general.

The Cicero Institute's Special Prosecutor Model

The triggering mechanism for the special prosecutor can be adjusted, but our proposed trigger is a sustained homicide rate in any county or prosecuting district that is more than double the state's homicide rate for at least two years, at which point the governor or attorney general may appoint a special prosecutor in that district. The district attorney may also request the assistance of the special prosecutor in a written request to the governor or attorney general. As noted previously in this white paper, homicide rates are an effective measure of crime because of the difficulty in manipulating the data. Comparing the homicide rate in the county to the state's current rate, as opposed to any fixed baseline like in HB 301, is far more useful in capturing outlier counties in relation to that state's unique crime rate and acts as a more fluid baseline that will remain relevant through the years as opposed to a rate fixed in statute. Much like the proposal in HB 301, the special prosecutor would operate on five-year terms.

The crimes that the special prosecutor could pursue are malleable, though our proposal recommends the seven crimes from HB 301 (first- and second-degree murder, first- and second-degree assault, first- and second-degree robbery, and vehicle hijacking), as well as drug manufacturing and drug distribution charges, and felony weapons violations, for a total of ten statutory crimes. These crimes were chosen because of their relative difficulty in prosecuting and their demonstrable, outsized impact on public safety.

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Georgia[86]	*5.36*	*5.56*	*5.77*	*6.06*	*6.36*	*5.82*	*4.64*	*4.97*	*6.90*
Macon Circuit	10.27	8.77	17.50	8.84	16.66	19.73	6.21	22.86	26.01
Stone Mountain Circuit	8.78	12.97	10.62	11.11	13.05	12.72	13.04	8.80	19.66
Atlanta Circuit	14.06	14.01	13.73	15.74	11.94	9.62	8.84	11.22	18.68

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Kansas[87]	*4.05*	*3.39*	*4.46*	*4.99*	*5.95*	*4.98*	*4.37*	*6.56*	*5.87*
Wyandotte (Kansas City)	18.18	15.52	19.09	28.11	26.11	18.70	21.09	34.96	29.37
Sedgwick (Wichita)	4.40	4.59	5.95	7.12	7.49	8.89	7.30	12.01	9.70

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Missouri[88]	*6.39*	*6.93*	*8.51*	*9.16*	*10.06*	*10.32*	*10.13*	*12.92*	*11.07*
Jackson County	16.63	14.08	18.23	21.62	24.89	24.22	25.47	28.05	25.39
St. Louis City	37.98	49.91	59.29	59.78	67.04	61.59	65.89	89.14	70.72
Greene County	4.95	6.63	4.16	4.13	6.18	7.20	5.45	9.15	9.76

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Tennessee[89]	*5.06*	*5.47*	*6.11*	*7.41*	*8.07*	*7.67*	*7.79*	*10.08*	*10.15*
Davidson (Nashville)	5.91	6.58	12.82	12.77	16.64	13.42	13.69	17.24	14.63
Shelby (Memphis)	14.16	15.13	15.03	23.69	20.71	20.79	21.98	32.40	33.91
Hamilton (Chattanooga)	6.30	9.41	6.50	7.82	8.57	7.67	9.78	10.50	10.08

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Wisconsin[90]	*N/D*	*N/D*	*N/D*	*N/D*	*3.22*	*3.04*	*3.20*	*5.23*	*N/D*
Dane (Madison)	N/D	N/D	N/D	N/D	2.49	1.70	0.92	2.96	N/D
Milwaukee (Milwaukee)	N/D	N/D	N/D	N/D	13.03	11.22	11.21	20.81	N/D
Kenosha (Kenosha)	N/D	N/D	N/D	N/D	6.56	2.97	3.53	4.71	N/D

	2013	2014	2015	2016	2017	2018	2019	2020	2021
Arkansas[91]	*N/D*	*N/D*	*N/D*	*N/D*	*8.66*	*7.70*	*8.19*	*10.91*	*11.18*
1st Judicial District	N/D	N/D	N/D	N/D	16.63	17.30	26.63	42.11	35.06
6th Judicial District	N/D	N/D	N/D	N/D	18.38	14.70	14.29	21.90	21.97
11th West Judicial District	N/D	N/D	N/D	N/D	33.89	22.09	34.96	30.51	39.13

As the graphs of six example states show, the two-consecutive-year bar set forth in the policy proposal is expansive enough to capture the counties that remain problematic but limited enough to avoid capturing sudden spikes in homicides, such as 2015 and 2017 in Davidson County, Tennessee, in which Nashville is located. Of the hundreds of counties for which I compiled homicide data across several states, the pattern holds: problematic counties remain problematic.

The data from Arkansas demonstrate that high crime is not exclusive to urban areas. The 1st and 11th West Judicial Districts are both largely rural, with an average population of 71,648 between the two districts. For comparison, the 6th Judicial District, in which Little Rock is located, had a population of over 400,000 in 2022. While the 6th District, by far the most populous in Arkansas, would be presumed to be the most dangerous, the homicide rate has not sustained a level over twice the state's rate for two consecutive years in the data I compiled. In fact, of the eight most populous judicial districts in the state, none sustained a homicide rate sufficient to trigger the special prosecutor. Instead, it was the rural counties that demonstrated the most pressing need for additional prosecutorial resources from the state's attorney general. Another example not represented in the graphic is the 19th East Judicial District, which had a population of only 28,000 in 2022. The homicide rate of the district largely remains below the state's rate—in fact, 2019 and 2022 saw zero homicides. Yet in 2017, the small rural county had a homicide rate of 32.49, the second highest in the state behind the 11th West District. It can be assumed that prosecuting sudden spikes in homicides are beyond the operational capabilities of rural prosecutors' offices and therefore demonstrate the need for the special prosecutor.

Using the average total state homicide rates instead of the median of the state's counties' homicide rates is important to accurately capture which counties exceed a normative "baseline"—i.e., a state that has many counties would have a much lower trigger than a state with less counties and would skew the baseline. Additionally, tying the trigger to the state's current homicide rate is a more accurate measure of what is "typical," for lack of a better word. If this proposal is supposing the state is better equipped to prosecute these ten crimes, yet the state's average homicide rate is higher than peer states, the bar for what is "atypical" for a homicide rate in any individual county in that state must also be adjusted accordingly. Lastly, calculating the average of a state's homicide rate excluding the problematic county also skews the results, given that it is likely (though as seen in Arkansas, not guaranteed) that such a county is more populous, more urban, and poorer than most other counties—all environmental predictors of a higher crime rate.[92] Therefore, excluding that county from the calculated average would unfairly represent what is "typical" for a local homicide rate.

There are three approaches to the degree of supersession that an appointed special prosecutor would have over the elected local prosecutor. The first, the most aggressive, would place the ten charges under the exclusive jurisdiction of the special prosecutor. Referrals from law enforcement or other agencies would be reviewed only by the special prosecutor's office, and their decision to file, divert, or dismiss would be immutable by the local prosecutor. Under the second approach, which I encourage most, the special prosecutor's office would be given first refusal on the ten charges, and if the special prosecutor chooses to dismiss, the local prosecutor would then be given the option to file, divert, or dismiss the charges. For the third approach, the least aggressive, the local prosecutor would have first refusal, with the special prosecutor having reviewable jurisdiction over the charges if the local prosecutor chooses not to file. In any scenario in which the special prosecutor decides to prosecute a case, the special prosecutor has exclusive jurisdiction of any other crimes committed during the commission of any of the ten statutory crimes.

Lastly, certain states may wish to pursue a fourth option, a so-called "task force" approach. Under this style of implementation, the attorney general would form a task force team of assistant attorneys general that can be deployed to assist individual prosecutors' offices in the event of a sudden crime spike. These AAG positions would be limited to working on the same ten statutory crimes to avoid wasting specialized resources but remain under the directive of the local prosecutor. A state AG's office will generally have greater resources to hire these specialized attorneys, given the ability to pay a higher wage, bestow a greater prestige on the position, and have a statewide scope to hire. These "Special AAG" positions would likely be a highly sought-after position, given the prestige of the office and task-force approach, though the position would require flexibility given the geographic mobility required by the assignment process.

The county in question may be made to bear some financial burden for the appointment of the special prosecutor. Within our special prosecutor proposal, the county covered by the position could be responsible for 50 percent of the cost of the special prosecutor and their necessary resources, and the remaining 50 percent will be paid by the state. The special prosecutor will need support staff, assistant prosecutors, and victim advocates to function properly. We recommend that the state provide sufficient funds for the special prosecutor's office to hire an appropriate number of support staff for the size and crime level of the jurisdiction in question. In Missouri's HB 301, the Missouri Legislature required enough funds be made available to hire fifteen assistant prosecutors and fifteen staff members, though we would suggest this allocation be used as a guidepost from which state legislatures can deliberate further. If the county in question refuses to pay the 50 percent added cost, the state should withhold discretionary state allocations for that county in the same amount. By virtue of the state assuming (50 percent of the fiscal) prosecutorial responsibility for ten of the most serious crimes, the fiscal needs of the local prosecutor will necessarily be substantially lessened, and even cash-strapped counties should have an allowance to pay the 50 percent remaining cost. In contrast, the task force approach shall be funded entirely by state appropriations to the state's office of the attorney general, who shall maintain a standing task force to be deployed upon request. This implicitly incentivizes struggling district attorneys to request help prior to the inflection point (per the homicide rate) whereupon the special prosecutor may be appointed. The policy is designed to support, not punish, district attorneys.

Accountability, Oversight, and Transparency

It is likely that any proposal that introduces any risk of supersession of local district attorneys will face resistance, even from law-and-order prosecutors. However, the policy is narrowly crafted and only triggers if prosecutors are failing to uphold public safety, whether through their adopted policies or resource constraints beyond their control. This proposal is better than any alternative because it does not restrict the tools currently available to a prosecutor. It does, however, introduce accountability, oversight, and transparency into the role. Irrespective of the cause, this policy acts to reduce the burden on the local prosecutor. During the five years of special prosecutor assistance, the district attorney may seek to work through a case backlog, upgrade their case management

systems, hire additional prosecutors, and conduct other logistical or cultural transformations necessary for the office's proper functioning at the end of the assistance period.

Accountability of elected prosecutors is currently limited to voter choice in election cycles (absent the rare recall election, such as of Chesa Boudin in San Francisco, or aberrant resignations, such as of Kim Gardner in St. Louis). However, local prosecutor elections are generally lacking in options, and many district attorneys (as many as 80 percent) run unopposed, and incumbents almost always win (as many as 95 percent).[93] Therefore, relying on voter choice is unlikely to ensure district attorneys act according to their oath to protect the public and to execute the laws—nor will churning through district attorneys alleviate any resource constraints on the office. Further, though each district attorney is a member of their respective state bar, sanctions for de-prosecution policies or actions are unheard of. Therefore, the time has come for statutory accountability to be introduced. In clear terms: the assistance is only triggered if the prosecutor is failing to uphold public safety. Progressive, traditional, and tough-on-crime prosecutors all may continue to implement policies that they believe will reduce crime—if those policies fail, prosecutors are given a chance to self-correct. If they refuse to self-correct, the state must intercede to protect the public.

Prosecutors have avoided meaningful oversight for centuries. De-prosecution practices may have been the impetus for this policy, but every prosecutor should be held accountable for their outcomes in office. The only "oversight" on prosecutors is a negative one: a prosecutor may not bring forth a case where the evidence is obviously insufficient. In such a case, the judge could dismiss the case, the defendant's attorney will successfully argue that the evidence is insufficient, or the jury may acquit. The complete lack of positive oversight is part of what makes the position so unique. There is no precedent to require a prosecutor to present charges, no matter how obviously culpable the accused may be. This policy does not try to institute this positive requirement, but instead retains prosecutorial independence with the addition of a meaningful oversight mechanism.

Finally, transparency is sorely lacking in prosecutorial decisionmaking. The direct application of this policy does little to remedy this, but the secondary recommendation is that states mandate a crime dashboard. Justice Counts,[94] a division of the Bureau of Justice Assistance, and the National Center for State Courts[95] each offer their own recommendations for the types of data to collect and publish. Additionally, Yolo County in California has established an impressive crime dashboard of their own in partnership with Measures for Justice.[96] It is our recommendation that any state that chooses to implement data collection standards for a crime dashboard goes further than any of the three examples to track referrals by case type and whether a case was filed, dismissed, or diverted. The three examples given track only "felony" or "misdemeanor" case types; however, the data would be far more transparent if the data included whether the referral included: misdemeanor with or without enhancement; low-, medium-, or high-level felony[97], with or without aggravated enhancement; drug-related felonies; gun-related felonies; sexual crimes; homicides; and guardianship or family cases. While these data would serve many needs, an important point is that

it will serve to expose unannounced policies of categorical non-enforcement. Without meaningful access to prosecutorial decisionmaking data, the public is uninformed as to whether certain types of charges are prosecuted at all.

Notably, this will not cost substantial resources. The Yolo County District Attorney's Chief of Innovation and Transparency stated the upkeep is roughly equivalent to a week's worth of time per quarter, and the most significant barrier is adapting the "Commons" dashboard to align with a state's criminal code—a task that should be funded by the Legislature upon adopting and mandating this transparency standard. This process may even extend itself into the adoption of policing or judicial dashboards down the line.

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