Prosecution and Racial Justice

Using Data to Advance Fairness in Criminal Prosecution

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Prosecutors in the United States have an unrivaled level of influence within the criminal justice system. They decide, among other things, whether to file criminal charges, the number and severity of offenses they will charge, whether to offer a plea bargain, and what sentence to recommend for defendants who are convicted. These decisions can have a profound impact on the outcome of a case and the life of a defendant. Yet, as they exercise this influence, prosecutors also have unrivaled independence. Unlike officials in law enforcement and the judiciary, who have come under varying degrees of oversight in recent years (see box on page 2), prosecutors act with little outside scrutiny or governance.

The discretion that prosecutors have is valuable for a number of reasons. Most important, it provides flexibility so they can tailor an appropriate response to individual cases. Yet it can also lead to unfair, disparate treatment. For many people, the possibility that minorities, especially African Americans and Latinos, might be prosecuted differently from white defendants is of particular concern. Statistics show that African Americans, for example, account for 39 percent of the population within the criminal justice system, even though they make up only 13 percent of the national population.[1] The Vera Institute of Justice's Prosecution and Racial Justice (PRJ) program seeks to address this concern by building confidence that prosecutorial discretion is not contributing to the disproportionate representation of people of color in the criminal justice system.

In partnership with district attorneys in three major metropolitan counties—Milwaukee County, Wisconsin; Mecklenburg County (Charlotte), North Carolina; and San Diego County, California—PRJ is piloting an internal assessment and management procedure to help supervisors identify evidence of possible racial bias in prosecutorial decisions and respond appropriately when it is found. PRJ is doing this by helping district attorneys collect and analyze data about their office's structures and processes which they can then use to take corrective action when necessary—without the need for potentially costly and disruptive intervention from external entities.

PRJ's process is based on a principle that informs all Vera work: effective reform combines robust and careful data analysis with a commitment to use the information to improve policies. This publication presents an overview of how this principle is being applied to prosecutorial decision making, oversight, and supervision. The report begins by identifying how PRJ and its partners developed their approach to data-based reform. It then discusses lessons that have been learned as the district attorneys began applying this methodology to ensure the integrity of the justice they deliver.

Developing a New Approach to Prosecutorial Management Through Data

District attorneys are elected on their promise to protect communities from crime. Many chief prosecutors gauge their ability to fulfill this promise by asking one question: "How many charged crimes end in a conviction?" According to this widely accepted approach, a high conviction

rate indicates a successful office; a low rate demonstrates less success. Yet closer consideration shows that the conviction rate is an incomplete measure of both performance and success. Because it reflects countless decisions at every stage of the prosecutorial process—from whether to press charges to whether to seek specialized sentencing options—the conviction rate can conceal evidence of poor or unsatisfactory performance at any point in the process. Consequently, it cannot adequately guide supervisors on how well their offices are operating and which practices and processes warrant improvement. The conviction rate fails, therefore, as a complete and useful measure of prosecutorial performance for which it is often taken.

To provide district attorneys with information they can act on, PRJ's staff of researchers and former prosecutors developed a series of performance indicators—select statistics that provide insight into how a system is operating—that focus on four key discretion points in the prosecutorial process: initial case screening, charging, plea offers, and final disposition (see table on page 4). When taken together, the indicators describe with meaningful specificity how the exercise of discretion at each point contributes to the final outcome of a criminal prosecution, thus providing managers greater opportunity for performance assessment and supervision.

By collecting data about, say, which charges prosecutors decline to pursue, or which sentences they request, supervisors can begin to identify facets of the system that appear to be performing inappropriately and may be in need of attention. They may discover, for example, that line prosecutors are seeking more severe penalties for a category of defendants who are otherwise similar to defendants for whom they seek a lesser punishment. This insight could be the impetus for focusing more attention on understanding this imbalance and, if necessary, implementing corrective measures.

In addition to the four key discretion points, the project

Monitoring Discretion in Law Enforcement

In recent years, law enforcement agencies and the courts have become increasingly subject to external constraints and oversight—due, at least in part, to concerns about fairness and disparity. Many police departments have come under federal scrutiny, for example, because of patterns of unacceptable practices, including allegations that they unfairly and disproportionately targeted minorities for traffic stops or searches. Similar concerns about equal treatment led legislators in many jurisdictions, including the federal government, to create sentencing structures and guidelines designed to limit the decision-making options of judges.

As PRJ's partners in Charlotte, Milwaukee, and San Diego work to enhance their policies, they are following the example of several law enforcement leaders who earlier traveled a similar path and did so without the coercion of federal oversight.

One example is from the late 1990s. The former U.S. Customs Service, the federal agency then entrusted with enforcing the nation's customs laws, faced well-substantiated accusations that it was unfairly targeting African Americans and Hispanics for invasive searches. Raymond W. Kelly, the agency's chief at the time, responded by collecting data on the search practices of customs agents. The data showed that racial disparities arose when agents exercised independent discretion in choosing who to search. Kelly responded by developing a policy requiring agents to consult with a supervisor before proceeding with a search. As a result, disparities shrank and the rate of positive searches—those that led to recovery of contraband—increased.* Kelly also instituted the then-novel practice of asking for daily reports on searches by race, which allowed him to monitor patterns, identify problems, and implement solutions on an ongoing basis.

* An in-depth description of Kelly's changes can be found in "A Case Study: How One Police Agency Changed for the Better" in *Profiles in Injustice* by David A. Harris, (New York: New Press, 2002): p. 208-22.

also tracks time to disposition, which is similarly important. After all, in cases where discretion may be a factor in disparate outcomes, it might be expressed by longer prosecution times for certain defendants who are otherwise comparable to those whose cases are resolved more quickly.

PRJ acknowledges that the factors it tracks in its analysis—the performance indicators at each of the four discretion points and time to disposition—are not comprehensive. Neither are they all determined exclusively by prosecutorial discretion: a defendant released on bond, for example, may feel less urgency to cooperate to swiftly resolve a case that could result in a criminal conviction and jail time than a defendant who is in pretrial detention facing a similar charge and fate. Nevertheless, the indicators are useful in identifying racially disparate outcomes and determining whether they are the result of racial bias.

The philosophy underlying PRJ's performance measure approach is not unique. In 2004, the American Prosecutors Research Institute (APRI), the research arm of the National District Attorney's Association, proposed an initial framework for a new way of measuring prosecutors' progress toward achieving widely accepted goals and desired outcomes. Their strategy for a more effective measure of

Seeking Culture Change

Like any organization, a district attorney's office will have a distinct culture. The adversarial nature of most criminal justice proceedings in the United States, the field's traditional emphasis on convictions as a measure of success, and the leadership's vulnerability to political change all contribute to the character of this culture.

Many prosecutors and their staff regard self-monitoring as an unnecessary and even risky proposition—especially self-monitoring for hints of racial bias. It is as if by choosing to look for this evidence they are admitting to being guilty of the practice. Other agencies have demonstrated, however, that self-monitoring promises many benefits, including a greater sense of integrity associated with the criminal justice system. When prosecutors hold themselves accountable for their decisions, they gain the support of their constituencies and the benefit of a supportive environment.

Yet, prosecutors who commit to monitoring their discretion must be prepared to change the culture of their offices. PRJ facilitates this change by creating regular meetings where discussion of race is not only sanctioned but encouraged by senior management. Prosecution offices that are open to uncovering existing racial disparities can work more effectively to reduce such disparities in the future.

An important component of this culture change is gaining trust. Prosecutors can gain the trust of community and civic organizations by engaging in open discussions that demonstrate their commitment to a more just criminal justice system. Milwaukee District Attorney John Chisholm has demonstrated this commitment by openly discussing with community groups his findings and the remedial steps his office has undertaken in response to them. Mecklenburg District Attorney Peter Gilchrist has also met regularly with community groups about his commitment to reducing racial disparities in the prosecutorial process. San Diego District Attorney Bonnie Dumanis has several community liaisons on staff and regularly meets with various community groups to share information and discuss concerns.

prosecutorial performance called for a similar, multiple-indicator mechanism.[2]

The multiple indicator approach is the leading edge of PRJ's effort to help district attorneys identify and address unwarranted disparities in the treatment of minority defendants. It is complemented by the project's equal emphasis on working with offices to ensure that the data collection and analysis process is practical, and that the resulting information is effective in examining problem areas and developing appropriate policy responses.

Collecting Data Indicators: What We Are Learning

Like APRI's proposed alternative measure of prosecutorial success, PRJ's system of multiple indicators enables supervisors to monitor decisions in specific segments of their operations. This makes it possible to identify areas that warrant managerial attention and oversight.

One of the first important lessons learned, however, is that prosecutors' offices often lack the technological capacity necessary to collect data easily, if at all. The second lesson is that once the broad technological hurdles are surmounted, the process must be targeted to optimize the resulting data's usefulness.

THE NEED FOR ADEQUATE SYSTEMS TO COLLECT DATA. Prosecution offices often use electronic case management systems to follow the progress of their cases. Such systems are rarely designed to marshal the aggregate information required to track disparity, however. A standard case management system may make it possible to follow the decisions of individual prosecutors in specific cases, but it probably cannot identify how an office of prosecutors exercised its discretion collectively. Consequently,

Performance Indicators for the Four Key Discretion Points in the Prosecutorial Process

CASE SCREENING →	CHARGING →	PLEA OFFERS →	FINAL DISPOSITION
> Arrest charges (specific statute citation)	> Highest charge	> Highest charge offered	> Trial date
> Arrest charge level (level/class of felony/misdemeanor)	> Highest charge type	> Highest charge offered type	> Disposition (dismissed, found not guilty, found guilty)
> Arrest charge crime type (person, property, drug, public order/ government, sex, weapons, DUI/traffic)	> Highest charge crime level	> Highest charge offered crime level	> Highest disposition charge
> Arrest date	> Highest charge crime type	> Highest charge offered crime type	> Highest disposition charge type
> Number of counts booked	> Total number of charges	> Total number of charges offered	> Highest disposition charge crime level
> Case status (accepted/declined)	> Charging date	> Plea offer date	> Highest disposition charge crime type
> Case deferred		> Plea acceptance date	> Total number of charges convicted
> Case diverted			> Sentence recommendations
> Reason for declination			> Disposition date

such systems offer little support for supervisors looking to address overall challenges.

The fact that case management systems rarely allow for aggregating case information is but one of several related challenges. Any system that could provide aggregate information would likely have to be computerized. Yet, prosecution offices, including our partners in Mecklenburg County, often rely on paper files for managing their cases. This is not uncommon in smaller jurisdictions where the absence of a computer-based system may have a minimal effect on overall work flow, or in offices with limited resources. Another frequent challenge is that crucial information may be stored across different agencies. In many jurisdictions information about arrest charges and custody status, for example, may be maintained by the sheriff, while pleas and sentencing are recorded by the court.

Although an ideal solution would be a web-based data collection system that integrates all agencies holding relevant information, the Mecklenburg and Milwaukee district attorneys have demonstrated that intermediate solutions are also viable.

As a first step in its data collecting effort, Mecklenburg County hired data entry support staff to computerize case information from its paper files, expediting review of initial case screening decisions. This allowed supervisors to compare the aggregate number of drug cases in which charges were declined to cases in which the charges were pursued. In Milwaukee, prosecuting officials overcame the second obstacle—data being maintained by different agencies—by soliciting data from those agencies and incorporating it into a single database using case identifiers that were common to all data sets.

IMPROVING DATA QUALITY. It is not enough simply to collect data. The data must be collected in ways that allow supervisors to compare the influence of the many factors that can affect case outcomes. PRJ has identified two principles of data collection that substantially enhance the usefulness of prosecutors' databases.

First, data collection systems should be sophisticated enough to allow prosecutors to record multiple independent variables at each discretion point. One of the earliest discretion points, for example, case screening, reflects prosecutors' initial judgment about cases as they enter the office, usually from the police. The relevant information that should be collected within this indicator category includes the total number of charges against the arrested person (arrest charges and number of counts), the charge type, the crime level, and the crime type. Offices must be able to identify non-legal information about the defendant as well, including, most saliently, the defendant's race. If a prosecutor chooses not to charge a case, the reason for the declination should be recorded too.

Second, data should be collected at both the defendant and charge levels. If data is considered only at the defendant level—tracking only what happens to the defendant's case as a whole—a great deal of information about separate charges is lost. A single defendant may face multiple charges, many of which can result in different outcomes. Some of these charges may be declined and others accepted; some may be upgraded and others downgraded. What happens to each of these individual charges determines what happens to a defendant's case as a whole and determines whether two similarly situated defendants are treated disparately. For example, two defendants may be arrested for the same five charges. The first may have four charges dismissed and one accepted while the second defendant may have all five charges accepted. Considered only at the defendant level, both individuals would be seen as accepted for prosecution. This, however, would overlook the fact that the first defendant is only prosecuted on one charge while the second is prosecuted on five charges—a very different outcome.

On the other hand, if data is considered only at the charge level, there is a risk that some individuals will be counted twice—where one or more charges are rejected and one or more charges are accepted—resulting in another kind of distortion. If this information is not collected specifically and accurately, supervisors will be unable to assess fully how decisions are made in their offices.

The data collection issues described here are complex. But our experience has shown that once understood, the principles are relatively simple to begin implementing. The district attorneys' offices in Charlotte, Milwaukee, and San Diego have each begun tracking prosecutorial decisions in case screening and charging, according to their individual capacities. They have also begun to see positive results, in terms of their ability to identify areas in need of examination and possible managerial oversight. Some of these gains are highlighted in the following sections of this report. In time, PRJ's partners expect to extend their oversight systems to include the full range of indicators at each discretion point: case screening, charging, plea offers, and final disposition.

Analyzing Data: What We Are Learning

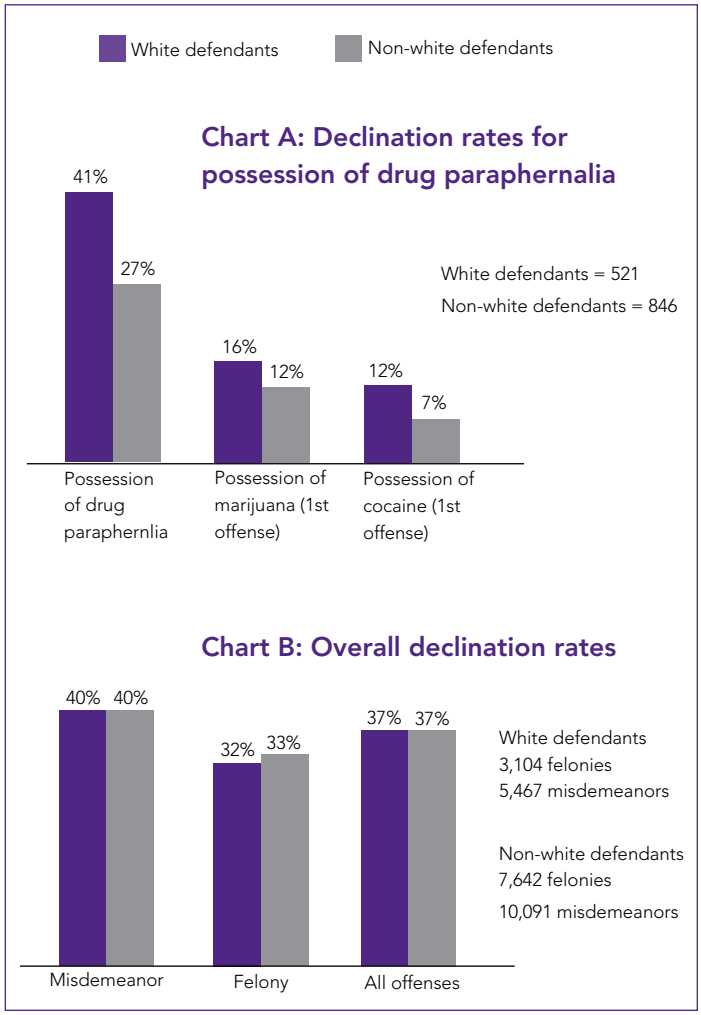
Data alone does not provide answers. It does, however, help to determine what additional questions should be asked. Developing a structured, recurring way to look at—or analyze—such data and then to apply that analysis to managerial protocols is central to the approach developed by PRJ and its partners.

PRJ's partner jurisdictions review data and discuss what data mean at regularly scheduled management meetings. Charlotte and Milwaukee have instituted new meetings dedicated specifically to this undertaking; San Diego is integrating it into an existing general management systems process. Whatever the venue, these discussions involve prosecutors and a team of legal, non-legal, and technology personnel who meet to examine, analyze, and interpret any evidence that suggests a racial bias in aggregate decision making. PRJ staff familiar with the issues are initially facilitating these meetings to help determine which factors, such as office policies and training, may be relevant to the disparities that have been found.

Recently, Milwaukee County held meetings to discuss data revealing an unexpected racial disparity in drug cases, as illustrated in Chart A, at right. For example, Milwaukee prosecutors chose not to prosecute 41 percent of whites charged with possession of drug paraphernalia compared to only 27 percent of non-whites arrested for the same crime. After looking at the data, the team considered a number of possible explanations for this disparity. These included policing practices, case screening procedures, and unconscious bias based on the character of the drug paraphernalia involved. In the course of their discussions, the team considered whether police were treating people differently, whether prosecutorial staff had a legally relevant reason to press or decline to press charges differently, and whether the disproportion was based on an unconscious racial bias.

In this case, racial bias was not deemed to be the most relevant factor. The disparity was traced, instead, to pros-

Percent of cases declined, by race



ecutors' level of experience. Junior prosecutors had traditionally been assigned to screen misdemeanor cases. A significant number of the paraphernalia cases that originated within the city of Milwaukee, where most of the African American population resides, involved possession of crack pipes. However, in the suburbs of the county of Milwaukee, the paraphernalia was more varied. Junior prosecutors associated the crack pipes with crack cocaine and pursued charges more aggressively. At the same time, they viewed other forms of paraphernalia as less serious and not worth pursuing. The result was that more African Americans were prosecuted. More experienced prosecutors, on the other hand, tended to view possession of drug paraphernalia charges generally as relatively minor and not worth pursuing.

How prosecutors subsequently addressed this disparity is the subject of the next section. It is first worth noting, however, that this disparity would have been masked if Milwaukee staff did not look into the data for the most accurate answers. As Chart B illustrates, the overall declination rates of whites and non-whites show no imbalance at all. It was only when staff considered the declination rates for specific crime types, such as possession of drug paraphernalia, that the disparity was revealed.

Lessons for Developing Management Protocols and Implementing Solutions

Once data has been collected and analyzed, PRJ's process encourages district attorneys to consider implementing policy changes to address any imbalances that have been identified. In the earlier example from Milwaukee County, District Attorney John Chisholm encouraged staff to view possession of crack cocaine paraphernalia less as a criminal matter than as evidence that the arrested individual had a problem with drug abuse. He enacted a policy that directed staff to decline these cases whenever it was reasonable to do so and to refer the arrested individuals to drug treatment. When prosecutors still seek to press charges, a supervisor's approval is required to ensure that lack of experience on the prosecutor's part is not a salient factor. Although these policy changes do not directly focus on racial issues, soon after they were implemented the racial disparity in drug paraphernalia charges disappeared.

Similar policy changes were implemented in Mecklenburg County where, as noted earlier, data entry personnel were hired to input information from paper files. That process revealed that Charlotte's prosecutors were filing charges in approximately 97 percent of all drug cases. This was an extraordinarily high percentage, given that the office's declination rate for all cases combined was roughly 30 percent. Further scrutiny revealed that many of the charges were eventually dismissed and a significant number of the cases were referred to drug treatment later in the process. Additionally, charges were being pressed for all drug cases and every drug charge involving African American women. Many of these cases, too, were being resolved later in the prosecutorial process. District Attorney Peter Gilchrist responded to these findings by instituting a more vigilant screening process that identified weak cases up front. As a result, the declination rate in drug cases overall increased to approximately 13 percent. Because Charlotte prosecutors were pursuing fewer minor charges that would eventually be dropped—including many against black women—more resources were available to prosecute serious cases that went forward.

A final example, from Milwaukee, shows that supervisors are increasingly recognizing that the interpretation of data, and not the data itself, is the key to management and reform. During a meeting to review declination rates, a finding that minorities were less likely to be prosecuted for property offenses was initially presented as evidence that there was no racial bias in how such cases were handled. Extensive discussions among managers within the office, however, yielded several other plausible and less comforting conclusions. Perhaps there were fewer cases with minority defendants because minority victims were reluctant to step forward, law enforcement was less willing to treat such crimes against minorities seriously, or prosecutors were less inclined to appropriately value the property rights of minority victims who are often demographically similar to their victimizers.

Conclusion

Prosecutors exercise significant discretion over the cases they handle. Their choices extend from whether to press charges at the beginning of the process, to their role in seeking plea bargains and making recommendations about bail and post-conviction disposition (seeking placement in an alternative to incarceration, for example). Clearly articulated legal factors, internal policies and practices, and ethical considerations constrain these choices, and historically this has been sufficient to sustain public confidence in the integrity of the prosecution function.

In recent years, however, other significant actors in the criminal justice system who once enjoyed similar autonomy have become subject to increasing levels of external oversight. Strict guidelines have been enacted to limit sentencing options available to judges, and many police departments discovered to be treating people differently based on their race have come under federal scrutiny and, in some cases, direct oversight. In both cases, a loss of public confidence was an important catalyst for the change. Prosecutors cannot assume that they are immune to similar forces.

In partnering with PRJ, the district attorneys of Charlotte, Milwaukee, and San Diego have made a commitment to sustaining the public's confidence. They have done so by assuming a leadership role in ensuring that neither race nor ethnicity are intentionally or unintentionally producing unfair outcomes or inappropriate racial disparities. Our experience has shown, moreover, that even when a disparity is not racially motivated, PRJ's approach to internal oversight can enhance public confidence in the fairness of the prosecutorial function. It is therefore an important model for prosecutors everywhere.

ENDNOTES

[1] William J. Sabol, Todd D. Minton, and Paige M. Harrison, *Prison and Jail Inmates at Midyear 2006* (Washington, DC, Bureau of Justice Statistics: 2007), NCJ 217675, p.9, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf; U.S. Census Bureau, 2005-2007 American Community Survey, http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2007_3YR_G00_S2601A&-ds_name=ACS_2007_3YR_G00_.

[2] American Prosecutor's Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures* (Alexandria, VA: American Prosecutor's Research Institute, 2004).

For More Information...

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