

COMMUNITY JUSTICE EXCHANGE

**TRANSPARENCY
IS NOT ENOUGH**

**A FRAMEWORK FOR BUILDING
CAMPAIGN STRATEGY**

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Advocates, activists, organizers, reformers, and community members across the political spectrum often demand transparency from the criminal legal system. People rightly care about transparency because of the harm the system inflicts behind closed doors—particularly upon Black and Brown, poor, LGBTQ, and immigrant communities. For organizers working to dismantle the criminal legal system, however, transparency is best understood as a limited but necessary goal, a first step that must be part of a larger campaign strategy.

Following this overview are a series of questions intended to provide a framework for developing and strengthening organizing campaign strategies around transparency and access. For organizers grappling with these questions, we hope they help (1) frame transparency as a first step—and not the end point—of campaigns, (2) develop a rigorous definition of accountability beyond transparency, and (3) ensure that demands for transparency and access do not produce only reformist solutions.

In theory, openness and transparency are core principles of America’s criminal court system. In practice, though, barriers to public access are the norm and they come in many forms.

- *Physical barriers* included the formal closure of courtrooms to the public¹ and informal, arbitrary court practices and rules that block people from entering courtrooms.²
- *Technology barriers* include court hearings only viewable through live video feeds or not viewable at all,³ and microphones turned so low that neither the audience nor the people being prosecuted can hear the judge.⁴
- *Financial barriers* include court filing fees and fees for downloading court records.⁵

1 An example of a closed court as of September 2018 is Dallas, TX. See article on this here: <https://www.texastribune.org/2018/09/05/Dallas-County-Bail-Machine/>

2 One example of an informal court practice is from the Bronx, NY when court officials told a group of young people they could not attend court in support of their friend because they were supposed to be in school. Another example is from Georgia where a guard outside the door of courtrooms would only allow defendants and family members inside. Read more about these two examples, and others, on pages 2191-2193 in this Harvard Law Review article by Jocelyn Simonson here: http://harvardlawreview.org/wp-content/uploads/2014/06/vol127_-simonson.pdf

3 The Philadelphia Bail Fund & Pennsylvanians for Modern Courts released a court watching report in Fall 2018 documenting the impact of video bail hearings. Read the report here: <https://www.phillybailfund.org/bailreport>

4 An example of microphones not being used is in Philadelphia in Spring 2019, as referenced in this article: <https://theappeal.org/video-hearings-the-choice-between-efficiency-and-rights/>

5 For example, the Public Access to Court Electronic Records (PACER) system, the federal judiciary’s electronic document system, charges such exorbitant fees (10 cents/page) that a lawsuit has been filed to challenge their fee structure. As of Spring 2019, the lawsuit was still pending. See article on this here: <https://newrepublic.com/article/153003/courts-making-killing-public-records-pacer-fees>

- *Operational barriers* include policies, practices, and decisions made by police, prosecutors, judges, and public defenders not made public to the people being prosecuted, much less to the general public. For instance, in places where a risk assessment tool is used in bail or sentencing determinations, the person being prosecuted is rarely informed of the reasons why they received a particular score.⁶
- *Data barriers* include the reluctance of prosecutors to release information on their office’s prosecutions, bail requests, plea offers, or sentencing requests⁷ and that aggregate public data is incredibly difficult to acquire because it is dispersed across multiple agencies and in multiple formats.⁸

It is important to understand that these barriers are not accidental; they are intentional characteristics of a punishment system built upon and designed to uphold white supremacy and other forms of oppression. A system that is opaque and difficult to navigate allows for racial, economic, and gender injustice to continue undisturbed. Inequity operates best in the shadows.

Barriers to access and transparency adversely impact people trying to fight their cases—and their loved ones trying to support them. These barriers can also obstruct activists, organizers, advocates, and community members attempting to participate or intervene in the system on behalf of a particular individual or a larger campaign for decarceration or accountability. When these groups organize to remove barriers to gain access or transparency, there is great potential for power building and power shifting to bolster campaigns, as can be seen in contemporary participatory defense hubs⁹ and courtwatching efforts.¹⁰

⁶ In the 2016 Wisconsin Supreme Court case *State v. Loomis*, Eric Loomis challenged his sentence on the grounds that the use of the COMPAS risk assessment tool for his sentencing violated his right to due process because he was not able to effectively challenge his risk score given the proprietary nature of the tool. The court declined to grant Loomis relief, but did create a set of disclaimers that must accompany risk assessment reports in the future. You can read the case law, *State v. Loomis*, here: <https://caselaw.findlaw.com/wi-supreme-court/1742124.html>

⁷ Cook County State’s Attorney Kim Foxx was the first prosecutor to ever release raw data to the public when she released six years of felony criminal case data in 2018. Read more about prosecutors’ offices being “black boxes” in this article: <https://theappeal.org/kim-foxx-just-released-six-years-of-data-most-prosecutors-offices-remain-black-boxes-238a37ee45f0/>

⁸ Amy Bach of Measures for Justice wrote a New York Times op-ed explaining just why it is so difficult to get data on the criminal legal system and why this data should be accessible to everyone. Read the full op-ed here: <https://www.nytimes.com/2018/03/21/opinion/missing-criminal-justice-data.html>

⁹ For example, Silicon Valley De Bug in San Jose, CA developed the practice of “participatory defense,” which is “a community organizing model for people facing charges, their families, and communities to impact the outcome of cases and transform the landscape of power in the court system.” De Bug has trained community organizers in over two dozen cities to develop participatory defense hubs which contest community presence and participation in court proceedings. Learn more about the De Bug participatory defense organizing model here: <https://acjusticeproject.org/about-purpose-and-practice/>

¹⁰ For example, Court Watch NYC harnesses the power of New Yorkers to hold prosecutors and other court actors accountable to ending injustices perpetuated against Black and Brown, poor, queer and TGNC, and migrant/immigrant communities through documenting and publishing court observations, providing public education, and organizing other direct action tactics. You can learn more about CWNYC here: <https://www.courtwatchnyc.org/>

While it is difficult to have accountability without transparency, transparency, in and of itself, does not guarantee that actors with power in the system will be held accountable for their actions and decisions. Even with adequate, or even excellent, transparency and access to the courts, violence and injustice within the criminal legal system continues. Videos of police brutality evince this point; despite documented proof witnessed by the public, police officers are rarely held accountable for violence. The same is true of the everyday workings of the criminal legal system. Transparency alone does not guarantee that there will be a shift in power in favor of traditionally marginalized groups most harmed by the system.

Demands for transparency, openness, and “fair access to justice” can often produce solutions that look like “reformist reforms”: reforms that only continue or expand the power and reach of the criminal legal system.¹¹ Investing large sums of money to improve the court’s electronic database system provides the court system with a bigger budget but doesn’t necessarily increase their accessibility to the public. Addressing jail overcrowding by video-conferencing defendants into their hearings from a holding tank doesn’t solve the problem that too many people are being arrested. Making courtrooms more open and efficient, easier to access and understand, will not, by itself, lead to transforming the inequitable foundations on which the system is built. In fact, making courts more open has the potential to legitimize the violence of the court system: if it is transparent, then it must be okay.

Approaching these problems from an abolitionist perspective requires different goals and often produces different responses. An abolitionist framework understands the prison industrial complex as unfixable; it is inherently unjust and must be dismantled. Therefore, any harm reduction changes, known as “non-reformist reforms,” must limit or reduce the overall reach and impact of the prison-industrial-complex (PIC) while also immediately improving existing conditions for people being prosecuted, and their communities.¹² Instead of investing funds into the system to improve accessibility, abolitionists would argue for existing funds to be reallocated and reduced. Instead of adopting a technological solution that expands the scope and tools of the system, abolitionists demand that we look at root causes and invest in resources that we know strengthen the safety of our communities: housing, education, health care, and so on.

The fight for openness, transparency, and access is useful from an abolitionist perspective when it builds communal power and when it is connected to the larger collective struggle toward abolition. One of the ways state actors in the criminal legal system, whether they be police, prosecutors, judges, or administrators, possess and wield power is through their control over process and information. There is important power-shifting potential when people who traditionally lack power gain access to information about what state actors are doing; similarly, there is power-building potential when that information is used to push for changes that lessen the scope, size, and power of the punishment system. A push for transparency, if used as a tactic for power-shifting and power-building toward abolition and not as an end goal in itself, can, in this way, be a strategic part of a larger abolitionist campaign.

¹¹ Read more about “Reformist Reforms” and “Non-Reformist Reforms” in the Critical Resistance Organizing Toolkit from 2012, found here: <http://criticalresistance.org/wp-content/uploads/2012/06/CR-Abolitionist-Toolkit-online.pdf>

¹² Read more about abolition as both an organizing framework and long-term goal in this 2017 Jacobin article here: <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration>

In the next section are a series of questions intended to provide a framework for developing and strengthening your organizing campaign strategies around transparency and access. They may be ones you and your co-strugglers are already exploring within your communities, organizations, and/or campaigns. We hope you can use them to (1) frame transparency as a first step—and not the end point—of your campaigns, (2) include in your theory of change a rigorous definition of accountability beyond transparency, and (3) ensure that demands for transparency and access do not produce only reformist solutions.

We've also created a workshop curriculum to introduce concepts and analytical frameworks so that participants can understand transparency and access to the criminal legal system as an entry point for transformative change. You can download the curriculum here: [LINK]. However you decide to use this resource, we hope it deepens analysis and inspires organizing interventions.

Questions for Building Campaign Strategy Around Transparency & Access

The Problem: Understanding your barriers to access and transparency

1. What are some of the barriers you have encountered in gaining access to court proceedings, to people who have been arrested or detained, or to information? What are some of the barriers that prevent the court system and court actors from acting with transparency?
 - a. Why do you think that barrier(s) exist(s)?
 - b. Who has access? Who has the power to grant access or provide transparency? Who (if anyone) is that person accountable to?
 - c. Is there a structural or procedural mechanism used to enforce that barrier?
2. How would your court system look differently if it was accessible and transparent?

The Strategy: Creating your campaign goals and demands for transparency and access within an abolitionist framework

1. For your particular transparency/access problem, what would a reformist solution be? What would an abolitionist solution be? How can you demand transparency and access without further legitimizing or extending the power of the state?
2. How can you situate your demands for transparency and access within larger campaign strategies to ensure that they lead to actual accountability and change?
3. Once transparency and access exist, how will you hold your courts accountable? What are ways you can try to hold your courts accountable even when the system denies the public transparency or access?
4. What collective responses or campaigns can flow from the new access to space/observation/process/data? How has power shifted and how can you leverage that power to push for further change?

The Means: Choosing tactics to achieve your campaign goals

1. What tactics, if any, have you already used to get around those barriers?
 - a. Why did you choose to use them?
 - b. Are your tactics situated with an inside,¹³ an outside,¹⁴ or an inside/outside strategy?
 - c. What tactic has been the most successful and why? What has not worked and why do you think that is the case?
 - d. Did any of the tactics or strategies shift power?

2. How do you ensure that whatever means are used to gain transparency or access do not prevent your ability to hold the system accountable? For example, if you rely on friendly relationships with court administration to provide information or process paperwork more quickly, will you be able or willing to make them a target of an accountability campaign if necessary?

¹³ Leveraging relationships with people who work in the system, such as court clerks, administrators, judges, and/or prosecutors, to achieve change.

¹⁴ Marginalized groups, which do not hold recognized political power, employ pressure—usually through organizing, mobilization, disruption, and protest—to reshape the established structures of power.

COMMUNITY JUSTICE EXCHANGE

PROBLEMS WITH COURT TRANSPARENCY AND ACCESS

Reformist vs. Abolitionist Responses

PROBLEM

Because of jail overcrowding, after arrest people are made to wait in detention for over a week before their bail hearings.

REFORMIST

“The courts should video conference bail hearings so that people won’t have to wait so long.”



ABOLITIONIST

“Shrinking the size and scope of the police force and the prosecutor’s office will result in fewer arrests and prosecutions and do away with the overcrowding problem.”

PROBLEM

The court building lobby is old, worn down, and uninviting for the public. In addition, court bathrooms do not meet ADA standards of accessible design.

REFORMIST

“The Governor’s budget should provide the courts with their requested funding increase for infrastructure spending. The lobby should be more welcoming and comfortable for family and community members, and people with disabilities should have accessible bathrooms.”



ABOLITIONIST

“The Governor should ensure less people are ensnared in the criminal court system in the first place, by passing decriminalization legislation and decreasing funding for law enforcement. The court could then reallocate existing funds spent on staff salaries and case processing to redo the lobby and make bathrooms accessible.”

PROBLEM

Due to budget and staffing cuts, in-person visits will no longer be allowed at jails. The jail administrators want to contract with private companies to build video-calling kiosks that will allow families to, for a steep fee, call their incarcerated loved ones.

REFORMIST

“Restore funding to jails so that in-person visits can resume. Negotiate with the video calling companies to lower their rates.”



ABOLITIONIST

“In-person jail visits are a right, regardless of a jail’s budget. When offered, video calling should be addition to in-person visits, and they should be free.”

