CRIMINAL JUSTICE SYSTEM

BRIEF

HOW THE CRIMINAL JUSTICE SYSTEM'S COVID-19 RESPONSE HAS PROVIDED VALUABLE LESSONS FOR BROADER REFORM

LOOKING TO THE FUTURE

AS THE CORONAVIRUS DISEASE 2019 (COVID-19) pandemic began to unfold in spring 2020, it brought both disease and enormous disruption as communities grappled to understand what they were dealing with. How and when COVID-19 affected specific states and locales varied considerably, and the circumstances to which government, the private sector, and the public had to respond also varied.

For justice organizations, the need to adapt to reduce the risk of spreading the virus was urgent. Many justice processes—including interactions between police officers and citizens on the street; court processes, which bring together many people from different areas; crowded prisons that house residents in close proximity; and group counseling sessions that support former inmates' reentry—require close physical interaction. Without substantial changes, the justice system had the potential to make the pandemic worse, harming public health even as it sought to protect public safety.

In addition to needing to change policies and procedures to address external pressure, many agencies and organizations in the justice system were facing internal pressure on their operations. The stresses of quarantines and of illness and death on staff members have been compounded by the economic fallout of the pandemic and having to do more with fewer resources.

While the pressure of the COVID-19 pandemic forced change on the system, it did so in an environment in which demands for a different approach to criminal justice have been echoing for a long time. For those seeking reform, the variety of pandemic responses that were required, as well as the speed and scale of those changes, created a natural experiment to test large, systemic changes to the criminal justice system in a way that many in the system and in the public more broadly would have believed unthinkable prior to the pandemic. As the COVID-19 pandemic recedes, stakeholders across the country have a unique opportunity to reimagine the justice system, using lessons from the pandemic to move toward a system that works better, costs less, and is better able to meet the needs of everyone that it serves.

PRIORITY Criminal Justice NEEDS INITIATIVE
A project of the **RAND Corporation**, the **Police Executive Research Forum**, **RTI International**, and the **University of Denver**

ABOUT THIS BRIEF

To better understand the challenges that the COVID-19 pandemic has created within the criminal justice system and how the various sectors of the system have adapted to those challenges, the Priority Criminal Justice Needs Initiative conducted a series of panel workshops with representatives of different sectors within the system. The Priority Criminal Justice Needs Initiative is a joint effort managed by the RAND Corporation in partnership with the Police Executive Research Forum, RTI International, and the University of Denver on behalf of the U.S. Department of Justice's National Institute of Justice. Panels focused on law enforcement, the court system, institutional corrections, community corrections, victim services providers, and community organizations. This brief presents key lessons learned and recommendations offered by panel workshop participants.

THE PRESSURE TO REFORM

Pre-Pandemic Pressure to Reform

Many of the ways in which the COVID-19 pandemic put pressure on individual justice agencies and stressed the seams in the justice system were not a surprise. Long before the pandemic, there were concerns among both experts and the public about the consequences of the number of people channeled into the justice system in the United States. Both within and outside criminal justice agencies, many have lamented the number of missions and tasks that have been left for the justice system to perform—responding to crime, managing mental health crises, conducting substance use interventions, and addressing routine neighborhood problems and frictions. Indeed, one panelist argued that police departments being asked to enforce public health mandates during the pandemic was just the most recent example of society asking the justice system to do something for which others should have been responsible—and funded. Over the years, calls for reform regarding mass incarceration, which is one of the most prominent demands, have focused on the consequences for justice-involved individuals and their communities. Such demands have also raised concerns about how the intermingling of responses to mental health issues, substance use, and crime has affected the system's overall effectiveness. However, concerns about the consequences of making major changes and deference to established practices have held broad change back.

However, the pandemic made it undeniable that the public safety goals of criminal justice and public health are inextricable, and that past efforts to prepare the system for pandemic threats were not entirely successful. That connection means that improving preparedness for future disease threats has become an additional reason to revisit the country's approach to criminal justice, in the hope that any future infectious disease outbreak will find a system that is better positioned to weather the storm.

So if there's a way to look to jurisdictions that have really thought meaningfully about what it means to really shrink the number of questions and responsibilities that the system addresses—and not just in terms of where we deploy police or who gets arrested—I mean the number of questions the system is willing to answer and is unwilling to answer . . . that for me would be the primary example of what we should be thinking about post-pandemic.

And then, the next time a crisis hits, maybe with fewer questions to answer, the legal system can be a little more adept in terms of how it responds to people's needs and how it works to save lives.

—Community organization panelist

Pre-Pandemic Pressure Continued and Expanded Because of Social Unrest

As the criminal justice system's response to the pandemic was gaining momentum, so too were calls for reform, driven largely by social and political conditions that were undermining trust in justice agencies, especially law enforcement. From the outset of the pandemic, both the disease and the response to it became intensely politicized. Despite mounting fatalities from COVID-19, even the need for a strong public health response was considered controversial, and conflicting narratives about the disease stymied coordinated efforts to contain it. This meant that there was also controversy about the role that different parts of the community wanted justice agencies to play in enforcing compliance with public health directives, such as wearing masks or closing businesses with significant in-person contact. In some parts of the country, law enforcement actively enforced mask-wearing and shut down events where virus transmission could occur across large numbers of people. In other parts of the country, intervention was much more limited. In some areas, justice agencies themselves resisted taking on—or outright refused to take on—the role of enforcing compliance with public health measures that were intended to reduce the spread of the virus. Some justice agencies found it difficult to ensure compliance with protective strategies, even among their own personnel.

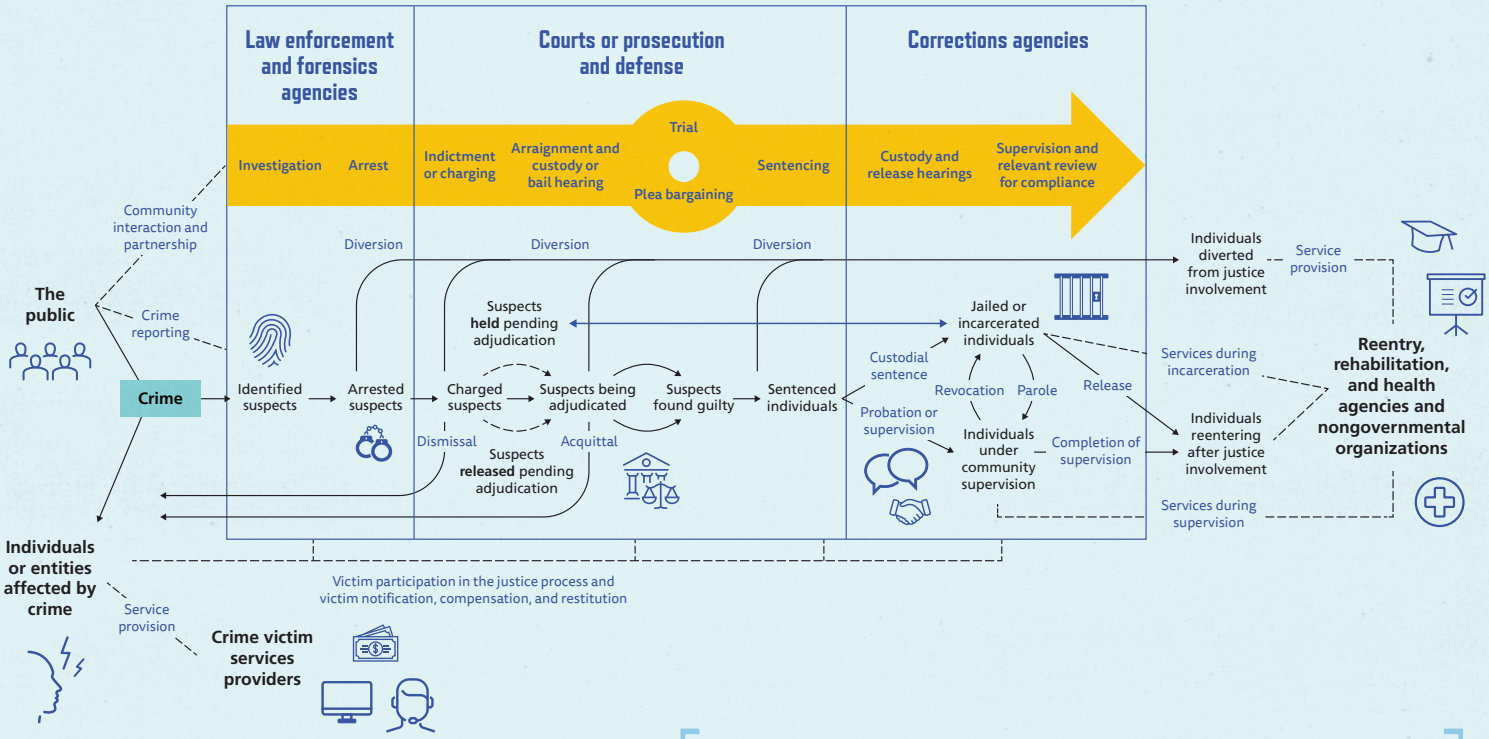
In addition, several months into the pandemic, the killing of George Floyd by police officers in Minneapolis, Minnesota, triggered large-scale protests and unrest. These protests also demanded action in response to the 2020 deaths of Breonna Taylor and Ahmaud Arbery, among others. Echoing the response to the killing of Michael Brown in Ferguson, Missouri, in 2014, the Black Lives Matter protests that started in May 2020 were more widespread and focused intensely critical attention on law enforcement and on the justice system more generally. The resulting push to cut funding from law enforcement agencies and reallocate it to non–criminal justice approaches for dealing with violence and other societal problems gained significant momentum in some jurisdictions. Some areas adopted changes to policing practices and implemented greater civilian oversight of justice agencies. Although law enforcement and policy responses to the protests differed significantly across the country, local-level actions that were taken during the protests were shared widely across the country, intensifying scrutiny of law enforcement agencies and further complicating the challenge of policing during the pandemic.

> **Let's not forget that 2020—a pivotal year—is also the greatest civil rights reckoning of our lifetime. And there's tremendous pressure in my community—and I assume in yours too—to scrutinize what we're doing in the criminal justice system.**
>
> —Court system panelist

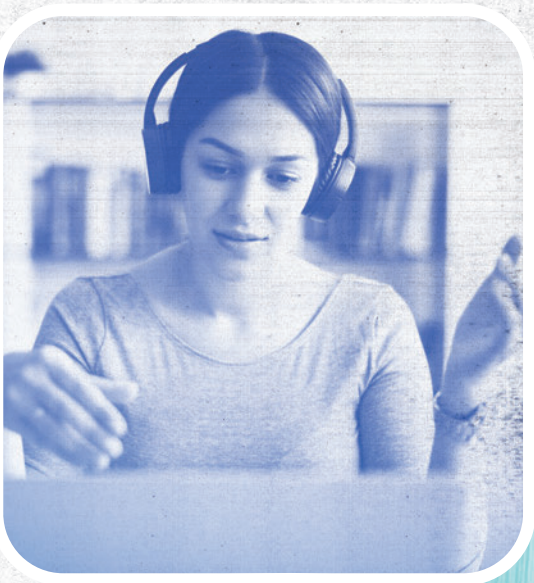
Shifts in Crime and Need and Pandemic-Related Adaptations Affected the Entire System

FIGURE 1.

The Criminal Justice System



This figure shows the flow of justice-involved individuals through the criminal justice system and the many entities involved in that process, including members of the public and victims of crime.



Although the justice system often is viewed as a single river of people flowing from arrest to the corrections system, it is much more complex in reality, involving agencies that are focused on mental health and drug treatment, as well as a variety of other reentry and rehabilitation services and services for victims of crime. Furthermore, there are many points for diversion that bypass the normal flow.

As demonstrated by pandemic responses in different parts of the system, changes in how one area operates can have large operational implications for other areas. For example, with courts and jails reducing operations, affected law enforcement agencies had to take new approaches to policing—in some cases deferring arrests, but in other cases issuing warnings or citations instead of arresting individuals. Diversion programs, such as those that require treatment for substance use in place of arrest, increased the caseload of treatment providers, including governmental and nongovernmental groups. Likewise, actions that correctional facilities took to reduce density in prisons added to the caseload of community supervision agencies, in terms of both monitoring requirements and service provision. From these examples, it is clear that jurisdictions seeking either to maintain pandemic-initiated changes or to implement such changes based on what others have done will need to take a holistic view of their respective system to ensure that the capacity needed to make such changes successfully is addressed.

Pressure Arising from the Pandemic Response

In addition to adding new salience to long-standing debates about reform, several practical effects from the pandemic response also will affect what the criminal justice system will look like moving forward. For example, workshop panelists pointed to such practices as deferred arrests and hearings, which have created backlogs of cases, demands, and needs that might take years to work through, even after pre-pandemic capacity is restored.

> We have an enormous backlog of felony cases. We normally carry about 2,500 [pending unresolved cases] at any time. . . . We now have 6,000 and another thousand cases that I could file tomorrow if they gave me a date for people to appear in court. So that's a tremendous problem.
>
> —Court system panelist

Furthermore, the recovery of the criminal justice system will be complicated by the scars that the pandemic almost certainly will leave on municipal budgets, on the philanthropic funding streams on which many service providers rely, and on the economy as a whole. The fiscal and economic fallout means that justice agencies likely will have fewer resources to address the backlogs and also that some of the needs that victim service and reentry programs are designed to address—such as employment challenges and financial problems—will expand and persist even as the pandemic comes under control.

A Unique Opportunity for Change

Across the panels, participants repeatedly expressed how much change had happened very quickly and how flexible and creative staff in their agencies and organizations had been to keep pushing their missions forward. This was counter to the prevailing view that the justice system has been—and likely always would be—slow to change. The fast response to the COVID-19 pandemic proved that view to be incorrect as many parts of the system made big changes and did so rapidly. By showing what is possible (with the right pressures and incentives), this demonstration opens up new possibilities for the future and weakens past explanations for sluggish innovation and reform.

> The pandemic was not the disruption that we wanted in the court system, but maybe [it was] the disruption we needed to really make change happen. . . . [W]e're a big old-fashioned institution that doesn't change very easily. And this pandemic has really pushed the pace of change.
>
> —Court system panelist

Furthermore, panelists saw a chance for innovation that could make the criminal justice system both more effective in managing public safety and fairer to those who become justice-involved. Panelists talked about the inherent tensions that exist within the system between the desire to craft justice interventions that are effective at the individual level and the need to respond uniformly across large categories of people, offenses, or problems. Responses to the pandemic to reduce the population of justice-involved individuals, allowing the system to focus on fewer people at a time, make customizing intervention for greater effectiveness easier. Technologies that the pandemic forced on a usually risk-averse justice system, most notably virtual modes of interaction and supervision, further enable the development of one-size-fits-one models that can conserve resources, improve fairness, reduce the intrusiveness of the justice system in the lives of individuals and their communities, and increase effectiveness. Although the likely enduring fiscal pressure on the justice system might make this sort of innovation practically important, learning from the pandemic to build a stronger justice legacy could be, in the words of one panelist, a way to find a "thin silver lining" in a very dark time for the country.

TWO MAJOR PANDEMIC-RELATED SHIFTS WITH POTENTIAL PROMISE

A Justice System with a Lighter Touch

Notwithstanding the multitude of changes made by different justice agencies and service organizations to respond to specific pandemic-related risks, perhaps the most significant lesson comes from the massive experiment represented by the changes made in arrest, incarceration, and supervision in response to the pandemic. Because reducing the density of people in the justice system was a key part of responding to infectious disease risk, this response lightened the touch of the justice system on society for an extended period.

For example, although there have been arguments in the past that police could arrest less while maintaining crime control and achieve better overall societal outcomes, the pandemic forced a broad experiment in doing so that is unlikely to have been conducted otherwise. Panelists representing law enforcement agencies pointed out that, although arrests did not cease across the board, some agencies made changes to reduce arrests that kept individuals who normally would have been brought into the justice system out of it permanently (e.g., in an interaction in which an arrest normally would have been made but no action was taken at all). Participants on both the law enforcement and community organization panels also indicated that the need to reduce arrests to limit the number of people in jails resulted in the increased use of diversion and deflection programs by their departments.

> If they're a violent offender or state-mandated to be arrested and incarcerated, they are going [to jail]. Otherwise, right now, people are being referred or they're going through expanded diversion and deflection programs. . . . I would say that that's been a positive outcome. . . . We're finding that, at least in the short term, our folks are not reoffending and are being diverted into treatment alternatives and other things that we may not have necessarily done [before].
>
> —Law enforcement management panelist

> I think one of the hugest impacts, and . . . a lesson learned later on, is who should actually be in jail? We had a response to a pandemic, and these collaborations with our stakeholders, our district attorneys, our public defenders, our law enforcement, those doing the arresting. We've made these agreements and now a lot of people who would have been in jail are . . . being supervised in the community. Well, if that is not having an effect on public safety, do those folks really need to be in jail in the first place, or can they be supervised in another capacity?
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> —Institutional corrections panelist

Correctional facilities, in which design and security needs limit the amount of flexibility available to ensure social distancing, also undertook significant adaptations during the pandemic that incidentally aligned with demands for reform that were made during national protests. To limit the risk of disease transmission, many correctional systems lowered their incarceration rates by both limiting the inflow of inmates and expediting the release of those already incarcerated. Reductions in the flow of new individuals into the corrections system had the greatest effect on jails, which have a much more dynamic churn of individuals coming in and leaving than prison facilities. Releasing inmates was a strategy sometimes employed by jails but was much more important as a mechanism for areas seeking to reduce prison populations. The outcomes of both of these strategies may eventually provide evidence to support a different approach to incarceration that has been worrisome for those focused on protecting public safety.

Finally, reductions in incarceration have led to increases in community supervision—in both probation and parole—which is taking place in an increasingly resource-constrained environment. This means that many agencies have taken approaches that lower the "dosage" of supervision. At the same time, many agencies have shifted to a more community-based approach,

where, for example, monitoring visits take place at or near the supervisee's home or are conducted virtually, reducing the intrusiveness of such visits on supervisees' time.

The Shift to Virtual Models

For some time, analysts and practitioners have argued that there could be substantial benefits from adding telepresence and other virtual technologies to the justice system. Those benefits were dramatically realized during the pandemic. The expansion of online police services saved officers time while limiting contact that would have increased disease risk. Virtual connections between courts and correctional facilities were valuable to both systems, allowing some tasks to be done with less transportation cost and security risk than are incurred when physically moving people from place to place. The provision of education, telehealth, and substance use counseling via virtual models increased inmate access to such services while incarcerated and increased individuals' access to such services following release while under community supervision. The ability for members of the public to connect virtually—to go to court, to speak with incarcerated family members, and to receive services—saved people who used those services money and time and made their participation in justice processes much less burdensome.

> I've heard from a number of facilities that, in response to [concerns about] shutting down visits, they have gone to video communication, and that's been wildly popular. And it doesn't really cost that much. And, as opposed to paying outrageous prices for telephone contact, having video contacts with families allows people to maintain those connections and is really a critical thing to help with successful reentry. So I'm hoping that's going to flourish and continue.
>
> —Institutional corrections panelist

However, our panelists raised questions about efficacy as well. For example, some cautioned that—particularly for counseling and service delivery—the effectiveness of virtual modes might not be sufficient. Indeed, the pandemic led agencies to apply virtual models for tasks and functions that previously had not been considered for such modes. And although there are clearly some types of virtual interactions and processes that are entirely unproblematic (e.g., providing individuals virtual ways to file paperwork or perform other transactions), important questions remain about the effect of virtual modes on the outcomes of trials and other hearings and on the feelings of victims as to whether they feel that justice has been served.

> This time—this year—has really propelled the courts into the technology age, and the courts have never historically embraced technology in a big way. But my imagination stops at the point where a person might be losing [their liberty] over Zoom. . . . There's something about being in the courtroom that makes the gravity of the situation real.
>
> —Court system panelist

Furthermore, the issue of the digital divide came up across essentially all of the panels. Not every justice agency or supporting organization has invested in technology that could allow it to "go virtual." Not everyone in every area of the country has ready access to technology and connectivity or has the same level of technological proficiency. To the extent that the justice system maintains virtual models, the needs of those populations without access to digital modes must be addressed so that the increase in access to justice for some is not offset by a decrease in access for others. Importantly, even before the pandemic, shortcomings in the availability, speed, and capacity of internet infrastructure have been of concern in poorer or more-rural areas. A coordinated effort to address this digital divide across sectors would facilitate virtual justice system models and would pay dividends in many other areas as well.

CONSIDERATIONS FOR MAINTAINING THESE SHIFTS

As criminal justice stakeholders consider whether the changes made during the COVID-19 pandemic across their respective systems should be kept after the pandemic recedes, one community organization panelist noted that there are at least three fundamental perspectives from which such changes need to be examined. Specifically, these are the perspectives of

- the justice system itself and how changes affect its functioning and effectiveness
- justice-involved individuals and their communities, which are significantly affected by decisions about policing, incarceration, and approaches to justice
- members of the public who are affected by crime and whose needs and perspectives on just outcomes also must be met.

This need to consider multiple perspectives came up repeatedly across the panels in different ways. Some changes made by agencies in response to the pandemic were beneficial from all of these perspectives. For example, panelists agreed that increasing the amount of information that agencies were sharing about what they were doing was useful for other justice agencies, for communities and justice-involved individuals, and for victims of crime, although not all panelists agreed that transparency across the justice system had increased.

In contrast, many changes made by justice agencies focused on the first two of these perspectives: changes made to maintain the functioning of the system and to protect both criminal justice practitioners and justice-involved individuals from the risk of viral spread. Some of those changes had negative effects on victims of crime and on the ability of justice agencies and service providers to meet their needs. Conversely, there was at least one example of a change that cut the other way: the decision to live stream many court proceedings to preserve public access while the courthouse was physically closed. That decision most directly served the need of the system for proceedings to be transparent and the needs of crime victims and the broader public for access, but it imposed potentially serious new costs on justice-involved individuals, whose day in court became exponentially more public than a traditional in-person proceeding. As a result, in considering the path forward, determining how major changes affect different populations served by the justice system will be important.

Evaluations

It is difficult to separate how the criminal justice system had to adjust to the realities of operating under pandemic conditions from the national political environment and backlash triggered by George Floyd's death. Some of the responses to the pandemic, including significant decarceration, aligned with some of the demands made during the protests. Similarly, while some of the organizations involved in protests were calling to defund the police as part of reform efforts, the economic consequences of the pandemic on state and municipal budgets were already resulting in the defunding of criminal justice agencies in very real ways. As a result, it is difficult (and perhaps even impossible) to fully separate the effects of the pandemic on the justice system from the broader national environment created by calls for justice reform. However, the reality that many of the actions taken to adapt to the COVID-19 pandemic were consistent with policy changes called for in these protests, as well as in previous reform efforts, creates more of an opportunity than a challenge.

As a result, it is difficult (and perhaps even impossible) to fully separate the effects of the pandemic on the justice system from the broader national environment created by calls for justice reform.

For example, responses to the pandemic have created an enormous evidence base to study with respect to both implementation and outcomes. Indeed, evaluations of changes in the longer term will be critical to ensure that the apparent benefits

- **are not aberrations that are valid only under COVID-19 pandemic conditions** (e.g., because of changes in crime or behavior driven by the pandemic)
- **are borne out by data** (i.e., that short-term or anecdotal benefits are replicated in a more robust review of policies and practices implemented across the country)
- **are not outweighed by unexpected consequences** (e.g., increased inequities among certain groups).

Evaluations of such challenges as the digital divide also will be needed in order to better understand concerns and address them moving forward.

The Need to Collect Data

There is an urgent need to assess what data need to be collected now, as the pandemic continues, for fear of losing the chance to assess what has been learned and how the changes made have performed. For example, in some agencies, there have been significant differences in the doses of justice intervention received by different people, and solid information about how those doses varied might become very difficult to reconstruct after their program involvement is complete. What the system did—and the value of it continuing to do some of those things—is part of the story, and the collection of data to support research and evaluation efforts going forward can help support the case for maintaining some of those practices. And some of the most important lessons from the pandemic come from what the system did not do, including the choice to not arrest many people and not require some individuals to complete their original sentences or periods of detention for particular crimes and violations. Lessons can be learned from what that inaction means for potential changes that could be made to the justice system of the future.

> I think there's a real opportunity to fundamentally shift the reach of the criminal justice system in the lives of the poorest people in the community. But there's also tremendous resistance. . . . I think it's going to be up to researchers to be able to really evaluate the impact of COVID and bail reform and these arguments around police legitimacy and the link between that and crime to really help us better understand the impact of all of those and what it means for supervision in the community.
>
> —Community organization panelist

> I think one thing that jumps out for us is that there should have been, or there needs to be, more discussion about measuring the actual processes that our partners are engaged in in response to COVID. You know, a lot of people are talking about outcomes and how we can be responsive to communities, but no one's measuring what they're doing very well. That's both the community partners and the law enforcement partners. . . . My concern about that is . . . six months from now, let's say this thing passes, and a lot of municipalities [will be able to] talk about what they think they did, but [there] won't be any actual process-related data that we can use to connect to the outcomes that we're all interested in.
>
> —Community organization panelist

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