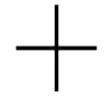


PLANK 5:

Ensure accountability and transparency in prosecution.



Prosecutors have an extraordinary amount of power in the criminal-legal system, but they are subjected to almost no oversight. This combination of great power and little oversight creates a system that tramples on the rights of people charged with crimes. Given their broad discretion over which cases are charged, whether cases proceed to trial, and the sentences that people receive, prosecutors exert enormous influence over who is subjected to the brutality of the criminal-legal system and for how long. Like the rest of the criminal-legal system, [this discretion is infected with racial bias](#), which influences every step of the process. Because of [high rates](#) of pretrial detention and mandatory minimum sentences, prosecutors have power to coerce plea agreements: People who are detained, who are facing financial hardship, and who are desperate to go home are more likely to plead guilty than take their case to trial, even if they're legally innocent. Research shows that people detained before trial [plead to more severe penalties than people charged with the same crimes but who aren't detained](#). The [vast majority of cases](#) — 97 percent of federal cases and 94 percent of state cases — end in plea agreements.

Even when prosecutors intentionally break the rules, such as by not fulfilling their constitutional mandate to produce exculpatory ["Brady" evidence](#) that favors those accused of a crime or impeaches a government witness, the court-created doctrine of ["absolute immunity"](#) protects prosecutors from facing liability.

We must advocate for a system where prosecutors are accountable to the people and communities who are subject to the devastating toll of criminal prosecution. U.S. laws and policies must be changed to ensure sufficient transparency and accountability regarding prosecutorial decisions and prosecutorial misconduct. Above all, resources in the United States must be rebalanced so that there is investment in upfront, non-carceral services that address social problems wholly outside of the criminal-legal process. Only then will the devastating effects of prosecutors with too much power and too little accountability be reduced.

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State Policy Priorities

Ensure that defense counsel has access to essential evidence

- Via both state statute and internal district attorney’s office policy, mandate early and automatic “[open-file](#)” discovery, which requires that prosecutors turn over all files and thereby eliminates information asymmetry. Such policy changes — which are already in place in many jurisdictions — may include appropriate protections for witnesses and individuals facing security threats (i.e., limitations on disclosing contact information).
- Via both state statute and internal district attorney’s office policy, ensure that police misconduct (i.e., sustained, unfounded, and unsustained misconduct complaints) is included as Brady material. Although histories of police misconduct are established Brady material, many prosecutors’ offices don’t hand over this information — in flagrant violation of the law. Disclosure of both police and prosecutor misconduct must be required and penalties for noncompliance should be severe, including but not limited to dismissal of the case with prejudice. In addition, prosecutors must be required to disclose to the defense arrests made by individual officers that do not result in charges, as well as complaints from individuals of officer misconduct. States should repeal provisions in public records laws that prevent disclosure of police officer complaint histories.
- Require discovery before a plea agreement takes place via both state statute and internal district attorney’s office policy. Since most cases never go to trial, plea bargaining is the only “adjudication” available to defendants. People deserve to know what evidence prosecutors have before they decide whether to accept a plea. Forensic evidence must be disclosed as early as possible. Also, prohibit any conditioning of plea offers on waiver of discovery.
- Introduce new requirements to ensure the quality of, retention of, and access to evidence, as well as access to the courts via state statute and internal district attorney’s office policies wherever available under state law. Such standards should include at minimum:
 - Prohibiting prosecutors from relying on evidence that has not been scientifically established (e.g., acceptable error rate), such as bitemark evidence or hair microscopy;
 - Creating statutory mechanisms at the state level that provide access to court when science changes or evolves or when experts repudiate past testimony;
 - Mandating post-conviction review of excessively long sentences;
 - Ensuring the preservation of evidence following conviction, throughout incarceration, as well as for the period of time that a person experiences collateral consequences from a conviction;
 - Creating a statutory right to pursue an “actual innocence” claim in post-conviction appeals, which includes the ability to test DNA evidence; and
 - Establishing a lab that defense counsel may use to test forensic evidence, or clearly state that all existing labs must equally prioritize evidence submitted by defense counsel and the prosecution.

Hold prosecutors accountable

- End state civil immunities for prosecutors.
- Mandate data collection and reporting of all prosecutorial decision-making (i.e., charging decision and other discretionary decisions).
- Enact legislation requiring that, when prosecutorial misconduct is found (including in instances where the court determines the error was harmless), the court *shall* refer the matter to the bar and the bar *shall* investigate the matter. In addition, all states should adopt [3.8\(d\), \(g\), and \(h\)](#) of the Model Rules of Professional Conduct, which specify prosecutors' ethical responsibilities. All states must also fund state bar ethics investigations into prosecutorial misconduct and must ensure that these investigations are undertaken by criminal lawyers with expertise who are well resourced to properly investigate these complaints expeditiously.
- Reform the grand jury process to include greater transparency and due process requirements, including by:
 - Requiring prosecutors to disclose each witness subpoenaed to the grand jury and the minutes of their testimony; and
 - Requiring that grand jurors be screened for conflicts and bias, allowing a robust *voir dire* process as opposed to no screening process as is the current practice.
- Require prosecutors to adopt practices aimed at reducing disparities in prosecutorial decision-making, including tracking disparities on the basis of race, ethnicity, religion, gender, sexual orientation, gender identity, and disability, without increasing funding for prosecutor offices.

End coercive practices by prosecutors

- Reduce the leverage that prosecutors have to coerce plea agreements, namely by reforming the bail system (see **Plank 2: Enact common sense pretrial justice**), abolishing mandatory minimum sentences, adequately funding the public defense system (see **Plank 3: Ensure a right to effective counsel for all**), and requiring judicial “second look” provisions (see **Plank 10: Support fair sentencing policy and the end of the criminalization of immigrants**).
- Abolish the “trial penalty” by passing legislation that codifies and strengthens judicial discretion and oversight in reviewing plea agreements, eliminating the stark difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial. This discrepancy currently coerces accused individuals nationwide to forgo their constitutional right to a trial.
- Prohibit prosecutors from using coercive tactics against a survivor in order to force their cooperation in criminal domestic violence, rape, or sexual assault-related investigations or trials. Such tactics include, but are not limited to:
- Holding survivors in contempt for not testifying against their harm-doer and/or cooperating with prosecutors;
 - Retaliating against survivors or other witnesses for not cooperating;
 - Using fraudulent subpoenas to threaten survivors and other witnesses;
 - Threatening to prosecute a witness, including survivors, for perjury if their testimony was not consistent with their original statement or for recantation;
 - Issuing material witness warrants and holding survivors in jail until they testify;
 - Dismissing a survivor’s desire to drop criminal charges against their harm-doer; and
 - Ignoring, disregarding, and misleading survivors.



Create an even playing field in court

- Appoint state judges with a wide variety of backgrounds, including people of color, people with disabilities, LGBTQ people, and people with experience as civil rights and defense attorneys.

Shift resources to emphasize social supports, not prosecutions

- Enact policies that shrink the size of prosecutors' offices while redirecting these resources into prevention-oriented, non-carceral supports and services that address basic, safety-related needs, such as treatment, transportation, nutrition, and health clinics.
- Encourage prosecutors to adopt policies that appropriately support and respect crime victims, including the use of trauma-responsive practices and prompt referrals to community resources.
- Via state law, create financial accountability for prosecutor offices, such as by considering the ways that prosecutorial decisions impact state and local budgets — namely through increasing jail and prison spending — and limiting the share of state and local resources available to each office. Other options include charging localities for the state and local resources they consume and providing block grants to local communities so they can allocate resources effectively and not rely too heavily on jails and prisons.
- Via state law, require prosecutors to put the costs of recommended sentences on the record when making sentencing recommendations.

Create systems to address harm done

- In police use-of-force cases, regardless of whether guns were involved or fatalities resulted, require an independent unit of the local district attorney's office, staffed by senior prosecutors and experienced investigators, to thoroughly investigate and determine whether to bring charges. In those cases where criminal charges are not brought, require an automatic review process of the decision not to bring criminal charges by an independent prosecutor and/or the state attorney general.
- Require prosecutor offices to create independently accountable Conviction Integrity Units and sentencing review units, which seek to rectify particularly egregious past injustices like wrongful convictions and police/prosecutor misconduct.
- Have an expectation to expunge court records upon an acquittal or completion of an incarceration sentence.

Federal Policy Priorities

Create an even playing field in court

- Appoint highly qualified judges to the federal bench who are committed to equal justice and who have a wide variety of backgrounds, including people of color, people with disabilities, LGBTQ people, and people with backgrounds as civil rights and defense attorneys.

End coercive tactics by prosecutors

- Implement all sentencing-related recommendations outlined in **Plank 10: Support fair sentencing policy and the end of the criminalization of immigrants.**
- Direct the attorney general to minimize arrests, decline to seek detention of individuals at their initial appearance in court, and consent to the release of those already detained absent clear and convincing evidence that the person poses a specific threat of violence to a specific person.
- Categorically ban the practice of jailing people solely because they are material witnesses in a case.

Ensure that defense counsel has access to essential evidence

- Mandate open file discovery.
- Create policies that mirror the State Policy Priorities around ensuring the quality of, retention of, and access to evidence, including Brady/police misconduct material.
- Amend the Federal Rules of Criminal Procedure (FRCrP) to require prosecutors to disclose to the grand jury all known favorable evidence relating to the subject or target of the indictment and prevent the presentation of evidence that would otherwise be constitutionally inadmissible at trial (Rule 6). Additionally, amend Rule 7 of the FRCrP to prohibit prosecutors from disclosing the name of unindicted co-conspirators in an indictment.
- Follow the recommendations of the National Academy of Sciences and create a National Institute for Forensic Science outside of the Justice Department that would set national standards for quality improvement in forensic disciplines.

Hold prosecutors accountable

- Pass legislation to abolish the legal doctrine of absolute immunity to ensure that federal prosecutors who engage in unethical or illegal behavior in pursuit of their duties are held accountable for those actions.

- Pass legislation that reforms or abolishes the judicial “harmless error” doctrine that many appellate courts inappropriately use to excuse egregious misconduct by prosecutors — particularly violations of constitutional due process rights. Enact legislation, like the Inspector General Access Act, which requires that the Office of Professional Responsibility, which oversees Justice Department lawyers, answer to the Office of the Inspector General rather than the U.S. attorney general. Require the inspector general of the Justice Department to investigate and act on any credible allegation of prosecutorial misconduct. Further, require annual reporting of all findings to the U.S. Congress.

Create systems to address harm done

- Pass legislation that funds a clemency advisory board that will exist outside of the Department of Justice, which has the expertise and authority to make clemency recommendations. The executive branch should transfer the Department of Justice’s authority and responsibility for clemency to these experts.
- Support direct compensation, immediate and long-term services (including medical, dental, housing, job assistance and training, educational aid, lawyers’ fees to the degree reasonable, child support arrears, and immediate subsistence) to people who have had their cases dismissed, are acquitted at trial, or were wrongfully convicted as defined in this model legislation. Ensure that, in addition to compensation for any time in custody, this compensation includes full reimbursement for any fees, fines, or other financial costs incurred as a result of arrest, detention, or pretrial supervision.
- In the federal statute guiding restitution for the wrongfully convicted, increase the amount of direct monetary compensation (including an inflator to adjust over time), immediate subsistence, and short- and long-term services to people who have had their cases dismissed, are acquitted at trial, or were wrongfully convicted.

Rebalance federal spending and policy priorities to emphasize civil rights

- Immediately end regressive law enforcement initiatives that direct U.S. attorney’s offices to prosecute state crimes, even those that lack a substantial federal interest, in the federal system.
- Reallocate existing Justice Department budgetary resources between the department’s Criminal Division and Civil Rights Division, giving the Civil Rights Division resources to increase civil enforcement investigations into prosecutor and police misconduct.
- Give the Justice Department’s Civil Rights Division explicit authority to investigate local and state prosecutors’ offices for systemic violations of federal and constitutional law.

- Amend 34 U.S.C. 12601 from “juvenile justice” to “juvenile and criminal justice,” expanding the authority of the Justice Department’s Civil Rights Division to conduct investigations into any situations wherein a government actor administering criminal justice has engaged in a pattern or practice of violating the Constitution or laws of the United States.
- Eliminate prosecution as a funding area under the Bureau of Justice Assistance’s Justice Assistance Grants; make public defense into its own purpose area through the amendment of 42 U.S.C. §3751.

End practices that encourage local prosecutorial harm

- Pass legislation restricting and prohibiting United States Marshals Service and U.S. Immigration and Customs Enforcement officials from contracting with states and localities about jail expansion.
- Have the Department of Justice immediately suspend prosecutions under 8 U.S.C §§1325, 1326 pending an urgent review to evaluate the harms caused under the zero-tolerance policy and to establish future policy.

