A PEEK BEHIND THE CURTAIN:

SHINING SOME LIGHT ON DISTRICT ATTORNEY POLICIES IN OREGON

ACLU
Oregon

ACKNOWLEDGEMENTS

The American Civil Liberties Union of Oregon is a nonpartisan organization dedicated to protecting and advancing civil rights and civil liberties. We utilize a variety of strategies including impact litigation, public education, research, organizing, and legislative advocacy.

This report is also a product of the *They Report to You Campaign*, a project of the American Civil Liberties Union of Oregon (ACLU of Oregon). This project works to improve our criminal justice system by reimagining the role of district attorneys, increasing voter engagement with these important elected leaders, and advocating for reforms that improve the transparency, policies, and practices of district attorneys while more appropriately balancing the enormous power and discretion of prosecutors.

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

District attorneys (DAs) and their prosecutors are the most powerful actors in the criminal justice system. How they go about their job can fundamentally impact people's lives for better or for worse. Despite the notion that DAs just follow the law, individual, elected district attorneys are given an enormous amount of discretion within the law. DAs and their staff are making choices on a daily basis about who they charge, the severity and number of charges, who gets access to treatment and diversion programs and who doesn't, which victims get access to services and support, and whether prosecutors are paying earnest attention to reducing racial disparity.

We submitted public records requests to all 36 of Oregon's district attorney offices in order to better understand what policies were shaping their work. It took two years and meaningful resources to get a partial but insightful glimpse of what exists.

Only thirteen DA offices demonstrated that they have a meaningful set of written policies for the core functions of their office, providing at least some guidance about how they and their staff are handling their core duties as prosecutors in Oregon.

Thirty percent of DA offices refused to respond to at least one of ACLU's requests for basic information and did so in direct violation of the state's public records law.

That means that at least 40 percent of the district attorney offices in Oregon have no internal written policies specific to their core work within the criminal justice system. We suspect this number may be higher because several offices didn't respond at all.

Although we were unable to develop a comprehensive view of the formal, guiding policies of Oregon's district attorney offices, we learned enough to be deeply concerned.

A basic set of policies that guide the core functions of every district attorney office in Oregon shouldn't be seen as a luxury. DA policies serve many critical purposes including:

- To ensure there is continuity to how staff in their office prosecute people
- To set standards for behavior and expectations on critical issues where there is no guiding law
- To provide clarity of expectations and critical information for other justice system stakeholders, victims, defendants, and the public at large
- To create mechanisms of accountability for holding themselves and their staff accountable
- To clarify how a particular office will use its discretion based on the DA's values, priorities, and their understanding of the most effective public safety strategies.

Basic district attorney policies should be easily available to the public, but, in fact, they are quite difficult to access. We didn't find any of the DA office policies online. Collecting them required public records requests and, in some cases, money, to access even the most elementary set of policies. Meanwhile, a surprisingly large number of DAs, who have sworn to uphold the law, are ignoring the state's public records law in a blatant disregard for government transparency.

We have seen the public's trust in the criminal justice system erode in recent years, which is a damaging trend that severely limits the effectiveness of our system. A lack of transparency among criminal justice leaders is major contributing factor to that disintegration of public confidence.

This report examines a theme from several district attorneys that indicates a disbelief that office policies are actually needed. Several DAs downplayed their immense discretion making the argument that the law provides a sufficient guide to their work. Such a perspective could be seen as a convenient way to avoid accountability for the ways DAs and their staff choose to maneuver through the enormous room the law provides them and how they act on issues on which the law is silent altogether.

It is clear that real differences exist from county to county on a range of issues. Some DA offices are updating policies based on changes in state law and the emerging research about best practices, but that is not the norm. And in one instance, a DA office is blatantly ignoring and working around a relatively new law passed by the Legislature.

Differences exist within DA offices on how they approach the intersection of immigrant rights and the justice system, how they handle youth,

as well as staff accountability and training, among many other areas. Some of what we learned raises serious concerns about the need for higher standards.

Finally, this report is a call to action.

As the most powerful actors in the criminal justice system, the policies that inform how DA offices are run and how they make decisions shouldn't be a mystery. Basic office policies should be easily available to the public, and, ideally, these policies would be created with public input. Neither is currently the case. "Just trust us" shouldn't be good enough for Oregon's justice system.

Policy development can ensure there is some intention, thoughtfulness, and consistency within our justice system. Prosecutors operate with high levels of discretion; and without any meaningful office policies and guidelines, unchecked prosecutorial discretion can lead to unequal practices, rogue prosecutors, confusion for victims and defendants in the process, and unclear expectations in our state's justice system.

The report suggests legislative action is needed to require every district attorney office in the state develops a baseline set of policies regarding the core functions of their office. Many counties are operating with almost nothing.

With no state requirements, DA offices can essentially operate in the dark, outside of public view, without any pressure to evolve and update their priorities and procedures to reflect best practices and improve outcomes.

INTRODUCTION

This report shares insights from our research into the policies of district attorney offices across Oregon. Starting in November 2016, we submitted public records requests to all 36 district attorney offices. The project's intent was to better understand the landscape of the state's district attorney offices and the basic policies guiding DAs' decisions and practices, and what differences exist from county to county.

District attorneys and their prosecutors are the most powerful actors in the criminal justice system. Although police and other law enforcement agencies can arrest people, prosecutors largely determine what happens next. Tens of thousands of people directly interact with DA offices annually. The policies, practices, and priorities of a DA's office can be the difference between whether or not crime victims get access to critical services that help them rebuild their lives, whether people battling addiction get offered treatment rather than jail, whether young people are held accountable in a way that protects their future life possibilities, or whether people of color are treated fairly.

Despite recent increased attention on the role of district attorneys around the country, information and data about how prosecutors make decisions is largely unavailable and outside the view of both the public and legislators[i]. Our justice system shouldn't be a secret, and Oregonians have a long history of valuing transparency. This report is designed to shine some light on DA policies, describe some of what exists and what doesn't in Oregon, and why it matters to the public. This report is also a call for change. Both the lack of transparency and the overall lack of substantive guiding policies for such powerful criminal justice actors is troubling and sets too low a bar for our justice system.

DA POLICIES AND THE BIGGER PICTURE

District attorneys are independently elected leaders, and it should be expected that there will be meaningful differences in how DA offices operate from county to county. Those differences can be shaped by the differing priorities and politics of DAs and also the different nature and needs of their counties. Oregon has both urban and rural counties, counties that are increasingly diverse, as well as counties that are demographically homogenous. The local economies, trends in drug use and in crime differ greatly across Oregon, which requires different approaches. For example, several DA offices have developed policies relating to the charging of wildlife offenses, although that isn't a priority for many other offices.

We are certainly not advocating for a cookie-cutter approach to district attorney policy development. Criminal justice actors need some room to maneuver in order to deliver justice that speaks to the individual circumstances of each situation.

There is not necessarily a blueprint for the content of policies that all Oregon DAs should adopt. But not having detailed, written policies is unacceptable, as is not making written policies easily available to the public.

CLEARLY WRITTEN DISTRICT ATTORNEY OFFICE POLICIES SERVE MANY PURPOSES INCLUDING:

- **To ensure there is continuity to how staff in their office do their job.**

  Although there will be some differences in how justice is applied across geographies, there should be consistency within individual DA offices. Consistency, or the lack of it, is also a major contributing factor to the level of public confidence in the justice system.

- **To set standards for behavior and expectations for the office on critical issues where there is no guiding law.**

  There is a great deal that Oregon law doesn't address that can have a profound impact on how victims and defendants are treated and what kind of outcomes we see from our justice system. Policies can determine the level of continuing education and competency that is expected among prosecutors and victim advocates, the degree prosecutors are collaborative and earnest in their interactions with other stakeholders, or how serious a role DAs play on issues of police misconduct.

- **To provide clarity of expectations and critical information for other justice system stakeholders, victims, defendants, and the public at large.**

  Our justice system can't be at its best when the process is a mystery. The system is already confusing for victims and defendants to navigate.

- **To create mechanisms of accountability for holding themselves and their staff accountable.**

  A lack of written policies and guidance can set-up staff for failure or significant mistakes. Establishing and implementing sound policy is part of the responsibility offices have to ensure their staff are making the best decisions.

MAKING WRITTEN DISTRICT ATTORNEY OFFICE POLICIES EASILY AVAILABLE TO THE PUBLIC SHOULD BE ESSENTIAL IN ORDER TO:

- **Develop and maintain trust with the community.**

  Oregonians have long placed high value in transparency and the notion that law enforcement offices might have something to hide can only damage community trust.

- **Clarify how a particular office will use its discretion based on the DA's values, priorities, and their understanding of the most effective public safety strategies, among other things.**

  District attorneys are elected leaders that have historically flown under the radar. Voters and the public should know much more about the choices they are making in the core functions of their office.

POLICIES NEED TO BE PERIODICALLY REVIEWED AND UPDATED IN ORDER TO:

- **Keep up with the latest research and insights about what works.**

  In the past 20 years, we have learned a tremendous amount about the best approaches to reduce crime. Some of these established lessons are being implemented throughout most of the state's justice system, particularly the places where there has been a shift toward treatment programs rather than incarceration for addiction-driven crime. But there are also places where both Oregon law and DA policies are out of step with consensus research. For example, research from around the country shows that keeping youth in the juvenile justice system results in significantly reduced recidivism. But Oregon still automatically throws many youths in the adult system in ways that are damaging, outdated, and out of sync with best practices.

- **Keep up with changes in community needs and priorities.**

  Our world is changing faster than ever. Policies and approaches developed ten or even five years ago may not reflect what matters most to residents now. DA offices need to be open and responsive to shifts in approaches reflected in periodic updates to written policies.

- **Provide greater clarity around ambiguities in the law based on the emergence of new technologies and contexts.**

  Emerging technology, like police body cameras, requires specific policies around when, how, and with whom video footage is shared. Although in the instance of body camera footage, police departments may be the most obvious agencies requiring guiding policies, as evidence of potential crimes and police misconduct, DAs should also be providing clarity for how they are interacting with, using, and sharing such footage. Given the rate at which new technology is being adopted by society, we should not underestimate the pace at which policies should be reviewed and updated.

THE PUBLIC SHOULD BE GIVEN OPPORTUNITIES FOR OPEN COMMENT ON PROPOSED POLICIES BEFORE BEING ADOPTED:

- **Many local law enforcement agencies and government bodies already accept and consider public comments regarding their policies and internal directives.**

  District attorneys should adopt what is a common and standard practice across government agencies. Allowing the public to weigh in on policies that impact them is good governance and builds trust.

- **Public comment periods allow government leaders the opportunity to educate the public about their role.**

  Public comment periods can build productive dialogue between the DA and the public they serve and represent in court. This conversation will give DAs opportunities to help the public better understand their role in building safe and healthy communities.

- **Involving the community in policy making allows constituents opportunities to inform their elected DAs about the vision and values they hope are reflected in the DAs' work.**

  Election campaigns shouldn't be the only opportunity for meaningful engagement between DAs and the public.

BASIC AREAS FOR WHICH DISTRICT ATTORNEY OFFICE POLICIES SHOULD BE REQUIRED:

Although individual DAs may take different approaches to the substance of their office policies, we believe district attorneys in each county should have a basic set of policies concerning their core functions, including but not limited to the following areas:

HOW CHARGING DECISIONS ARE MADE FOR:

- Driving under the influence of intoxicants
- Controlled substance crimes
- Property offenses
- Environmental crimes
- Domestic violence
- Misdemeanor crimes
- Measure 11 mandatory minimum offenses
  - Adult prosecution of 15-, 16- and 17-year-old offenders under Ballot Measure 11
- Charging youth under 18 more generally
- Whether to seek the death penalty

What factors DAs consider in deciding whether to charge people and what to charge them with can have a life-altering effect on people involved in the justice system. What is the process? Do certain decisions require more oversight or high-level approval? Do prosecutors aggregate charges to increase potential sentence severity or criminal history? Do they have policies not to prosecute certain low-level crimes? Do their policies make diversion and treatment the default for a range of offenses? How are young people treated and why?

HOW CASE DISPOSITION DECISIONS ARE MADE FOR:

- Plea bargaining
- Civil compromise agreements
- Requests for the imposition of fines and fees
- The use of restorative justice programs
- Pre-plea and post-plea diversion programs
- The consideration of collateral consequences of conviction, including immigration consequences
- Sentencing programs, including alternative incarceration programs, conditional release, work release, earned sentence reductions and short-term transitional leave

Case disposition refers to how cases are resolved. How do prosecutors decide which type of resolution to seek? What kinds of plea deals are offered and when? Are prosecutors advocating for plea agreements that reduce access to key rehabilitation programs? Do prosecutors support civil compromises that victims have agreed to, or do offices categorically oppose civil compromises? When are defendants saddled with expensive fines and fees and what role is the prosecution taking in advocating for court-ordered financial obligations? When and for whom are prosecutors supporting access to diversion and treatment programs? Are DA offices considering the immigration consequences of disposition and trying to reduce a defendant's negative immigration implications?

THE FILING OF AN AFFIDAVIT AND MOTION FOR CHANGE OF JUDGE:

What are the circumstances for which a DA office attempts to remove a judge from a case or for categories of cases?

VICTIM SUPPORT AND INVOLVEMENT IN CASES

What resources are available for victims in the process? Are DA offices doing demographic analysis about which victims are getting access to victims' compensation, support services, and basic information about their related case? How are victims' wishes taken into account when deciding whether to charge defendants or what to charge them with?

PRETRIAL RELEASE, INCLUDING THE AMOUNT OF SECURITY RELEASE REQUESTED FOR CHARGED OFFENSES AND OBJECTIONS TO RELEASE

When do DAs support and oppose releasing defendants not yet convicted of a crime? Are offices using risk assessments, and if so, has the risk assessment tool been vetted for potential bias? What approach does the DA office take in advocating for bail amounts? Does the office generally try to minimize the use of jail for people awaiting trial, or is that not a consideration?

PRETRIAL DISCOVERY, INCLUDING:

- The process for obtaining discovery
- Compliance with discovery obligations required by the Oregon and United States Constitutions, and training on compliance with those obligations
- Existing agreements (and the creation of new agreements) with law enforcement agencies on data retention and data sharing
- Costs charged for discovery materials

Discovery refers to the process of providing and exchanging information and records with the defense when preparing for trial. How do prosecutors seek discovery? Do they go through the court or communicate with defense counsel directly? How do prosecutors ensure they are turning over any and all exculpatory (favorable) evidence to defendants? What trainings on discovery obligations do DAs require of their prosecutors? Are DAs communicating clearly with police departments about their obligations in this area? Are there formal agreements with police departments about how evidence should be maintained and shared? What rubric do DA offices use for charging defendants reasonable amounts for obtaining the discovery materials they are entitled to or request?

PROSECUTORIAL ETHICS, INCLUDING COMPLIANCE WITH THE RULES OF PROFESSIONAL CONDUCT AND OREGON REVISED STATUTES:

- Confidentiality, including obtaining and handling confidential information
- Qualification standards for prosecutors by case type

How do DA offices ensure compliance with prosecutors' ethical duties? Do DA offices have their own ethical standards? What happens if a complaint is made against a prosecutor? How is prosecutorial misconduct handled? What records are kept confidential? How do DAs ensure confidentiality is maintained? What makes a prosecutor qualified to prosecute criminal violations, misdemeanors, felonies, and death penalty cases? Are there special requirements for prosecutors to cover cases involving special sensitivities or requiring specific expertise, such as juveniles, gangs, domestic violence, sex crimes, etc.?

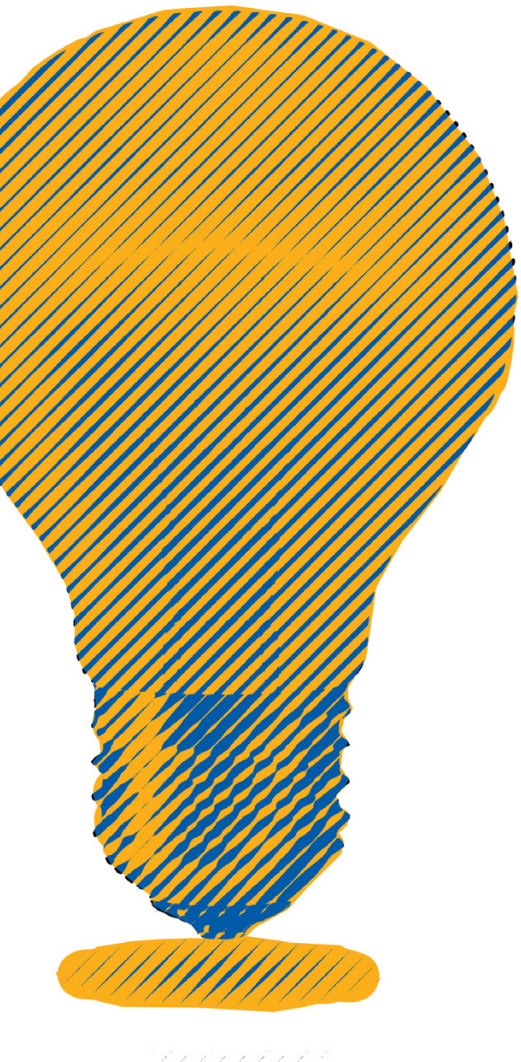
THE USE OF CERTIFIED LAW STUDENTS

What kinds of cases can law students certified to represent the state in court handle? How are such certified law students trained and supervised?

The list of recommended areas for DA office policies could easily be expanded. There are a range of other areas that would likely benefit from clear policies like jury selection, collaboration with law enforcement, use of grand juries, relationship with the media, and investigation and prosecution of police misconduct, for example. And as noted earlier, some DA offices may have issues that are specific to their local context that require intentional policy development.

Furthermore, we believe it is helpful within policy manuals for individual DAs to speak to their understanding of and belief about the role of the prosecutor. There is a very active social movement right now engaged in redefining the role of district attorneys across the country. That movement is driven by critiques of how historical prosecutorial practices have contributed to both mass incarceration and intense racial disparity within our criminal justice system. This is a time to re-envision the role of prosecutors in a way that modernizes prosecutorial practices to help achieve more effective and fair outcomes in our justice system.

ROOM FOR INNOVATION



Because district attorneys have immense discretion within the justice system, they have the ability to innovate and proactively address some of the historic limits, weaknesses, and unfairness of our criminal justice system. There is a new set of leaders being elected as district attorney around the country who recognize that change is needed, and DAs have tremendous power to lead and implement reforms. In the past few years, more elected DAs have stepped out of the box and challenged traditional notions about what is needed and what works. If district attorneys in Oregon begin to create and update their policies, we hope that they will embrace the opportunity to modernize their approach and move beyond the ways things have historically been done.

Here are just a few examples of district attorney leadership in other parts of the country. These examples are not endorsements of these DAs; rather they are snapshots of forward-thinking approaches that re-envision the role of prosecutors.

A newly elected district attorney in Durham, NC, Satana Deberry, raised the importance of stopping the school-to-prison pipeline for youth when she ran for office in 2018. Deberry believes that shifts in how her office handles youth can make a huge difference, and she advocates for holding young people accountable while protecting their potential success.

From 2012 to 2017, Durham schools had over 1,100 school-based criminal complaints against children 15 and younger. About 80 percent of the offenses were misdemeanors, and dozens were low-level felonies[ii].

"Just from a perspective of a prosecutor, I think moving forward we would like to move to not accept any referrals from the schools," Deberry said. *"We think there are better ways to deal with those issues than giving kids a criminal record."* Deberry is suggesting youth can be held accountable through a special "Teen Court" that avoids giving young people the consequences of a criminal record.[iii]

Larry Krasner was elected as the district attorney of Philadelphia, PA, in 2017. Krasner created a new practice to address his concerns about the cost of mass incarceration.

"Fiscal responsibility is a justice issue, and it is an urgent justice issue..." Krasner wants prosecutors and judges to grapple with the cost of sentences. At sentencing hearings, his prosecutors are now being asked to tell judges the taxpayer tab of particular sentences. In a state where a four-year prison sentence can cost over $160,000, this bold move will raise more attention to the cost-benefit analysis of different approaches to crime and accountability.

"A dollar spent on incarceration should be worth it," Krasner said. *"Otherwise, that dollar may be better spent on addiction treatment, on public education, on policing and on other types of activity that make us all safer."* [iv]

Meanwhile, Kim Foxx, elected in 2016 as Cook County (Chicago), Illinois' State Attorney, has taken a courageous and unprecedented step to create much greater transparency and access to information about the work of the chief prosecutor's office.

In 2018, Foxx released case-level data, available online that goes back to roughly 2010. It contains tables documenting key phases in a case's movement through the office: Intake, Initiation, Dispositions, and Sentencing. The data tables have been redacted of personally identifying information, but include unique numerical identifiers so cases, defendants, and charges can be followed. The data release includes over 45 million data points and over 300,000 cases.

"For too long, the work of the criminal justice system has been largely a mystery" said State's Attorney Foxx. *"That lack of openness undermines the legitimacy of the criminal justice system. Our work must be grounded in data and evidence, and the public should have access to that information."*

"I sought this office committed to building the most open and transparent prosecutor's office in the country. I am proud to be taking the lead on open data and hope that many of my fellow prosecutors around the country will join me in this effort to be truly transparent and accountable to our constituents. The public deserves nothing less." [v]

OVERVIEW OF RESEARCH PROCESS

At the very end of 2016, we submitted public records requests to all 36 district attorney offices in Oregon. Our inquiry made it clear that our intent was not to make a large, voluminous request, but rather to begin to understand the landscape of district attorney operations across the 36 counties. We asked for current policies, guidelines, or mandates (including explanatory memoranda) in a range of areas. Of particular interest to us were:

- Charging policies and practices
- Plea negotiation policies
- Use of diversion programs
- Training requirements
- Compliance with *Brady* and all discovery obligations
- Procedures for the review, investigation, and reprimand of attorneys when ethical, policy, or duty violations occur

After back and forth communication with the majority of DA offices, we sent follow-up requests to all 36 offices in the summer of 2018 asking for additional information and in some cases the originally requested materials from initially unresponsive offices.

Our approach was not to ensure compliance at all costs. One DA office asked for what we considered unreasonable amounts of money to comply with parts of our request, and several DA offices did not respond at all. We chose not to prioritize expending even more resources to force offices to comply with the law, as long as we received information and responses from the majority of DA offices in the state. The information we gathered provided incredible insight, even if it is not comprehensive.

The records were then reviewed multiple times by various researchers to properly categorize and summarize findings. We categorized DA offices to identify the extent of their policies by identifying the percentage of policies provided that correspond to the categories this report lists as *Basic Areas for which District Attorney Office Policies Should Be Required*.

This report highlights some observations and analysis of what we received. It is possible that some DA offices may have additional information that speaks to some of the areas of our core concerns. If that is the case, it is up to them to explain why they held the information back.

Because this project spanned roughly two years, some of the district attorneys in the offices we originally contacted are no longer there. We have captured the shifts in office leadership that occurred since the beginning of this project as an addendum.

THE OVERWHELMING PRESENCE OF THE ABSENCE:
RANKING RESPONSES FROM DA OFFICES

Most of the information we requested was incredibly simple. Our records request focused on written policies and memoranda about the core functions of district attorney offices.

NON-REPONSES

Five DA offices did not respond at all. They didn't even acknowledge the receipt of our request. Those offices were **Columbia*, Hood River, Klamath*, Lake*, and Umatilla* counties**.

Six DA offices acknowledged receipt of our records request but did not follow-up with either documents or estimates of cost to obtain the requested documents. Those offices were: **Jefferson, Morrow, Polk, Wallowa, Wasco, and Yamhill counties**.

As noted earlier, we did not prioritize the time or resources to try to force DA offices to comply with the law. This project was designed to gather a broad assessment of district attorneys' written policies in Oregon. Although a third of DA offices chose to ignore our requests, there were many valuable insights gleaned from the information we did gather.

Without any response, we are not able to characterize what the DA offices in this category do or don't have in regard to functional policies. Perhaps as troubling as not knowing what is happening in these offices, is the fact that elected leaders, sworn to uphold the law, can choose to ignore it.

* *This category includes four counties who did respond to one of our records requests, and so they show up again in one of the categories later in this section. We made the determination that ignoring one of the records requests should qualify the office to be listed in the non-responsive category. Columbia, Lake, and Umatilla Counties ignored our request in 2016, while Klamath failed to respond to our 2018 request for updated and additional records. See addendum for details.*

DISTRICT ATTORNEYS' ROLE IN PUBLIC RECORDS REQUESTS

Among the multi-faceted roles of district attorneys in Oregon, DAs have a vital role in ensuring our government is transparent. If a local government agency improperly refuses access to public records, the requester can appeal to the county's district attorney. Oregon law gives DAs the power to review the denial and order the release of the requested records.

In 2018, a group of law students from the University of Oregon launched a project to examine how DAs were approaching their role in enforcing public records law. The students requested five years' worth of information on DA decisions regarding appeals and enforcement of public record law. The students argued the information would show how well DAs were doing in enforcing this important area of state law.

As Pamplin Media Group reported,

> *"A third of Oregon DAs — 12 out of 36 — didn't follow deadlines in the state's records law for responding to requests. They missed deadlines, failed to follow through or ignored the students altogether. And, when they did respond, most DAs told the students that it wasn't in the public interest to reveal how they made their decisions — and that allowed them to charge fees for releasing public records. The estimates for fees the DAs sent to the students exceeded $1,000."*

The Bend Bulletin also reported on this story, highlighting the degree to which various DAs in Oregon had different inclinations and approaches around transparency. The Bulletin noted that Deschutes and Multnomah County DA offices have made their orders on public records easily available on their website, but that kind of open approach was in sharp contrast to the Lane County DA.

In response to this research the Bulletin published an editorial, *Transparency Not Valued by Many Oregon DAs*, summarizing the problem and asking the legislature to act. Here is an excerpt:

> *"Oregonians' ability to see how their government, no matter at what level, operates, should not be limited by the county in which they live. Records in Lane County should be every bit as accessible as those in Multnomah or Deschutes, no matter what a district attorney's view of the law is."*

> *"Lawmakers should be able to fix most of these problems easily, if they're of a mind to. They can make it clear that Oregonians expect their district attorneys to understand and uphold the public records law, deadlines and all. They should recognize that some agencies set fees high as a way of discouraging requests, and deal with the problem."*

EXORBITANT COST ESTIMATES

In 2016, the Washington County DA's office provided detailed estimates of over $2,000 for information that most other offices gave us at no or minimal cost. Given the size of the Washington County DA Office, we were interested in seeing their policies, but we declined to pay them excessive costs.

NOTE: *Washington County DA's Office provided excessive cost estimates in response to the 2016 records request when Bob Hermann was the DA.*

NO WRITTEN POLICIES EXIST

15 DA offices acknowledged in their response that they have no written policies related to our requests around the core functions of their office.

Those counties include **Benton, Clatsop, Columbia, Gilliam, Grant, Josephine, Klamath, Lincoln, Linn, Morrow, Sherman, Umatilla, Wallowa, Wasco, and Wheeler counties.** Over 40% of all DA offices in Oregon have no internal written policies to guide their work. But the number could be over 60% depending on the status of the offices who chose not to respond.

Many of these offices are incredibly small with very limited staffing. This was pointed out in more than one response. It is important to consider how the needs and abilities of smaller offices differ in regard to the development of written policies. On one hand, it may be more difficult to keep up to date, meaningful guiding policies when an office has limited administrative, operational, and management staff. That said, the power and impact those offices have on individual Oregonians is no less profound based on the size of the office.

Additionally, some offices acknowledged that although they don't have office policies specific to the functions of their justice system duties, their county's public employee handbook and county-wide policies do guide and dictate aspects of their work. Although we appreciate that county-wide public employee handbooks can inform them on administrative and personnel matters like hiring and firing, this project was clearly about assessing what policies guide prosecutorial duties. In this instance, county-wide public employee handbooks are entirely insufficient for matters like when to charge a youth as an adult, how to inform police departments that some of their officers may no longer be credible witnesses, or what standards should inform plea negotiations.

LOW LEVELS OF POLICY DEVELOPMENT AND WRITTEN PROCEDURAL GUIDES

Four counties have what we would describe as low levels of written office policies covering less than 20 percent of the basic areas we've identified as essential. These are offices without any sort of policy manual, but they do have some policies in the form of handouts or limited policy memos. Their policies cover either a very limited number of topics, or do not provide much detail, or both. Three common areas covered in some but not all of these offices include: charging decisions for a range of offenses, diversion decisions, and discovery.

DA offices in this category include **Crook, Jefferson, Union, and Yamhill counties.**

One theme emerged from some of the offices with little to no written policies. Former DA Daina Vitolins of Crook County argued that much of the core understandings that guide their work are communicated verbally. She suggests that office policies can exist even if they are not written.

> *"Many of your requests, so far as we understand them, ask for written policies regarding the internal operations of the Crook County District Attorney's office. Not every practice of the office is required to be memorialized in a formal memorandum or policy statement – (like) those that have been provided along with this letter. Other practices, which are not required by law to be written, are communicated through face-to-face interactions with departmental staff and our counterparties such as defense counsels and members of the public. Because those oral communications are not "records" as defined under the public records act, please do not consider the lack of a written policy as an indication that such a policy does not exist or is not observed."* – DA Vitolins

We agree that office practices and standards can informally exist even if they are not written down. Staff can, at times, have clear expectations on behavior and protocol based on verbal instructions. That said, taking shortcuts on the development of publicly accessible, written policies creates a range of problems like lack of public transparency, difficultly holding staff accountable for violations, as well as internal and external confusion about process. Oregon should require written policies.

LIMITED POLICY MANUALS OR AN EXTENSIVE RANGE OF PIECEMEAL POLICIES

Ten Counties have either compiled limited policy manuals and/or have other written policy documents and memos covering between 20 percent and 60 percent of the basic areas we've identified as essential. The policies address fewer topics and/or provide less detail than the counties with the most comprehensive policies. The common policy areas among many of these counties include approaches to charging for a range of crimes, access to diversion programs, discovery guidelines, civil compromise, and charging and disposition of youth.

DA offices in this category include **Baker, Coos, Curry, Douglas, Harney, Jackson, Lane, Malheur, Marion, and Tillamook counties.**

EXTENSIVE POLICY MANUALS COVERING CORE PROSECUTORIAL FUNCTIONS

Three counties responded with policy manuals and other written policy documents covering a wide range of topics related to prosecutors, especially personnel, charging, diversion programs, plea negotiations, discovery obligations, training, ethical and legal violations, bail, sentencing, and juveniles. Their policies are described in detail such that prosecutorial staff and the public can discern how the offices will likely approach a particular situation. Their policies cover over 60 percent of the basic areas we've identified as essential.

The DA offices in this category are **Clackamas, Deschutes, and Multnomah counties.**

NOTE: *Washington County's DA office suggested they used much of Multnomah County's policies but asked for excessive amounts of money to provide responses to our requests, which we declined to pay. We don't know where WA County is using and not using Multnomah County DA's policies as a model.*

ARE DAs JUST FOLLOWING THE LAW?

DA DISCRETION, OFFICE CHOICES REGARDING POLICIES AND PRACTICES, AND IMPACTS ON OREGONIANS.

An important theme emerged from many of the DA responses to the public records requests. Several DAs seemed to implicitly downplay or deny the implications of district attorneys' immense individual discretion within the justice system. This denial goes to the heart of why the state needs to set a higher bar for public policies that guide the work within DA offices.

Multiple DA offices responded with language to suggest that, in the absence of the kinds of charging and operational policies we had inquired about, DAs were bound to follow the law. They essentially said the law provides sufficient guidance for their work.

Here are a few different examples of that core message:

> *"Please be aware that the public records that you requested do not exist. The Josephine County District Attorney's Office does not have any written or electronic internal policies or protocols, internal memoranda, operation manuals, publications, transcripts, meeting minutes, or internal training materials for the items that you requested. The guidelines of the District Attorney's office are set out in Oregon Revised Statutes, Oregon Administrative Rules, and the Oregon Rules for Professional Conduct."*
> (DA Ryan Mulkins, Josephine County)

> *"The attached Declaration of Principles, the U.S. and Oregon Constitutions, the Oregon Revised Statutes, and Oregon Administrative Rules are the written guidelines this office uses that relate to this inquiry."*
> (Linn County, DA Doug Marteeny)

> *"We utilize the Oregon Revised Statutes and applicable case law in addressing the other 13 items you referenced in your letter.*
>
> *I will not charge you a fee for sending you the records attached. If for some reason you want copies of the Oregon Revised Statutes, please advise me of this and I will make an estimate of the cost to copy and send to you. You are welcome to come and look at the Oregon Revised Statutes in my office if you wish."*
> (DA Eric Nisley, Wasco County)

When reading these responses, two core questions arose:

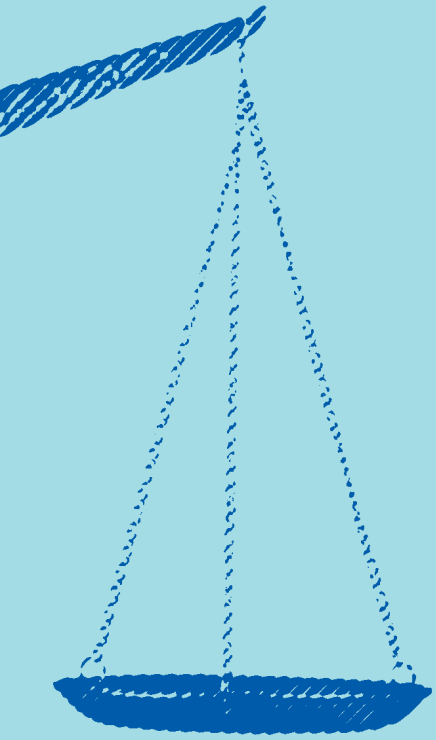
Are district attorney offices simply following the law?

Are existing federal and state laws a sufficient guidepost for the work of DA offices?

A brief examination of the huge degree of prosecutorial discretion allowed within the criminal justice system makes a strong argument for the necessity of robust procedural policies for DAs. The fact of the matter is that prosecutors have a massive amount of space to maneuver within the law.

For example, state law provides a range of criminal offenses available within Oregon statute with which prosecutors can charge a person. But the decision of whether or not to charge someone is within the discretion of a DA's office, as well as the decision about the number and the severity of charges, whether to offer someone a plea deal, or whether to ensure someone has access to a diversion program like drug court, among other life-altering determinations.

Within all that discretion, individual district attorneys can make very different decisions from county to county about how they want to interpret and apply the law. And among the DA offices that have substantive office policies, we often see different approaches and choices being made, some of which are further explored in this section.



Furthermore, the law often provides the lowest standard for law enforcement to follow, but our public safety policies should not be limited to the legal floor. Public safety leaders can and should do more based on their vision, values, ethics, and priorities.

There are also places where the law provides no guidance, and the public likely wants some basic standards to establish faith in our justice system's fairness and efficacy. For instance, this report explores the fact that Oregon prosecutors have no state-mandated training requirements specific to their jobs, unlike most other law enforcement employees. Although ensuring a baseline level of competency with mandated training for prosecutors is not required by state law, it is hard to think that the public wouldn't want district attorneys to require on-going training for the staff whose decisions dramatically impact the public.

Additionally, changes in the law are often outpaced by the emergence of new contexts, new understandings, and new research that underscore the need for new practices. This can lead to lack of clarity in the law. For example, the emergence of new technology has presented new questions about how, for example, constitutional standards of law enforcement searches apply to things like cell phones. Updating policies and practices to ensure DA offices are operating in alignment with current insights on best practices is mostly at the will of individual district attorneys.

To suggest that district attorney offices are just following the law and don't need publicly available and periodically updated policies skirts accountability for the daily choices DAs and their staff make regarding interpretation and application of the law. Those choices profoundly impact people's lives.

This section of the report examines areas where differing DA office policies and practices likely lead to very different outcomes for Oregonians. This section starts with a case study of Tillamook County, where the DA is purposefully ignoring the intent of a new Oregon law and identifying loopholes for his staff.

INTENTIONALLY WORKING AROUND THE LAW

Tillamook County is an example of a district attorney using his discretion to circumvent the intent of a law, while clinging to outdated notions on how to address drug use.

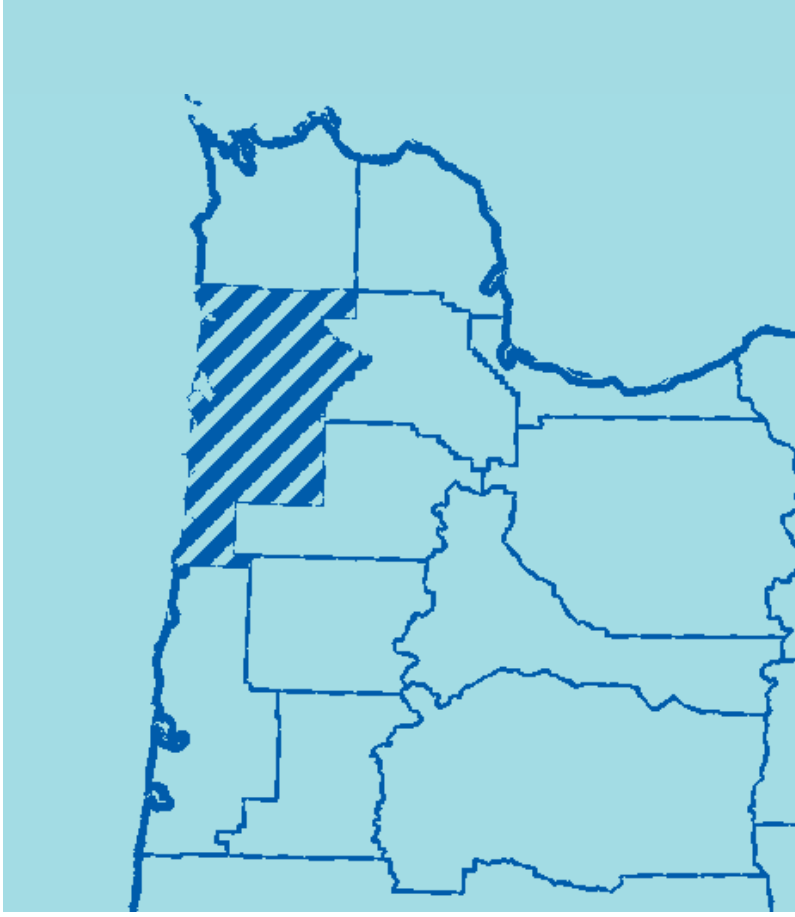
In 2017, the Oregon Legislature passed an important justice reform, House Bill 2355, to defelonize small-scale possession of drugs. The Legislature acknowledged what the public has long realized: The War on Drugs has been a failure and we can't arrest or prosecute our way out of drug problems.

Over two-thirds of all Oregonians know someone personally who has struggled with addiction, and the Legislature made the change recognizing that a focus on felony convictions makes it harder for people to gain future access to housing and employment and harder for people to turn their lives around. The public strongly supports an emphasis on prevention and treatments as opposed to harsh criminal sentences.

But our investigation revealed that a person struggling with addiction who is arrested for drug possession in Oregon will have a significantly different experience based on where they live. In Tillamook County, DA William Porter leans heavily on the punishment paradigm and is actively working around the intent of Oregon law.

In response to our 2018 records request, DA Porter included a set of records related to House Bill (HB) 2355, including emails to local law enforcement and deputy district attorneys, a charging "cheat sheet," the text of the house bill, a memorandum from Clackamas County, and a summary from the Association of Oregon Counties.

One of the components of HB 2355 was to make simple possession of drugs a misdemeanor if someone has two or fewer prior convictions for possession of a controlled substance (PCS). Another component is that PCS is a misdemeanor unless the amount is a "usable quantity," a defined term, which excludes "residue" cases, such as used paraphernalia.



In an email to local law enforcement dated July 28, 2018, DA Porter editorializes on the new law, "[T]he unthinkable has happened: Possession of Class I and II controlled substances amounts to a misdemeanor under HB 2355." DA Porter writes that there are still ways in which unlawful possession can become a felony, "but the factors are not really easy to evaluate at the roadside." Thus, he advises that law enforcement should go ahead and arrest for misdemeanor PCS.

In an email to law enforcement dated August 7, 2018, DA Porter again talks about the new law. Because he was "so focused on the overall disaster" of HB 2355, he missed "a loophole favorable to us!" Residue cases are chargeable as misdemeanors; "there's just no incentive to do so 'cause they will never count toward a future felony PCS." However, the "good news" is that residue evidence gives law enforcement probable cause and triggers the automobile exception to the search warrant requirement. DA Porter concludes that he doubts his office will file charges on most residue cases, but "the old [law enforcement] interdiction tools are still there for use in the field."

Then, in an email dated August 30, 2018, DA Porter instructs his deputy DAs regarding "the new way to charge felony drug possession." DA Porter writes, "once enough of the new misdemeanors have gone through the conviction process, we may find ourselves pleading two modern misdemeanor PCS's as a precursor to making an otherwise misdemeanor PCS into a felony." In other words, DA Porter wants his deputy DAs to use their prosecutorial discretion to plead two misdemeanor charges where they could plead one so that a defendant's next possession offense can be charged as a felony under the new law.

To be clear, DA Porter's plans for charging possession of a controlled substance and using residue evidence are not formal policies. However, an articulated practice has no less impact on defendants as a formalized policy. The difference lies in the public's inability to access the policy or hold the elected DA accountable for their choices. In this case, the choice is to take advantage of loopholes in order to maximize felony charges and the severity of sentences for people facing low-level drug offenses. His approach is intentionally side-stepping a law designed to increase the likelihood of recovery and life-success by reducing criminal consequences.

IMMIGRANT RIGHTS

SHARPLY CONTRASTING APPROACHES

With the recent shift in the rhetoric and policies of the federal government, many people from immigrant backgrounds have become deeply fearful of accessing our courts or seeking help from law enforcement officers.

When police and county prosecutors play the role of federal immigration agents, many immigrants are too afraid to report a crime, seek help if they have been victimized, or provide information to law enforcement that can help solve cases. This isn't hypothetical–statistics show that crime reports made by Latinos in a number of major cities drastically dropped in 2017, a pattern some law enforcement leaders blame on heightened fears of deportation by immigrants and their families[vi].

Over three decades ago, the state Legislature made it clear that local law enforcement should not use their resources, equipment, or personnel to enforce federal immigration law. This same law was overwhelmingly affirmed by Oregon voters in November 2018, when Ballot Measure 105, an attempt to repeal the law, was voted down by almost 30 points.

Only a handful of district attorneys publicly opposed Measure 105, which raises questions about whether most of Oregon DAs are out of alignment with the majority of the state's voters on this issue.

The implications of district attorneys' policies can be life-altering for immigrants. Not only are most DA offices silent on their interpretation and implementation of the state law on this subject, but where policies do exist there are stark differences.

Multnomah and Clackamas counties are the first and third most populous counties in Oregon, respectively. The two counties are adjacent to one another and share a 50-mile border. In fact, their DA offices are less than 13 miles apart and both have robust policy manuals covering a wide range of subjects. But when it comes to the intersection of immigrant rights, criminal justice, and foreign citizens, Clackamas and Multnomah counties have incredibly different approaches.

The Multnomah County DA policy manual recognizes Oregon's important law that prohibits the use of local law enforcement resources to carry out federal immigration enforcement, what some people call our "sanctuary law", and the fact that international law and certain bilateral treaties require law enforcement to notify arrested criminal defendants that they have a right to contact their consulate and to assist them in doing so. The office policy manual lists the 57 countries for which notification is required.

Multnomah's policy also explicitly states that their office "does not notify or alert immigration officials or agencies regarding individuals (witnesses, victims, or defendants) with whom we come into contact. This applies to our work in the adult and juvenile justice systems, as well as our work seeking to enforce child support obligations." The policy goes on to safeguard foreign citizens by requiring a single point of contact within the office when "communication with [Immigration and Customs Enforcement (ICE)] is deemed essential to the prosecution" of a case.

Multnomah County has created a thoughtful policy that reflects both compliance with the state law and the spirit and values the law embodies.

The related policy of the Clackamas County DA office stands in blunt contrast. Rather than complying with the spirit and letter of Oregon's pro-immigrant laws, the Clackamas County policy actively promotes collaboration with ICE. We believe their policies violate Oregon law. Certainly, their policies undermine community trust and encourage racial profiling.

Most concerning is Clackamas County's policy to notify ICE any time they charge someone who they know, or suspect may be in violation of federal immigration law. Furthermore, the Clackamas DA policy states that they will also notify ICE after convicting a defendant known or suspected of being a non-citizen, regardless of whether he or she is in the country legally.

Notably, the Clackamas County DA policy is silent on whether staff will notify ICE when they come across juveniles, witnesses, or even crime victims suspected of being in violation of immigration law. The result is that such referrals would not violate office policy.

The Clackamas County policy also chooses to inform ICE when a person suspected of violating immigration law is at the "charging" stage. That means that people who are charged with crimes may end up getting arrested and detained by ICE mid-proceedings, before their guilt or innocence is determined. In such cases, victims may never have the opportunity of a judgment, conviction, or restitution in their case, and innocent defendants never have the chance to clear their names.

By linking the state prosecutor's function to federal immigration enforcement, undocumented and documented immigrants alike are made to fear that participating in the criminal justice system could result in surveillance, racial profiling, and the deportation of themselves or family members.

By encouraging the reporting of individuals who are merely "suspected" of being noncitizens, the policy encourages racial profiling. With no guidance or criteria, the policy creates the possibility that district attorney's staff may notify ICE based only on someone's name appearing foreign, the presence of an accent, or even someone's perceived race or ethnicity.

When comparing Multnomah and Clackamas County DAs' policies in this area, the differences are stark. The divergent policy choices and interpretations being made by these two district attorneys lead to fundamentally disparate outcomes for immigrants involved in the justice system merely miles apart.

PROSECUTORIAL TRAINING

A LOW BAR

What we learned from the analysis of DA policies was as notable for what doesn't exist as for what does.

In sharp contrast to most law enforcement employees in Oregon, district attorneys and their prosecutors have no state-required training specific to their role in the justice system. The fact that the most powerful people in the state's criminal justice system have no training requirements should concern voters because it is likely leading to bad outcomes for Oregonians.

Currently the Oregon Department of Public Safety Standards and Training provides essential training on professional standards and competency that are pre-requisites for anyone in Oregon before they can be employed as a police officer, a sheriff deputy, a corrections officer, and in parole or probation. The state requires training to ensure a baseline knowledge and competency to do those jobs, recognizing that how those jobs are performed can have life-altering impacts on Oregonians. There aren't similar state requirements for prosecutors.

Right now, a district attorney's office can hire someone fresh out of law school who could be immediately making life-changing decisions affecting victims and defendants. A law degree, in and of itself, is not sufficient background for these jobs.

Although prosecutors and DAs are required to be licensed attorneys in the State of Oregon, passing the Oregon Bar does not prepare people for the wide range of duties involved in criminal prosecution. Because someone might have a PhD in criminology shouldn't mean they can skip certification and immediately become a police officer. Specialized expertise and skills matter for an effective and healthy justice system, yet prosecutors are entirely exempt by the state from required training relevant to their jobs. Although all licensed attorneys are required by the Oregon Bar to take a certain amount of Continuing Legal Education (CLE)–accredited courses, prosecutors can meet their CLE requirements without ever participating in a training that is even tangentially related to the job they do.

In the absence of state-required training for prosecutors, the ACLU of Oregon's public records requests explored whether individual DA offices have robust and specific policies on training. What we learned is deeply troublesome.

Few offices required trainings beyond what the Oregon State Bar already requires of all Oregon attorneys: a certain number of CLE credits per reporting period and, for new lawyers, completion of the OSB New Lawyer Mentoring Program. For example, former Clatsop County DA Josh Marquis explicitly stated that he does not require his prosecutors to attend any trainings beyond the CLEs required by the Oregon Bar. Similarly, Morrow County DA Justin Nelson stated that no training is mandatory for all prosecutors in his office; instead, training is based on the individual needs of prosecutors after consultation with the DA.

The most common response we received was that prosecutors attend trainings put on by the Oregon Department of Justice (ODOJ) and the Oregon District Attorneys Association (ODAA), such as its "Annual Institute for Prosecutors – Basic," i.e., basic training for prosecutors. The most common topic on which DA offices reported holding trainings was ethics, although the responses did not make clear whether that meant attorney ethics generally or prosecutorial ethics specifically. For example, Baker County DA Matt Shirtcliff said that all prosecutors complete ethics training through the ODAA; Coos County DA Paul Frasier said he conducts an in-house training on ethics issues; and, in Linn County, one-on-one ethics training is provided to all new attorneys, and office-wide ethics training is provided periodically.

Many DA offices provided lists of CLEs their attorneys attended outside the office and CLEs they hosted in-house during the last few years. Larger DA offices, like those in Clackamas, Deschutes, and Multnomah counties, hosted or sponsored the most prosecutor-specific CLEs. However, attendance at these CLEs did not appear to be mandatory, and there were no formal policies governing prosecutor training.

The Jackson County DA office has a short policy document, adopted January 2013, that outlines a new training program meant to provide prosecutors with the majority of their CLE training in-house. The office hosts a four-hour CLE four times per year. Each prosecutor is required to arrange a speaker or speak him or herself for one CLE credit hour per year. Senior DDAs and chief deputies are required to organize the trainings and approve the topics.

Klamath and Lincoln County prosecutors receive mandatory training on general workplace topics, but those trainings are not specific to their role as prosecutors. Both offices encourage prosecutors to attend certain prosecutor-specific trainings; however, attendance is not mandatory, and there is no formal training policy. In Klamath County, the DA office pays for its attorneys' CLEs, including the ODAA annual conference. The office requests that all new attorneys, if possible, attend the ODOJ's trainings on domestic violence and DUI. Similarly, the Lincoln County DA office "highly recommends" its prosecutors attend trainings on the topics of child abuse and family violence, sexual assault, drug use and addiction, human trafficking, specialty courts, and domestic violence.

MAJOR GAPS

As salient research emerges from around the country, it is crucial that prosecutors become well-versed on information that will improve outcomes and minimize damage. There are a variety of areas that could be considered essential training for district attorneys and prosecutors in the 21st century. Although those topics were not altogether absent from the list of trainings shared with us by various DA offices, none of the following areas were required or consistently offered across the state.

Trauma and Trauma Informed Care:

Prosecutors are working with crime victims on a daily basis, but what do they know about trauma and trauma-informed care? This is an area where a great deal of new findings are informing shifts in approaches to a wide range of professions. And this is a place where, even with the best intentions, a DA office could exacerbate the symptoms and negative impacts of trauma in victims and defendants if not well-trained. For example, at least one DA office has even gone so far as to arrest and jail a woman who was a victim of sexual assault in order to assure her appearance and testimony at the trial of her abuser.

Public Health and Crime:

Meanwhile, many of the most cutting-edge and effective justice system programs around the country are taking a public health approach to the intersections of crime, mental health, and addiction. But DA offices don't require training for prosecutors on the current state of addiction science, harm reduction, or best practices in addressing mental illness and crime.

Implicit Bias:

Finally, there have been important strides in acknowledging and trying to address deep and devastating racial disparities in our criminal justice system. In 2017, Oregon passed a landmark law that, among other things, requires updated training for police and local law enforcement on issues like implicit bias. Unfortunately, prosecutors are exempt from that requirement and, on paper, the overwhelming majority of individual DA offices don't seem to be stepping in on their own to provide training that could mitigate prosecutorial bias in charging.

Training within individual DA offices seems sporadic, not necessarily prioritized on high impact areas, and not mandated with the exception of Jackson County.

Oregon is not setting a low bar—it is setting no bar on training for some of the most powerful actors in the criminal justice system. This is clearly an area where other law enforcement employees have a much higher set of requirements and expectations when compared to prosecutors. And if individually elected district attorneys are not prioritizing robust continuing education in critical areas, perhaps this is a place where the Legislature should.

CIVIL COMPROMISE POLICIES

Another area where district attorney policies differ from county to county is on civil compromises. A civil compromise allows a crime victim and a defendant to reach a settlement agreement and the defendant is absolved of criminal liability. Civil compromises can better center crime victims' needs and can allow victims to dictate settlement conditions. For example, a victim might ask for an apology in addition to financial compensation. Civil compromises reduce the collateral consequences to defendants, who avoid a criminal conviction while still being held accountable. Not every case demands punishment in criminal court and sometimes prosecution is not what victims want.

Civil compromises are available only for certain misdemeanors and where there is a discrete victim or victims, as opposed to crimes against the public order or the state. Two common examples are vandalism and shoplifting, where a property owner may be made whole financially and by other factors. An added benefit of such civil compromises is that they free up DA resources for use prosecuting more serious crimes.

Six DA offices provided civil compromise policies in response to the ACLU's records request. Of those, Clackamas and Coos counties oppose motions for civil compromises as a rule. A policy of categorical opposition seems confusing for offices who often present themselves as victim advocates.

In contrast to Clackamas and Coos counties are the policies of Curry, Deschutes, and Douglas counties.

Curry and Douglas counties' district attorney policy manuals share the same policy of not opposing motions for civil compromise if "based on the affidavit of satisfaction of the victim." However, "opposition is appropriate" where any one of four factors are present:

1. the defendant has an extensive criminal history;
2. there are multiple victims;
3. the nature of the offense suggests that the defendant is involved in organized criminal activity; or
4. there is other egregious conduct.

This policy of openness toward civil compromise is a step in the right direction; however, some of the factors triggering opposition are broad and vague. For example, reasonable minds may differ about when criminal history is "extensive" and what constitutes "egregious" conduct. It is still unclear whether these DA offices are generally inclined to support civil compromises or largely use their policies to oppose them.

Even more malleable is the policy of Deschutes County. There, the DA office "will consider" a civil compromise where it would meet the DA's "goals of community safety and justice"—an extremely broad standard. The policy provides a "non-exhaustive list" of factors to consider with a lot of room for interpretation.

People harmed by crime should have more options available to them for repairing the harm and seeking accountability. The state's criminal justice system provides a limited set of options that often don't meet the needs of victims. Ideally, district attorney offices would be explicitly open to victim-centered, restorative justice options. Civil compromises may not always be appropriate, but they can conserve DA resources, empower victims, and reduce unnecessary collateral consequences of justice system involvement for people who break certain laws. It was surprising to see some DA offices universally oppose civil compromises. This raises questions about where the rest of DA offices stand on the issue.

SO MUCH MORE THAT MATTERS

This report is not meant to be an exhaustive examination of the substance of the written policies that exist within Oregon district attorney offices. Rather, this report highlights how DA policies and practices matter, and matter in many areas that are not often thought about.

Prosecutorial duties are vast. There is a lot more ground that could be covered and additional questions to be answered. Such as, what are district attorney approaches to charging youth as adults, supporting diversion programs, meeting obligations to share information with defense counsel, tracking and addressing prosecutorial misconduct within their office, working with victims, and addressing police accountability?

The public should have better answers to the questions about district attorney office policies and approaches.

RAISING THE BAR:
HOW OREGON MOVES FORWARD

THE LEGISLATURE'S ROLE

Over the years, the Oregon Legislature has placed a range of requirements on law enforcement agencies and their employees to ensure the state has an evolving, responsive, effective, trustworthy, and transparent justice system.

Legislative action is needed to require every district attorney office in the state develops and periodically updates a baseline set of policies regarding the core functions of their office. Many counties are operating with almost nothing.

Because DAs are the most powerful actors in the criminal justice system, the policies that inform how their offices are run and how they make decisions shouldn't be a mystery. Basic office policies should be easily available to the public, and ideally those policies should be open to public comment before being formalized.

Legislative action can ensure there is greater intention, thoughtfulness, and consistency within our justice system. Prosecutors operate with high levels of discretion. Without any meaningful policies and guidelines, unchecked prosecutorial discretion can lead to unequal practices, rogue prosecutors, confusion for victims and defendants, and unclear expectations in the system. "Just trust us" shouldn't be good enough for Oregon's justice system.

With no state requirements, DA offices can essentially operate in the dark outside of public view without any pressure to evolve and update their priorities and procedures to reflect best practices and improve outcomes.

This area of justice system improvement easily falls within the realm of legislative action.

CROWD-SOURCING, MUTUAL SUPPORT, AND THE ROLE OF THE DA ASSOCIATION

District attorneys can choose to fight state requirements on policy development or embrace them. As a group of elected leaders that have historically flown under the radar of the public and who face very little oversight or structural accountability, many DAs are not used to the recent increase of public attention and concerns about their work. DAs shouldn't perceive attempts to require minimum standards from their offices as an unwanted imposition, but as an earnest attempt to help the state's criminal justice system modernize and become more transparent, effective, and accountable.

As mentioned earlier in this report, a large number of district attorney offices are small and have limited administrative and operational staffing. In these cases, organizational development requirements can be daunting. But Oregon needs to raise the bar, and the process doesn't need to be challenging.

It seems possible that many DAs were talking to each other about how they would handle our public records requests. A clear give-away was the use of cookie-cutter language used across several offices in response to the requests. DA offices could elevate their thinking and make easier work of establishing baseline policies by taking a similar crowdsourcing and coordinated approach. Sharing information, ideas, and potential templates among DA offices would go a long way toward moving forward. Perhaps, Oregon District Attorneys Association can help. There are also a range of other places to go for support and models, like the American Bar Association's "Criminal Justice Standards for the Prosecution Function" updated in 2015[vii], the Association of Prosecuting Attorneys[viii], the Vera Institute for Justice[ix], and Fair and Just Prosecution[x].

CONCLUSION

District attorneys and their staff have the capacity to greatly influence people's lives, for better or worse. The law provides DAs with enormous discretion to make decisions about who and how people are prosecuted. Public records requests to the state's 36 district attorney offices revealed a troubling lack of formal and transparent policies. The requirement for such policies to exist and be easily accessible to the public would hold DAs and our justice system to a necessary and basic standard of accountability. It is long overdue.

Without legislative action, it's impossible to ensure that district attorneys will establish necessary and thoughtful policies around the core functions of their office. Many counties are operating with nothing guiding their current work. Mandating basic and transparent policies for every DA office is an essential step towards modernizing our justice system. This will make it more likely that prosecutorial approaches reflect current best practices to improve outcomes for Oregonians.

ADDENDUM

COUNTY AND DISTRICT ATTORNEY		DID NOT RESPOND* TO 2016 RECORDS REQUEST	DID NOT RESPOND* TO 2018 RECORDS REQUEST
BAKER	DA Matt Shirtcliff	✓	✓
BENTON	DA John Haroldson	✓	✓
CLACKAMAS	DA John Foote	✓	✓
CLATSOP	DA Josh Marquis	✓	✓
COLUMBIA	DA Steve Atchison (2016) DA Jeff Auxier (2018)	X	✓
COOS	DA Paul Frasier	✓	✓
CROOK	DA Daina Vitolins (2016) DA Wade Whiting (2018)	✓	✓
CURRY	DA Everett Dial	✓	✓
DESCHUTES	DA John Hummel	✓	✓
DOUGLAS	DA Richard L. Wesenberg Jr.	✓	✓
GILLIAM	DA Marion Weatherford	✓	✓
GRANT	DA Jim Carpenter	✓	✓
HARNEY	DA Joseph Lucas, Ph.D.	✓	✓
HOOD RIVER	DA John Sewell	X	X
JACKSON	DA Beth Heckert	✓	✓
JEFFERSON	DA Steven Leriche	X	✓
JOSEPHINE	DA Ryan Mulkins	✓	✓
KLAMATH	DA Rob Patridge (2016) DA Evelyn Costello (2018)	✓	X
LAKE	DA Ulys Stapleton (2016) DA Sharon Forster (2018)	X	✓
LANE	DA Patricia W. Perlow	✓	✓
LINCOLN	DA Michelle Branam	✓	✓
LINN	DA Doug Marteeny	✓	✓
MALHEUR	DA Dan Norris (2016) DA David M. Goldthorpe (2018)	✓	✓
MARION	DA Walt Beglau	✓	✓
MORROW	DA Justin Nelson	X	✓
MULTNOMAH	DA Rod Underhill	✓	✓
POLK	DA Aaron Felton	X	X
SHERMAN	DA Wade McLeod	✓	✓
TILLAMOOK	DA William B. Porter	✓	✓
UMATILLA	DA Dan Primus	X	✓
UNION	DA Kelsie McDaniel	✓	✓
WALLOWA	DA Mona Williams (2016) DA Rebecca Frolander	X	✓
WASCO	DA Eric Nisley	X	✓
WASHINGTON	DA Bob Hermann (2016) DA Kevin Barton (2018)	X* ✓	**
WHEELER	DA Gretchen Ladd	✓	✓
YAMHILL	DA Bradley C. Berry	X	✓

ACLU of Oregon provided DA offices with records requests in November, 2016, and July, 2018. Those offices marked with a red X either didn't respond at all, or acknowledged receipt of the request but never followed up with either responses, requests for clarification, or cost estimates.

* Although Washington County DA's office responded with some information in 2016, they also requested an excessive amount of money to fully respond.

** Washington County was not sent a follow-up records request in 2018.

ADDENDUM

COUNTY AND DISTRICT ATTORNEY		NO WRITTEN POLICIES	LOW LEVELS OF WRITTEN POLICIES	LIMITED POLICY MANUALS OR EXTENSIVE RANGE OF PIECEMEAL WRITTEN POLICIES	PROVIDED EXTENSIVE POLICY MANUALS
BAKER	DA Matt Shirtcliff			●	
BENTON	DA John Haroldson	●			
CLACKAMAS	DA John Foote				●
CLATSOP	DA Josh Marquis	●			
COLUMBIA	DA Steve Atchison (2016) DA Jeff Auxier (2018)	●			
COOS	DA Paul Frasier			●	
CROOK	DA Daina Vitolins (2016) DA Wade Whiting (2018)		●		
CURRY	DA Everett Dial			●	
DESCHUTES	DA John Hummel				●
DOUGLAS	DA Richard L. Wesenberg Jr.			●	
GILLIAM	DA Marion Weatherford	●			
GRANT	DA Jim Carpenter	●			
HARNEY	DA Joseph Lucas, Ph.D.			●	
HOOD RIVER	DA John Sewell				
JACKSON	DA Beth Heckert			●	
JEFFERSON	DA Steven Leriche		●		
JOSEPHINE	DA Ryan Mulkins	●			
KLAMATH	DA Rob Patridge (2016) DA Evelyn Costello (2018)	●			
LAKE	DA Ulys Stapleton (2016) DA Sharon Forster (2018)				
LANE	DA Patricia W. Perlow			●	
LINCOLN	DA Michelle Branam	●			
LINN	DA Doug Marteeny	●			
MALHEUR	DA Dan Norris (2016) DA David M. Goldthorpe (2018)			●	
MARION	DA Walt Beglau			●	
MORROW	DA Justin Nelson	●			
MULTNOMAH	DA Rod Underhill				●
POLK	DA Aaron Felton				
SHERMAN	DA Wade McLeod	●			
TILLAMOOK	DA William B. Porter			●	
UMATILLA	DA Dan Primus	●			
UNION	DA Kelsie McDaniel		●		
WALLOWA	DA Mona Williams (2016) DA Rebecca Frolander	●			
WASCO	DA Eric Nisley	●			
WASHINGTON	DA Bob Hermann (2016) DA Kevin Barton (2018)				*?
WHEELER	DA Gretchen Ladd	●			
YAMHILL	DA Bradley C. Berry		●		

* The limited response from Washington County DA office suggested they use significant portions of Multnomah County DA policies, but did not share more information about which portions they have adopted and which ones they have not. Their 2016 response provided excessive cost estimates for more detail.

END NOTES

i *Unlocking the Black Box: How the Prosecutorial Transparency Act Will Empower Communities and Help End Mass Incarceration*, 2019, ACLU. https://www.aclu.org/report/unlocking-black-box

ii *Durham's next district attorney wants to stop prosecuting most students charged in school*, November 14, 2018, Herald Sun.

iii *Durham's next district attorney wants to stop prosecuting most students charged in school*, November 14, 2018, Herald Sun.

iv *Philadelphia's New DA Wants Prosecutors To Talk Cost Of Incarceration While In Court*, March 31, 2018, NPR.

v *State's Attorney Foxx Announces Unprecedented Open Data Release,* March 2, 2018. Cook County State's Attorney Website. https://www.cookcountystatesattorney.org/news/states-attorney-foxx-announces-unprecedented-open-data-release

vi *Latinos in Three Cities Are Reporting Fewer Crimes Since Trump Took Office*, 2017, FiveThirtyEight.com.

vii *Criminal Justice Standards for the Prosecution Function*, February 13, 2015, American Bar Association. https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

viii Association of Prosecuting Attorneys. https://www.apa-inc.org/about/

ix *A Prosecutor's Guide for Advancing Racial Equity*, March 2015, Vera Institute of Justice. https://www.vera.org/publications/a-prosecutors-guide-for-advancing-racial-equity

x Fair and Justice Prosecution. https://fairandjustprosecution.org/about-fjp/our-work-and-vision/

All the documents collected from this project's records requests and our communication with DA offices can be viewed online at:

https://acluor.sharefile.com/d-s8d40729ee9e47569