

# How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor

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*This Note serves as a surgeon general's warning that not all progressive prosecutors are alike and provides a "weighted constellation" framework that advocates can use to assess which district attorneys deserve the progressive name. Although the justice system's structural landmines inhibit district attorneys' efforts to substitute law-and-order policies with more forward-thinking approaches, local prosecutors still wield enormous power; they can reduce incarceration and more equitably enforce the law. Participants in local politics should elect and support district attorneys who effect authentically progressive policies. Because not all seemingly progressive district attorneys are in fact pursuing meaningful criminal justice reform, this Note aims to help advocates separate the bona fide progressives from tough-on-crime prosecutors in sheep's clothing. Those keen to assess their district attorney can use this Note's proposed analytical framework, which accounts for the totality of each district attorney's circumstances but draws clear lines between progressive and non-progressive prosecution practices. This Note presents fourteen metrics of prosecutorial policies that further a more dignified and fair American justice system. Advocates should use these fourteen metrics to evaluate a district attorney and—depending on the history of the prosecutor's office and the local justice system—assign weights to each of the metrics. Advocates should then examine the district attorney's performance for each metric, including whether the prosecutor falls outside the metric's outer bounds, the distance between the prosecutor's policies and the theoretically most progressive iteration of the metric, and the prosecutor's policies compared with their peers' policies. To aid with the last analytical step, this Note provides a comparative analysis of twenty-one prosecutors' performance against a subset of seven of the metrics—the death penalty, bail reform, decarceration and the New Jim Crow, non-prosecution and diversion, wrongful convictions, police accountability, and prosecutorial accountability.*

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## INTRODUCTION

*I understand I'm in one more race in the United States where all the candidates on the Democratic side are using the P word. It turns out they're all 'progressives.' And they're all progressive at least from the beginning of the campaign until the end. Well here's the truth: words are cheap. It is easy to say that you are what you have not shown yourself to be.*

—Larry Krasner's endorsement of Tiffany Cabán's candidacy for Queen's District Attorney<sup>1</sup>

Over the past few campaign cycles, a single book has emerged as a favorite among candidates who present themselves as a progressive option for the office of district attorney<sup>2</sup> (DA)—*The New Jim Crow* by Michelle Alexander. Alexander's seminal page-turner—which dissects the role of racism in America's carceral state—has stirred an entire generation's conscience. For district attorney candidates who wish to convey that they have done their criminal justice homework, *The New Jim Crow* is the go-to book to name-drop in a stump speech.<sup>3</sup> In 2018, Philadelphia DA Larry Krasner greeted his new class of Assistant District Attorneys (ADAs) with “who here has read Michelle Alexander?”<sup>4</sup> Posing next to a copy of *The New Jim Crow*, Hillar C. Moore III of East Baton Rouge told the *New Orleans Times-Picayune* that criminal defendants are some of the “least fortunate people” and that he was working to keep them out of courtrooms.<sup>5</sup> When a reporter pressed Los Angeles's Jackie Lacey on how she was addressing racial disparities in prosecution, she responded “I don't keep statistics . . . but I expose myself to all kinds of literature. I've read *The New Jim Crow*. I'm familiar

<sup>1</sup> *Endorsements, CABAN FOR QUEENS DISTRICT ATTORNEY* (Nov. 20, 2019), <https://www.cabanforqueens.com/endorsements/> [<https://perma.cc/RZ5T-XDXR>].

<sup>2</sup> This paper uses “District Attorney” and “DA” to refer to the offices of District Attorney, State Attorney, Commonwealth's Attorney, County Attorney, and Attorney, largely interchangeable titles for the same office—an elected prosecutor. This paper does not examine Attorneys General. States' Attorneys General usually engage entirely in civil prosecution; however, they occasionally have some criminal prosecutorial responsibilities and some small states subsume the office of the District Attorney into the Attorney General office. Because this paper is focused particularly on criminal justice, Attorney General offices are outside this paper's scope.

<sup>3</sup> See Jessica Pishko, “I've Read the New Jim Crow . . .: How to Tell if a Prosecutor Is Only Pretending to Be a Criminal Justice Reformer.”, SLATE (Apr. 13, 2017), <https://slate.com/news-and-politics/2017/04/how-to-tell-if-a-prosecutor-is-only-pretending-to-be-a-criminal-justice-reformer.html> [<https://perma.cc/TGK8-W9NH>].

<sup>4</sup> Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/UJM3-2F8V>].

<sup>5</sup> Emily Lane, *Baton Rouge DA Hillar Moore Is BRAVE-ly driven in the fight against crime*, NOLA.COM (Dec. 11, 2013), [https://web.archive.org/web/20181005200243/https://www.nola.com/crime/baton-rouge/index.ssf/2013/12/baton\\_rouge\\_da\\_hillar\\_moore\\_is.html](https://web.archive.org/web/20181005200243/https://www.nola.com/crime/baton-rouge/index.ssf/2013/12/baton_rouge_da_hillar_moore_is.html) [<https://perma.cc/972A-YVZ5>] (“A stack of books with names like, ‘Don't Shoot,’ ‘The New Jim Crow,’ ‘Comeback Cities’ and ‘The Tipping Point,’ serve as the centerpiece of the conference table—a cornucopia devoted to his passion: absorbing as much information as he can about violence prevention and public safety.”); see also Pishko, *supra* note 3.

with the dialogue around mass incarceration. Michelle Alexander.<sup>6</sup> Cook County State Attorney Kim Foxx has spoken publicly about how *The New Jim Crow* has affected her views of race and mass incarceration.<sup>7</sup> Manhattan DA Cyrus Vance tipped his hat to the tome in a 2015 speech: “But while the crimes [that I was prosecuting] were diverse, no thinking person could stand in the well of that court for long without noticing that the defendants being arraigned were disproportionately young men of color. Even back then, long before the term ‘mass incarceration’ entered the general conversation.”<sup>8</sup>

But some of these seemingly progressive prosecutors are unlike the others. Although Krasner and Foxx work to enact forward-looking reforms in their districts, Lacey’s, Moore’s, and Vance’s track records are worryingly similar to those of their tough-on-crime peers who sustain the carceral state that Alexander slams in her oft-cited book.<sup>9</sup>

Voters are increasingly interested in electing district attorneys who reject traditional tough-on-crime policies and aim to reform prosecution. The first nation-wide public opinion poll of voters’ views on prosecutors—which the ACLU conducted in 2017—found strong bipartisan and geographically diverse support for prosecutors committed to alleviating mass incarceration, reducing racial bias in the justice system, and holding police officers accountable for wrongdoing.<sup>10</sup> Yet, law-and-order incumbents consistently win elections. In 2018, 84% of elected prosecutors ran unopposed in their general

<sup>6</sup> L.A. Sentinel Newspaper, (*Part 3*) *DA Jackie Lacey speaks on being fair*, YOUTUBE (Feb. 25, 2017), [https://www.youtube.com/watch?v=TPE1RW\\_jN0Q&feature=emb\\_title](https://www.youtube.com/watch?v=TPE1RW_jN0Q&feature=emb_title) [<https://perma.cc/P26L-42AS>].

<sup>7</sup> See Micah Uetricht, *The Criminal-Justice Crusade of Kim Foxx*, CHI. READER (Mar. 9, 2016), <https://www.chicagoreader.com/chicago/kim-foxx-bid-unseat-anita-alvarez-cook-county/Content?oid=21359641> [<https://perma.cc/K3B8-DJ8A>].

<sup>8</sup> *District Attorney Vance Delivers Commencement Address at New York Law School’s 123rd Graduation Ceremony*, MANHATTAN DIST. ATT’Y’S OFF. (May 9, 2015) [hereinafter *Commencement Address*], <https://www.manhattanda.org/district-attorney-vance-delivers-commencement-address-at-new-york-law-school-s-123rd-graduation-ceremony/> [<https://perma.cc/S43F-CJTU>]. Perhaps the most prominent person to pay lip service to the book is Senator Kamala Harris, the former San Francisco DA, whose sister is friends with Michelle Alexander and proofread *The New Jim Crow* when the book was a manuscript. See Jamilah King, *Can Harris’ Sister Help Her Overcome the “Kamala Is a Cop” Rap?*, MOTHER JONES (Feb. 13, 2019), <https://www.motherjones.com/politics/2019/02/kamala-maya-harris-progressive-prosecutor-campaign-criminal-justice/> [<https://perma.cc/9NHM-AXM3>].

<sup>9</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

<sup>10</sup> According to the ACLU study, 89% of voters say it is “very important” for prosecutors to actively work towards ending mass incarceration with non-prison options. Eighty-eight percent of voters are more likely to support a prosecutor who believes in reducing racial bias in the criminal justice system. Ninety-one percent believe that it is important for a prosecutor to prioritize reducing unequal treatment of individuals because of race, including 90% of white voters, 90% of Latino voters, and 95% of Black voters. Seventy-nine percent of voters say they are much more likely to support a candidate for prosecutor who believes it is their responsibility to hold officers that break the law accountable and will work to increase overall transparency in the criminal justice system. See *Americans Overwhelmingly Support Prosecutorial Reform, Poll Finds*, ACLU (Dec. 12, 2017) (citing DAVID BINDER RESEARCH, NATIONAL VOTER SURVEY SUMMARY MEMO (2017), [https://www.aclu.org/sites/default/files/field\\_document/171212\\_dbr\\_aclu\\_campaign\\_for\\_smart\\_justice\\_memo\\_v5.pdf](https://www.aclu.org/sites/default/files/field_document/171212_dbr_aclu_campaign_for_smart_justice_memo_v5.pdf) [<https://perma.cc/E8JM-GFP5>]), <https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds> [<https://perma.cc/5V9Y-9FYE>].

election;<sup>11</sup> challengers won only 18% of the few contested races.<sup>12</sup> Evidently, voters, progressive organizations, and funders lack the mechanism to—and fail to—identify candidates who deserve the progressive prosecutor name.

Although the justice system's other actors persistently shackle progressive prosecution policies, a truly reformist district attorney will far better serve a local community than a law-and-order prosecutor would. But members of the polity face a quandary: how can they determine who, among the plethora of district attorneys wearing the “progressive” badge, is pursuing genuine reform? Advocates cannot use an attorney's impeccable taste in critical race theory literature as a litmus test; this Note provides a more robust answer.

Part I addresses the common criticism that a true progressive prosecutor cannot exist and contends that it is nonetheless essential that voters identify and support genuinely reformist prosecutors. Part II provides a three-step “weighted constellation” framework that readers should use to evaluate whether a district attorney is a genuine progressive prosecutor: (1) assigning weights to fourteen metrics; (2) examining the district attorney's performance for each metric, including (a) whether the prosecutor falls outside the metric's outer bounds; (b) how far the prosecutor's policies fall from the theoretically most progressive iteration of the metric; and (c) the prosecutor's policies' relative progressiveness compared with their peers' policies. This section also explains the framework's methodology and provides a dataset of twenty-one supposedly progressive prosecutors. Part III compares twenty-one prosecutors across seven of these fourteen metrics—the death penalty, bail reform, decarceration and the New Jim Crow, non-prosecution and diversion, wrongful convictions, police accountability, and prosecutorial accountability—to illustrate the comparative element of the framework's second step, i.e., step (2)(c).

## I. CAN PROSECUTORS EVER BE PROGRESSIVE?

Prosecutors are significant policymakers in the American penal system; they have “more control over life, liberty, and reputation than any other person in America.”<sup>13</sup> Unavoidably, structural forces will shackle a theoretically perfectly progressive prosecutor. Nonetheless, a project that instructs voters about how to identify truly forward-thinking prosecutors is still worthwhile.

According to some, judges', the police's, and subordinate prosecutors' intransigence blunt district attorneys offices' power to enact meaningful

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<sup>11</sup> See Evan Hughes, *America's Prosecutors Were Supposed to Be Accountable to Voters. What Went Wrong?*, POLITICO (Nov. 5, 2017), <https://www.politico.com/magazine/story/2017/11/05/cyrus-vance-jr-americas-prosecutor-problem-215786> [https://perma.cc/JFP9-UR2K].

<sup>12</sup> See *id.*

<sup>13</sup> Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 173 (2019) (citing Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940)).

change.<sup>14</sup> This is undeniable. Police unions have forcefully criticized Larry Krasner,<sup>15</sup> Rachel Rollins,<sup>16</sup> and Kim Foxx.<sup>17</sup> State court judges have constrained DAs' efforts to replace long-standing prosecutorial practices<sup>18</sup> with

<sup>14</sup> See generally Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. (forthcoming 2020).

<sup>15</sup> The Philadelphia Fraternal Order of Police (FOP) President John McNesby has called Krasner "anti-police," has demanded that Krasner resign, and has taken out billboards along I-95 that read "Help Wanted: New Philadelphia District Attorney. Please contact FOP Lodge #5." *Help Wanted: Philadelphia Police Union Calling For New District Attorney In I-95 Billboards*, CBS PHILLY (June 27, 2019), <https://philadelphia.cbslocal.com/2019/06/27/help-wanted-philadelphia-police-union-calling-for-new-district-attorney-in-i-95-billboards/> [<https://perma.cc/Y3P4-FRDJ>]; see also Kimberly Davis, *He Betrayed Us, He Lied To Us: Police Officer's Widow, FOP Call For DA Krasner's Resignation Over Abu-Jamal Appeal*, CBS PHILLY (Apr. 23, 2019), <https://philadelphia.cbslocal.com/2019/04/23/daniel-faulkner-widow-fop-call-for-da-larry-krasners-resignation-mumia-abu-jamal-appeal/> [<https://perma.cc/Z9A9-TZQ8>]; Kristen Johansen, *He's Anti-Law Enforcement: Head Of Philly's Police Union Expresses Concern Over DA's Race*, CBS PHILLY (May 17, 2017), <https://philadelphia.cbslocal.com/2017/05/17/hes-anti-law-enforcement-head-of-phillys-police-union-expresses-concern-over-das-race/> [<https://perma.cc/B9T4-NE9N>]. Recently, FOP has ratcheted up its war with Krasner by suing him over his publishing a "not-to-call" list of police officers to testify in court who had a history of lying and racial bias. See *Judge Throws Out FOP Lawsuit Over District Attorney's So-Called 'Do Not Call' List*, CBS PHILLY (Aug. 23, 2019), <https://philadelphia.cbslocal.com/2019/08/23/judge-throws-out-fop-lawsuit-over-district-attorneys-so-called-do-not-call-list/> [<https://perma.cc/82SD-A6MH>].

<sup>16</sup> One week before Rollins took office, the National Police Association filed a Massachusetts state bar complaint against her, alleging that she was violating ethics rules by promising to refuse to prosecute non-violent property crimes. See adminpolice, *National Police Association Files Bar Complaint Against District Attorney Elect Rachael Rollins*, NAT'L POLICE ASS'N. (Dec. 28, 2018), <https://nationalpolice.org/national-police-association-files-bar-complaint-against-district-attorney-elect-rachael-rollins/> [<https://perma.cc/9JL3-N4YM>]; Kaitlin Flanigan, *Police Group Accuses Suffolk DA-Elect of 'Reckless Disregard' for Massachusetts Laws*, NBC BOS. (Dec. 28, 2018), <https://www.nbcboston.com/news/local/Rachael-Rollins-Suffolk-District-Attorney-Elect-National-Police-Association-Bar-Complaint-503616441.html> [<https://perma.cc/3DQ2-5T5A>].

<sup>17</sup> Chicago's police union slammed Kim Foxx for pandering to a "powerful anti-police movement" after she exonerated defendants whose wrongful convictions were obtained through police coercion and unlawful interrogation methods and demanded that Foxx resign for refusing to charge shoplifting as a felony unless the value of what allegedly was stolen was more than \$1,000. Mitchell Armentrout, *Police Union President Slams Foxx, Prosecutors After Exonerations*, CHI. SUN-TIMES (Nov. 18, 2017), <https://chicago.suntimes.com/2017/11/18/18401698/police-union-president-slams-foxx-prosecutors-after-exonerations> [<https://perma.cc/T42L-QRS8>]; see also Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance From Within*, BRENNAN CTR. JUST. (June 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within> [<https://perma.cc/67V8-2PJK>].

<sup>18</sup> For example, Philadelphia's elected judges have consistently refused to sign off on plea deals recommended by Krasner's office as too lenient. See Cohen, *supra* note 17. Further, the Pennsylvania Supreme Court recently construed the state's law in a fashion that severely limits Larry Krasner's attempts to reform his office's death penalty practices. See Julie Shaw, *DA Larry Krasner Gives Up Fight in More Death-row Appeals, Stirring Concern from Courts, Families*, PHILA. INQUIRER (May 23, 2019), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-death-penalty-cases-20190523.html> [<https://perma.cc/4UNV-R6SK>]. According to Krasner, a defendants' 2005 trial was "tainted by substandard performance," and Krasner has argued to the court that Pennsylvania's law's grant of wide prosecutorial discretion should give him the power to decide whether to continue to seek the death penalty in this case. *Id.* The state's high court disagreed and denied Krasner's attempt to toss out the death sentence. See *id.*

forward-looking approaches.<sup>19</sup> Subordinate line prosecutors often work to subvert their boss's agenda.<sup>20</sup>

Nonetheless, this argument understates the breadth of prosecutorial power. Prosecutors cannot unilaterally dismantle the justice system's entrenched structural obstacles; yet, prosecutors greatly influence local justice. Handling 95% of all criminal cases in America, local prosecutors wield the authority to lock up fewer people and alleviate unnecessarily harsh punishment.<sup>21</sup> Indeed, prosecutors' impact on criminal justice likely dwarfs that of any other actor.<sup>22</sup> Their massive discretion over prosecution, case strategy,

<sup>19</sup> A recent conflict about cash bail in Harris County, Texas is illustrative. In 2016, a federal judge ruled that the Harris County bail system for misdemeanors was unconstitutional. In response, fourteen county judges spent more than \$6 million of taxpayer money appealing the ruling. To convey to the public that cash bail reform was socially undesirable, the judges proceeded to grant low cash bonds to higher risk defendants and release defendants without supervision or reminders to return to court. Although the judges' appeal ultimately failed, the case brought legislative bail reform to a grinding halt. See Maura Ewing, *Harris County Judges May Face A Reckoning Over Bail On Election Day*, APPEAL (Nov. 4, 2018), <https://theappeal.org/harris-county-judges-may-face-a-reckoning-over-bail-on-election-day/> [https://perma.cc/7525-8AXC].

<sup>20</sup> Emily Bazelon has described her observations of Brooklyn line prosecutors refusing to comply with DA Eric Gonzalez's official policies on bail, non-prosecution, and evidence disclosure. After shadowing members of Gonzalez's office, she found that Brooklyn ADAs were still relying on police officers who had histories of constitutional violations in making arrests and issuing charges. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 280 (1st ed. 2019); see also @CourtWatchNYC, TWITTER, <https://twitter.com/courtwatchnyc?lang=en> [https://perma.cc/S2YW-4NX9]. And before Wesley Bell was even sworn into office as the new St. Louis District Attorney, prosecutors in his own office voted to join the St. Louis County Police Association, the county's largest police union that had endorsed Bell's opponent in the election. This unprecedented move was criticized as a conflict of interest by watchdog groups such as the ACLU. The union also called for the reinstatement of prosecutors that Bell had discharged. See Alice Spieri, *Five Years After Ferguson, St. Louis County's New Prosecutor Confronts a Racist Criminal Justice System*, INTERCEPT (Jan. 24, 2019, 1:58 PM), <https://theintercept.com/2019/01/24/wesley-bell-st-louis-prosecutor-ferguson/> [https://perma.cc/6NQH-G7FP]; see also Abdul Rad & Arthur Rizer, *A Dangerous Conflict of Interest*, ST. LOUIS POST-DISPATCH (Jan. 15, 2019), [https://www.stltoday.com/opinion/columnists/a-dangerous-conflict-of-interest/article\\_527bcecb-603d-5044-a96e-e6901b5190e3.html](https://www.stltoday.com/opinion/columnists/a-dangerous-conflict-of-interest/article_527bcecb-603d-5044-a96e-e6901b5190e3.html) [https://perma.cc/S2YW-4NX9]; David Hunn, *St. Louis County Prosecutors Vote to Unionize*, ST. LOUIS POST-DISPATCH (Dec. 18, 2018), [https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutors-vote-to-unionize/article\\_e8422a8f-0fb6-584c-96b6-ff4391b6c6b0.html](https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutors-vote-to-unionize/article_e8422a8f-0fb6-584c-96b6-ff4391b6c6b0.html) [https://perma.cc/2QAN-PW75].

<sup>21</sup> See Emily Bazelon & Miriam Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [https://perma.cc/V8GH-FZYT].

<sup>22</sup> John Pfaff contends that prosecutors are the most important factor in the increase of prison populations. See generally JOHN PLAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION-AND HOW TO ACHIEVE REAL REFORM (2017). President Barack Obama has allegedly stated that DAs have more power than the President of the United States to effect change in the criminal justice system. See Hughes, *supra* note 11; see also Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 845-46 (2004) ("[P]rosecutors have been criticized for bringing cases that are too weak or poorly investigated, for bringing prosecutions that are unduly harsh, and for other purported excesses."); Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-crim->

and bail decisions positions district attorneys to enact local reforms.<sup>23</sup> Who your prosecutor is also matters to each individual defendant—just ask Curtiss Flowers,<sup>24</sup> Randall Dale Adams,<sup>25</sup> or the many other defendants whom prosecutors wrongfully prosecuted or sought overly harsh sentences for.

Others caution against advocates' paying undue attention to progressive prosecutors. One variation of this argument is that there can never be enough forward-looking prosecutors to effect systemic change.<sup>26</sup> Tough-on-crime is clearly still the mainstream approach to prosecution.<sup>27</sup> Paul Butler

inal-justice-reform/ [https://perma.cc/3FDB-2J95]; Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 11, 2015), https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment [https://perma.cc/9HBW-3N68]; Brooklyn Defender Servs., *Power of Prosecutors*, YOUTUBE (Sept. 10, 2017), https://www.youtube.com/watch?time\_continue=1&v=zrgvix7MnqA [https://perma.cc/C3WN-K833].

<sup>23</sup> Jeffrey Bellin has compiled a long list of articles that have espoused the “prosecutors are all-powerful” viewpoint. See Bellin, *supra* note 13, at 189 (citing ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (“[Prosecutors are] the most powerful actors in the criminal justice system’ . . . and I blame them for [m]uch of what is wrong with American criminal justice.”)); see also Shima Baradaran Baughman, *Sub-constitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1076 (2017) (arguing that “the Prosecutor Problem” is “what modern scholars claim is responsible for the astronomical increase in incarceration in America in the last fifty years”); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (“Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.”); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 678 (2016) (“No serious observer disputes that prosecutors . . . hold most of the power in the United States criminal justice system.”).

<sup>24</sup> See Gilbert et al., *Reversed*, APM REPORTS (June 21, 2019), https://www.apmreports.org/story/2019/06/21/curtis-flowers-wins-scotus-appeal [https://perma.cc/AN9P-DRAU].

<sup>25</sup> See Michael L. Radelet, *Randall Dale Adams: Filmmaker Helped Free Innocent Man*, BLUHM LEGAL CLINIC, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/randall-dale-adams.html [https://perma.cc/5US6-J4DB].

<sup>26</sup> Academics such as Rachel Barkow question if the recent progressive prosecution surge has any staying power. To enact serious criminal justice reform, argues Barkow, the politics of district attorney elections cannot merely shift to the left. Indeed, the role of politics and elections must be minimized in district attorney elections—serious criminal justice reforms cannot be enacted by prosecutors “playing a political game differently.” See BAZELON, *supra* note 20, at 289. Those in Barkow’s camp are wary that the voting public’s comfort with progressive prosecutors is dependent on current low crime levels and predict that the prosecutorial reform movement will “fizzle” should crime rise again. See *id.*

<sup>27</sup> See Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019), https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms [https://perma.cc/RME5-SNGW] (quoting Angela J. Davis on the promise of progressive prosecutors and Jonathan Blodgett, the President of the National District Attorneys Association). The continuing presence and legacy of the prosecutors who disavow the progressive prosecution model is evidence of the failure of the reformist prosecution model to gain national acceptance. Notably, Attorney General William Barr publicly chastised progressive prosecutors as “dangerous to public safety.” At a FOP convention in New Orleans, Barr slammed progressive prosecutors as “anti-law enforcement” and “dangerous to public safety”—progressive prosecutors “style themselves as ‘social justice’ reformers . . . but they spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law.” *Id.* Tellingly, when New York sought to establish an independent state commission on prosecutorial misconduct in 2017, the New York District Attorney’s association pulled no punches in lobbying heavily against the commission and threatened to sue and boycott it. See BAZELON, *supra* note 20, at 289.

estimates that he considers fewer than 100 of America's 2,400 to be "progressive."<sup>28</sup> In the last two years, traditional prosecutors defeated progressive candidates in DA elections in Sacramento,<sup>29</sup> San Diego,<sup>30</sup> and Las Vegas.<sup>31</sup> Another riff on this argument: advocates should train their sights on systematically reforming the police—the most helpful avenue for criminal justice reform—rather than prosecutorial reform.

Still, there is value in voters' elevating prosecutors who will use their office's broad powers to effect change in their communities. Although few, "progressive" prosecutors oversee jurisdictions that cover a significant portion of the U.S. population. Forty million Americans (i.e., more than 12% of America's population) live in a city or county with a "progressive" prosecutor.<sup>32</sup> The Black Lives Matters movement has drawn much-needed attention to municipal policies to defund the police as in fact the best avenue for local criminal justice reform—these include abolishing paid leave for officers under investigation, cutting pensions and refusing to hire officers who have committed excessive force, creating liability for officer misconduct, cutting the size of the police force, and redirecting funds from the police to other community resources. Although meaningful local criminal justice reform is impossible without defunding the police, advocates cannot ignore the actual and potential impact of progressive prosecutors, whose increasing national prominence represents the burgeoning national push to reform the role of the modern American prosecutor.

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<sup>28</sup> See Paul Butler, *Prosecutors' Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019), [https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693\\_story.html](https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html) [https://perma.cc/S7EE-S3PB].

<sup>29</sup> See Marcos Bretón, *Sacramento's DA Race is Done: Why Progressives Never Should Have Backed Noah Phillips*, SACRAMENTO BEE (June 15, 2018), <https://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article213205949.html> [https://perma.cc/PCK3-PD8L].

<sup>30</sup> See Greg Moran, *DA Race: Stephan Easily Defeats Challenger Jones-Wright, Earns Full Term*, SAN DIEGO UNION-TRIBUNE (June 6, 2018), <https://www.sandiegouniontribune.com/news/public-safety/sd-me-elex-da-20180531-story.html> [https://perma.cc/6WP2-8KAL].

<sup>31</sup> See Rachel Crosby, *Wolfson Beats Langford to Retain Clark County DA Seat*, LAS VEGAS REV.-J. (June 12, 2018), <https://www.reviewjournal.com/news/politics-and-government/clark-county/wolfson-beats-langford-to-retain-clark-county-da-seat/> [https://perma.cc/7A3A-3VRF].

<sup>32</sup> See *id.*



II. METHODOLOGY

A. *The Metrics*

TABLE 1

<b>Column I: Metric and Justification</b>	<b>Column II: Theoretically Most Progressive Stance</b>	<b>Column III: Potential Progressive Policies</b>	<b>Column IV: Outer Limit</b>
<p><b>1. Bail Reform</b> <i>Cash bail only serves to imprison those who cannot afford bail</i><sup>33</sup></p>	<p>Refuse to seek cash bail in any case, including felonies</p>	<p>Request cash bail only for non-major or non-violent crimes, support efforts to eliminate cash bail, allow defendants to use unsecure bonds in place of cash bail, place caps on the amount of bail that subordinate prosecutors can request for “crimes of poverty,” and support bail funds</p>	<p>Refuse to reduce request for cash bail at in any case, even for minor crimes</p>
<p><b>2. Death Penalty</b> <i>The death penalty is more cruel, inhumane, and degrading than other punishments and the state imposes death disproportionately on black, male defendants accused of crimes against white victims</i><sup>34</sup></p>	<p>Publicly oppose the death penalty and refuse to seek death sentences in any inherited or new cases</p>	<p>Publicly oppose the death penalty and refuse to seek death sentences in any inherited or new cases</p>	<p>Request the death penalty in any case, even if for only a small subset of the “worst” defendants or even if the state does not carry out executions</p>

<sup>33</sup> See FAIR & JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 6–7 (2018) [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf) [<https://perma.cc/S2KQ-WWAL>]; see also Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America’s Money Bail System*, 36–37 BUFF. PUB. INT. L.J. 29, 32 (2019).

<sup>34</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 23–24; see generally HUGO BEDAU, *THE DEATH PENALTY IN AMERICA* (1998); Stephen Nathanson, *Does It Matter If The Death Penalty is Arbitrarily Administered?*, 14 PHIL.& PUB. AFF. 115 (1985); Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty*, 14 PHIL. & PUB. AFF. 115 (1985); Carol Steiker, *No, Capital Punishment Is Not Morally Required*, 58 STAN. L. REV. 751 (2010).

<p><b>3. Decarceration and the New Jim Crow</b>  <i>America incarcerates en masse; black and brown men are systematically imprisoned at higher rates than white men</i><sup>35</sup></p>	<p>Abolish prison and eliminate racially discriminatory effects in prosecution</p>	<p>Reduce prison population and address racially discriminatory prosecutorial policies</p>	<p>Fail to decrease prison populations or mitigate prosecutorial practices that disproportionately impact marginalized groups</p>
<p><b>4. Diversion and Non-Prosecution</b>  <i>There are too many prosecutions of non-violent, victimless crimes, which feeds mass incarceration</i><sup>36</sup></p>	<p>Refuse to prosecute any crime</p>	<p>Institute non-prosecution policies that result in everyone in a community benefitting equally from those policies, including non-prosecution of crimes that the police have historically used to target people of color (e.g., marijuana prosecutions)</p>	<p>Prosecute minor or non-violent crimes</p>

<sup>35</sup> See generally ALEXANDER, *supra* note 9; Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration> [<https://perma.cc/PGW3-77PB>]; UC Berkeley Sch. of Law, *Professors Devon Carbado and Priscilla Owen: Police Violence and Black Women*, YOUTUBE (Apr. 6, 2018), [https://www.youtube.com/watch?v=66830\\_oEgaM](https://www.youtube.com/watch?v=66830_oEgaM); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/W9CW-A8KC>]; *Excessive Punishment*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/excessive-punishment/> [<https://perma.cc/4L6U-HF2E>]; *Mass Incarceration*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration> [<https://perma.cc/22FV-S4E8>].

<sup>36</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 4–5; *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 CUNY L. REV. 203, 229–31 (2008); see generally ALEXANDER, *supra* note 9; MICHAEL MITCHELL & MICHAEL LEACHMAN, CTR. BUDGET & POL'Y PRIORITIES, *CHANGING PRIORITIES: STATE CRIMINAL JUSTICE REFORMS AND INVESTMENTS IN EDUCATION* (2014), <https://www.cbpp.org/sites/default/files/atoms/files/10-28-14sf.pdf> [<https://perma.cc/M9QF-LE3X>]; Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, 3 HARM REDUCTION J. 6 (2006); Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?" America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 145 (2014).

<p><b>5. Sentencing Reform</b>  <i>Punitive sentencing statutes drive mass incarceration, and prosecutors recommend disproportionately higher sentences for people of color<sup>37</sup></i></p>	<p>Abolish prison and expunge and seal all criminal records</p>	<p>Support elimination of mandatory minimums, support sentencing reform legislation, support efforts to commute existing sentences, set up expungement and sealing mechanisms for criminal records</p>	<p>Completely refuse to advocate for forward-looking or backward-looking sentencing reform (commutations, expungements, sealings)</p>
<p><b>6. Evidence Disclosure</b>  <i>Weak constitutional and statutory requirements permit prosecutors to avoid disclosing key evidence to defendants, leading to widespread miscarriages of justice<sup>38</sup></i></p>	<p>Institute total “open-file” and “open discovery” policies (i.e., disclosure of all relevant evidence and all information received from law enforcement to defendants)</p>	<p>Increase amount of relevant evidence disclosed to the defense through versions of open file and open discovery policies</p>	<p>Systematically fail to disclose relevant evidence to the defense</p>
<p><b>7. Fines, Forfeitures, Fees</b>  <i>Fines, forfeitures and fees are a regressive poverty tax; they stymie rehabilitation, exacerbate indigent defendants’ debt, and fail to improve public safety<sup>39</sup></i></p>	<p>Refuse to collect fines, forfeitures, or fees</p>	<p>Impose fines, forfeitures, and fees with thoughtful consideration of defendants’ ability to pay</p>	<p>Persistently collect fines, forfeitures, fees</p>

<sup>37</sup> See Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 447–69 (2013); Eileen Hirsch & Martha Askins, *Juvenile Lifers: Reforming Extreme Sentences*, WIS. LAW., Jan. 2019, at 12, 13; see generally FAIR & JUST PROSECUTION, REVISITING PAST EXTREME SENTENCES: SENTENCING REVIEW AND SECOND CHANCES (2020), [https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP\\_Issue-Brief\\_SentencingReview.pdf](https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP_Issue-Brief_SentencingReview.pdf) [<https://perma.cc/W5RY-BGB5>].

<sup>38</sup> See David A. Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. R. ONLINE 25, 33–34 (2017); see also Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 539 (2007); Vida B. Johnson, *Federal Criminal Defendants Out of the Frying Pan and into the Fire? Brady and the United States Attorney’s Office*, 67 CATH. U. L. REV. 321, 332–34 (2018); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. Rev. 138, 151–53 (2012); see generally FAIR & JUST PROSECUTION, PROMOTING TRANSPARENCY AND FAIRNESS THROUGH OPEN AND EARLY DISCOVERY PRACTICES (2018), [https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief\\_Discovery.pdf](https://fairandjustprosecution.org/wp-content/uploads/2018/01/FJP.Brief_Discovery.pdf) [<https://perma.cc/CYZ8-PRGF>].

<sup>39</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 20–21; see also CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 13–15 (2016), <http://cjpp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf> [<https://perma.cc/QZF4-H8UY>]; FAIR & JUST PROSECUTION, FINES, FEES, AND THE POVERTY PENALTY (2017), [https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief\\_Fines.Fees\\_.pdf](https://fairandjustprosecution.org/wp-content/uploads/2017/11/FJPBrief_Fines.Fees_.pdf) [<https://perma.cc/GT3C-AKJL>]; MATTHEW MENDNDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP

<p><b>8. Immigration</b>  <i>The justice system disproportionately harms non-US citizens, who are a particularly vulnerable group</i><sup>40</sup></p>	<p>Refuse to levy criminal charges against any non-US citizens and refuse to cooperate with ICE</p>	<p>Institute policies that reduce criminal charges levied against non-US citizen defendants and reduces the exposure of non-US citizens to the justice system (e.g., calling fewer non-US citizen witnesses)</p>	<p>Consistently charge non-US citizens with criminal offenses and persistently comply with ICE detainers</p>
<p><b>9. Juveniles</b>  <i>Those under the age of 25 have yet to fully develop emotionally or neurologically; prosecutors should treat them as the juveniles that they are and not as adults</i><sup>41</sup></p>	<p>Refuse to seek criminal punishment for any juveniles (i.e., people under 25)</p>	<p>Institute policies including not prosecuting juveniles for minor or non-violent crimes, not prosecuting juveniles as adults, and diverting juveniles</p>	<p>Consistently charge juveniles as adults and seek criminal punishment for juveniles who allegedly committed minor and non-violent crimes</p>

COSTS OF CRIMINAL JUSTICE FEES AND FINES (2019), [https://www.brennancenter.org/sites/default/files/2019-11/2019\\_10\\_Fees%26Fines\\_Final4\\_0.pdf](https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final4_0.pdf) [<https://perma.cc/LR6T-UJBD>].

<sup>40</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 11; see generally Heidi Altman, *Prosecuting Post-Padilla: State Interests and the pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1 (2012); Hillary Blout et al., *The Prosecutor's Role in the Current Immigration Landscape*, CRIM. J., Winter 2018, [https://www.ilrc.org/sites/default/files/resources/prosec\\_role\\_immig\\_landscape-rc-20180215.pdf](https://www.ilrc.org/sites/default/files/resources/prosec_role_immig_landscape-rc-20180215.pdf) [<https://perma.cc/3AQW-L9B6>]; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); *Collateral Consequences, Immigration And Second Chances*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/issues/collateral-consequences-immigration-and-second-chances/> [<https://perma.cc/AG2C-GSHC>].

<sup>41</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 9; see generally FAIR & JUST PROSECUTION, *YOUNG ADULTS IN THE JUSTICE SYSTEM* (2019), [https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP\\_Brief\\_YoungAdults.pdf](https://fairandjustprosecution.org/wp-content/uploads/2019/01/FJP_Brief_YoungAdults.pdf) [<https://perma.cc/VY9V-PF9Y>]; Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103 (2013).

<p><b>10. Police Brutality and Accountability</b>  <i>Police brutality in communities of color is widespread, and prosecutors encourage police misconduct by relying on unreliable police testimony in prosecuting defendants<sup>42</sup></i></p>	<p>Completely eliminate police brutality and corruption and publicly support police abolition; eradicate prosecutors' use of unreliable police testimony</p>	<p>Charge police officers who commit police brutality, publicly advocate that municipalities defund the police; reduce reliance on testimony from unreliable police officers</p>	<p>Fail to prosecute police officers who commit acts of brutality, remain silent about police reform; rely on police officers who have provided unreliable evidence in court</p>
<p><b>11. Prosecutorial Accountability</b>  <i>Prosecutors face little-to-no accountability for unethical or illegal behavior, leading to miscarriages of justice<sup>43</sup></i></p>	<p>Completely eliminate illegal and unethical prosecutorial conduct</p>	<p>Accord appropriate punishments—including job termination and criminal charges when necessary—for subordinate prosecutors who behave unethically or illegally</p>	<p>Make no gains in establishing prosecutorial accountability or exacerbate prosecutorial accountability</p>
<p><b>12. Office Culture and Diversity</b>  <i>DA offices often have overly combative, win-at-all-costs cultures or tolerate prosecutors' casually using racist, sexist, or other bigoted language that reinforce anti-defendant attitudes<sup>44</sup></i></p>	<p>Successfully cultivate culture of seeking justice over winning cases and maintain zero tolerance for racist, sexist, or other bigoted language in the workplace</p>	<p>Make gains orienting office culture towards justice and reduce racist, sexist, or other bigoted language in the workplace</p>	<p>Fail to tackle win-at-all-cost culture or racist, sexist, or other bigoted language in the workplace</p>

<sup>42</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 19; see generally FAIR & JUST PROSECUTION, PROMOTING INDEPENDENT POLICE ACCOUNTABILITY MECHANISMS (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Police-Accountability.9.25.pdf> [<https://perma.cc/8BCF-VFAF>]; Sklansky, *supra* note 38, at 38–40; BLACK LIVES MATTER, <https://blacklivesmatter.com/> [<https://perma.cc/Z89N-5PE9>].

<sup>43</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 14–15; see generally Bruce Green & Ellen Yaroshesky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999); Ellen Yaroshesky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 U.C. DAVIS L. REV. 275 (2004).

<sup>44</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 14–15; Sklansky, *supra* note 38, at 39–40.

<p><b>13. Probation and Parole</b>  <i>Probation and parole increase the likelihood that a person will reoffend purely because of technical violations, trapping the person in the penal system at the expense of rehabilitation or reducing recidivism</i><sup>45</sup></p>	<p>Substitute all probation and parole with non-supervised diversion programs</p>	<p>Limit probationary terms, increase the usage of non-supervised diversion programs in the stead of probation or parole, reduce technical violations</p>	<p>Consistently ask for lengthy probation or parole accompanied with myriad technical violations</p>
<p><b>14. Wrongful Convictions</b>  <i>America has a longstanding history of wrongful prosecutions and convictions—the epitome of miscarriage of justice</i><sup>46</sup></p>	<p>Exonerate every defendant whom the county has wrongfully convicted</p>	<p>Set up well-resourced conviction integrity units to examine past convictions and administer exonerations</p>	<p>Tepidly address wrongful convictions</p>

Promulgating a list of metrics is difficult because it is impossible to generate a single progressive roadmap for prosecutors. David Sklansky rightfully points out that there is no consensus on what “best practices” are for prosecutors’ offices because people have mixed expectations of prosecutors and because prosecutors serve different communities with distinct needs.<sup>47</sup> By offering recommendations with diverging levels of generality, existing literature reflects scholars’ struggle to pin down the policies that progressive prosecutors ought to pursue. At a high level of particularity: the Brennan Center’s list of twenty-one “practical steps”<sup>48</sup> and Fair and Just Prosecution’s “briefs” for newly elected prosecutors.<sup>49</sup> At the abstract end of the spectrum, Joseph Margulis recommends seven high-level goals—such as “be purposeful” and “minimize harm”—as part of his “alternative organizing vision

<sup>45</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 13; see generally Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL’Y 51 (2013).

<sup>46</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 16; see generally FAIR & JUST PROSECUTION, CONVICTION INTEGRITY UNITS AND INTERNAL ACCOUNTABILITY MECHANISMS (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJP-Brief.ConvictionIntegrity.9.25.pdf> [<https://perma.cc/2PG3-3ERM>]; H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 11; Peter A. Joy, *Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (2006); Dennis J. Stevens, *Forensic Science, Wrongful Convictions, and American Prosecutor Discretion*, 47 HOW. J. CRIM. J. 31 (2008); Fred C. Zacharias & Bruce A Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009); *Wrongful Convictions*, EQUAL JUST. INITIATIVE, <https://ejl.org/issues/wrongful-convictions/> [<https://perma.cc/U4QV-UETE>].

<sup>47</sup> See Sklansky, *supra* note 38, at 27.

<sup>48</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33.

<sup>49</sup> See *Issues at a Glance Briefs*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/resources/issues-at-a-glance-briefs/> [<https://perma.cc/4S88-X8X6>].

that guides the operation of the prosecutorial function.”<sup>50</sup> Sklansky’s “handbook” occupies a space between these two poles; it provides ten “suggestions” ranging from “make clear how you want to be judged” to “diversify your staff.”<sup>51</sup>

These existing approaches are helpful for prosecutors who are seeking guidance on running progressive offices. But no clear guidance exists for voters, funders, progressive groups, or other members of the polity who aspire to support progressive prosecutors. This Note provides assessors with a substitute framework that accounts for the totality of each DA’s circumstances while drawing clear lines between progressive and non-progressive prosecution practices.

As a conceptual starting block, an American criminal justice system can be theoretically progressive only if the government (1) treats everyone with dignity; and (2) carries out justice equitably and fairly. Abolitionists would contend that the state can only accomplish these twin goals through abolition of police, prosecutors, and prison. Accepting abolition’s lofty goals, this paper instead turns to two avenues to make progress towards these theoretical goals in today’s America: the state should (1) police, prosecute, and lock up far fewer people; and (2) not disproportionately police, prosecute, and lock up members of marginalized groups (specifically racial and ethnic minorities, sex workers, the LGBTQ+ community, immigrants, and so forth). Drawing on the plethora of existing criminal justice literature—including publications by the aforementioned Brennan Center, Fair and Just Prosecution, and Professor Sklansky—there are fourteen buckets of prosecutorial policies that affect these two theoretical goals and their practical counterparts. Readers can use these fourteen buckets as metrics to assess whether a DA is a bona fide progressive. These metrics are not an Emily’s List- or NRA-style scorecard; readers should not expect prosecutors to hit a certain score for each metric or to check every single box from this list. Rather, readers should combine and weigh these fourteen metrics depending on the DA’s county.

First, assessors should run down the list of fourteen metrics<sup>52</sup> (Column I) and add weights to each metric depending on the specific context and history of that county’s DA office, criminal justice system, politics, and community needs. When assigning weights, the assessor should avoid assigning a binary value or a scale value to each metric; rather, the assessor should assign weights per a legal balancing test.<sup>53</sup> Second, assessors should examine the DA’s specific policies for each relevant metric (i.e., start with Row 1.) If a

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<sup>50</sup> Joseph Margulies, *Seven Steps for Progressive Prosecutors*, VERDICT (Apr. 30, 2019), <https://verdict.justia.com/2019/04/30/seven-steps-for-progressive-prosecutors> [<https://perma.cc/NWZ3-5W5L>].

<sup>51</sup> See Sklansky, *supra* note 38, at 28, 40.

<sup>52</sup> The metrics are not listed in order of importance. Each of the fourteen metrics is at a mid-level of generality and includes many important sub-metrics for assessors’ consideration.

<sup>53</sup> Although imprecise, courts commonly use balancing tests to measure the relative importance of interests. See generally T. A. Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987).

prosecutor's policies fall outside the "outer limit" (Row 1, Column IV) of a given metric, the assessor can potentially shift the prosecutor from progressive to not progressive, or even regressive, status. As for a prosecutor who is pursuing any of a variety of progressive policies (i.e., they fall into Row 1, Column III), assessors can compare those policies with the, theoretically, most progressive stance on each issue (Row 1, Column II) and with the policies of prosecutor peers who find themselves in Column III (refer to Part III: Comparative Analysis for guidance). The assessor should move onto the next metric (i.e., move down to Row 2) and repeat this step for all fourteen metrics. Finally, the assessor should conduct a totality analysis accounting for the analysis from steps one and two, i.e., the weights given to each metric, if and how many times a prosecutor crossed the outer limits of the metrics, how far away the prosecutor's policy was from the theoretically most progressive iteration of the metric, and how the prosecutor's policies for a metric compare with their peers.

No two prosecutors serve the exact same community—this demands a "weighted constellation" approach. Not every metric applies to every prosecutor in equal fashion. For example, readers cannot compare the capital policies of DAs in non-death penalty districts with DAs in death penalty states. Further, this approach accommodates prosecutors who focus on a specific policy because of their county's history and crime trends. Assessors should assign weight to a metric according to a county's relationship with that metric. Take, for example, a district with a troubling history of wrongful convictions; a DA that stakes out progressive stances on the other thirteen metrics but has done little to tackle wrongful convictions is perhaps undeserving of the progressive prosecutor title. But take Aramis Ayala and Melissa Nelson, who have focused on death penalty and wrongful conviction respectively because those issues have a special history in their counties; their failure to address other criminal justice issues may not be evidence of their regression but rather an indicator of how they are prioritizing their communities' needs. Similarly, assessors should not relegate DAs of smaller jurisdictions to regressive or nonprogressive status for failing to develop a policy for a particular metric—they do not have the staff, budget, or bandwidth to enact the same breadth of policies as DAs in metropolitan areas.

Although a totality analysis is, necessarily, a fluid endeavor, each metric allows assessors to draw clear lines between progressive and regressive prosecutorial policies. Each metric has outer-limits and crossing these limits could move a prosecutor from progressive to non-progressive—or even regressive—status. None of these metrics are binary, but some metrics are brighter lines than others. Take the death penalty. Capital punishment supersedes other punishments in its cruelty and degradation of dignity, and the state imposes death in a racially disproportionate manner. Consequently, a truly progressive prosecutor should refuse to pursue the death penalty in any case. Therefore, of the DAs who serve capital districts, it is relatively easy for advocates to separate the genuinely progressive prosecutors from the rest of the pack—they are either seeking the death penalty or they are not. On the



other hand, assessors may have more trouble using the non-prosecution of minor crimes to sieve the progressives from the non-progressives. Prosecutors draw different lines between minor and non-minor crimes, and alternatives to prosecution—such as issuing citations, charging fines, and mandatory classes—have distinct implications for different communities, cases, and contexts. Therefore, each non-prosecution policy on its face tells us little about a prosecutor’s progressiveness. Yet an outer-bound still exists—a DA who prosecutes defendants for the same subset of minor crimes at the same rate as their law-and-order counterparts is not a reformer; it would be intellectually dishonest if they portrayed themselves as a progressive prosecutor.

The framework also lays down guideposts at the other end of the scale—the most progressive policies for each metric. These are the best policies for prosecutors seeking to help create a justice system that treats everyone with dignity and serves justice fairly and equitably. Practically, it may be impossible for even the most well-intentioned prosecutors to attain some of these theoretical limits for political reasons and other actors’ interference. Nonetheless, this Note serves up these metrics and their bright lines as a helpful yardstick for assessors.

To aid assessors who are evaluating a prosecutor’s performance for a specific metric, this Note provides a comparative analysis of “progressive” prosecutors’ records on seven of the fourteen metrics: the death penalty, bail reform, decarceration and the New Jim Crow, non-prosecution, wrongful convictions, police accountability, and prosecutorial accountability. The comparative analysis demarcates the outer limits for each of the seven metrics and identifies the prosecutors who have crossed those lines and could therefore be considered non-progressive or regressive. This subset was selected because the media has adequately covered the track record of many of the prosecutors who form this Note’s dataset (see “Part B. The Prosecutors”) for each of these metrics; this paper trail is conducive to a thorough comparative analysis for each of these seven metrics. Because the other seven metrics have a smaller media paper trail, conducting a robust comparative analysis without delving into federal government and municipal records is a difficult exercise that exceeds this Note’s methodological scope.

### *B. The Prosecutors*

Who identifies as a “progressive prosecutor”? The phrase “progressive prosecutor” crept into the national conscience after a succession of attorneys donning the progressive prosecutor mantle—Larry Krasner of Philadelphia, Kim Foxx of Cook County, Kim Ogg of Houston, and Rachel Rollins of Sussex County—won elections in 2017 and 2018. Since their headline-grabbing electoral successes, progressive district attorney candidates have hit the

campaign trail all over the nation<sup>54</sup>—including in Queens, St. Louis, Sacramento, and Denver—to offer an alternative choice to traditional “law-and-order” incumbents.<sup>55</sup> But cabining the phrase “progressive prosecutor” with the Krasner-era squad is an improperly narrow conception of the diverse set of attorneys who seek to portray themselves as liberal reformers.

First, several DAs have explicitly portrayed themselves as progressive reformers since the early 2010s—long predating the 2017 and 2018 wave. As early as 2011, former San Francisco DA George Gascón supported propositions that would end criminal punishments for nonviolent offenders, helped lower California’s prison population, and expunged many convictions.<sup>56</sup> Back in 2012, Jackie Lacey of Los Angeles touted her support for progressive policies—including using more alternative courts, probation, drug treatment programs, programs that treat the mentally ill—and she has publicly emphasized her own racist experiences with the police.<sup>57</sup> During the Obama Administration, Hillar Moore III of Louisiana advocated for progressive prosecution and criminal justice reform at a White House roundtable discussion and several progressive organizations’ panels.<sup>58</sup>

Second, many DAs who did not initially hold themselves out to be “progressive” in their first campaign and early years in office have changed their tune and have publicly tacked leftward. Perhaps the most obvious example is Cyrus (or “Cy”) Vance. When he first took office in 2010, Vance’s “win-at-all-costs” attitude fostered a cohort of line prosecutors who refused to disclose evidence to the defense and vigorously prosecuted minor crimes—such as turnstile jumping and marijuana possession—in a racially discriminatory fashion.<sup>59</sup> But as the public increasingly scrutinized Vance’s office in the late oughts, Vance created a conviction integrity unit and announced that he would no longer prosecute marijuana possession.<sup>60</sup>

<sup>54</sup> See Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFPOST (May 12, 2018, 7:00 AM), [https://www.huffpost.com/entry/george-soros-prosecutors-reform\\_n\\_5af2100ae4b0a0d601e76f06](https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06) [https://perma.cc/L885-TPKE].

<sup>55</sup> See Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 353–55 (2001).

<sup>56</sup> See Evan Sernoffsky, *George Gascón Was a Progressive DA in Progressive San Francisco. Why Did He Make So Many Enemies?*, S.F. CHRONICLE (Oct. 21, 2019, 9:59 AM), <https://www.sfchronicle.com/crime/article/Gasc-n-made-enemies-as-SF-s-reformer-district-14545705.php> [https://perma.cc/UHQ8-92U2]. Gascón is running against Jackie Lacey in the 2020 election for Los Angeles County’s District Attorney. *Id.*

<sup>57</sup> See Ann Garrison, *Jackie Lacey – First Black, First Woman – in Run-Off for LA DA, as California Prisoners Head Home*, S.F. BAYVIEW NAT’L BLACK NEWSPAPER (June 10, 2012), <https://sfbayview.com/2012/06/jackie-lacey-first-black-first-woman-in-run-off-for-la-da-as-california-prisoners-head-home/> [https://perma.cc/WEZ6-76Z2].

<sup>58</sup> See Roy L. Austin, Jr. & Meg Reiss, *Focusing on Prosecutors Is Vital to Criminal Justice Reform*, WHITE HOUSE PRESIDENT BARACK OBAMA (Dec. 16, 2016, 3:28 PM), <https://obamawhitehouse.archives.gov/blog/2016/12/16/focusing-prosecutors-vital-criminal-justice-reform> [https://perma.cc/3FSS-2WDR].

<sup>59</sup> See Tom Robbins, *The People vs. Cy Vance*, MARSHALL PROJECT (Apr. 29, 2018, 9:00 PM), <https://www.themarshallproject.org/2018/04/29/the-people-vs-cy-vance> [https://perma.cc/N3N8-XUSY].

<sup>60</sup> See *id.* Another example hails from across the Hudson. Melinda Katz narrowly defeated Tiffany Cabán in the 2019 Queens District Attorney Democratic primary. Cabán caught na-

Third, neither party membership nor geography circumscribe this group. Republican DA Melissa Nelson's creating Florida's first conviction integrity unit sent a shockwave through local politics.<sup>61</sup> And these prosecutors are not confined to metropolises on the coasts: Wesley Bell, Jim Stewart, Kim Ogg, Mark Gonzalez, and Beth McCann are southern and southwestern reformers.

Although the umbrella of self-espoused liberals may be broader than the group that many intuitively associate with the concept of progressive prosecution, such prosecutors are still a tiny slice of America's roughly 2,437<sup>62</sup> elected prosecutors.<sup>63</sup> Pinpointing the DAs who identify as progressive prosecutors is surprisingly difficult. In 2015, the Reflective Democracy Campaign published a dataset of every single elected prosecutor who held office in the summer of 2015;<sup>64</sup> a more updated dataset does not exist. Assuming that each of these 2,437 offices still exist in 2020, there is no available literature on how many of these prosecutors self-identify as progressive or provide a method to make such identifications. Although Paul Butler estimates that fewer than 100 of America's elected prosecutors identify as progressive,<sup>65</sup> he has not specified the prosecutors he includes on his list of 100 or how he drew up that number.

This Note does not present an updated dataset of America's elected prosecutors; nor does it name every prosecutor that self-identifies as progressive or list all of their policies.<sup>66</sup> Rather, this Note presents a subset of the

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tional attention for her progressive platform, and Katz clearly ran to Cabán's right. See Vivian Wang, *Tiffany Cabán Concedes Queens D.A. Race, Dashing Progressives' Hopes*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/nyregion/tiffany-caban-queens-da-concedes.html> [<https://perma.cc/DQL9-CL5J>]. But after her primary victory, Katz has repositioned herself as a progressive reformer and has radically shifted from her primary platform—Katz has since suggested that she aims to eliminate cash bail, and plans on declining to prosecute marijuana possession, decriminalizing sex work, and closing down Rikers. See Christine Chung, *After Primary That Veered Left, Dem Stalwart Katz Lands in Progressive Camp*, CITY (Sept. 5, 2019), <https://thecity.nyc/2019/09/katz-says-shes-ready-to-take-a-left-turn-as-queens-da.html> [<https://perma.cc/6NYM-2XKU>].

<sup>61</sup> See Larry Hannan, *SA Melissa Nelson (Office of the State Attorney for Florida's Fourth Judicial Circuit) Elections Matter: Florida's 4th Judicial Circuit*, APPEAL (July 10, 2017), <https://theappeal.org/elections-matter-floridas-4th-judicial-circuit-f0daa8a80edd/> [<https://perma.cc/WH8D-4QZ4>].

<sup>62</sup> See Press Release, Women Donors Network, White Men Dominate Elected Prosecutor Seats Nationwide; 60% of States Have No Elected Black Prosecutors, at 1 (July 7, 2015), <https://womendonors.org/wp-content/uploads/2015/07/press-release.pdf> [<https://perma.cc/5PF2-XSTZ>].

<sup>63</sup> America's DAs are a remarkably homogenous and un-diverse group—98% are white, 80% are male, and 75% run for office unopposed. See Speri, *supra* note 20; Color of Change, *Winning Justice: Taking on Prosecutors Narrated By Common*, YOUTUBE (Jan. 11, 2019), <https://www.youtube.com/watch?v=lkwMGEiRBe4&feature=youtu.be>; see Women Donors Network, *supra* note 62, at 1.

<sup>64</sup> See JUSTICE FOR ALL, <https://wholeads.us/justice/> [<https://perma.cc/KZ33-278V>]. It is worth noting that this dataset includes Attorney Generals, which are outside this paper's scope.

<sup>65</sup> See Paul Butler, *Prosecutors' Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019), [https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693\\_story.html](https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html) [<https://perma.cc/S7EE-S3PB>].

<sup>66</sup> However, these projects would fill a hole in the existing literature.

twenty-one incumbent DAs—whom the media and academia have named “progressive prosecutors”—to illustrate how many prosecutors who lean into their progressive image are less reformist than meets the eye. This Note relies on media and academic coverage as an, albeit imperfect, indicator of district attorneys’ self-proclaimed image. Using online media and journal search tools,<sup>67</sup> searching iterations of the phrases “progressive prosecutor” and “reformist district attorney” yielded the names of thirty-three attorneys mentioned in articles containing the aforementioned phrases.<sup>68</sup> Those who are not incumbent DAs were removed from the dataset.<sup>69</sup> Of the incumbent DAs, those who did not meet any of the following four criteria were also removed from the dataset: 1) prosecutors who have explicitly referred to themselves as a “progressive” or “reform” prosecutor; 2) prosecutors who have otherwise presented themselves as a “progressive” or “reform” prosecutor without using those literal words; 3) prosecutors whom mainstream media outlets, a journal article, or criminal justice organizations have cited as a “progressive” or “reform” prosecutor; or 4) prosecutors who have announced policy proposals that are progressive by mainstream criminal justice standards. The remaining twenty-one attorneys are incumbent DAs whom the public heavily associate with the progressive prosecutor label.

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<sup>67</sup> These include Google News, LexisNexis, Westlaw, and Bloomberg.

<sup>68</sup> The thirty-three attorneys yielded by this search were Aramis Ayala, Beth McCann, Charles Todd Henderson, Chesa Boudin, Cyrus Vance, Darcel Clark, Eric Gonzalez, George Gascón, Jackie Lacey, James Stewart, John Chisholm, John Creuzot, Kamala Harris, Ken Thompson, Kim Foxx, Kim Ogg, Kym Worthy, Larry Lrasner, Leon Cannizzaro, Marco Serna, Mark Gonzalez, Marilyn Mosby, Margaret Moore, Mark Dupree, Mark Gonzalez, Melissa Nelson, Michael O’Malley, Parisa Dehghani Tafti, Rachel Rollins, Scott Colon, Stephanie Morales, Tiffany Cabán, and Wesley Bell. This is not to say that other prosecutors who are either considered to be progressive or self-identify as progressive do not exist. There may be local prosecutors who have not received generous local or national media attention for their progressive campaign platforms or policies. This is an unfortunate limitation of a study that delves into candidates for office who portray themselves as a particular image—those who fail to make their image known are necessarily excluded from the dataset.

<sup>69</sup> Because this paper illustrates its argument by casting a critical eye on what supposedly progressive prosecutors have done in office, this subset is cabined to incumbent DAs and excludes unsuccessful progressive prosecutor candidates, such as Tiffany Cabán, or recently elected reformist district attorneys who had not taken office when this article was finished, such as Chesa Boudin.

TABLE 2

<u>Prosecutor</u>	<u>Factor I:</u> Explicitly referred to themselves as a “progressive” or “reform” prosecutor	<u>Factor II:</u> Otherwise presented themselves as a “progressive” or “reform” prosecutor	<u>Factor III:</u> Presented by mainstream media outlets, a journal article, or criminal justice organizations as a “progressive” or “reform” prosecutor	<u>Factor IV:</u> Announced policy proposals that are progressive by mainstream criminal justice standards
1. Aramis Ayala <i>Florida’s Ninth Judicial Circuit State Attorney</i> <sup>70</sup>			X	X
2. Beth McCann <i>Denver District Attorney</i> <sup>71</sup>	X	X	X	X
3. Cyrus Vance <i>Manhattan District Attorney</i> <sup>72</sup>	X	X		X
4. Eric Gonzalez <i>Brooklyn District Attorney</i> <sup>73</sup>	X	X	X	X

<sup>70</sup> See Aramis Ayala, POLITICO, <https://www.politico.com/interactives/2017/politico50/aramis-ayala/> [https://perma.cc/XSX3-P3J3].

<sup>71</sup> See FAIR & JUST PROSECUTION ET AL., *supra* note 33, at 27; Collier Meyerson, *Prosecutors Keep Their Jobs by Putting People in Jail. Can They Be Leaders in the Fight for Criminal-Justice Reform?*, NATION (Nov. 14, 2017), <https://www.thenation.com/article/prosecutors-keep-their-jobs-by-putting-people-in-jail-can-they-be-leaders-in-the-fight-for-criminal-justice-reform/> [https://perma.cc/2Z8L-3C3T]; Elise Schmelzer, *Denver District Attorney’s Office to Examine Past Cases for Potential Racial Bias as McCann Aligns Herself with National Prosecutor Reform Movement*, DENVER POST (Aug. 19, 2019, 6:00 AM), <https://www.denverpost.com/2019/08/19/denver-district-attorney-beth-mccann/> [https://perma.cc/3KFQ-GB48].

<sup>72</sup> See Josie D. Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html> [https://perma.cc/8LSS-AXZM]; Robbins, *supra* note 59.

<sup>73</sup> See Kori Chambers, *The ‘Progressive Prosecutor.’ Why the Brooklyn DA Wants Criminals Released from Prison Sooner*, PIX11 (May 14, 2019, 10:45 PM), <https://pix11.com/2019/05/14/the-progressive-prosecutor-why-the-brooklyn-da-wants-criminals-released-from-prison-sooner/> [https://perma.cc/U2KH-3RT5]; *Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office Is Implementing as Part of the Justice 2020 Initiative, Establishing a National Model of a Progressive Prosecutor’s Office*, BROOKLYN DISTRICT ATTORNEY’S OFFICE (Mar. 11, 2019), <http://www.brooklynda.org/2019/03/11/brooklyn-district-attorney-eric-gonzalez-unveils-sweeping-reforms-his-office-is-implementing-as-part-of-the-justice-2020-initiative-establishing-a-national-model-of-a-progressive-prosecutors/> [https://perma.cc/LT59-MAU3]; ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN (2020), <http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf> [https://perma.cc/BB2F-SLG6].

5. Hillar Moore III <i>East Baton Rouge District Attorney</i> <sup>74</sup>		X	X	
6. Jackie Lacey <i>Los Angeles District Attorney</i> <sup>75</sup>		X	X	
7. James Stewart <i>Caddo Parrish District Attorney</i> <sup>76</sup>		X	X	X
8. John Chisholm <i>Milwaukee District Attorney</i> <sup>77</sup>			X	
9. John Creuzot <i>Dallas District Attorney</i> <sup>78</sup>		X	X	
10. Kim Foxx <i>Cook County State Attorney</i> <sup>79</sup>	X	X	X	X

<sup>74</sup> See Lane, *supra* note 5; Pishko, *supra* note 3.

<sup>75</sup> See Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, APPEAL (Nov. 12, 2019), <https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/> [<https://perma.cc/6UZS-LAYU>].

<sup>76</sup> See Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> [<https://perma.cc/5E56-2QNS>]; Alec, *LA: Reform Candidate James Stewart wins Caddo Parish DA Election*, OPEN FILE BLOG (Nov. 24, 2015), <https://www.prosecutorialaccountability.com/2015/11/24/la-reform-candidate-james-steward-wins-caddo-parish-da-election/> [<https://perma.cc/7ZU6-WCES>]; Meyerson, *supra* note 71.

<sup>77</sup> See Angela J. Davis, *The Progressive Prosecutor: An Imperative For Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 3 (2018).

<sup>78</sup> See Michael Barajas, *Dallas County DA John Creuzot Calls New Reforms 'A Step Forward in Ending Mass Incarceration'*, TEX. OBSERVER (Apr. 11, 2019, 1:19 PM), <https://www.texasobserver.org/dallas-county-da-john-creuzot-calls-new-reforms-a-step-forward-in-ending-mass-incarceration/> [<https://perma.cc/QEF3-XUVH>]; Ariel Ramchandani, *A Texas Prosecutor Fights for Reform*, ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/politics/archive/2019/10/can-john-creuzot-reform-texas-prosecution/600592/> [<https://perma.cc/53CS-EH6W>]; Shawn Shinneman, *The Atlantic Profiles Dallas DA John Creuzot*, ATLANTIC (Oct. 25, 2019, 3:53 PM), <https://www.dmagazine.com/frontburner/2019/10/the-atlantic-profiles-dallas-da-john-creuzot/> [<https://perma.cc/5LV6-N837>].

<sup>79</sup> See Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 758 (2018); Bazelon & Krinsky, *supra* note 21; Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx> [<https://perma.cc/K9C4-XD3J>]; Daniella Gibbs Léger et al., *Kim Foxx: What Does It Mean To Be a Progressive Prosecutor?*, CTR. AM. PROGRESS (Mar. 21, 2019, 10:08 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2019/03/21/467603/kim-foxx-mean-progressive-prosecutor/> [<https://perma.cc/6Y9Y-GB3F>].

11. Kim Ogg <i>Houston District Attorney</i> <sup>80</sup>	X	X	X	X
12. Kym Worthy <i>Detroit District Attorney</i> <sup>81</sup>			X	
13. Larry Krasner <i>Philadelphia District Attorney</i> <sup>82</sup>	X	X	X	X
14. Leon Cannizzaro <i>Orleans Parish District Attorney</i> <sup>83</sup>		X		X
15. Mark Gonzalez <i>Nucres County District Attorney</i> <sup>84</sup>	X	X	X	X
16. Margaret Moore <i>Travis County District Attorney</i> <sup>85</sup>		X	X	X

<sup>80</sup> See *The Paradox of “Progressive Prosecution”*, *supra* note 79, at 758; Bazelon & Krinsky, *supra* note 21.

<sup>81</sup> See Lauren N. Williams, *ESSENCE Unveils List of 100 Woke Women for the May 2017 Issue*, *ESSENCE* (Apr. 16, 2017), <https://www.essence.com/entertainment/100-woke-women-may-2017-issue/> [<https://perma.cc/QE5Z-VXBU>].

<sup>82</sup> See *Progressive Prosecution: 2 Years in with DA Larry Krasner*, HARV. L. SCHOOL, <https://hls.harvard.edu/event/opias-progressive-prosecution-2-years-in/> [<https://perma.cc/5GPS-5F6V>]; Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, *N.Y. TIMES MAG.* (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/Q7YH-Q9QK>].

<sup>83</sup> See Nicholas Chrastil, *‘Who’s Going to Be Smarter on Crime?’ A Look Ahead at the 2020 DA’s Race*, *LENS* (Mar. 1, 2019), <https://thelensnola.org/2019/03/01/whos-going-to-be-smarter-on-crime-a-look-ahead-at-the-2020-das-race/> [<https://perma.cc/FB9B-Y97J>]; Rice, *supra* note 72.

<sup>84</sup> See Timothy Bella, *The Most Unlikely D.A. in America*, *POLITICO MAG.* (May 6, 2018), <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322> [<https://perma.cc/6LYZ-WVD5>]; Henry Gass, *Meet a New Breed of Prosecutor*, *CS MONITOR* (Jul. 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> [<https://perma.cc/F6T4-DGBT>]; Justin Miller, *The New Reformer DAs*, *AMERICAN PROSPECT* (Jan. 2., 2018), <https://prospect.org/health/new-reformer-das/> [<https://perma.cc/76HT-GQDK>].

<sup>85</sup> See Ryan Autullo, *Outside PAC Directs Money into Travis DA’s Race, Targeting Margaret Moore*, *STATESMAN* (Aug. 10, 2019), <https://www.statesman.com/news/20190810/outside-pac-directs-money-into-travis-das-race-targeting-margaret-moore> [<https://perma.cc/MK7Q-XRL7>]; Michael King, *District Attorney Margaret Moore Announces Re-Election Campaign*, *AUSTIN CHRONICLE* (May 24, 2019), <https://www.austinchronicle.com/daily/news/2019-05-24/district-attorney-margaret-moore-announces-re-election-campaign/> [<https://perma.cc/4SZ2-LYCJ>]; Jeff Stensland, *‘Progressive Prosecution’ Concerns Austin Police Union*, *SPECTRUM NEWS* (Dec. 7, 2018, 6:30 PM), <https://spectrumlocalnews.com/tx/austin/news/2018/12/08/progressive-prosecution-concerns-austin-police-union> [<https://perma.cc/Z6C9-2MFC>].

17. Melissa Nelson <i>Florida's Fourth Judicial Circuit State Attorney</i> <sup>86</sup>		X	X	X
18. Michael O'Malley <i>Cuyahoga County District Attorney</i> <sup>87</sup>		X	X	
19. Rachel Rollins <i>Suffolk County District Attorney</i> <sup>88</sup>	X	X	X	X
20. Stephanie Morales <i>Portsmouth Commonwealth Attorney</i> <sup>89</sup>		X	X	X
21. Wesley Bell <i>St. Lois District Attorney</i> <sup>90</sup>	X	X	X	X

### III. COMPARATIVE ANALYSIS

#### A. Bail Reform

Cash bail only serves to imprison those who cannot afford bail. Most state prison inmates have not been charged with any crime; they languish

<sup>86</sup> See Stensland, *supra* note 85.

<sup>87</sup> See Cory Shaffer, *Activists Demand Cuyahoga County Prosecutor Follow Progressive Prosecutors Elsewhere, Bar Requests of Cash Bail for Low-Risk Defendants*, CLEVELAND.COM (Aug. 6, 2019) [hereinafter Shaffer, *Activists*], <https://www.cleveland.com/court-justice/2019/08/activists-demand-cuyahoga-county-prosecutor-follow-progressive-prosecutors-elsewhere-bar-requests-of-cash-bail-for-low-risk-defendants.html> [https://perma.cc/M32G-BXZP]; Cory Shaffer, *Michael O'Malley Topples Cuyahoga County Prosecutor Timothy McGinty*, CLEVELAND.COM, [https://www.cleveland.com/metro/2016/03/michael\\_omalley\\_topples\\_cuyaho\\_1.html](https://www.cleveland.com/metro/2016/03/michael_omalley_topples_cuyaho_1.html) (last accessed Nov. 21, 2019) [https://perma.cc/3BJZ-NY33].

<sup>88</sup> See Catherine Elton, *The Law According to Rachael Rollins*, BOS. MAG. (Aug. 6, 2019, 9:47 AM), <https://www.bostonmagazine.com/news/2019/08/06/rachael-rollins/> [https://perma.cc/8FJS-TPXD].

<sup>89</sup> See Maryam Saleh, *Prosecutor Who Convicted White Police Officer for Killing Black Teen Is Re-Elected in Contentious Race*, INTERCEPT (Nov. 7, 2017, 8:58 PM), <https://theintercept.com/2017/11/07/prosecutor-who-convicted-white-police-officer-for-killing-black-teen-is-re-elected-in-contentious-race/> [https://perma.cc/96LT-JR78].

<sup>90</sup> See Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, GUARDIAN, <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> [https://perma.cc/MG9P-EN5W]; Speri, *supra* note 20.



behind bars simply because they cannot afford bail.<sup>91</sup> Countless studies show that bail is not necessary to serve its ostensible policy rationale, namely to force untrustworthy criminal defendants to show up to court;<sup>92</sup> other forms of bail, such as unsecured bonds, are just as effective.<sup>93</sup> Cash bail compounds the justice system's disproportionate impact on racial minorities and indigent defendants<sup>94</sup> by forcing marginalized defendants to plead to higher sentences and charges than those given to defendants who can afford bail.<sup>95</sup> Cash bail enriches bail bondsmen at the expense of the thousands of poor people—whom prosecutors have not charged with a crime—who are stuck in state prisons.<sup>96</sup> The most progressive stance that a prosecutor could take is to refuse to seek cash bail in any case. Well-meaning prosecutors could limit their requests for cash bail to non-major or non-violent crimes, support efforts to eliminate cash bail in their states, allow defendants to use unsecured bonds in place of cash bail, place caps on how the amount of bail that their prosecutors can request for “crimes of poverty,”<sup>97</sup> and support bail funds.<sup>98</sup> This metric's obvious outer-limit is refusing to offer cash bail, even for minor crimes.

There is no record of any prosecutor adhering to the most theoretically progressive version of this metric. Those who fall on the more progressive

<sup>91</sup> See Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36–37 *BUFF. PUB. INT. L.J.* 29, 32 (2019).

<sup>92</sup> See *id.*; Udi Ofer, *We Can't End Mass Incarceration Without Ending Money Bail*, *ACLU* (Dec. 11, 2017, 4:30 PM), <https://www.aclu.org/blog/smart-justice/we-cant-end-mass-incarceration-without-ending-money-bail> [<https://perma.cc/7Y9V-39F3>]; Stephanie Wykstra, *Bail Reform Which Could Save Millions of Unconvicted People from Jail, Explained*, *VOX* (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [<https://perma.cc/HTG4-5HCS>]. The advocacy organization Robert F. Kennedy Human Rights demonstrated this point by spending \$ 1.2 million to bail out 102 defendants from Rikers. Only two of those defendants failed to show up for their next court hearing. See Jeffery C. Mays, *105 New York City Inmates Freed in Bail Reform Experiment*, *N.Y. TIMES* (Nov. 20, 2018), <https://www.nytimes.com/2018/11/20/nyregion/bail-reform-rikers-rfk-nyc.html> [<https://perma.cc/NV6L-6YGM>].

<sup>93</sup> The Vera Institute has found that out of 99 people who were released on unsecured bail or partly secured bond, 88% returned to court, and only 8% were arrested before trial for another felony charge. See Wykstra, *supra* note 92 (citing *The State of Justice Reform 2017*, *VERA*, <https://www.vera.org/state-of-justice-reform/2017> [<https://perma.cc/A4LE-4PWN>]).

<sup>94</sup> See Johnson, *supra* note 91, at 32–34.

<sup>95</sup> See Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges 1* (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), <https://www.nber.org/papers/w22511.pdf> [<https://perma.cc/V48T-5538>].

<sup>96</sup> See *COLOR OF CHANGE & ACLU, SELLING OFF OUR FREEDOM 12–15* (2017), [https://www.aclu.org/sites/default/files/field\\_document/059\\_bail\\_report\\_2\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf) [<https://perma.cc/562W-YLCW>].

<sup>97</sup> See Rosa Goldensohn, *New York's Most Desperate Caught Up in 'Crimes of Poverty'*, *CITY* (Oct. 14, 2019), <https://thecity.nyc/2019/10/new-yorks-most-desperate-caught-up-in-crimes-of-poverty.html> [<https://perma.cc/8WCR-J4GU>]; see also Mirko Bagaric, *Rich Offender, Poor Offender: Why It (Sometimes) Matters in Sentencing*, 33 *L. & INEQ.* 1, 3–4 (2015).

<sup>98</sup> Bail funds are charitable funds that are used to put up bail for defendants too poor to pay their way out of jail. See Alysia Santo, *Bail Reformers Aren't Waiting for Bail Reform*, *MARSHALL PROJECT* (Aug. 23, 2019), <https://www.themarshallproject.org/2016/08/23/bail-reformers-aren-t-waiting-for-bail-reform> [<https://perma.cc/D8UZ-5UQB>].

end of this metric's spectrum—including Wesley Bell,<sup>99</sup> Larry Krasner,<sup>100</sup> Kim Foxx,<sup>101</sup> and Michael O'Malley<sup>102</sup>—have ended cash bail requests for non-violent, minor crimes and have commanded their prosecutors to stop requesting unnecessarily lofty bail. A little to Bell's, Krasner's, Foxx's, and O'Malley's right stand Beth McCann and Rachel Rollins; both refuse to eliminate cash bail outright for non-violent or minor crimes. McCann permits her prosecutors to allow release on personal bond “when appropriate.”<sup>103</sup> Rollins's 2019 “Policy Memo” asks her prosecutors to get their supervisors' approval to request cash bail.<sup>104</sup>

But other members of the set have troublingly nonprogressive bail policies. Jackie Lacey and Leon Cannizzaro adamantly seek cash bail for even non-violent, minor crimes. Indeed, Cannizzaro has gone so far as to slam New Orleans's bail funds<sup>105</sup> as “extremely disturbing” and providing defendants “a get-out-of-jail-free card.”<sup>106</sup> During their campaigns, Travis County's

<sup>99</sup> See Speri, *supra* note 20.

<sup>100</sup> Krasner's office identified twenty-five nonviolent, non-sex-related charges that constitute up to 61% of all the office's cases, where the bail was set so low it was “effectively only a punishment for those too poor to pay it.” Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [<https://perma.cc/DPQ5-PUVV>]. Krasner instituted a policy of not recommending bail for those charges; as a result, nearly 1,750 defendants were released without cash bail in 2018. See *id.*

<sup>101</sup> In 2017, Kim Foxx announced that her office would recommend releasing people pretrial when the defendant has no violent criminal history, when the defendant's current offense is a misdemeanor or low-level felony, and when there are no other risk factors. See *State's Attorney Foxx Announces Major Bond Reform*, COOK COUNTY ST.'S ATT'Y (Jun. 12, 2017), <https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform> [<https://perma.cc/3GR6-J3SF>]. In doing so, Foxx followed through on her campaign pledge to release people in jail who could not afford to post bail of \$1,000 or less. See *id.*

<sup>102</sup> Michael O'Malley announced that he instructed his prosecutors to defer to the judge to set bond in non-violent cases and to seek non-cash bail for non-violent felony cases. See Shaffer, *Activists*, *supra* note 87.

<sup>103</sup> Schmelzer, *supra* note 71.

<sup>104</sup> See SUFFOLK CTY. DIST. ATTORNEY, THE RACHAEL ROLLINS POLICY MEMO 15 (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/5DZB-EUUF>]; see also Walter Wuthmann, *Rachael Rollins, 100 Days in: What Has Changed, and What Hasn't, Under the Reformer DA*, WBUR NEWS (Apr. 12, 2019), <https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days> [<https://perma.cc/88N5-395L>]. It is worth noting that Rollins's memo contradicts her campaign promise to refuse to ask for cash bail. See Wuthmann, *supra*.

<sup>105</sup> See Ramon Antonio Vargas, *Cannizzaro Rails Against Incarceration Reduction Efforts, Saying They Threaten Public Safety*, NOLA.COM (Feb. 5, 2019, 4:49 PM), [https://www.nola.com/news/crime\\_police/article\\_d91ad729-21a5-5083-ae36-fa644405cfc8.html](https://www.nola.com/news/crime_police/article_d91ad729-21a5-5083-ae36-fa644405cfc8.html) [<https://perma.cc/EZD7-LBCZ>].

<sup>106</sup> See Raven Rakia, *New Orleans Prosecutor Calls New Bail Fund 'Extremely Disturbing'*, APPEAL (Nov. 28, 2019), <https://theappeal.org/new-orleans-da-stokes-fears-over-bail-fund/> [<https://perma.cc/5NV8-NBTH>]. Cannizzaro probably dislikes bail funds because Louisiana has a “user-pay” justice system. In user-pay systems, the courts, district attorneys, law enforcement, and public defenders derive their revenue through payments from defendants. See generally MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS (Jan. 2017), <https://www.vera.org/downloads/publications/past-due-costs-consequences-charging-for-justice-new-orleans.pdf> (describing New Orleans's user-pay justice system). Because all the aforementioned players are dependent on defendants' fees and fines, user-pay systems are

Margaret Moore and Nueces County's Mark Gonzalez refused to acknowledge whether they would reduce their requests for cash bail in their districts. Now in office, both Moore and Gonzalez seek cash bail for non-violent, minor crimes.<sup>107</sup>

Some DAs' espoused bail policies contradict their offices' practices. Officially, the two self-proclaimed reformist New York DAs, Cy Vance and Eric Gonzalez, bar their prosecutors from seeking bail for misdemeanors. But Manhattan and Brooklyn line prosecutors still seek bail for some minor crimes. One culprit: Vance's bail policy's many exceptions have swallowed the policy.<sup>108</sup> New York public defenders and Court Watch NYC have witnessed Vance's prosecutors repeatedly seek bail for non-flight risk defendants charged with misdemeanors and nonviolent felonies.<sup>109</sup> In 2016, Vance's office detained 17% of defendants whom prosecutors charged with misdemeanors and minor infractions.<sup>110</sup> Vance's bail policies probably contribute to Manhattan's having the highest level of incarceration of the five boroughs.<sup>111</sup> A similar tale unfolds in Brooklyn; Court Watch NYC attended a hearing where a Gonzalez ADA requested \$1500 bail for a defendant who allegedly stole four bars of soap.<sup>112</sup> Notwithstanding their line prosecutors' insubordination,<sup>113</sup> Vance's and Gonzalez's offices' failure to administer thoughtful cash bail policies sets the two DAs apart from their more progressive peers.

Kim Ogg—who has shifted rightward on bail—falls into the same camp as Cy Vance and Eric Gonzalez. When campaigning for the Harris County DA office, Ogg supported a lawsuit challenging the county's cash bail system for misdemeanor cases.<sup>114</sup> Ogg joined advocates who argued that Harris County kept poor people and minorities locked up simply because they could not afford cash bail, which, in turn, forces many defendants to

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structured to motivate a state's criminal justice system to over-prosecute. Progressive prosecutors should take it upon themselves to advocate that their state move away from user-generated funding systems and shift towards a system where the state funds criminal justice through a general fund.

<sup>107</sup> See *Progressive Prosecutors' Not All So Progressive on Bail Reform*, GRITS BREAKFAST (Sep. 30, 2019), <https://gritsforbreakfast.blogspot.com/2019/09/progressive-prosecutors-not-all-so.html> [https://perma.cc/RA9W-NVJJ].

<sup>108</sup> See Jake Offenhardt, *Vance's DAs Won't Stop Throwing the Book at Petty Crime*, VILLAGE VOICE (Feb. 8, 2018), <https://www.villagevoice.com/2018/02/08/vances-das-wont-stop-throwing-the-book-at-petty-crime/> [https://perma.cc/BU4Q-RJAM].

<sup>109</sup> According to Tina Luongo, a chief attorney for Legal Aid Society's criminal practice division, "We're still getting bail requested on people who are not a flight risk charged with misdemeanors and nonviolent felonies." Robbins, *supra* note 59. Court Watch NYC reported attending a hearing where a Manhattan ADA requested \$700 bail for a misdemeanor shoplifting case, even though the defendant's last warrant was from 1992. See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> See Beth Schwartzapfel, *The Prosecutors*, MARSHALL PROJECT (Feb. 26, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/02/26/the-prosecutors> [https://perma.cc/87VW-GN92].

<sup>113</sup> See BAZELON, *supra* note 20, at 274.

<sup>114</sup> See Bazon & Krinsky, *supra* note 21.

plead guilty to heavy charges to secure release.<sup>115</sup> Three months after her election victory, Ogg told reporters “holding low-level offenders who can’t bond out because they’re too poor is against the basic principles of fairness.”<sup>116</sup> Agreeing with the challengers, a judge found that Houston’s cash bail system unconstitutionally discriminated by race. A settlement emerged that would end the challenged cash bail policies via a court-supervised consent decree, and criminal justice advocates praised the proposed agreement.<sup>117</sup> But Ogg pulled a political 180 on bail. Contravening her campaign platform, Ogg—in lockstep with Houston’s police chief—now opposes the proposed settlement.<sup>118</sup> She claims that the consent decree would precipitate the release of violent individuals: “[w]e are all for bail reform as long as it protects the public.”<sup>119</sup>

Ogg maintains that her prosecutors recommend that defendants charged with minor offenses should be released on personal bonds rather than cash bail;<sup>120</sup> yet Ogg sent an email commanding her subordinate prosecutors to request high bond amounts for certain defendants. Ogg dictated that “misdemeanor high bond requirements should be \$15,000.”<sup>121</sup> She made it clear: “this directive is coming directly from me.”<sup>122</sup> Members of Houston’s elected judiciary have begun to push back on Ogg’s prosecutors’ astronomical bail requests. In 2019, Ogg’s ADAs requested \$15,000 bond for a man charged with misdemeanor theft, \$15,000 for a man possessing less than two ounces of marijuana, \$20,000 for a defendant accused of trespass, and \$100,000 for a man charged with misdemeanor violation of a protective order for messaging someone he was forbidden from contacting.<sup>123</sup> Houston judges set the defendants’ bonds at \$1,000, \$1,000, \$3,000 and \$10,000.<sup>124</sup> The judges’ refusal to defer to Ogg’s high bond requests is telling, as judges normally defer to prosecutors’ requests or ratchet up requests that judges

<sup>115</sup> See Juan A. Lozano, *Discord over Deal to Settle Houston-Area Bail Lawsuit*, AP NEWS (Oct. 26, 2019), <https://apnews.com/9d4f92ba715b4d22ae3986d1b76f37> [<https://perma.cc/6AJG-JLDG>].

<sup>116</sup> Tom Dart, *Houston’s New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017, 7:00 AM), <https://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas> [<https://perma.cc/MGY2-NWTX>].

<sup>117</sup> See Lozano, *supra* note 115. Criminal justice activists have praised the proposed settlement. Civil Rights Corps attorney Elizabeth Rossi: “The [Houston] settlement is going to keep tens of thousands of people out of cages every year going forward, which is a really exciting prospect.” *Id.*

<sup>118</sup> See *id.*; *A First-Cut Reaction to Harris-County DA Kim Ogg’s Reasons for Opposing Bail Reform*, GRITS BREAKFAST (Aug. 23, 2019), <https://gritsforbreakfast.blogspot.com/2019/08/a-first-cut-reaction-to-harris-county.html> [<https://perma.cc/KQG5-ALD3>].

<sup>119</sup> Lozano, *supra* note 115.

<sup>120</sup> See Dart, *supra* note 116.

<sup>121</sup> Alex Hannaford, *Harris County D.A. Ran As A Reformer. So Why Is She Pushing High Bail For Minor Offenses?*, APPEAL (Aug. 9, 2018), <https://theappeal.org/harris-county-kim-ogg-bail-reform-jail/> [<https://perma.cc/HQG2-LLHK>].

<sup>122</sup> *Id.*

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

deem too low. Ogg's bail policies are regressive, punitive, and inconsistent with the concept of progressive prosecution.

### B. *Death Penalty*

Progressive academics and organizations agree that the death penalty is more “cruel, inhuman and degrading”<sup>125</sup> than any other punishment and that the state disproportionately sentences to death black, male defendants accused of crimes against white victims.<sup>126</sup> This metric's outer limits are clear: in a death penalty jurisdiction, a progressive prosecutor should publicly oppose death penalty and refuse to seek death sentences in inherited or new cases. Supporting the death penalty for only a small subset of defendants—the “worst” defendants—is incompatible with a progressive approach to criminal justice. Each death sentence is immoral, and jurisdictions never successfully cabin their executions to a small number because prosecutors inevitably succumb to the politically irresistible pressure to broadly seek the death penalty.<sup>127</sup>

There are “progressive” prosecutors in death penalty states who publicly oppose and do not seek the death penalty. In 2017, the Orange-Osceola state attorney Aramis Ayala announced that she would seek the death penalty no longer.<sup>128</sup> Similarly, Beth McCann,<sup>129</sup> Larry Krasner<sup>130</sup> and Wesley Bell<sup>131</sup> have pledged that their offices would never seek the death penalty.<sup>132</sup>

Unlike Ayala, McCann, Krasner, and Bell, other members of the dataset seek death sentences. Jackie Lacey of Los Angeles officially supports the death penalty. Since she assumed office in 2012, she has secured capital

<sup>125</sup> *Death Penalty*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/death-penalty/> [https://perma.cc/DXM8-D8NW].

<sup>126</sup> See generally BEDAU, *supra* note 34, Reiman, *supra* note 34, Nathanson, *supra* note 34, Steiker, *supra* note 34.

<sup>127</sup> CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT*, 160–62 (2016).

<sup>128</sup> The subsequent fallout of Ayala's announcement—including Governor Rick Scott reassigning Ayala's first-degree murder cases to another prosecutor and impending litigation between Ayala and Scott at the Florida Supreme Court—has drawn national attention. See *Aramis Ayala*, *supra* note 70.

<sup>129</sup> See *New Denver District Attorney Will Not Seek Death Penalty*, EQUAL JUST. INITIATIVE (Jan. 11, 2017), <https://ejj.org/news/new-denver-district-attorney-will-not-seek-death-penalty/> [https://perma.cc/5455-QCS5].

<sup>130</sup> Krasner has asked the Pennsylvania Supreme Court to rule that the death penalty is impermissible under the state's constitution. See Akela Lacy, *Reformist District Attorney Larry Krasner Argues Pennsylvania Death Penalty Is Unconstitutional*, INTERCEPT, <https://theintercept.com/2019/07/15/larry-krasner-pennsylvania-death-penalty-unconstitutional/> [https://perma.cc/3DNX-T53Q].

<sup>131</sup> Notably, Bell refused to seek the death penalty in a notorious murder and sexual assault case that took place in at a Catholic Supply Store in his county. See Speri, *supra* note 20.

<sup>132</sup> It is worth noting that Ayala and McCann cite the death penalty's huge financial drain on the state's coffers in justifying their opposition to the death penalty. See *Aramis Ayala*, *supra* note 70; EQUAL JUST. INITIATIVE, *supra* note 129. Although it is true that the death penalty trials are extraordinarily expensive, it would be bolder and braver for reformist prosecutors to condemn the death penalty as immoral in and of itself. But regardless of rationale, Ayala's and McCann's opposition to the death penalty is still commendable.

sentences for twenty-two defendants;<sup>133</sup> all were people of color.<sup>134</sup> Lacey's prosecutors secured four death sentences in 2017 alone.<sup>135</sup> Under Lacey's aegis, Los Angeles has become "the nation's leader in generating death sentences."<sup>136</sup> Likewise, East Baton Rouge's Hillar Moore III supports capital punishment.<sup>137</sup>

Other "progressive" prosecutors either equivocate about the merits of the death penalty or confine their support for capital punishment to "extreme cases." Kim Ogg, for example, claims that she only seeks the death penalty in "rare circumstances," such as for murderers of police officers, mass murderers, serial murderers, and killers who "torture and enjoy the suffering of their victims."<sup>138</sup> Nueces County DA Mark Gonzalez did not mention capital punishment during his campaign and claims that his views on the death penalty "change every single day."<sup>139</sup> Yet capital creep is already evident in Ogg's and Gonzalez's offices. Ogg is pursuing the death penalty in eight separate cases.<sup>140</sup> Ogg has publicly opposed executing people with intellectual disabilities; yet she is seeking the death penalty for three defendants despite strong evidence that all three have intellectual disabilities.<sup>141</sup> Gonzalez is pursuing the death penalty against a defendant accused of murdering his wife.<sup>142</sup>

<sup>133</sup> ACLU, *THE CALIFORNIA DEATH PENALTY IS DISCRIMINATORY, UNFAIR, AND OFFICIALLY SUSPENDED. SO WHY DOES LOS ANGELES DISTRICT ATTORNEY JACKIE LACEY STILL SEEK TO USE IT?* 2 [https://www.aclu.org/sites/default/files/field\\_document/061819-dp-whitepaper.pdf](https://www.aclu.org/sites/default/files/field_document/061819-dp-whitepaper.pdf) [<https://perma.cc/5GFT-EVKD>].

<sup>134</sup> Of the 22 cases, eight defendants had lawyers who were previously or subsequently disbarred, suspended or charged with misconduct. *See id.*

<sup>135</sup> *See id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See Miller, supra* note 84. It is worth noting that Moore did support Constitutional Amendment 2, which repealed Louisiana's non-unanimous jury verdict death sentence law. *See* Dillon Lowe, *Louisiana Might Finally Get Rid of Its Century-Old, Racist Jury System*, SLATE (Oct. 22, 2018, 2:27 PM), <https://slate.com/news-and-politics/2018/10/louisiana-unanimous-jury-verdict-constitutional-amendment.html> [<https://perma.cc/7T58-RYG8>].

<sup>138</sup> Mike Tolson, *A New Era of the Death Penalty in Houston*, HOUS. CHRON. (Dec. 20, 2017, 10:44 AM) <https://www.houstonchronicle.com/local/gray-matters/article/A-new-era-of-the-death-penalty-in-Houston-12444244.php> [<https://perma.cc/5XGQ-KUVS>].

<sup>139</sup> *See* Carimah Townes, *Is Mark Gonzalez the Reformer He Promised to Be?*, APPEAL (Nov. 21, 2017), <https://theappeal.org/is-mark-gonzalez-the-reformer-he-promised-to-be-462f199a60c/> [<https://perma.cc/HRG8-HCE5>]. Another DA who cropped up in the original list of thirty-three progressive prosecutors is Charles Todd Henderson, who was elected Birmingham's DA in 2016. *See* Rory Fleming & Stephen Cooper, *When Politicians Perpetuate the Death Penalty Against the Will of the People*, COUNTERPUNCH (Dec. 6, 2017), <https://www.counterpunch.org/2017/12/06/when-politicians-perpetuate-the-death-penalty-against-the-will-of-the-people/> [<https://perma.cc/JF99-MAVV>]. During his campaign, Henderson promised to only seek the death penalty "in the most heinous cases." *Id.* But Henderson was charged with felony perjury just before he took office, so Governor Ivey appointed a new Republican head prosecutor to take Henderson's place. *See id.* Because Henderson is not an incumbent DA, he is not included in this paper's dataset.

<sup>140</sup> *See* Susan Buchanan, *Ogg Promised Death Penalty Reform in Harris County, but Hasn't Delivered It*, TRIBTALK (July 3, 2019), <https://www.tribtalk.org/2019/07/03/ogg-promised-death-penalty-reform-in-harris-county-but-hasnt-delivered-it/> [<https://perma.cc/8KRH-63UM>].

<sup>141</sup> The three defendants are Dexter Johnson, Robert Jennings, and Harlem Lewis. *See id.*

<sup>142</sup> *See id.*

Unlike Texas—which regularly executes people on death row—California has not executed a defendant since 2006, and California’s governor issued an execution moratorium in 2019.<sup>143</sup> Realistically, Lacey’s defendants face a far lower chance of execution compared with Ogg’s and Gonzalez’s defendants. But the state imposes the death sentence in a discriminatory manner; sending a defendant to death row is in itself cruel and unusual.<sup>144</sup> Therefore, Lacey’s capital policies still contravene the first aspiration—human dignity—and second aspiration—equitable justice—of a theoretically progressive criminal justice system. Lacey necessarily joins Ogg and Gonzalez outside the bounds of this metric’s outer-limits.<sup>145</sup> In short, even if a DA operates in a capital state that realistically does not execute those on death row, seeking capital punishment in any case is still inconsistent with the concept of progressive prosecution.

Some progressive prosecutors have not sought capital punishment in any new cases but pursue death penalty cases inherited from their predecessors. James Stewart, of Caddo Parrish, Louisiana, is most illustrative. Criminal justice advocates know Caddo Parrish as the death penalty capital of America; some consider it one of the country’s “most racist places.”<sup>146</sup> Dale Cox—Stewart’s predecessor—is partially responsible for the county’s notoriety; Cox’s office secured the death sentence for one-third of all Louisiana death row inmates tried since 2011.<sup>147</sup> Even though Caddo Parrish accounts for 5% of Louisiana’s population and 10% of the state’s homicides, nearly half of all the state’s death sentences in the past twelve years came out of Caddo Parrish. Almost all the condemned were men of color, and there is overwhelming evidence that ADAs in Scott’s office pursued capital sentences in bad faith and with shaky evidence.<sup>148</sup> In short, Stewart inherited

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<sup>143</sup> See Scott Wilson & Mark Berman, *California Gov. Gavin Newsom to Impose Moratorium on Death Penalty*, WASH. POST (Mar. 12, 2019, 10:31 PM), [https://www.washingtonpost.com/national/california-gov-gavin-newsom-to-impose-moratorium-on-death-penalty/2019/03/12/3a3ad1dc-4520-11e9-8aab-95b8d80a1e4f\\_story.html](https://www.washingtonpost.com/national/california-gov-gavin-newsom-to-impose-moratorium-on-death-penalty/2019/03/12/3a3ad1dc-4520-11e9-8aab-95b8d80a1e4f_story.html) [https://perma.cc/EE5U-VKYE].

<sup>144</sup> See *Glossip v. Gross*, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting).

<sup>145</sup> It is worth noting that Lacey’s seeking of death sentences is also out-of-step with the needs of her own constituents, given that Los Angeles voters overwhelmingly supported the 2016 ballot initiative that would have eliminated capital punishment in the state. See DEP’T OF REGISTRAR-RECORDER/CTY. CLERK, CTY. OF L.A., FINAL OFFICIAL ELECTION RETURNS NOVEMBER 6, 2012 GENERAL ELECTION 4 (2012), <https://www.lavote.net/documents/nov-6-2012-official-election-returns.pdf> [https://perma.cc/J5AM-W8WL].

<sup>146</sup> Yolanda Young, *America’s Death Penalty Capital: Can a Black DA Really Change the System?*, GUARDIAN (Mar. 13, 2016, 8:00 AM), <https://www.theguardian.com/us-news/2016/mar/13/caddo-parish-louisiana-death-penalty-capital-district-attorney> [https://perma.cc/RZ29-YZKH].

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* The county’s high volume of death sentences and racially disparate sentencing decisions drew enormous national attention and even caused Justice Stephen Breyer to question the constitutionality of the death penalty. See *Reed v. Louisiana*, 137 S. Ct. 787, 787 (2017) (Breyer, J., dissenting from denial of certiorari) (“Marcus Dante Reed was sentenced to death in Caddo Parish, Louisiana, a county that in recent history has apparently sentenced more people to death per capita than any other county in the United States. . . . The arbitrary role that geography plays in the imposition of the death penalty, along with the other serious

an office with a troubling relationship with capital punishment. Yet against this startling backdrop, Stewart supports the death penalty. Stewart—similarly to Ogg, Moore, and Gonzales—ostensibly reserves capital punishment for the “worst of the worst” and has not requested the ultimate sentence in any new cases. But Stewart is seeking the death penalty, instead of dropping the capital charges, in capital cases inherited from Cox’s office.<sup>149</sup>

In sum, a district attorney that seeks the death penalty in any case is not a progressive prosecutor. Progressive prosecutors cannot seek the ultimate sentence in few “extreme” cases or in cases inherited from predecessor DAs. Supporting the death penalty in any form is fundamentally incompatible with the concept of progressive prosecution.

### C. *Decarceration and the New Jim Crow*

America is the biggest incarcerator in the world; today, over 2.2 million people are behind bars.<sup>150</sup> Race plays a particular role in mass incarceration<sup>151</sup>—the phenomena known widely as “the New Jim Crow.”<sup>152</sup> The state locks up black and brown men for longer sentences than their similarly situated white peers. Sixty percent of people in prison are people of color, and black men are six times more likely to be incarcerated than white men.<sup>153</sup> Prosecutors should help reduce their state’s prison population and address racially discriminatory prosecutorial policies; prosecutors can achieve these twin goals through non-prosecution and diversion—two separate but related metrics. Prosecutors who make no effort to decrease—or in fact increase—prison populations cross the outer limit of this metric.

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problems I have previously described, has led me to conclude that the Court should consider the basic question of the death penalty’s constitutionality.”).

<sup>149</sup> Stewart’s office may also be culpable in perpetuating the sins of his predecessor’s office. For example, Stewart is seeking the death penalty for Grover Cannon and has opposed the release of an audio recording by the police that Cannon’s legal team claim exonerates Cannon. See Joshua Vaughn, *In Louisiana, a Messenger of Change Disregards His Message*, APPEAL (Jun. 21, 2019), <https://theappeal.org/in-louisiana-a-messenger-of-change-disregards-his-message/> [<https://perma.cc/DJN2-UEQ4>]. Even though a judge determined that pretrial media coverage made it impossible to select an impartial jury to try Cannon in Caddo Parrish, Stewart has attempted to transfer the case back to Caddo. See *id.* In seeking the death penalty for Marcus Reed (the plaintiff whose case caused Justice Breyer to question the death penalty), Stewart’s office has blocked all motions to compel discovery, issued redacted documents to Reed’s defense team, and even requested that Reed’s attorneys financially compensate the DA’s office for their time. See *id.* When Rodricus Crawford petitioned to have his death sentence overturned, Stewart channeled Dale Cox’s pro-death penalty language in his opposition brief. Crawford was convicted for allegedly murdering his son. See Young, *supra* note 146. A senior attorney at the Justice Center contends that Crawford’s conviction was “implausible” and “supported by evidence based on abject stereotypes.” *Id.*

<sup>150</sup> See THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS 2 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/C53C-KHV3>].

<sup>151</sup> See generally ALEXANDER, *supra* note 9; 13TH (Netflix 2016).

<sup>152</sup> See generally ALEXANDER, *supra* note 9.

<sup>153</sup> See *Trends in U.S. Corrections*, *supra* note 150, at 5.



Many members of the set have made headway in reducing their local prison populations. Wesley Bell's office's policies have reduced St. Louis's jail population by 20% in six months.<sup>154</sup> In tandem with Philadelphia's mayor, Larry Krasner helped reduce Philadelphia's population by about 30% over two years.<sup>155</sup> During Kim Foxx's tenure, Cook County's incarcerations have dropped by 19%.<sup>156</sup> Other DAs—like Beth McCann and Margaret Moore—have committed to study racist incarcerations patterns. McCann hired a researcher to examine her office's felony filings to look for racial bias patterns in charging and plea deal offerings.<sup>157</sup> Moore commissioned a study to pinpoint where racial disparities occur in prosecutions.<sup>158</sup> When the study concluded that racial disparities largely occurred because of the police's disproportionately arresting African Americans, Moore announced that she would work with the county's police department and advocates to tackle racism in prosecution.<sup>159</sup>

At least one member of the set outright rejects decarceration as part-and-parcel of progressive prosecution. Leon Cannizzaro of Orleans Parish castigated efforts to reduce Louisiana's prison population as “ill-conceived”<sup>160</sup> and a “grand social experiment espoused by sheltered academics and naive politicians.”<sup>161</sup> Since Cannizzaro took office in 2009, his office's acceptance rate of cases has jumped from fifty to 90%. Although incarceration rates throughout Louisiana have declined, the state inmate population from Orleans Parish has increased.<sup>162</sup> Cannizzaro did support a grant application for a study aimed at reducing Orleans Parish's jail population, but he vocally criticized the project after the state cut his office out of the grant award.<sup>163</sup>

At least two members of the set—Hillar Moore III and Cy Vance—are supposedly concerned with mass incarceration and racial discrimination in prosecution. Yet their offices make little headway in reducing incarceration and may, in fact, be increasing the prison population. In 2013, Hillar Moore III posed next to copies of *The New Jim Crow*, David M. Kennedy's *Don't*

<sup>154</sup> See Parisa Dehghani-Tafti et al., Opinion, *Reform Prosecutors Are Committed to Making Society Fairer — and Safer*, WASH. POST (Aug. 16, 2019), [https://www.washingtonpost.com/opinions/reform-prosecutors-are-committed-to-making-society-fairer—and-safer/2019/08/16/eba231ce-bf85-11e9-a5c6-1e74f7ec4a93\\_story.html](https://www.washingtonpost.com/opinions/reform-prosecutors-are-committed-to-making-society-fairer—and-safer/2019/08/16/eba231ce-bf85-11e9-a5c6-1e74f7ec4a93_story.html) [https://perma.cc/4YQM-SZ7P].

<sup>155</sup> See *id.*

<sup>156</sup> See Nancy Loo, *Incarceration Rates Drop 19% Under Kim Foxx, Report Says*, WGNTV (July 30, 2019, 12:49 PM), <https://wgntv.com/2019/07/30/incarceration-rates-drop-19-under-kim-foxx-report-says/> [https://perma.cc/WMM5-QTM7].

<sup>157</sup> See Schmelzer, *supra* note 71.

<sup>158</sup> See Michael King, *How Much Reform Is Enough in the Travis County District Attorney Race?*, AUSTIN CHRON. (Aug. 23, 2019), <https://www.austinchronicle.com/news/2019-08-23/how-much-reform-is-enough-in-the-travis-county-district-attorney-race/> [https://perma.cc/3BAQ-893G].

<sup>159</sup> See *id.*

<sup>160</sup> Vargas, *supra* note 105.

<sup>161</sup> Chrastil, *supra* note 83.

<sup>162</sup> See Andru Okun, *Orleans Parish and the Terrible, Horrible, No Good, Very Bad DA: On the Ruthless Tactics Of Leon Cannizzaro*, ANTIGRAVITY (June 2017) <http://antigravitymagazine.com/feature/orleans-parish-and-the-terrible-horrible-no-good-very-bad-da-on-the-ruthless-tactics-of-leon-cannizzaro/> [https://perma.cc/25GK-Q2YF].

<sup>163</sup> See Vargas, *supra* note 105.

*Shoot*, and Paul Grogan and Tony Proscio’s *Comeback Cities* while telling a local reporter “I believe I am a progressive DA” and “I’m not proud that we have the highest incarceration rate in the world.”<sup>164</sup> That same year, Moore claimed that he was “hell-bent on finding a way to keep them out court-rooms,” as a person who sees criminal defendants as some of the “least fortunate people,” and a prosecutor who is not looking to fill the “traditional role of the DA’s office.”<sup>165</sup> Yet Moore has opposed nearly every measure in a set of criminal justice reforms proposed by a Louisiana task force that would decrease Louisiana’s prison population and reduce the state’s \$625 million annual prison budget.<sup>166</sup> Indeed, Moore appears bent on imprisoning *more* people. In 2015, Moore proposed opening a “misdemeanor jail” that would imprison 100,000 people with unpaid misdemeanor warrants; traffic tickets constituted 60% of the warrants,<sup>167</sup> the “jail” would be located in a large basement without a kitchen, and the state would feed inmates from a nearby McDonalds.<sup>168</sup> Insisting that these jails would “encourage” people to show up to court, Moore only backed down after local Baton Rouge leaders slammed the proposed “jail” as “obscene,” “loan sharking,” “backwards,” and an “embarrassment.”<sup>169</sup>

Cy Vance is Moore’s bedfellow for this metric. In 2015, Cy Vance told New York University Law School’s graduating class, “I recognized racism in the criminal justice system long before the term ‘mass incarceration’ entered the general conversation.”<sup>170</sup> He has also supported advocacy supporting the closure of Rikers Island.<sup>171</sup> Yet the Manhattan DA’s office accounts for a disproportionate number of Rikers’ prisoners. Although Vance’s office only handles 29% of New York City’s criminal cases, his prosecutors locked up almost 38% of the city’s jail population.<sup>172</sup> The Manhattan DA’s office’s fondness for incarceration perpetuates racism in New York’s justice system. In 2014, the Vera Institute found that the state was more likely to detain black and Latino defendants prosecuted by Vance’s office at booking than it would similarly situated white defendants.<sup>173</sup> In 2017, 51% of marijuana cases involving black defendants in Manhattan ended in conviction—but

<sup>164</sup> Pishko, *supra* note 3.

<sup>165</sup> Lane, *supra* note 5.

<sup>166</sup> See Pishko, *supra* note 22; Pishko, *supra* note 3.

<sup>167</sup> Pishko, *supra* note 3.

<sup>168</sup> See *id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Commencement Address*, *supra* note 8.

<sup>171</sup> See Rice, *supra* note 72.

<sup>172</sup> See Robbins, *supra* note 59. A special commission on Rikers Island issued a report on the prison. Referring to Vance’s office’s disproportionate contribution to the prison’s population, the report states “no other borough comes close” to Manhattan. *Id.* Even though Brooklyn has 1 million more residents than Manhattan, Brooklyn only accounts for 22% of those detained at Rikers. See *id.*

<sup>173</sup> See *Race and Prosecution in Manhattan*, VERA INST. JUST. (Jul. 2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan> [https://perma.cc/6STJ-FKXN].

only 23% involving white defendants did.<sup>174</sup> Indeed, Vance's office is more punitive towards defendants who are poor and of color than other New York City DAs are.<sup>175</sup> Because their offices fail to decarcerate and disproportionately prosecute black and brown defendants, Moore and Vance fall past the outer-bounds of this metric.

Other members of the set are dangerously close or cross the outer bounds of this metric. In Caddo County, James Stewart's office frequently initiates peremptory challenges to strike black jurors from trials; doing so perpetuates racially biased court proceedings. A study found that Stewart's prosecutors were three times as likely to strike black potential jurors than white potential jurors.<sup>176</sup> Likewise, Kim Ogg requested that Houston provide funding for her office to hire an additional 102 prosecutors in 2019—a signal that her office was going to increase prosecutions and therefore increase incarceration. Academics and legal scholars condemned Ogg's request.<sup>177</sup> Relatedly, two other members of the set incarcerate a startlingly high number of youths—an intersection of both the “Decarceration” and “Juveniles” metrics. Cannizzaro prosecutes more youths as adults than any other prosecutor in Louisiana.<sup>178</sup> Since Michael O'Malley became Cuyahoga County's DA in 2017, the jurisdiction's crime rate has flattened or fallen. But the number of young people the DA's office is sending to adult court has more than doubled.<sup>179</sup> In 2017, O'Malley's office tried 100 young people as adults and transferred ninety-one to adult court—up from forty-nine the year before.<sup>180</sup> Sending large numbers of juveniles to jail is out-of-step with decarceration; progressive prosecutors must treat young people as the juveniles that they are.

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<sup>174</sup> See Brendan Cheney, *For Non-White New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO (May 9, 2017, 5:06 AM), <https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807> [https://perma.cc/8PW7-MZZ9]. Relatedly, Vance has come under fire for his refusal to prosecute high profile white defendants. In particular, he refused to bring charges against Harvey Weinstein despite the existence of an audio recording of Weinstein admitting to groping a woman, and Vance declined to prosecute Ivanka Trump and Donald Trump Jr. for fraud in 2012. See Robbins, *supra* note 59.

<sup>175</sup> See Robbins, *supra* note 59.

<sup>176</sup> Stewart's comments about slavery are problematic: “One of my biggest questions about slavery has always been: how do you have eight people on a plantation who are white and 85 who are black, and they don't change something?” Young, *supra* note 146.

<sup>177</sup> Although Ogg claimed that her office needed more prosecutors to handle a case backlog, an independent study found that Ogg had overstated her office's caseload and that additional prosecutors were unnecessary. See Keri Blakinger, *Academics Raise Concerns About Report Finding Harris County DA Overburdened, Understaffed*, HOUS. CHRON. (Oct. 16, 2019, 2:52 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Academics-raise-concerns-about-report-finding-14539787.php> [https://perma.cc/4UQW-AFVA].

<sup>178</sup> See Katy Reckdahl, *In New Orleans, 'Eligible' Delinquents Increasingly Routed to Adult Courts, Prisons*, NOLA.COM (Mar. 31, 2015, 7:54 AM), [https://www.nola.com/news/article\\_62d8dfec-9bca-5f1c-84cb-4e708876c662.html](https://www.nola.com/news/article_62d8dfec-9bca-5f1c-84cb-4e708876c662.html) [https://perma.cc/TKB3-844D].

<sup>179</sup> Elizabeth Weill-Greenberg, *Despite Flat Crime Rates, More Cleveland-Area Young People Are Being Tried as Adults*, APPEAL (Oct. 22, 2019), <https://theappeal.org/despite-flat-crime-rates-more-cleveland-area-young-people-are-being-tried-as-adults/> [https://perma.cc/5B65-ALVA].

<sup>180</sup> See *id.*

D. *Diversion and Non-Prosecution*

Starting in the 1980s, federal and state criminal justice legislative initiatives stimulated massive growth in prosecution and, consequently, incarceration.<sup>181</sup> In particular, an explosion of drug prosecutions played a significant role in creating America's modern carceral state.<sup>182</sup> Over the past four decades, prosecutors have tried an ever-growing number of people—especially those of color—for certain crimes; prior to 1980, prosecutors enforced these crimes more loosely and legislation coupled these crimes with shorter prison sentences.<sup>183</sup> Non-prosecution and diversion of defendants into non-penal programs is an essential tool to promote decarceration (see Part III. C.)

Unlike the death penalty—perhaps the brightest-line of the fourteen metrics—progressive non-prosecution policies vary far more because prosecutors must tailor them to communities' specific needs. This metric's outer limit may be less obvious, but assessors can still draw some clear boundaries. Everyone in a community should equally benefit from a DA's non-prosecution policies. This means that DAs should not prosecute marijuana possession or other crimes that prosecutors have historically used to punish people of color, for example, gravity knife laws in New York. Also, the alternative to prosecution must equally impact all defendants. For example, prosecutors' substituting criminal punishment with fines and fees—an intersection with the "Fines, Fees, Forfeitures" metric—is a better, but still inequitable, solution. Forcing defendants to cough up cash as punishment stymies rehabilitation, exacerbates indigent defendants' debt, and does not improve public safety.<sup>184</sup> Because courts usually impose fees and fines without considering defendants' ability to pay, fees and fines act as a regressive poverty tax.<sup>185</sup> Jurisdictions' jailing those who cannot pay their fees and fines renders the entire enterprise moot;<sup>186</sup> thoughtful diversion programs can be a more equitable substitute.

<sup>181</sup> See generally ALEXANDER, *supra* note 9.

<sup>182</sup> See generally King & Mauer, *supra* note 36; Lauren Carroll, *How the war on drugs affected incarceration rates*, POLITIFACT (July 20, 2016), <https://www.politifact.com/factchecks/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates/> [<https://perma.cc/K97D-CYPL>].

<sup>183</sup> See MITCHELL & LEACHMAN, *supra* note 36, at 5; Angela J. Davis, IN SEARCH OF RACIAL JUSTICE: THE ROLE OF THE PROSECUTOR 6 N.Y.U. J. LEGIS. & PUB. POLICY 821, 830 (2013).

<sup>184</sup> See MATTHEW MENENDEZ ET AL., BRENNAN CTR. FOR JUSTICE, THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 9–10 (2019), [https://www.brennancenter.org/sites/default/files/2019-11/2019\\_10\\_Fees%26Fines\\_Final4\\_0.pdf](https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final4_0.pdf) [<https://perma.cc/H56U-C2RC>].

<sup>185</sup> See *id.*

<sup>186</sup> See *id.*

Many prosecutors, including Kim Ogg,<sup>187</sup> Larry Krasner,<sup>188</sup> John Creuzot,<sup>189</sup> Kim Foxx,<sup>190</sup> Wesley Bell,<sup>191</sup> and Margaret Moore<sup>192</sup> have all rolled out non-prosecution and expungement policies for marijuana possession. Members of the set have expanded their non-prosecution policies and diversion programs outside the realm of drug possession and refuse to prosecute so-called “crimes of poverty,” including low-level shop-lifting, criminal trespass, failure to pay child support, and theft cases involving low amounts of money.<sup>193</sup> Some members of the set have opted for the less-than-ideal fines and fees approach; for example, Kim Ogg<sup>194</sup> and Mark Gonzalez<sup>195</sup> allow possessors of small amounts of marijuana to avoid criminal charges by paying a fine and taking drug education classes.

Cyrus Vance, Eric Gonzalez, Rachel Rollins, Mark Gonzalez, and Hillar Moore III have also publicly announced non-prosecution policies, but their enforcement disproportionately affects marginalized members of the community. In the past two years, Vance’s office officially reduced penalties for marijuana possession and re-committed to not prosecuting most cases of

<sup>187</sup> Ogg announced that her office will no longer charge people for possession of less than four ounces of marijuana; instead, her office will divert defendants to drug education classes. See Dart, *supra* note 119.

<sup>188</sup> Krasner announced that his office would be dropping all outstanding marijuana possession charges and would no longer pursue criminal charges against anyone arrested for marijuana possession; Instead, \$25 citations would be issued for possession and \$100 citations would be issued for those consuming marijuana in public. See Joe Trinacria, *Larry Krasner Sues Big Pharma, Drops All Marijuana Possession Charges*, PHILA. MAG. (Feb. 16, 2018, 9:17 AM), <https://www.phillymag.com/news/2018/02/16/krasner-big-pharma-marijuana-possession/> [<https://perma.cc/9339-ZP3Q>].

<sup>189</sup> Creuzot dismissed more than one thousand drug possession cases during his first three months in office. See Andrea Lucia, *Dallas County District Attorney John Creuzot Announces He Won't Prosecute 'Low-Level' Crimes*, CBS DFW (Apr. 11, 2019, 9:33 PM), <https://dfw.cbslocal.com/2019/04/11/dallas-county-district-attorney-john-creuzot-low-level-crimes/> [<https://perma.cc/8M3U-TBZS>].

<sup>190</sup> As Illinois plans to legalize marijuana in January 2020, Kim Foxx has announced that—in partnership with a tech non-profit—her office will expunge tens of thousands of marijuana convictions. See Megan Crepeau, *Thousands of Weed Convictions Will Be Automatically Expunged in Cook County: 'We Are Righting the Wrongs of the Past'*, CHI. TRIBUNE (Aug. 28, 2019, 5:40 AM), <https://www.chicagotribune.com/news/criminal-justice/ct-marijuana-conviction-expungement-kim-foxx-20190827-3zytvgvmdzf4jlx4crnz5dbfae-story.html> [<https://perma.cc/5WVG-23JN>].

<sup>191</sup> Wesley Bell issued a detailed memo to his prosecutors that announced that he would no longer prosecute possession of less than 100 grams of marijuana. See Speri, *supra* note 20.

<sup>192</sup> See King, *supra* note 158.

<sup>193</sup> John Creuzot announced that he will dismiss many criminal trespass cases because such charges are most often levied against the poor and mentally ill and will no longer prosecute theft cases involving personal items worth less than \$750. See Lucia, *supra* note 189. Kim Foxx will no longer prosecute low-level shoplifting. See Schmelzer, *supra* note 71. Beth McCann instituted a diversion program where some people between the ages of 18 and 26 facing minor charges can avoid charges if they complete certain requirements. See *id.* Wesley Bell officially does not prosecute failure to pay child support and has announced treatment and diversion programs in partnership with local health organizations to address addiction and mental illness. See *id.*

<sup>194</sup> See Brian Rogers, *DA's Pot Program Draws Mixed Reaction*, HOUS. CHRON. (Feb. 16, 2017, 11:14 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/DA-s-pot-program-draws-mixed-reaction-10939161.php> [<https://perma.cc/2M8W-GXCD>].

<sup>195</sup> See Townes, *supra* note 139.

fare evasion;<sup>196</sup> by recommitting, Vance admits that his office ignored his original order. Vance claims that, since 2014, his office has prosecuted 26% fewer misdemeanors and dropped prosecutions for small-time offenses (such as unlicensed vending or taking up more than one subway seat) by 87%.<sup>197</sup> Yet in 2015, Vance was more likely to prosecute a misdemeanor charge than any other New York City DA. Activists claim that Vance's prosecutors pursue charges for a range of low-level offenses, including fare-beating, "aggressive begging in a public space," and criminal contempt—all offenses that are disproportionately levied against indigent New Yorkers.<sup>198</sup> Even though Vance has publicly supported repealing New York's gravity knife law—which prosecutors disproportionately enforce against people of color—<sup>199</sup> the Manhattan DA's office prosecutes a disproportionate number of New York's gravity knife cases.<sup>200</sup> Vance's office has prosecuted four times as many felony gravity knife cases as the rest of the city's district attorneys' gravity knife cases combined.<sup>201</sup>

Officially, Eric Gonzalez's office does not pursue low level marijuana possession charges; he claims Brooklyn marijuana possession prosecutions fell 98% between 2017 and 2018.<sup>202</sup> But Gonzales still prosecutes cases of *smoking* marijuana in public that constitute nuisance; thus, his office still prosecuted more than 80% of all low-level marijuana offenses in 2018.<sup>203</sup> The police predominantly arrest people of color for smoking cannabis.<sup>204</sup> Outside of drug prosecutions, Gonzales's prosecutors have sought hefty charges against indigent defendants accused of trespass<sup>205</sup> and resisting ar-

<sup>196</sup> See Offenhartz, *supra* note 108.

<sup>197</sup> See *id.*

<sup>198</sup> Court Watch NYC witnessed an arraignment of two defendants who were charged with fare-beating and "aggressive begging in a public space." *Id.* Both defendants accepted plea bargains that included a \$200 surcharge to the court. See *id.* Vance's prosecutors also pursued charges of criminal contempt against a pregnant, homeless woman in relation to a family dispute. See *id.* The judge granted the prosecutors recommended bail of \$25,000 bond or \$15,000 in cash. See *id.* Because the defendant could not afford bail, she was sent to Rikers. See *id.*

<sup>199</sup> 84% of defendants in New York gravity knife cases were people of color. See Hughes, *supra* note 11.

<sup>200</sup> See Offenhartz, *supra* note 108.

<sup>201</sup> To make matters worse, Vance has not prosecuted any of the hundreds of stores in Manhattan that sell gravity knives and instead has entered into "deferred prosecution agreements" with those stores. Five of those retailers have violated the agreements. See Jon Campbell, *New York Just Saved a Law Used to Jail Thousands of Minorities*, DAILY BEAST (Oct. 24, 2017, 11:49 AM), <https://www.thedailybeast.com/new-york-just-saved-a-law-used-to-jail-thousands-of-minorities> [<https://perma.cc/E64Y-NJY6>].

<sup>202</sup> See Mary Frost, *Brooklyn DA: Prosecution of Low-Level Marijuana Cases Down 98 Percent*, BROOKLYN DAILY EAGLE (Feb. 20, 2019), <https://brooklyneagle.com/articles/2019/02/20/brooklyn-da-prosecution-of-low-level-marijuana-cases-down-98-percent/> [<https://perma.cc/V24M-GEYW>].

<sup>203</sup> New York classifies smoking and possession of marijuana as the same misdemeanor (criminal possession in the fifth degree). See Beth Fertig & Jenny Ye, *Brooklyn DA's Pledge to Reduce Marijuana Prosecutions Makes Little Difference*, WNYC (Sept. 7, 2017), <https://www.wnyc.org/story/despite-das-change-marijuana-policy-brooklyn-defendants-still-come-court/> [<https://perma.cc/Y4WU-XQ23>].

<sup>204</sup> See *id.*

<sup>205</sup> Emily Bazelon examines the case of "Kiki" in her book, *Charged*. A Brooklyn ADA pressed for burglary charges with prison time for Kiki for squatting in a Brooklyn home and

rest.<sup>206</sup> While campaigning, Rachel Rollins of Suffolk County promised to stop prosecuting fifteen charges.<sup>207</sup> But her office's non-prosecution practices may not line up with her campaign promise. Court Watch MA members have observed Rollins's subordinates prosecute 259 cases that included charges off Rollins's list; her prosecutors advanced 118 of those cases in criminal court.<sup>208</sup> Court Watch MA claim that the "racial disparities" in Rollins's prosecutions "are incredibly stark" and that "charges on the do-not-charge list are being prosecuted all the time."<sup>209</sup>

Mark Gonzalez's and Hillar Moore III's policy initiatives have undermined their own non-prosecution programs. Mark Gonzalez's pretrial diversion program for domestic violence offenders is illustrative. During Gonzalez's first year in office, his prosecutors enrolled only two men in the program; one of the men was a minor celebrity athlete.<sup>210</sup> Instead of course-correcting and sending more defendants through diversion, Gonzalez announced that the program "had failed" and, instead, he would increase domestic violence prosecutions.<sup>211</sup> In Baton Rouge, Hillar Moore III championed "smart prosecution," a seemingly-progressive collective policing

stealing a laptop to buy food, alcohol, and pot. See BAZELON, *supra* note 20, at 276–78. Kiki was homeless, undocumented, and charging Kiki with burglary would expose him to potential deportation; the ADAs were unswayed. See *id.* The ADA's actions were completely in line with Gonzalez's official non-prosecution policies. Gonzalez eventually intervened in Kiki's case, but refusing to prosecute individual cases is ineffective. See *id.*

<sup>206</sup> Gonzalez's office pressed charges of resisting arrest against Jazmine Headley, who was sitting on the floor of a food stamp application office because there were no available chairs. See Bazelon & Krinsky, *supra* note 21; Ashley Southall, 'Appalling' Video Shows the Police Yanking 1-Year-Old From His Mother's Arms, N.Y. TIMES (Dec. 9, 2018), <https://www.nytimes.com/2018/12/09/nyregion/nypd-jazmine-headley-baby-video.html?module=inline> [<https://perma.cc/6L9Q-VS2F>].

<sup>207</sup> See *Charges To Be Declined*, RACHEL ROLLINS, <https://rollins4da.com/policy/charges-to-be-declined/> [<https://perma.cc/TC7K-D8NH>].

<sup>208</sup> See Eoin Higgins, *Progressive DA Rachael Rollins Hasn't Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious.*, INTERCEPT (Mar. 24, 2019, 6:00 AM), <https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/> [<https://perma.cc/L85Z-4NPB>]; Emma Whitford, *Suffolk County D.A. Rachael Rollins's Office Is Still Prosecuting Cases She Pledged to Drop*, APPEAL (Feb. 6, 2019), <https://theappeal.org/suffolk-county-da-rachael-rollins-office-is-still-prosecuting-cases-she-pledged-to-drop/> [<https://perma.cc/7NDJ-2G2S>].

<sup>209</sup> Higgins, *supra* note 208; see also Whitford, *supra* note 208.

<sup>210</sup> See Justin Jouvenal, *From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018, 6:25 PM), <https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fcea2ab1story.html> [<https://perma.cc/4DNV-XRKH>].

<sup>211</sup> *Id.* Gonzalez faced substantial pressure to dump his diversion program after it was revealed that one of the two men who were enrolled in the program was a minor league baseball player. See *id.* A video emerged of the man "savagely punching and slapping" his fiancé after Gonzalez dropped the charges. See *id.*

model that theoretically relied on non-prosecution practices;<sup>212</sup> instead, Moore's model increased prosecutions.<sup>213</sup>

This metric's outer bounds are obscure, but Cy Vance, Mark Gonzalez, Rachel Rollins, Mark Gonzalez, and Hillar Moore hug this metric's outer limits. One member of the set clearly fails this metric—Leon Cannizzaro. On the Orleans Parish DA's website, Cannizzaro highlights his alleged achievements in non-prosecution and diversion.<sup>214</sup> Apparently, he has “exponentially expanded pre-trial Diversion upon taking office,” he “first proposed to New Orleans' City Council in August 2009 that cases of simple marijuana possession should no longer be prosecuted in Criminal District Court,” and he “executed a policy to move non-violent misdemeanors from Criminal District Court to Municipal Court.”<sup>215</sup> Yet Cannizzaro has sought 150 arrest warrants for witnesses—many of whom are themselves victims of crimes—to force them to testify in court.<sup>216</sup> Arresting victims of sex trafficking, a shooting, and assault because they do not wish to testify<sup>217</sup> does not cohere with the twin goals of treating people with dignity and meting out justice fairly and equitably.

### E. Police Accountability

The most progressive prosecutors would publicly campaign to defund the police; more specifically, prosecutors should call on their municipalities to redirect policing budgets towards other public spending priorities.<sup>218</sup> However, prosecutors do not hold their county's purse strings and cannot unilaterally abolish the police. Instead, assessors can evaluate prosecutors' police accountability record on two other fronts. First, prosecutors rarely

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<sup>212</sup> See Max Rivlin-Nadler, *How a Group Policing Model Is Criminalizing Whole Communities*, NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-a-group-policing-model-is-criminalizing-whole-communities/> [<https://perma.cc/9JYK-7GUE>].

<sup>213</sup> See *id.* Moore also supports locking elementary school children for up to six months for bringing fake guns to schools. See Larry Hannan, *Is the “Incarceration Capital of the World” Finally Ready to Lose Its Title?*, SLATE (Apr. 6, 2017, 6:58 PM), <https://slate.com/news-and-politics/2017/04/is-louisiana-finally-ready-for-criminal-justice-reform.html> [<https://perma.cc/883X-4CB2>].

<sup>214</sup> See *District Attorney Leon Cannizzaro Jr.*, ORLEANS PARISH DISTRICT ATT'Y, <https://www.orleansda.com/district-attorney-leon-a-cannizzaro-jr/> [<https://perma.cc/C6ZM-WAFD>].

<sup>215</sup> *Id.*

<sup>216</sup> See Aviva Shen, *‘Like A Bad Dream’: In New Orleans, Witnesses Are Going To Jail Instead of Perpetrators*, APPEAL (May 21, 2018), <https://theappeal.org/like-a-bad-dream-in-new-orleans-witnesses-are-going-to-jail-instead-of-perpetrators-604243d9faff/> [<https://perma.cc/UR6W-5WPH>].

<sup>217</sup> See *id.*

<sup>218</sup> See Brian Highsmith, *Defund Our Punishment Bureaucracy*, AM. PROSPECT (Jun. 2, 2020), <https://prospect.org/justice/defund-our-punishment-bureaucracy/>; Sarah Jones, *We Are Asking the Police to Do Too Much*, N.Y. (Jun. 2, 2020), <https://nymag.com/intelligencer/2020/06/killing-of-george-floyd-shows-our-over-reliance-on-police.html> [<https://perma.cc/4CDG-9VHA>].



charge police officers who commit unlawful acts of violence.<sup>219</sup> Second, when pursuing cases, prosecutors often rely on non-credible police officer testimony and evidence. A study found that the state has charged or imprisoned thousands of people based partially on testimony from law enforcement officials whom their bosses and prosecutors deemed to have credibility problems.<sup>220</sup> And at least 300 prosecutors' offices have no list tracking dishonest police officers.<sup>221</sup> A bona fide reformist prosecutor should publicly condemn and criminally charge police officers who commit misconduct and brutality, and they should refuse to use unreliable law enforcement testimony and evidence to prosecute defendants; total failure to progress on either front contravenes this metric's outer bounds.

As to the first prong, some members of the set have made progress condemning and addressing police brutality against people of color. Kim Foxx, Wesley Bell, and Michael O'Malley defeated their counties' incumbents<sup>222</sup> by highlighting the incumbents' failure to prosecute the police officers who shot LaQuan McDonald, Michael Brown, and Tamir Rice.<sup>223</sup> Virginia's Stephanie Morales attained national fame for being one of the few prosecutors who has prosecuted and won a conviction for a white police officer who wrongfully killed a black person.<sup>224</sup> Other prosecutors have leveraged other tools to promote police accountability. Margaret Moore created a Civil Rights Unit that reviews all police use-of-force cases instead of deferring to police-friendly grand juries to indict bad cops.<sup>225</sup> Likewise, Wesley Bell is working with fifty-five police departments to streamline law enforcement's interactions with his office.<sup>226</sup>

But other members of the set have a less-than-stellar track record of prosecuting police officers who commit acts of brutality. Jackie Lacey has not charged a single Los Angeles Police Department officer for a shooting since she took office in 2012 even though over 400 people were killed by law enforcement or died in custody during her tenure.<sup>227</sup> Lacey opposed a California law that raised the standard for law enforcement's use of deadly force

<sup>219</sup> See Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #Hashtag Activism*, 20 CUNY L. REV. 521, 552–54 (2017); BLACK LIVES MATTER, <https://blacklivesmatter.com/what-we-believe/> [https://perma.cc/73XV-S985].

<sup>220</sup> See Mark Nichols & Steve Reilly, *Hundreds of Police Officers Have Been Labeled Liars. Some Still Help Send People to Prison*, USA TODAY (Oct. 15, 2019, 12:49 PM), <https://www.usatoday.com/story/news/2019/10/15/brady-lists-police-officers-dishonest-corrupt-still-testify-investigation-database/3986273002/> [https://perma.cc/9EPR-RE7V].

<sup>221</sup> See *id.*

<sup>222</sup> The incumbents were Anita Alvarez, Bob McCulloch, and Tim McGinty.

<sup>223</sup> See, e.g., Speri, *supra* note 20.

<sup>224</sup> See Saleh, *supra* note 89.

<sup>225</sup> See Tony Plohetski, *Travis County DA Makes Major Shift in Oversight of Police Shootings*, STATESMAN (Apr. 12, 2017, 12:01 AM), <https://www.statesman.com/NEWS/20170412/Travis-County-DA-makes-major-shift-in-oversight-of-police-shootings> [https://perma.cc/QU9Z-2D44].

<sup>226</sup> See Dehghani-Tafti et al., *supra* note 154.

<sup>227</sup> See Pishko, *supra* note 75.

to “necessary.”<sup>228</sup> Hillar Moore III openly disdains police accountability and opposes police body cameras. “[I’m] not a big fan of police cameras. . . . Why not put them on the public defender?”<sup>229</sup> Police accountability advocates have castigated John Chisholm<sup>230</sup> and John Creuzot,<sup>231</sup> for their mixed record on charging police who have committed brutality.

As for the second prong, members of the set have mixed records on using unreliable police testimony in criminal cases. Larry Krasner released a “do-not-call” list of twenty-nine non-credible police officers; his office also installed a computer system that automatically flags those officers for his ADAs.<sup>232</sup> Eric Gonzalez released the names of seven police officers that he deemed to be not credible and whose testimony he will eschew in criminal cases.<sup>233</sup> He also released the names of forty police officers that trial judges deemed to be not credible, but he stipulated that he would “sometimes” rely on those officers’ testimony in prosecutions.<sup>234</sup> Advocates who believe that a trial judge’s determination of unreliability is enough to land a police officer on a do-not-call list have denounced Gonzalez for leaving such officers of his list. Other prosecutors are less transparent about their do-not-call policies. Kim Ogg claims that she maintains a private do-not-call list, but she has not released the list to the public.<sup>235</sup> Relatedly, Beth McCann’s electorate

<sup>228</sup> Samantha Michaels, *LA’s First Black District Attorney Is Battling for Reelection. Black Activists Want Her Out*, MOTHER JONES (Mar. 2, 2020), <https://www.motherjones.com/crime-justice/2020/03/jackie-lacey-george-gascon-rachel-rossi-los-angeles-black-lives-matter-district-attorney-police-use-of-force/> [<https://perma.cc/6EM7-F8FS>]. In March, 2020, Lacey’s husband drew national attention after he pulled a gun on Black Lives Matters protestors. See *District Attorney’s Husband Pulls Gun on Protesters*, CNN, <https://www.cnn.com/videos/us/2020/03/03/los-angeles-district-attorneys-husband-pulls-gun-protesters-mxp-vpx.hln> [<https://perma.cc/CXE8-ARLT>].

<sup>229</sup> Pishko, *supra* note 3.

<sup>230</sup> Chisholm did charge four Milwaukee police officers with crimes related to their involvement in the unlawful rectal probing of a detained suspect, but Chisholm refused to press charges against a white police officer who shot Dontre Hamilton, an unarmed black man, fourteen times. See Erik Gunn, *Invisible No More*, MILWAUKEE MAG. (Jan. 21, 2013), <https://www.milwaukeeemag.com/InvisibleNoMore/> [<https://perma.cc/ZLV4-T2B6>].

<sup>231</sup> Creuzot successfully prosecuted Amber Guyger, a white police officer who shot Botham Jean. Jean, a black man, was sitting unarmed in his own apartment when Guyger killed him. See Elliott C. McLaughlin & Steve Almasy, *Amber Guyger Gets 10-year Murder Sentence for Fatally Shooting Botham Jean*, CNN (Oct. 3, 2019), <https://www.cnn.com/2019/10/02/us/amber-guyger-trial-sentencing/index.html> [<https://perma.cc/7MBV-6K7D>]. But Creuzot declined to bring charges or dismissed charges in three recent high-profile incidents of police brutality in Dallas. See Ramchandani, *supra* note 78.

<sup>232</sup> See Julie Shaw & Chris Palmer, *Here Are the 29 Philly Cops on the DA’s ‘Do Not Call’ List*, PHILA. INQUIRER (Mar. 6, 2018), <https://www.inquirer.com/philly/news/crime/29-philly-officers-do-not-call-list-krasner-20180306.html> [<https://perma.cc/J5UA-JYHX>].

<sup>233</sup> The presence of only seven officers on Gonzalez’s do-not-call list is “absurd” to the Brooklyn Defenders. Joseph Goldstein, *Why 7 Police Officers Were Blacklisted in Brooklyn*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/nyregion/police-credibility-brooklyn-district-attorney.html> [<https://perma.cc/7QRF-4VR6>].

<sup>234</sup> See *id.*

<sup>235</sup> See Keri Blakinger, *Advocates Call on Harris County DA to Release Name of Untrustworthy Cops*, HOUS. CHRON. (Jul. 19, 2019, 2:46 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Advocates-call-on-Harris-County-DA-to-release-14108434.php> [<https://perma.cc/8MWZ-KHTP>].

gave her heat when she failed to file misdemeanor charges against Denver Police Chief Robert White and Deputy Chief Matt Murray who had illegally withheld a letter requested under the Colorado Open Records Act.<sup>236</sup>

### F. Prosecutorial Accountability

As explained in Part I, one common critique is that the legal system enables “all-powerful” prosecutors to lock up countless defendants using unlawful and unethical tactics. A truly progressive prosecutor would hold badly behaved subordinate prosecutors accountable for failing to disclose appropriate evidence to the defense, for relying on unreliable evidence in pursuing a conviction, or for behaving unethically in other ways. Prosecutors should carry out accountability programs and terminate line prosecutors if necessary.

Some have attempted to enforce ethical standards and have indicated that they will curb prosecutorial misconduct. Kim Ogg created an Office of Professional Integrity to hold prosecutors to ethical guidelines about turning over evidence to defendants.<sup>237</sup> Almost immediately after taking office, Wesley Bell fired the veteran assistant prosecutor who oversaw the district attorney’s office’s lackluster prosecution of Darren Wilson, the police officer who killed Michael Brown in 2014.<sup>238</sup> By firing many line attorneys,<sup>239</sup> Larry Krasner has publicly signaled that the Philadelphia DA’s office does not welcome prosecutors who do not support progressive prosecution.

Other members of the set have failed to hold their subordinates accountable at the expense of defendants’ rights. One of Mark Gonzalez’s ADAs allegedly withheld a key piece of exculpatory evidence in a case resulting in a wrongful conviction;<sup>240</sup> a court sentenced the defendant to forty years in prison for a murder she did not commit before a judge overturned the conviction.<sup>241</sup> Gonzalez has retained the ADA on his staff and is appealing the judge’s decision to free the defendant.<sup>242</sup> Both Cyrus Vance and Eric Gonzalez opposed New York’s first major attempt to address widespread

<sup>236</sup> See Natasha Gardner, *Meet Denver’s New District Attorney: Beth McCann*, 5280 (Nov. 2017), <https://www.5280.com/2017/10/meet-denvers-new-district-attorney-beth-mccann/> [<https://perma.cc/X36B-QU3Y>].

<sup>237</sup> See Brian Rogers, *Ogg Taps Former Judge for Ethics Post in DA’s Office*, HOUS. CHRON. (Jan. 11, 2017, 9:41 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Ogg-taps-former-judge-for-ethics-post-in-DA-s-10851523.php> [<https://perma.cc/B8ST-5946>].

<sup>238</sup> See Joel Currier, *Bell Fires Veteran St. Louis County Prosecutor Who Presented Grand Jury Evidence in Michael Brown Case*, ST. LOUIS POST-DISPATCH (Jan. 3, 2019), [https://www.stltoday.com/news/local/crime-and-courts/bell-fires-veteran-st-louis-county-prosecutor-who-presented-grand/article\\_be622ab7-b377-52dd-ba71-546847835d2d.html](https://www.stltoday.com/news/local/crime-and-courts/bell-fires-veteran-st-louis-county-prosecutor-who-presented-grand/article_be622ab7-b377-52dd-ba71-546847835d2d.html); Speri, *supra* note 20.

<sup>239</sup> See Lacy, *supra* note 130.

<sup>240</sup> See Eleanor Dearman, *Here’s Why the Innocence Project is Looking at Courtney Hayden’s Case*, CALLER TIMES (Jan. 7, 2019), <https://www.caller.com/story/news/crime/2019/01/07/heres-why-innocence-project-looking-courtney-haydens-case/2381571002/> [<https://perma.cc/3EC3-KNQF>].

<sup>241</sup> See *id.*

<sup>242</sup> See *id.*

prosecutorial misconduct. In 2019, New York moved to create the state's first prosecutor disciplinary committee.<sup>243</sup> Despite overwhelming evidence from the ProPublica study, mentioned in Part I, that courts and DAs do not hold accountable New York prosecutors who unlawfully obtain convictions, Vance and Gonzalez opposed the committee's creation.<sup>244</sup> Once again, Leon Cannizzaro is in a league of his own. Court Watch NOLA revealed that the Orleans Parish jail recorded calls between prisoners and their attorneys.<sup>245</sup> The jail turned the recordings over to Cannizzaro's prosecutors, who used them in prosecutions.<sup>246</sup> Cannizzaro did not discipline any of his prosecutors for their involvement in this unethical and illegal practice.<sup>247</sup>

### G. Wrongful Convictions

There are three exonerations per week in the United States,<sup>248</sup> and wrongful convictions have stolen 22,315 years from 2,521 exonerates.<sup>249</sup> DNA technology spurred the initial wrongful conviction movement, and the emergence of conviction integrity units—which review old, questionable prosecutions—contributed to exonerations reaching a record high in the late 2000s.<sup>250</sup> Prosecutors should set up well-resourced conviction integrity units (CIUs) to examine past convictions and help administer exonerations. A DA who does not institute a robust CIU despite their office's history of wrongful convictions moves beyond the outer limit of this metric.

Larry Krasner,<sup>251</sup> Kim Foxx,<sup>252</sup> Wesley Bell,<sup>253</sup> and Melissa Nelson,<sup>254</sup> set up robust CIUs and enacted vigorous conviction review policies that have exonerated many of the wrongfully convicted. Other prosecutors—such as

<sup>243</sup> See Joaquin Sapien, *Bill Proposes Greater Accountability for New York Prosecutors Who Break the Law*, PROPUBLICA (Aug. 16, 2018, 2:58 PM), <https://www.propublica.org/article/bill-proposes-greater-accountability-for-new-york-prosecutors-who-break-the-law> [<https://perma.cc/8Q4B-C75D>].

<sup>244</sup> See BAZELON, *supra* note 20, at 289.

<sup>245</sup> See Johanna Kalb, Opinion, *Protect the Right to Counsel: Stop Recording Attorney-Client Calls*, NOLA.COM (Jun. 23, 2018), [https://www.nola.com/opinions/article\\_42e1c94a-692d-5ecb-9d87-b8731e3f927f.html](https://www.nola.com/opinions/article_42e1c94a-692d-5ecb-9d87-b8731e3f927f.html) [<https://perma.cc/6K6T-V973>].

<sup>246</sup> See *id.*

<sup>247</sup> See *id.*

<sup>248</sup> See *The Wrongfully Convicted*, TIME, <https://time.com/wrongly-convicted/> [<https://perma.cc/8ZNN-E6RR>].

<sup>249</sup> NATIONAL REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/7ZVT-9N62>].

<sup>250</sup> See *The Wrongfully Convicted*, *supra* note 248.

<sup>251</sup> Before Larry Krasner assumed office, Philadelphia's Conviction Review Unit (CRU) was "notoriously ineffective." Christopher Moraff, *New Philadelphia DA Larry Krasner Hits Reset on the Office's Troubled Conviction Review Unit*, APPEAL (Feb. 15, 2018), <https://theappeal.org/new-philadelphia-da-larry-krasner-hits-reset-on-the-offices-troubled-conviction-review-unit-acc2c14412b4/> [<https://perma.cc/SR8H-RHMC>]. Between 2014 and 2018, the CRU had only exonerated four people. Krasner has since hired Patricia Cummings, a nationally-known innocence advocate and former head of the Dallas District Attorney's CIU, to run the CRU. See *id.* The CRU exonerated nine people in Krasner's first 19 months in office. See *Philadelphia District Attorney Exonerates 9 people in 19 Months*, CBS NEWS (Sep. 3, 2019, 9:29 AM) <https://www.cbsnews.com/news/philadelphia-district-attorney-larry-krasner-exonerates-nine-people-in-19-months/> [<https://perma.cc/8768-4533>].

Kim Ogg<sup>255</sup> and Beth McCann<sup>256</sup>—do not maintain a systematic method for exonerations and instead opt for a piecemeal approach. This does not necessarily indicate Ogg's and McCann's lack of commitment to freeing the wrongfully convicted—perhaps the Houston and Denver DA offices have a relatively less fraught history with improper prosecutions than the offices in Philadelphia, Chicago, Ferguson, Duval, and Nassau do. Nonetheless, local progressive groups have expressed disappointment in James Stewart's failure to set up a CIU despite the Caddo Parish DA office's long history of wrongful, racially motivated convictions.<sup>257</sup>

Other members of the set have created CIUs but failed to give these structures enough support to exonerate anyone. Cy Vance deserves credit as the first New York DA to create a CIU.<sup>258</sup> But, for nine straight years, Vance refused to publicly disclose whether his unit had fully exonerated a single person.<sup>259</sup> After the Marshall Project pressured Vance's office, the DA eventually released the names of seven alleged exonerees in 2019.<sup>260</sup> But the Project found that the state retried and convicted one of the exonerees and released another exoneree only after he pled guilty to lower charges. So Vance's CIU has only officially exonerated five people in nine years.<sup>261</sup> Advocacy organizations refer to Vance's CIU as a "conviction-rejustification unit" that fails to free the wrongfully convicted.<sup>262</sup> In Vance's neighboring borough, Eric Gonzalez's Conviction Review Unit (CRU) has brought exonerations in Brooklyn to a halt. Under Gonzalez's predecessor, Ken Thompson, Brooklyn's CRU overturned twenty-one convictions between 2014 and

<sup>252</sup> Kim Foxx's CIU has exonerated dozens of people. Her office has focused on wrongful convictions that it had obtained because of the Chicago police's employing coerced interrogations and other unlawful tactics. See Cohen, *supra* note 17; 18 *Exonerated in Chicago's Second Mass Exoneration*, INNOCENCE PROJECT (Sep. 24, 2018), <https://www.innocenceproject.org/second-mass-exoneration-in-chicago/> [<https://perma.cc/UEJ7-Q7D7>].

<sup>253</sup> Wesley Bell's "Conviction and Incident Review Unit" investigates officer-involved shootings and possible wrongful prosecutions. See Mary Harris, "I Could Care Less About Conviction Rates", SLATE (Aug. 9, 2019, 2:04 PM), <https://slate.com/news-and-politics/2019/08/wesley-bell-progressive-prosecution-ferguson.html> [<https://perma.cc/2X5T-GW72>].

<sup>254</sup> Melissa Nelson set up Florida's first CIU. See Hannan, *supra* note 61.

<sup>255</sup> Kim Ogg exonerated death row inmate Dewayne Brown. See *Alfred Dewayne Brown Declared Actually Innocent*, DEATH PENALTY INFORMATION CTR. (Mar. 4, 2019), <https://deathpenaltyinfo.org/news/alfred-dewayne-brown-declared-actually-innocent> [<https://perma.cc/3C9L-SZFQ>].

<sup>256</sup> After significant public pressure, Beth McCann opted to not file an opinion in Clarence Moses-El's attempt to claim \$1.9 million in damages from Colorado for his wrongful conviction. See Denver Justice Project, *UPDATE: Beth McCann Changes position, Cynthia Coffman Denies Clarence's Compensation*, CHANGE.ORG (Jan. 27, 2018), <https://www.change.org/p/da-beth-mccann-and-ag-cynthia-coffman-da-mccann-ag-coffman-don-t-put-an-innocent-man-back-on-trial-let-moses-el-move-on/u/22302011> [<https://perma.cc/TAF6-GYBL>].

<sup>257</sup> See Young, *supra* note 146.

<sup>258</sup> See Robbins, *supra* note 59.

<sup>259</sup> See *id.*

<sup>260</sup> See *id.*

<sup>261</sup> A former member of Vance's transition committee describes Vance's CIU as "much more interested in preserving convictions than in taking a fresh, objective look at all the evidence." *Id.*

<sup>262</sup> See *id.*

2017. Gonzalez assumed the role of DA in 2017. Since then, the CRU has only overturned three or four convictions;<sup>263</sup> in 2018, the CRU exonerated no one.<sup>264</sup> There are eighty cases pending before the Brooklyn CRU.<sup>265</sup>

Gutting your own CIU is not a New York City special. Kym Worthy of Detroit—whom a nationally circulated magazine listed as one of its “Woke 100”<sup>266</sup>—has repeatedly refused to admit error in cases where there is compelling evidence of actual innocence. She has admitted that her CIU is “not staffed with any attorneys.”<sup>267</sup> In 2014, Leon Cannizzaro announced a “Conviction Integrity and Accuracy Project” that would review wrongful convictions.<sup>268</sup> He pulled the plug on the Project after one year; it exists no longer.<sup>269</sup> Cannizzaro is known to fight exoneration cases for years and exhaust every appellate option. By charging witnesses who recant false trial testimony with perjury, Cannizzaro’s office has discouraged such witnesses from exonerating the wrongfully convicted.<sup>270</sup> In fact, a study found that Worthy and Cannizzaro are two of the six elected prosecutors who are “most unwilling to admit the innocence of wrongfully convicted people despite overwhelming evidence of error.”<sup>271</sup>

Society’s infatuation with stories of actual innocence and wrongful conviction can distract from other areas of much-needed prosecutorial reform, especially reducing over-punitive sentences for those who are unlikely to be found innocent. But a prosecutor’s treatment of the wrongfully convicted still speaks volumes about the sincerity of their progressive agenda. The failure of Stewart, Vance, Gonzalez, Worthy, and Cannizzaro to launch effective CIUs fails this metric.

<sup>263</sup> See James Ford, *Families of Wrongly Convicted Rally for Change Outside Brooklyn DA’s office*, PIX11 (May 16, 2019), <https://pix11.com/2019/05/16/families-of-wrongly-convicted-rally-for-change-outside-brooklyn-das-office/> [<https://perma.cc/G7KL-PAQ4>]. Families of the Wrongfully Convicted say three cases; the Brooklyn DA’s website says four cases. Noah Goldberg, *Critics Say DA’s Conviction Review Unit is “No Longer Functional,”* BROOKLYN DAILY EAGLE (May 16, 2019), <https://brooklyneagle.com/articles/2019/05/16/critics-say-das-conviction-review-unit-is-no-longer-functional/> [<https://perma.cc/2L89-GLXM>].

<sup>264</sup> See Ford, *supra* note 263.

<sup>265</sup> See *id.*

<sup>266</sup> See *id.*

<sup>267</sup> Jessica Pishko, *Kym Worthy Refuses to Admit Fault, Again*, APPEAL (Aug. 29, 2017), <https://theappeal.org/kym-worthy-refuses-to-admit-fault-again-118f9a2133b0/> [<https://perma.cc/H5J7-574E>].

<sup>268</sup> See Naomi Martin, *Orleans DA Leon Cannizzaro announces new unit to ensure fair convictions*, NOLA.COM (Aug. 20, 2014, 7:29 AM), [https://www.nola.com/news/politics/article\\_2472bbe9-73e4-5bc6-b9b5-b95194396a6d.html](https://www.nola.com/news/politics/article_2472bbe9-73e4-5bc6-b9b5-b95194396a6d.html) [<https://perma.cc/Q76J-5KQB>].

<sup>269</sup> See John Simerman, *Cannizzaro, Innocence Project Call It Quits on Project to Unearth False Convictions*, NOLA.COM (Jan. 11, 2016), [https://www.nola.com/news/article\\_44ce1702-dd2b-5100-87de-f6e3e5b7c9f6.html](https://www.nola.com/news/article_44ce1702-dd2b-5100-87de-f6e3e5b7c9f6.html) [<https://perma.cc/2KA6-JR4N>].

<sup>270</sup> See Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), <https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html> [<https://perma.cc/5Q63-B32R>].

<sup>271</sup> Rory Fleming, *Portland Is No Progressive Paradise—Just Look at Its District Attorney*, FILTER (May 9, 2019), <https://filtermag.org/portland-is-no-progressive-paradise-just-look-at-its-district-attorney/> [<https://perma.cc/VTW2-BTZK>].

## CONCLUSION

[The prosecutor] is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

—*Berger v. United States*, 295 U.S. 78, 79 (1935)

Academics can agree to disagree about whether a progressive prosecutor can truly exist. In an era when the public is increasingly interested in electing prosecutors who stress criminal justice reform, academics must educate communities about what their district attorneys are doing and how to evaluate them. This framework and these comparative illustrations merely provide the groundwork for members of the polity to size up their local prosecutor and vote wisely.

