

THE COMPROMISES PROGRESSIVE PROSECUTORS MUST MAKE: THREE CASE STUDIES

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Abstract

Elected prosecutors in the United States have facilitated mass incarceration, especially since 1994. In response, activists have helped to elect progressive prosecutors at the local level. This thesis examines whether prosecutors can achieve progressive goals, including increasing the fairness of the criminal justice process, prosecuting police abuse, and reducing incarceration. Based on three case studies, I find that prosecutors can reduce incarceration and increase the fairness of the criminal justice process, but that they currently face significant constraints in prosecuting police abuse. A prosecutor's capacity to collaborate with more conservative agents is the most crucial factor for success and depends on not prosecuting police abuse, limiting the extent to which they reduce prosecutions, and, to a lesser degree, limiting how far they go toward promoting a fairer criminal process.

List of Figures and Tables / 2

Introduction / 3

Works Cited / 145

- I. How Elected Prosecutors Promote Mass Incarceration / 11
- II. The Progressive Prosecutor Ideal / 18
- III. Barriers to the Ideal / 36
- IV. Moving the Barriers / 46
- V. John Chisholm: Multiterm Prosecutor / 55
- VI. Melissa Nelson: Prosecutor in a Conservative District / 86
- VII. Marilyn Mosby: Uncompromising Prosecutor / 112
- VIII. The Compromise of Progressive Prosecution / 139

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List of Figures

Figure 1: State and federal incarceration rates over time / 13

Figure 2: Progresssive prosecutor ideal metrics / 19

Figure 3: Milwaukee County incarceration rates / 74

Figure 4: Florida's Fourth Judicial Circuit incarceration rates / 100

Figure 5: Baltimore City incarceration rates / 130

List of Tables

Table 1: Progressive prosecutors / 4

Table 2: Barriers and responses / 53

Table 3: Progress toward the ideal / 141

INTRODUCTION

Over the past several decades, the American criminal justice system has been characterized by unprecedented incarceration rates, gaping racial disparities, and rampant police abuse. In response, a coalition of racial justice activists, progressive Christians, liberal billionaires, and nonprofit leaders have helped to elect progressive prosecutors at the local level.² Progressive prosecutors now govern over 12 percent of the U.S. population because they have come to power in major cities, including Philadelphia, Boston, and Brooklyn.³ This thesis investigates whether progressive prosecutors can make a difference.

The movement to elect progressive prosecutors had a banner year in 2016, as shown in Table 1. Kim Foxx was elected Chicago's district attorney in 2016 to address police brutality.⁴ In Houston Harris County, Texas, Kim Ogg was elected on a platform to decriminalize drug offenses.⁵ Mark Gonzalez of Nueces County, Texas, stormed into office with a "not guilty" tattoo across his chest.⁶ Larry Krasner had sued the police department 75 times as a civil rights lawyer before becoming chief prosecutor of Philadelphia in 2017.⁷ As Heather Pickerell said, progressive candidates "are now hitting the campaign trail en masse."⁸ Scholars refer to members

² Note, "The Paradox of 'Progressive Prosecution,'" *Harvard Law Review* 132, no. 2 (December 2018): 751; Angela J. Davis, "Reimagining Prosecution: A Growing Progressive Movement," *UCLA Criminal Justice Law Review* 3, no. 1 (2019): 6; Benjamin Levin, "Imagining the Progressive Prosecutor," *Minnesota Law Review, Forthcoming*, *U of Colorado Law Legal Studies Research Paper* 20-7, (2020): 8; John Pfaff, "Why the Policy Failures of Mass Incarceration Are Really Political Failures," *Minnesota Law Review* 104 (2019): 2691.

³ Emily Bazelon, *Charged* (New York: Random House Trade Paperbacks, 2019), 290.

⁴ Bruce Green et al., "Can a Good Person Be a Good Prosecutor in 2018?" *Fordham Law Review Online* 1 (2018): 10.

⁵ Green et al., "Good Prosecutor in 2018," 18.

⁶ David Alan Slansky, "The Progressive Prosecutor's Handbook," *UC Davis Law Review Online* 50, no. 25 (2017): 26.

⁷ Jennifer Gonnerman, "Larry Krasner's Campaign to End Mass Incarceration," *New Yorker*, April 24, 2019; Alan Feuer, "He Sued Police 75 Times. Democrats Want Him as Philadelphia's Top Prosecutor," *New York Times*, June 17, 2017.

⁸ Heather Pickerell, "Critical Race Theory and Power: The Case for Progressive Prosecution," *Harvard BlackLetter Law Journal* 73, no. 36 (2020): p. 73.

of the new district attorney class as “progressive prosecutors”⁹ because they promise to reduce prosecutions of ordinary people, reduce racial disparities, and prosecute police misconduct.

Table 1: Progressive prosecutors¹⁰

Name	Jurisdiction	Date elected
Henry Morgenthau	Manhattan, NY	1975
Ronnie Earle	Travis County, TX (Austin)	1977
Terrence Hallinan	Bronx, NY	1995
Kym Worthy	Detroit, MI	2004
Leon Cannizzaro	New Orleans, LA	2008
Jason Williams	Orleans Parish, LA	2008
Hillar Moore III	East Baton Rouge, LA	2009
Cyrus Vance Jr.	Manhattan, NY	2009
John Chisholm	Milwaukee, WI	2007
George Gascon	San Francisco, CA	2011
Jackie Lacey	Los Angeles, CA	2012
Marilyn Mosby	Baltimore, MD	2014
Scott Colom	16th Circuit Court, MS	2015
Stephanie Morales	Portsmouth Commonwealth, VA	2015
James Stewart	Caddo Parish, LA	2015
Kim Foxx	Chicago, IL	2016
Michael O’Malley	Cleveland, OH	2016
Aramis Ayala	Orlando, FL	2016
Beth McCann	Denver, CO	2016
Erik Gonzalez	Brooklyn, NY	2016
Kim Ogg	Houston, TX	2016
Mark Gonzalez	Nueces County, TX	2016
Margaret Moore	Travis County, TX	2016
Melissa Nelson	Fourth Judicial Circuit, FL	2016
Mark Dupree	Kansas City, KS	2017
Larry Krasner	Philadelphia, PA	2017
Satana Deberry	Durham County, NC	2018
Wesley Bell	St. Louis, MO	2018
Rachael Rollins	Suffolk County, MA	2018
John Creuzot	Dallas, TX	2019

The fact that prosecutors such as Beth McCann, Wesley Bell, and Scott Colom are winning elections on progressive agendas shows that the political winds are turning against mass incarceration.¹¹ Since 2018, however, there has been a lively debate in the literature about

⁹ Bruce Green and Rebecca Roiphe, “When Prosecutors Politick: Progressive Law Enforcers Then and Now,” *Journal of Criminal Law and Criminology* (2020): 15.

¹⁰ Coding assistance from Clare Stevens, Oberlin College ‘21.

¹¹ Green and Roiphe, “When Prosecutors Politick,” 1; Green et al., “Good Prosecutor in 2018,” 32.

whether these newly elected prosecutors can achieve the movement's progressive aspirations. Leading advocates Angela J. Davis, Pickerell, and Emily Bazelon call progressive prosecution "essential,"¹² "imperative,"¹³ and "the most promising means of reform ... on the political landscape,"¹⁴ respectively. It "has a lot going for it," adds John Pfaff.¹⁵ David Alan Slansky, Madison McWithey, Bruce Green, and Rebecca Roiphe are also advocates of the movement.¹⁶

By contrast, another set of scholars criticize progressive prosecution. "Count me a skeptic," says David Patton.¹⁷ Furthermore, the anonymous author of a prominent note for the *Harvard Law Review* likens the criminal justice system to moldy bread and disparages progressive prosecution as an attempt to eat around the mold. It is unclear why the Harvard author is anonymous, but they are an early and prominent critic. "Let's not get too excited," Abbe Smith adds.¹⁸ Additional critics of progressive prosecution include Rachel Barkow, Darcy Covert, Maybell Romero, and Franklin Zimring.¹⁹

At the heart of the debate between these two scholarly camps is whether an elected prosecutor can reduce incarceration, bring down racial disparities, and prosecute police misconduct. Skeptics posit that various obstacles make progressive prosecution impossible,

¹² Green et al., "Good Prosecutor in 2018," 12.

¹³ Pickerell, "Race and Power," 74.

¹⁴ Bazelon, *Charged*, 296.

¹⁵ John Pfaff, "A Second Step Act for the States (and Counties, and Cities)," *Cardozo Law Review* 41, no. 1 (December 2018): 6.

¹⁶ Slansky, "Progressive Prosecutor's Handbook"; Madison McWithey, "Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part One: Internal Constraints," *Boston College Law Review E. Supp.* 61, no. 32 (2020); Green et al., "Good Prosecutor in 2018."

¹⁷ Green et al., "Good Prosecutor in 2018," 24.

¹⁸ Green et al., "Good Prosecutor in 2018," 5.

¹⁹ Rachel Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration* (Cambridge: Belknap Press: An Imprint of Harvard University Press, 2019); Darcy Covert, "Transforming the Progressive Prosecutor Movement," *Wisconsin Law Review*, *Forthcoming*, (2021); Maybell Romero, "Rural Spaces, Communities of Color, and the Progressive Prosecutor," *Northwestern Law: the Journal of Criminal Law and Criminology*, 110, no. 4 (2020); Pfaff, "Political Failures."

especially over a sustained period and outside liberal districts.²⁰ By contrast, proponents argue that elected prosecutors can overcome these barriers because of their immense authority.²¹ In this thesis, I focus on five barriers to progressive prosecution emphasized by skeptics in the literature, focusing on office norms,²² police resistance,²³ and the need to win re-election.²⁴

In light of these challenges, I test whether and to what extent three case studies have reached the progressive ideals: John Chisholm of Milwaukee County (elected in 2006), Melissa Nelson of Jacksonville, Florida (elected in 2016), and Marilyn Mosby of Baltimore City, Maryland (elected in 2014). I select these cases because the critics' "paradox" critique, which I expand on later, indicates that these three prosecutors should fail to achieve the progressive prosecutor movement's goals. Chisholm should disappoint because prosecutors cannot possibly make progressive reforms and get re-elected multiple times. Nelson should fall short because she was elected in a conservative district. Finally, Mosby should fail because a prominent skeptic highlights her as evidence that progressive prosecution is impossible.

My approach is to analyze the level of progressive success that the three case studies have found relative to their predecessors. To do so, I conduct 11 interviews, both on the phone and over video chat, with participants who have familiarity with one or more of my case studies.

²⁰ Pickerell, "Race and Power," 82.

²¹ Davis, "Reimagining Prosecution," 1.

²² Pickerell, "Race and Power," 83; Note, "Paradox," 762; Davis, "Reimagining Prosecution," 15; McWithey, "Internal Constraints," 35-36; 37; Seema Gajwani and Max Lesser, "The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise" *New York Law School Law Review* 70, no. 64 (2019-2020): 79; 71; Nguyen, Hao Quang. "Progressive Prosecution: It's Here, But Now What?" *Mitchell Hamline Law Review* 46, no. 2 (2020): 342; Heather Pickerell, "How To Assess Whether Your District Attorney Is A Bona Fide Progressive Prosecutor," *Harvard Law & Policy Review* 15, no. 1 (January 7, 2020): 12; Abbe Smith, "Prosecutors I Like: A Very Short Essay," *Ohio State Journal of Criminal Law* (2018-2019): 414.

²³ Pickerell, "Bona Fide," 5; Pickerell, "Race and Power"; Madison McWithey, "Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints," 61, no. 9 (March 2020): 50; Note, "Paradox," 765.

²⁴ Note, "Paradox," 760; John Pfaff. *Locked in: the true causes of mass incarceration—and how to achieve real reform* (New York: Basic Books, 2017), 171.

Following the Oberlin College Institutional Review Board's protocol for this thesis, the interview subjects' identities are kept confidential. The participants have direct knowledge about the elected prosecutors analyzed in this thesis. The interview subjects include prosecutors, judges, legislators, scholars, activists, and division captains. I also engaged in a general conversation with a division captain that is not cited in this thesis but informs my thinking. The interviews are semi-structured. The information collected in the interviews include the case study's progressive goals, challenges they face, and strategies they deploy to deal with those challenges. I supplement the interviews by reviewing press releases and policy statements.

I also read law review articles and books covering my case studies and progressive prosecution more generally. Moreover, I review articles in local and national news outlets including *Milwaukee Magazine*, *The Milwaukee Journal Sentinel*, *Urban Milwaukee*, *Milwaukee Courier*, *Florida Times-Union*, *Tampa Bay Times*, *Baltimore Sun*, *Baltimore Magazine*, *The Appeal*, *The New York Times*, *Washington Post*, and *The Wall Street Journal*. The information I collect allows me to evaluate each case study's progressiveness across reducing incarceration, increasing the fairness of the criminal judicial process, and prosecuting police crimes.

I predict that Mosby, Chisholm, and Nelson can reduce incarceration, reduce racial disparities, and prosecute police misconduct. But only to the extent that Mosby, Chisholm, and

Nelson rework the incentives and personnel within their office,²⁵ develop a good working relationship with the police force,²⁶ and mobilize activists to build support for their policies.²⁷

Based on my analysis of Chisholm, Nelson, and Mosby, I find that prosecutors can reduce incarceration and increase the fairness of the criminal justice process but not prosecute police abuse. Progressive prosecution is a compromise, not a paradox. A prosecutor must obtain cooperation from more conservative actors, including the electorate, the police, and judges, in order to reduce incarceration and increase the fairness of the criminal judicial process. Securing cooperation from more conservative actors is integral for success but also demands compromise.

To be successful, prosecutors must make the following compromises. The first is with the police: a prosecutor must not prosecute police abuse, one of the movement's primary goals. The second compromise is with legislators, judges, citizens, and the police: a prosecutor needs to focus their reforms on nonviolent rather than violent crimes. The third compromise is with state legislators, the police, and citizens: progressive prosecutors must enact diversion programs rather than categorical refusals to prosecute a set of crimes. In addition to these three compromises in conduct, elected prosecutors need to make a rhetorical compromise: they must demonstrate that their reforms will benefit voters who do not experience the costs of over-incarceration. One approach is by emphasizing the "return on investment" critique of mass incarceration. The second strategy is to highlight the racial injustices of incarcerating low-level drug offenders. I

²⁵ Slansky, "Progressive Prosecutor's Handbook," 29-30; Davis, "Reimagining Prosecution," 26; Green et al., "Good Prosecutor in 2018," 10; McWithey, "Internal Constraints," 43-44; Pickerell, "Bona Fide Progressive Prosecutor," 12; Paul Butler, "A Conversation with Paul Butler About Progressive Prosecutors," interview by Kary Antholis, *Editor's Blog*, Crime Story, February 24, 2020; Smith, "Prosecutors I Like," 420-421; *But* Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 79; 71.

²⁶ Davis, "Reimagining Prosecution," 24; Madison McWithey, "External Constraints," 55; 56; *But* Note, "Paradox," 765.

²⁷ Smith, "Prosecutors I Like," 420; Pfaff, "A Second Step Act," 21; Pfaff, *Locked in*, 206; Davis, "Reimagining Prosecution," 25.

expand later on why two these specific rhetorical framings constitute a compromise. Moreover, a prosecutor hoping to introduce progressive prosecution over time may even find it necessary to distance themselves from the progressive prosecutor label.

These four concessions comprise what I term the “compromise of progressive prosecution.” This argument is a response to the critics’ “paradox of progressive prosecution” claim that it is impossible for prosecutors to move toward progressive ideals due to resistance from junior prosecutors, the police force, judges, state and local officials, and the electorate. I find that collaboration with these conservative actors enables progress on two key goals of the movement, reducing incarceration and reducing racial disparities. Notably, the compromise, with these conservative agents looks differently in different places. The longer that a progressive prosecutor serves in office, the easier it is for them to determine the compromises they must make. My argument is also distinct from the other advocates, including Davis, Pickerell, Slansky, and McWithey, because I stress that collaboration is not only a factor for success, but the most key factor and that collaboration is at the same time the most key constraint. I use the term collaboration to refer to the act of coordinating with more conservative actors in order to introduce progressive reforms, such as diversion programs and conviction review units. These reforms, to different degrees, demand cooperation from the police department, judges, legislators, and citizens, among other more conservative actors.

Chisholm and Nelson both abstained from police prosecution and non-prosecution but introduced diversion programs and increased data transparency. On the other hand, Mosby prosecuted a major police killing and instructed her junior prosecutors not to charge a set of crimes. In response to these non-compromises, the actors she depends on suppressed her progressive reforms. For example, the police disregarded her non-prosecution order, and the

governor assigned the state attorney general to handle violent crimes in her district.

Coalition-building and the corresponding concessions that it entails both develop a prosecutor's capacity to move toward the progressive ideal and restrict progress at the same time.

Part I shows that elected prosecutors promote mass incarceration, and Part II defines the progressive prosecutor ideal. Part III specifies barriers to progressive prosecution, and then Part IV clarifies strategies for moving those barriers. Parts V through VII describe three case studies' success in moving toward the progressive prosecutor ideal and the compromises they made along the way. I conclude in Part VIII that progressive prosecutors must concede prosecuting police abuse and make other compromises in order to build the coalition of conservative agents that is needed to reduce incarceration rates and increase the fairness of the judicial process.

I. HOW ELECTED PROSECUTORS PROMOTE MASS INCARCERATION

Local prosecutors

Local prosecutors possess significant discretionary authority in the administration of criminal law, and they have used that discretionary authority to drive mass incarceration, particularly since 1994. There are several theories in the literature for why prosecutors have used their agency to promote mass incarceration.

There are three types of prosecutors in the United States: federal prosecutors, state prosecutors, and local prosecutors. Federal prosecutors, officially known as United States Attorneys, work for the Department of Justice. They enforce violations of federal criminal statutes, such as federal tax evasion.²⁸ State prosecutors, or State Attorneys General, handle time-intensive violations of state criminal law, such as consumer protection and drug trafficking cases.²⁹ Finally, there is the local prosecutor's office, which is the focus of this paper. Local prosecutors deal with the most common state crimes, including drug possession, drunk driving, assaults, burglaries, and murders.³⁰ The local prosecutor's office is run by the chief county prosecutor, the District Attorney (DA).

The District Attorney is an elected official that serves as the top prosecutor in their designated county.³¹ There are 2,400 district attorneys (DAs) across the U.S.³² These chief county prosecutors supervise over 25,000 assistant district attorneys (ADAs).³³ Since 95 percent of cases are handled at the county level, DA's play a crucial role in the criminal legal system. In

²⁸ Lisa Williams and Iris Hsiao, "Sizing up the Prosecution: A Quick Guide to Local Prosecution." Harvard Law School, last modified 2010, 4.

²⁹ Williams and Hsiao, "Sizing up," 4.

³⁰ Williams and Hsiao, "Sizing up," 4.

³¹ District attorneys are elected in every state except for Delaware, New Jersey, Alaska, and Connecticut: Pfaff, *Locked in*, 128.

³² Pickerell, "Bona Fide Progressive Prosecutor," 8.

³³ Pfaff, *Locked in*, 129; Jeffrey Bellin, "Theories of Prosecution," *California Law Review* 108 (March 6, 2019): 1210.

2017, President Obama noted that district attorneys have more authority over criminal justice than the President of the United States.³⁴ “Do what they just did in Philadelphia and Boston, and elect state’s attorneys and district attorneys who are looking at issues in a new light,” he said, referring to prosecutors Larry Krasner and Rachael Rollins.³⁵

Prosecutors are powerful because they make charging, cash bail, and plea bargain decisions. The charging decision is the most powerful tool in the prosecutor’s arsenal.³⁶ After a police officer makes an arrest, the prosecutor chooses whether to dismiss the case or file charges. A dismissal allows the accused to walk free, while the decision to charge often leads to a criminal conviction.³⁷ The prosecutor also chooses which charges to select and how many to file. The second important tool is the cash bail decision. If a prosecutor chooses to press charges, they then decide whether or not to request cash bail. Cash bail is a tool for pressuring the accused to return to court. If the accused cannot afford to pay the cash payment demanded by the court, they are then held in jail as they wait for trial.³⁸ This usually gives way to the third tool under the prosecutor’s control: the management of plea bargain negotiations. Prosecutors may encourage defendants to plead guilty rather than go to trial. They reach a plea agreement by threatening to impose additional charges if the accused rejects the offer.³⁹ Prosecutors find it easier to make deals with jailed defendants. Since 1920, over 95% of criminal cases have been decided through a deal between the prosecutor and the accused.⁴⁰ It is through the charging, cash bail, and plea bargain decisions at which a prosecutor can act more or less punitively.

³⁴ Pickerell, “Race and Power,” 80.

³⁵ Gonnerman, “Larry Krasner’s Campaign.”

³⁶ Note, “Paradox,” 752.

³⁷ Green et al., “Good Prosecutor in 2018,” 9.

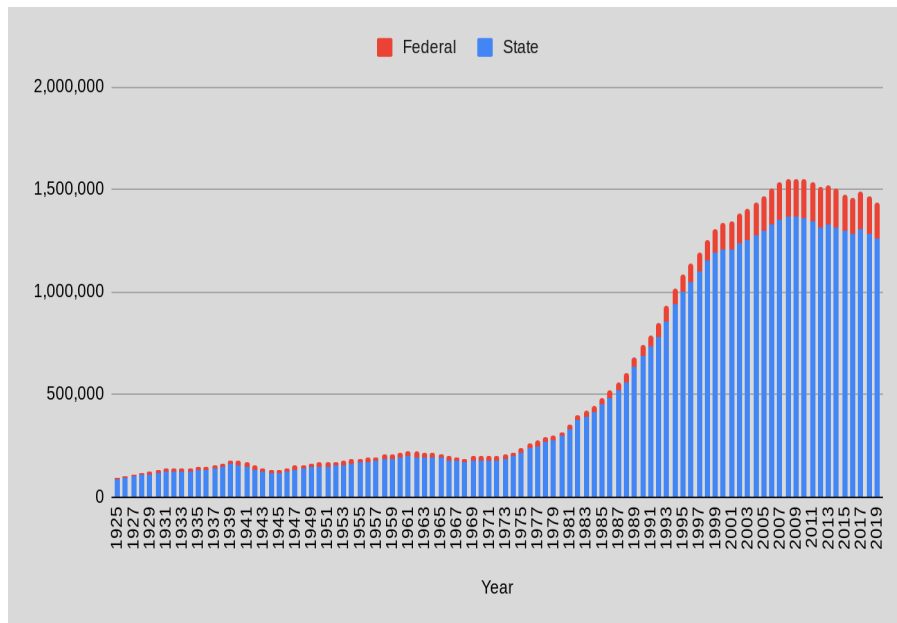
³⁸ Adureh Onyekwere, “How Cash Bail Works,” Brennan Center for Justice, last modified June 2, 2020.

³⁹ Davis, “Reimagining Prosecution,” 5.

⁴⁰ Nguyen, “Now What?” 333.

Prosecutors have used the power of the plea-bargain, cash bail, and cash-bail decisions to drive mass incarceration. As a result of decisions made by local prosecutors, the prison population has boomed from from 300,000⁴¹ to over 1.5 million imprisoned people in the United States.⁴² Most of the prison population is housed in state prisons, not federal prisons, as shown in Figure 1. Local prosecutors are the actors who handle the cases that lead to incarceration in state prisons, while federal prosecutors handle the cases that lead to incarceration in federal prisons.

Figure 1: State and federal incarceration rates over time⁴³



⁴¹ Alexander, *New Jim Crow*, 6.

⁴² Davis, "Reimagining Prosecution," 3.

⁴³ Data from Prison Policy Initiative, "Incarceration Counts and Rates, 1925-2016," https://www.prisonpolicy.org/data/incarceration_counts_and_rates_by_type_over_time.xlsx; Jennifer Bronson and E. Ann Carson. "Prisoners in 2017," Bureau of Justice Statistics, April 2019, <https://www.bjs.gov/content/pub/pdf/p17.pdf>; Carson, E. Ann. "Prisoners in 2018." U.S. Department of Justice: Office of Justice Programs, April 2020, <https://www.bjs.gov/content/pub/pdf/p18.pdf>; Jacob Kang-Brown, Chase Montagnet, Eital Schattner-Elmaleh, and Oliver Hinds, "People in Prison 2019," Vera Evidence Brief, May 2020. <https://www.vera.org/downloads/publications/people-in-prison-in-2019.pdf>.

Local Prosecutors Drive Mass Incarceration

Almost 90% of the incarcerated population are held in state prisons,⁴⁴ and local prosecutors helped drive the 700% expansion in the state prison population that has occurred over a 40 year period.⁴⁵ The carceral process at the state level begins when a city police officer makes an arrest and brings the case to the local prosecutor's office.⁴⁶ From there, the individual will be sent to a state prison only if the local prosecutor decides to file charges and goes on to reach a conviction.⁴⁷ Prosecutors have the discretion to not file charges even if they have the evidence to secure a conviction.⁴⁸ In other words, they can dismiss a case for any reason. Furthermore, Angela J. Davis says that prosecutors have full discretion to offer a more or less generous plea offer.⁴⁹ Ronald Wright additionally notes that judges and state legislatures generally refrain from exercising oversight over these decisions.⁵⁰ In that way, the chief local prosecutor is "the most unregulated actor in our criminal legal process," says Paul Butler.⁵¹ Elected prosecutors are unregulated largely because they are executive branch officials, but the lack of regulation opens the doors to the abuse of power.⁵²

John Pfaff identifies local prosecutors as the driving factor behind mass incarceration since 1994. Between 1994 and 2008, crime rates fell by over 30% and arrest rates fell by 10%. At the same time, local prosecutors increased the rate at which they filed felony charges by 40%.⁵³ For that reason, "the primary driver of incarceration is increased prosecutorial toughness

⁴⁴ Pfaff, *Locked In*, 13.

⁴⁵ Pfaff, *Locked In*, 13; Pickerell, "Race and Power," 77.

⁴⁶ Pfaff, *Locked In*, 70.

⁴⁷ Pfaff, *Locked In*, 70.

⁴⁸ Nguyen, "Now What?" 333.

⁴⁹ Davis, "Reimagining Prosecution," 5.

⁵⁰ Ronald Wright, "How Prosecutor Elections Fail Us," *Wake Forest University Legal Studies Paper*, no. 1339939 (Feb. 2009): 581.

⁵¹ Butler, "Conversation."

⁵² Green and Roiphe, "Prosecutors Politick," 32.

⁵³ Pfaff, *Locked In*, 71.

when it comes to charging people.”⁵⁴ Additionally, Angela J. Davis has shown that prosecutorial discretion has contributed to racial disparities in terms of who is sent to prison and for how long.⁵⁵ Pfaff and Davis show that elected local prosecutors have exercised wide authority and limited oversight to increase incarceration rates and racial disparities. In doing so, they have developed what scholars call a win-at-all-costs culture. Still, not all tough prosecutors are ill-intentioned. For example, during his time as a defense lawyer, James Forman Jr. encountered a “breed of race-conscious black prosecutors who prodded the system to value the lives of black victims.”⁵⁶

While scholars agree that prosecutors have gotten harsher, John Pfaff says that there are no straightforward answers for why that occurred. One factor is that state politicians gave local prosecutors the tools to imprison more people, say Pickerell and Pfaff.⁵⁷ State legislatures passed strict sentencing laws that made the risk of going to trial greater, notes John Pfaff.⁵⁸ “Tell your client to take the deal or we go to trial,” James Forman Jr. quotes a prosecutor telling him during his time as a public defense attorney.⁵⁹

Political considerations provide another explanation for harsh prosecution. Forman Jr. says that citizens around the country started pressuring elected officials to take action against rising crime beginning in the 1970s.⁶⁰ The fact that citizens were successfully pressuring for action is possible because the United States is one of only a small number of countries where prosecutors are elected.⁶¹ The outsized power of white suburbanites and bottom-up anti-crime

⁵⁴ Pfaff, *Locked In*, 6.

⁵⁵ Davis, “Reimagining Prosecution,” 4.

⁵⁶ James Forman Jr., *Locking Up Our Own: Crime and Punishment in Black America* (New York: Farrar, Straus and Giroux: 2017), 224.

⁵⁷ Pickerell, “Race and Power,” 77; Pfaff, *Locked In*, 135-136.

⁵⁸ Pfaff, *Locked In*, 30.

⁵⁹ Forman Jr., *Locking Up Our Own*, 124.

⁶⁰ Forman Jr., *Locking Up Our Own*.

⁶¹ Ronald Wright, “Beyond Prosecutor Elections,” *SMU Law Review* 3, no.11 (2014): 1.

organizing are two specific political forces that made public prosecutors get tougher. Emily Bazelon says that “conviction rates are the statistic many D.A.s cite in seeking re-election.”⁶²

Related to the need to get re-elected, Pfaff and Slansky also make the “steppingstone” claim.⁶³ This is the idea that prosecutors got tougher to serve their long-term political needs. Local prosecutors became more influential during the war on crime.⁶⁴ They enjoyed more influence, note Benjamin Levin and Maybell Romero, because state politicians passed harsh criminal laws and judges promoted unchecked discretion.⁶⁵ Moreover, John Pfaff points out that the profession became more prestigious because of public panic over crime as well as glowing depictions of prosecutors in TV shows and movies.⁶⁶ Increased power and attention may have strengthened their ability to rise up the political ranks, says Pfaff.⁶⁷ In short, John Pfaff’s and David Alan Slansky’s “steppingstone” argument is that prosecutors are harsh to bolster their resumes for higher office.⁶⁸

Tough laws and political dynamics are not the only variables that promote tough prosecution. John Pfaff emphasizes what he calls the “prosecutorial moral hazard problem.”⁶⁹ He says that prosecutors send people to prison for free. On the other hand, prosecutors feel a financial cost when they send an individual to jail or put them into a diversion program. That occurs because prisons are funded by the state while jails and diversion programs are funded by the county. And the prosecutor's office is funded by the county, not the state.⁷⁰ In turn, says Pfaff,

⁶² Bazelon, *Charged*, 18.

⁶³ Pfaff, *Locked In*, 139; David Alan Slansky, “The Changing Political Landscape for Elected Prosecutors,” *Ohio St. J. Crim. L.* 14, Stanford Public Law Working Paper No. 2828803 (2017): 649.

⁶⁴ Levin, “Imagining,” 5; Romero, “Rural Spaces,” 9; Pfaff, *Locked In*, 140.

⁶⁵ Levin, “Imagining,” 5; Romero, “Rural Spaces,” 9.

⁶⁶ Pfaff, *Locked in*, 140.

⁶⁷ Pfaff, *Locked in*, 139.

⁶⁸ Pfaff, *Locked in*, 139-140, Slansky, “Changing Political Landscape,” 648-649.

⁶⁹ Pfaff, “Political Failures,” 2673.

⁷⁰ Pfaff, *Locked In*, 142-143.

prosecutors have a financial motivation to secure a felony conviction rather than a misdemeanor or a treatment alternative.⁷¹

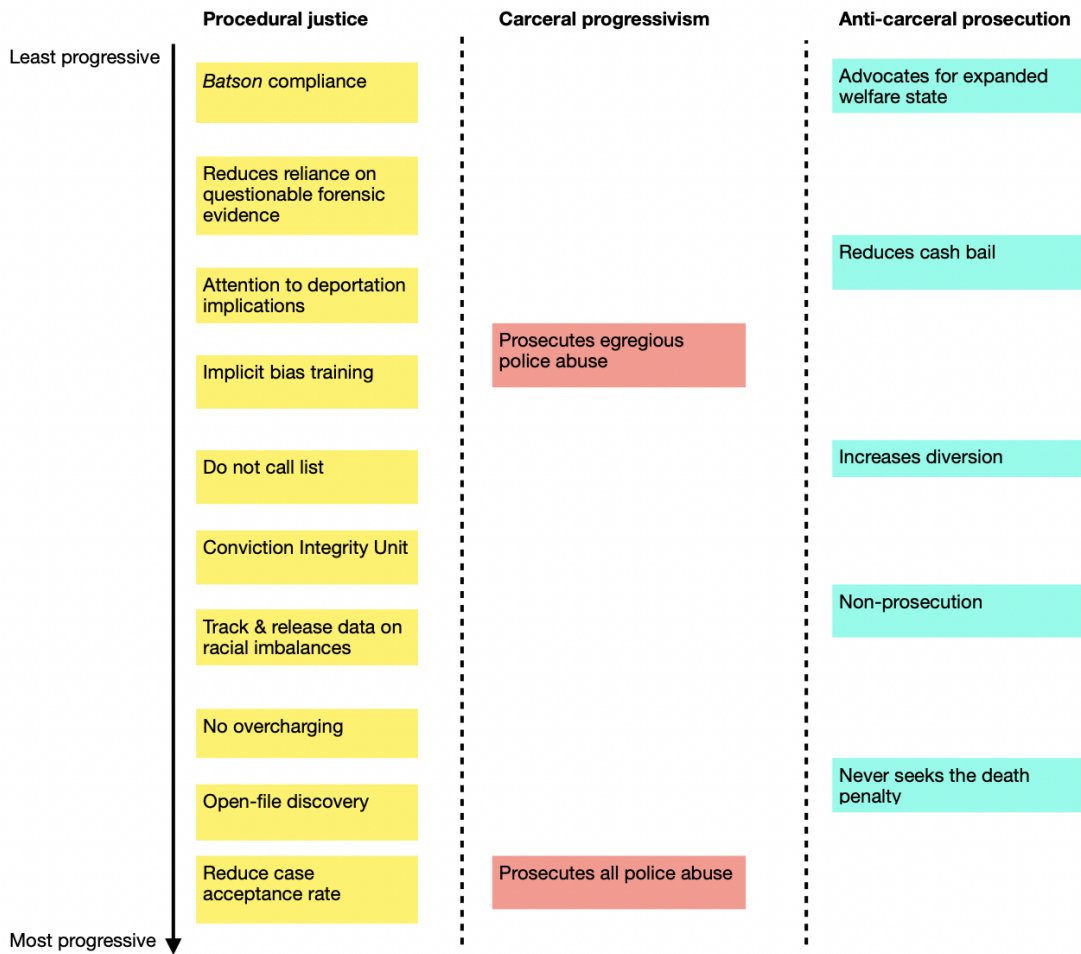
In this section I argued that elected prosecutors are influential actors in the criminal legal system, and that the dominant “win at all costs” model of prosecution has contributed to mass incarceration. I then highlighted theories from the literature about why prosecutors have become more aggressive since 1994. The next matter I address is what a “progressive” model of prosecution would look like.

⁷¹ Pfaff, *Locked In*, 145.

II. THE PROGRESSIVE PROSECUTOR IDEAL

Benjamin Levin's framework captures the three core aims of the progressive prosecutor movement: reduce prison and jail time for ordinary people, safeguard defendant's rights, and prosecute police misconduct. I combine these three goals and their corresponding policies into a three-planked model of the "ideal" progressive prosecutor. Sketching the ideal allows us to envision what progressive prosecution would look like if it were advanced to the fullest extent. There is no consensus definition of progressive prosecutor in the literature, but Levin's ideal model captures advocates' varied aspirations. It should also be noted that Levin splits up the three planks into separate ideal types, while I bring the planks together into one framework of the ideal progressive prosecutor. In the following sections, I discuss barriers to the ideal, strategies for softening those barriers, and then analyze three case studies to determine whether, and if so, to what extent, the progressive ideal can be realized in light of internal and external barriers.

Figure 2: Progressive prosecutor ideal metrics⁷²



While the dominant “win-at-all-costs” model of prosecution drives mass incarceration, a group of scholars, activists, nonprofits, and donors contend that a model of progressive prosecution, shown in Figure 2, is possible.⁷³ This model is based on Colorado Law Professor Benjamin Levin’s argument that advocates have various ideas for what progressive prosecution should entail.⁷⁴

⁷² Coding assistance from Clare Stevens, Oberlin College ‘21.

⁷³ Green et al., “Good Prosecutor in 2018,” 8; Bazelon, *Charged*, xxvii.

⁷⁴ Levin, “Imagining,” 2-3.

Levin categorizes these ideas into three core principles: procedural justice, carceral progressivism, and anti-carceral prosecution.⁷⁵ Procedural justice, Levin explains, means engaging in proper conduct.⁷⁶ To do so, a prosecutor must administer the law in a fair and unbiased fashion.⁷⁷ Carceral progressivism, Levin's second principle, involves focusing on crimes by elites, including police officers, corporations, and politicians.⁷⁸ Finally, anti-carceral prosecution demands that the prosecutor pull back the criminal legal system entirely.⁷⁹ Taken together, Levin's three-pronged ideal consists of protecting defendants' rights, punishing the powerful, and reducing criminal punishment for ordinary people. This model is shown above in Figure 2, with increasing levels of intensity as you move down the graph.

A. Procedural justice

The first plank of Levin's model is procedural justice. Procedural justice demands that a prosecutor operate the mechanics of criminal law in accordance with fairness.⁸⁰ One way a prosecutor can fulfill this principle is by addressing racial bias in prosecutions.⁸¹ For instance, Margaret Moore of Travis County, Texas enlisted researchers to identify points where racial imbalances occurred. After finding that the arrests were the driving factor, Moore worked with the police department to address the issue.⁸² Other prosecutors, including Dan Satterberg of Milwaukee and Beth McCann of Denver, have also brought in researchers to investigate racial

⁷⁵ Levin, "Imagining," 3.

⁷⁶ Levin, "Imagining," 17.

⁷⁷ Levin, "Imagining," 17.

⁷⁸ Levin, "Imagining," 22.

⁷⁹ Levin, "Imagining," 28.

⁸⁰ Levin, "Imagining," 17.

⁸¹ Levin, "Imagining," 17.

⁸² Pickerell, "Bona Fide Progressive Prosecutor," 31.

disparities.⁸³ Furthermore, Chicago’s chief prosecutor Kim Foxx and several other prosecutors have introduced implicit bias training.⁸⁴

Leading prosecution expert Angela J. Davis encourages prosecutors to monitor and address racial disparities.⁸⁵ She notes that racial imbalances in prisons are driven in no small part (25 percent) by racial discrimination within the criminal process.⁸⁶ The additional 75 percent, she says, is fueled by: “... poverty, lack of education, and high unemployment in communities of color — all of which are impacted by race discrimination in society as a whole.”⁸⁷ When it comes to drug crimes, discrimination by criminal officials drives half the racial imbalances, says Davis.⁸⁸ In that way, Davis highlights both the value and the limits of racial progressivism in prosecution. The value is that reducing racial discrimination from within the system will reduce racial disparities, particularly for drug crimes. The limit is that even in the absence of discrimination from within, there will be external discrimination that sustains racial disparities.

In addition to addressing racial disparities, Levin asserts that the procedural ideal requires guarding against wrongful convictions.⁸⁹ Heather Pickerell notes that reform-minded prosecutors including Wesley Bell, Kim Foxx, Larry Krasner, and Melissa Nelson have established “conviction integrity units.”⁹⁰ These units investigate claims of innocence. The staff members then help free innocent individuals and clear their records.⁹¹

⁸³ Pickerell, “Bona Fide,” 31; Jeffrey Toobin, “The Milwaukee Experiment,” *New Yorker*, May 4, 2015.

⁸⁴ “Cook County State’s Attorney Transition Report,” Kim Foxx, accessed December 30, 2020, https://www.cookcountystatesattorney.org/sites/default/files/files/documents/kim-foxx-transition-brochure_0.pdf.

⁸⁵ Davis, “Reimagining Prosecution,” 25-26.

⁸⁶ Davis, “Reimagining Prosecution,” 4.

⁸⁷ Davis, “Reimagining Prosecution,” 4.

⁸⁸ Davis, “Reimagining Prosecution,” 4.

⁸⁹ Levin, “Imagining,” 17.

⁹⁰ Pickerell, “Bona Fide Progressive Prosecutor,” 42.

⁹¹ Slansky, “Handbook,” 32.

Scholars also mention benefits and limits to a focus on wrongful convictions. Levin notes that the government should not incarcerate people who are innocent.⁹² For example, if a prosecutor secures a conviction based on a coerced confession or inaccurate scientific evidence, the verdict should be overturned, says Abbe Smith.⁹³ After all, that person may not have committed the offense. Even if they did, our process requires that prosecutors prove that the offense occurred, note Seema Gajwani and Max Lesser.⁹⁴

Still, Benjamin Levin, Heather Pickerell and Abbe Smith say there are downsides to focusing primarily on people who are incarcerated due to mistakes in the criminal process.⁹⁵ Namely, that the incarceration of the innocent is the exception and not the norm. Renowned scholar and defense lawyer Abbe Smith say, “I run a ‘Guilty Project,’ not an Innocence Project.”⁹⁶ Scholars say we can miss important issues when we place an outsized focus on wrongful convictions. Doing so, they say, may fail to consider what the right response entails when the defendant does commit the crime and the conviction does accord with proper procedure.⁹⁷

Procedural justice also requires that a prosecutor avoid cases that are based on unlawful or discriminatory police practices, says Levin.⁹⁸ Vida B. Johnson points to a case in Baltimore in which a police officer planted evidence on citizens.⁹⁹ Additionally, Michelle Alexander describes racist policing against young poor Black communities as part of the War on Drugs.¹⁰⁰ Moreover, Abbe Smith and other scholars observe that police officers often lie when they get on the witness

⁹² Levin, “Imagining,” 31.

⁹³ Abbe Smith, *Guilty People* (Rutgers University Press, 2020).

⁹⁴ Gajwani and Lesser, “Hard Truths of Progressive Prosecution,” 71.

⁹⁵ Levin, “Imagining,” 31; Pickerell, “Bona Fide Progressive Prosecutor,” 44; Smith, *Guilty People*, 3.

⁹⁶ Smith, *Guilty People*, 2.

⁹⁷ Pickerell, “Bona Fide Progressive Prosecutor,” 44; Smith, *Guilty People*, 3.

⁹⁸ Levin, “Imagining,” 17.

⁹⁹ Green et al., “Good Prosecutor in 2018,” 16.

¹⁰⁰ Alexander, *New Jim Crow*, 63-72.

stand to testify against a defendant: the issue is so common that scholars nickname it “testilying.”¹⁰¹ These scholars say that a prosecutor committed to fair procedure should address illegal searches, discriminatory arrests, and dishonest police testimony. In Heather Pickerell’s 2020 article for the *Harvard Law and Policy Review*, she praises Philadelphia district attorney Larry Krasner’s decision to compile and release a list of police officers with poor track records. Krasner’s “do-not-call” list helps his assistant prosecutors avoid questionable police officers.¹⁰²

Furthermore, scholars say that procedural justice requires that a prosecutor avoid pressing excessive charges. John Pfaff notes that prosecutors often file more charges than they can prove in court, a practice called “overcharging,” according to Angela J. Davis.¹⁰³ In doing so, prosecutors incentivize the defendant to agree to a plea deal rather than risk trial, says Pfaff.¹⁰⁴ Angela J. Davis notes that district attorney Larry Krasner banned his subordinates from bringing murder charges at a level higher than could be proven in court, “the era of trying to get away with the highest charge regardless of the facts is over,” he stated.¹⁰⁵

There are other ways for prosecutors to advance fair process. For example, Hao Quang Nguyen suggests that prosecutors factor immigration consequences into their decisions.¹⁰⁶ Nguyen states that the conviction of a noncitizen may put them at risk for deportation. He points out that two similarly situated defendants who are found guilty of the same offense could face different outcomes if one of them is an undocumented immigrant.¹⁰⁷ Since this is unequal, Nguyen says that prosecutors should hire immigration experts to help the office avoid

¹⁰¹ Smith, “Good Prosecutor,” 393; Green et al., “Good Prosecutor in 2018,” 14-15; Levin, “Imagining,” 17.

¹⁰² Pickerell, “Bona Fide Progressive Prosecutor,” 40.

¹⁰³ Pfaff, *Locked In*, 132; Davis, “Reimagining Prosecution,” 12.

¹⁰⁴ Pfaff, *Locked In*, 132.

¹⁰⁵ Davis, “Reimagining Prosecution,” 12.

¹⁰⁶ Nguyen, “Now What?” 339.

¹⁰⁷ Nguyen, “Now What?” 338.

unwarranted deportations.¹⁰⁸ He celebrates prosecutors who have taken that step,¹⁰⁹ such as Brooklyn prosecutor Eric Gonzalez.¹¹⁰

Moreover, David Alan Slansky recommends that prosecutors hand over ample evidence to the defense attorney.¹¹¹ In *Brady v. Maryland* (1963), the Supreme Court ruled that the prosecutor must hand over “material exculpatory evidence” to the defense.¹¹² That is, a prosecutor must reveal evidence to the defense if there is a “reasonable probability” that it would impact the conclusion of the case.¹¹³ For example, Jeffrey Bellin says that if the prosecutor has information that would undermine confidence in an important witness, they must hand it over to the defense lawyer.¹¹⁴

In addition to evidence disclosure, Jeffrey Bellin warns against striking jury members because of their race.¹¹⁵ The Supreme Court declared it unconstitutional in the 1985 case *Batson v. Kentucky*, for a prosecutor to engage in racial discrimination during the jury selection process.¹¹⁶ But there are countless loopholes for escaping *Batson* and it is a herculean task for the defense to prove that the prosecutor struck a jury member specifically because of their race.¹¹⁷ Bellin says that elected prosecutors should instill the importance of following the *Batson* ruling

¹⁰⁸ Nguyen, “Now What?”

¹⁰⁹ Nguyen, “Now What?” 339.

¹¹⁰ “Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants,” Press Office, Brooklyn District Attorney’s Office Press Office, accessed January 19, 2021, <http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/>.

¹¹¹ Slansky, “Progressive Prosecutor’s Handbook,” 34-35.

¹¹² Bazelon, *Charged*, 104-105; Jeffrey Bellin, “The Changing Role of the American Prosecutor,” *Ohio State Journal of Criminal Law*, forthcoming, (June 2020): 12; Slansky, “Progressive Prosecutor’s Handbook,” 33-34.

¹¹³ Bazelon, *Charged*, 104-105; Slansky, “Progressive Prosecutor’s Handbook,” 34.

¹¹⁴ Bellin, “Changing Role,” 12.

¹¹⁵ Bellin, “Changing Role,” 15.

¹¹⁶ Alexander, *New Jim Crow*, 119.

¹¹⁷ Alexander, *New Jim Crow*, 121.

to their staff, even when junior prosecutors know they can get away with breaking *Batson*.¹¹⁸ By stressing the importance of *Batson* compliance, the elected prosecutor will reduce the number of convictions tainted by a racial bias.

Moreover, David Alan Slansky and Jeffrey Bellin say that prosecutors should reduce reliance on unreliable forensic evidence, as well as informants.¹¹⁹ Forensic evidence refers to scientific testimony or the presentation of scientific evidence in court. Scholars of criminal law say that a lot of forensic evidence brought forward is untrustworthy. In fact, many wrongful convictions are driven by dubious forensic evidence. So-called expert analysis of bite marks in court, for instance, have been linked to a host of wrongful convictions according to a 2016 study by the Texas Forensic Evidence Commission.¹²⁰ Bazelon recommends that prosecutors avoid the categories of forensic evidence that are known to be unreliable, investigate the veracity of experts' claims, and stay up to date with the scientific literature to ensure that the evidence presented is still considered valid by scholars.¹²¹

Scholars also say that relying on informants drives wrongful convictions, and often leads to *Brady* violations.¹²² When prosecutors call on an informant for testimony, they will often fail to disclose information to the defense that casts doubt on the trustworthiness of the witness.¹²³ The main issue with informants though, is that they are not trustworthy. As Bellin says, "The case relies on a jailhouse informant who claims he heard the defendant confess. Really?"¹²⁴ In turn, a prosecutor who is committed to procedural justice reduces reliance on informant testimony.

¹¹⁸ Bellin, "Changing Role," 15.

¹¹⁹ Slansky, "Progressive Prosecutor's Handbook," 35.

¹²⁰ Bazelon, *Charged*, 333.

¹²¹ Bazelon, *Charged*, 333.

¹²² Slansky, "Progressive Prosecutor's Handbook," 35.

¹²³ Slansky, "Progressive Prosecutor's Handbook," 35.

¹²⁴ Bellin, "Changing Role," 16.

Taken together, Levin’s procedural justice ideal demands that a prosecutor administer criminal law in a measured and unbiased fashion.¹²⁵ Scholars suggest that an ideal procedural prosecutor would eliminate racial discrimination, overturn wrongful convictions, avoid wrongful convictions, and not overcharge. Scholars also recommend that they account for deportations, improve evidence disclosure, not strike jury members because of their race, and refuse false police testimony. Proponents argue that these procedural repairs would make the criminal legal system more equitable and restrained. The policies fall under procedural justice because they smooth out the criminal legal process.¹²⁶ In order to advance the procedural justice ideal, elected prosecutors need to convince citizens that protecting defendants’ rights is a worthwhile endeavor, which I expand on in Part III and IV.

Maybell Romero, a critic, says that procedural justice principles are “... standards as low as abiding by the most basic constitutional strictures upon their role.”¹²⁷ David Alan Slansky, on the other hand says that procedural justice makes the legal system “... fairer, more humane, and more effective.”¹²⁸ Slansky notes the prevalence of prosecutorial misconduct to show the need for process reforms.¹²⁹ Still, as the Harvard author warns, these policies might provide “a patina of morality to a fundamentally immoral system.”¹³⁰ Levin also asserts that procedural justice sets a low ceiling because following professional standards will not address the external forces that drive mass incarceration, which are poverty and racial oppression.¹³¹ But as Angela J. Davis says, “an ‘all-or-nothing’ approach will achieve nothing.”¹³² For that reason, the progressive

¹²⁵ Levin, “Imagining,” 17.

¹²⁶ Levin, “Imagining,” 17.

¹²⁷ Romero, “Rural Spaces,” 9.

¹²⁸ Slansky, “Progressive Prosecutor’s Handbook,” 42.

¹²⁹ Slansky, “Progressive Prosecutor’s Handbook,” 39.

¹³⁰ Note, “Paradox,” 768.

¹³¹ Levin, “Imagining,” 21.

¹³² Davis, “Reimagining Prosecution,” 27.

prosecutor exemplar should introduce procedural justice, which is the first plank of the three-part ideal.

B. Carceral progressivism

The second plank of Levin's ideal model is carceral progressivism.¹³³ Carceral progressivism is the view that criminal punishment should further left-wing social and economic goals, says Levin.¹³⁴ For example, a carceral progressive might prosecute police officers who commit violence. Many reform-minded prosecutors were elected after anti-Black police killings: the victories of Michael O'Malley (Cuyahoga County, Ohio), Kim Foxx (Chicago) and Wesley Bell (Ferguson, Missouri) occurred after police killings of Tamir Rice, Laquan McDonald, and Michael Brown, respectively.¹³⁵ In each of these cases, the incumbent prosecutor failed to convict the police officers.¹³⁶ Additionally, commentators have called district attorney Marilyn Mosby a progressive prosecutor after she prosecuted the police officers who killed Freddie Gray.¹³⁷ Traditionally, prosecutors handle the police shooting charging decision, but often bring a weak case to the grand jury. A prosecutor might instead appoint a district attorney in a nearby county, the state attorney general, or a different special prosecutor to determine whether or not to press charges in police misconduct cases.

The anonymous author of the *Harvard Law* note says that prosecutors who seek to reign in police misconduct often face backlash from police officers, the police union, and the police commissioners.¹³⁸ Because the prosecutor's office is connected to the police department,¹³⁹ it is

¹³³ Levin, "Imagining," 22.

¹³⁴ Levin, "Imagining," 22.

¹³⁵ Slansky, "Progressive Prosecutor's Handbook," 39; Pickerell, "Bona Fide Progressive Prosecutor," 39; McWithey, "External Constraints," 61; McWithey, "External Constraints," 52.

¹³⁶ Pickerell, "Bona Fide Progressive Prosecutor," 39.

¹³⁷ Note, "Paradox," 750; Levin, "Imagining," 24.

¹³⁸ Note, "Paradox," 762-766.

¹³⁹ McWithey "External Constraints," 50; Smith, "Prosecutors I Like," 420.

hard for prosecutors to confront the police, says Madison McWithey and a host of other scholars.¹⁴⁰ But advocates of progressive prosecution contend prosecutors should still do so. Vida B. Johnson says there are a range corrupt police practices, including lying, wrongful searches, racist policing, brutality, and murder that have eroded public trust in the criminal legal system. Johnson acknowledges that it is hard for prosecutors to stand up to their law enforcement partners. But she says that prosecutors are the only actors that currently have the ability to do so.¹⁴¹

Beyond prosecuting police violence, carceral progressives may look to oppose perceived economic injustice, Levin explains.¹⁴² For instance, district attorney Chesa Boudin (San Francisco) established an Economic Crimes Against Workers Unit. The unit focuses on crimes committed by firms against workers.¹⁴³ Additionally, Levin notes that Tiffany Cabán, a district attorney candidate in Queens, New York, promised to take on landlord crimes on the campaign trail.¹⁴⁴ The efforts of Boudin and Cabán show the belief that criminal law can serve as a check on employers and landlords. This belief indicates carceral progressivism can expand beyond prosecuting lawbreaking police officers and into prosecuting corporate and landlord abuse.

Carceral progressivism may also involve focusing on identity-based crimes, such as sex crimes and hate crimes, says Levin.¹⁴⁵ For example, Chesa Boudin pledged to “test every rape

¹⁴⁰ Pickerell, “Race and Power,” 87; McWithey, “External Constraints,” 50; Romero, “Rural Spaces,” 12; 14; Note, “Paradox,” 760-765; Bellin, “Theories,” 1245; Bellin, “Changing Role,” 17; Jeffrey Bellin, “The Power of Prosecutors,” *New York University Law Review* 94, no. 2 (August 2018): 180; Abbe Smith, “Can You Be a Good Person and a Good Prosecutor,” *Georgetown Law Faculty Publications and Other Works* 14 (2001): 392.

¹⁴¹ Green et al., “Good Prosecutor in 2018,” 14-16.

¹⁴² Levin, “Imagining,” 22.

¹⁴³ “District Attorney Launches New Economic Crimes Unit to Protect Workers’ Rights,” San Francisco District Attorney, accessed January 11, 2021, <https://www.sfdistrictattorney.org/press-release/new-economic-crimes-unit-to-protect-workers/>.

¹⁴⁴ Levin, “Imagining,” 25.

¹⁴⁵ Levin, “Imagining,” 22.

kit” and Brooklyn district attorney Eric Gonzalez established a Dedicated Hate Crimes Bureau.¹⁴⁶ Addressing sex crimes and hate crimes aims to promote social justice through prosecutions. In short, carceral progressivism comes in different forms but the idea is punishing the powerful or focusing on crimes against subjugated groups.¹⁴⁷

Critical race theorist Richard Delgado, a proponent of carceral progressivism, calls for prosecutors to pursue “with vigor, energy, and imagination white collar crimes, bribery, political corruption, civil rights criminal violations, consumer fraud, and other cases that seek to reinforce democracy by convicting those who endanger it.”¹⁴⁸ Benjamin Levin, a critic, says there are risks to adopting this approach. Carceral progressivism, he says, demands more criminalization.¹⁴⁹ Criminalizing more types of conduct in general, does not help marginalized communities according to Levin.¹⁵⁰ Richard Delgado, on the other hand, calls on prosecutors to prosecute the powerful and at the same time work to replace the current prison state with a new system.¹⁵¹

When I evaluate the level of success that each of my case studies have achieved relative to their predecessor on carceral progressivism, I focus on police prosecution. For one, several prosecutors were elected after incidents of unpunished police brutality. Moreover, police prosecution was an important issue in both Chisholm’s and Mosby’s campaigns. Third, progressive prosecutor advocates emphasize the importance of fair and transparent investigations

¹⁴⁶ Marissa Hoechstetter, “Can a Prosecutor Be Progressive and Take Sex Crimes Seriously?” *The Appeal*, January 08, 2020, <https://theappeal.org/progressive-prosecutors-metoo/>; “Brooklyn District Attorney Creates a Dedicated Hate Crimes Bureau,” Kings County Politics, December 12, 2018, <https://www.kingscountypolitics.com/brooklyn-district-attorney-creates-a-dedicated-hate-crimes-bureau/>.

¹⁴⁷ Levin, “Imagining,” 32.

¹⁴⁸ Richard Delgado, “Should Good People Be Doctors? A Comment on Paul Butler and Anonymous,” *SMU Law Review Forum* 72, no. 1 (2019): 6.

¹⁴⁹ Levin, “Imagining,” 32.

¹⁵⁰ Levin, “Imagining,” 32.

¹⁵¹ Delgado, “Good People,” 6.

of police misconduct. Finally, prosecuting the police provides a hard test for carceral progressivism because elected prosecutors work closely with the police force.

My focus on prosecuting police abuse is not to say that prosecuting other powerful actors, including elected officials and landlords is not an interesting area to explore. It should also be mentioned that I exclude the prosecution of sex crimes and hate crimes in my analysis of carceral progressivism. These crimes are not always committed by powerful actors, as Levin points out.¹⁵² In turn, ramping up the prosecutions of crimes that are committed by ordinary people does not further a progressive-oriented model of prosecution.

C. Anti-carceral prosecution

The final tenet of Levin's three-pronged ideal is anti-carceral prosecution. Anti-carceral prosecution encompasses policies that reduce or eliminate criminal prosecutions and capital punishment.¹⁵³ There are three core policies that slash incarceration rates: diversion programs, non-prosecution orders, and reducing cash-bail requests. In addition, the anti-carceral prosecutor should support political efforts to expand the social safety net. That measure is necessary because a stronger welfare system will ensure that individuals do not need to turn to crime to support themselves. Moreover, the ideal anti-carceral prosecutor would never seek the death penalty.

A diversion program generally refers to a treatment or community-based sanction alternative. Notably, diversion programs cannot be single-handedly put in place by an elected prosecutor. Diversion demands "significant time and money," says prosecutor scholar Madison McWithey.¹⁵⁴ For example, an interview subject with direct experience in a prosecutor's office told me that when a prosecutor seeks to implement a diversion program, the key question they

¹⁵² Levin, "Imagining," 32.

¹⁵³ Levin, "Imagining," 26.

¹⁵⁴ McWithey, "External Constraints," 51.

have to answer is: “Divert to what?”¹⁵⁵ Often, elected prosecutors partner with a nonprofit or a community group to develop a treatment program.¹⁵⁶ Beyond the treatment program itself, diversion can only be put in place in a systematic manner if it is set by the state legislature into statutory law.¹⁵⁷ Finally, there is the crucial question of funding. Generally, these programs are funded by the state legislature. That can present limits on the reach of the program. In Milwaukee, for example, the state legislature stipulates that diversion can only be applied to cases with nonviolent offenders.¹⁵⁸ In addition, funding for diversion can be obtained from federal grants or donations from nonprofits, foundations, or philanthropies. Even so, these sources of funding are more fragile.¹⁵⁹ Moreover, diversion requires participation from defendants, public defenders, police officers, and judges. Often there is pressure from judges and correctional actors to move through cases fast, which can present an obstacle to gaining the cooperation of the courts.¹⁶⁰ In short, diversion programs require the following to be put in place systematically: statutory law that sets the parameters, funding from the state or from outside donors, an external community group to handle the program, and buy-in from the court.

Levin notes that a chief prosecutor may also reduce criminal prosecutions by ordering her assistants to not charge certain crimes.¹⁶¹ Top prosecutor Larry Krasner of Philadelphia, for example, ordered his assistant prosecutors to not bring charges for possession of marijuana or marijuana equipment.¹⁶² Critics call non-prosecution orders dangerous and undemocratic.¹⁶³

¹⁵⁵ Zoom call with interview subject (February 5, 2021) (on file with author).

¹⁵⁶ Phone call with interview subject (February 22, 2021) (on file with author).

¹⁵⁷ Nguyen, “Now What?” 330; Phone call with interview subject (February 22, 2021) (on file with author).

¹⁵⁸ Phone call with interview subject (February 22, 2021) (on file with author).

¹⁵⁹ Phone call with interview subject (February 22, 2021) (on file with author).

¹⁶⁰ Phone call with interview subject (February 22, 2021) (on file with author).

¹⁶¹ Levin, “Imagining,” 28.

¹⁶² Davis, “Reimagining Prosecution,” 31.

¹⁶³ Green and Roiphe, “When Prosecutors Politick,” 31.

Advocates on the other hand, respond that these bold orders reduce incarceration and that district attorneys are elected officials.¹⁶⁴

Beyond non-prosecution orders, an anti-carceral prosecutor might establish restorative justice programs. As Seema Gajwani and Max Lesser explain, restorative justice is a formal conversation between the offender, the victim, and the victim's family.¹⁶⁵ Through the conversation, they make an arrangement for how the person who committed the offense should make it up to the victim.¹⁶⁶ Gajwani and Lesser argue that restorative justice allows for mutual healing and accountability, while incarceration causes destruction for both victims and people who commit crimes.¹⁶⁷

In addition to restorative justice, an anti-carceral prosecutor should reduce cash bail. During the stretch between the arrest and the final verdict, the accused person enjoys the presumption of innocence.¹⁶⁸ Nevertheless, a judge may require the defendant to post a cash payment as a way to ensure they return to court.¹⁶⁹ If the accused person pays bail and appears at subsequent hearings, the court will return the money.¹⁷⁰ On the other hand, if the defendant cannot make bail, they will be held in jail until the case concludes,¹⁷¹ which can take several months or even over a year.¹⁷²

Emily Bazelon says that the judge considers two factors when they determine bail: "flight risk" and "rearrest risk."¹⁷³ These terms refer to the likelihood that the defendant will not show

¹⁶⁴ Green and Roiphe, "When Prosecutors Politick," 30; 32.

¹⁶⁵ Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 88.

¹⁶⁶ Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 88.

¹⁶⁷ Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 92.

¹⁶⁸ Bazelon, *Charged*, 36.

¹⁶⁹ Onyekwere, "Cash Bail."

¹⁷⁰ Onyekwere, "Cash Bail."

¹⁷¹ Nguyen, "Now What?" 339.

¹⁷² Bazelon, *Charged*, 36.

¹⁷³ Bazelon, *Charged*, 36-37.

up to court and the likelihood that the accused person will commit another crime in the runup to trial, respectively.¹⁷⁴ A high bail amount aims to guard against these risks. For one, high bail motivates defendants to return to trial. Second, high bail can lead to incarceration before trial, and thereby prevent the accused person from harming the general public.

Despite these aims, scholars point out problems. A prevalent criticism is that cash bail puts a price tag on freedom. As Hao Quang Nguyen says, “Plainly put, rich people can pay for freedom while poor people cannot.”¹⁷⁵ Another criticism is that cash bail decisions are racist. The Brennan Center for Justice notes that “Black and Latino men [are] assessed higher bail amounts than white men for similar crimes by 35 and 19 percent on average, respectively.” Finally, high cash bail expands the jail population: the Brennan Center for Justice finds that 70% of people in jail are waiting for trial.¹⁷⁶ Moreover, as Michelle Alexander notes, the vast majority of individuals in jail cells, sixty-six percent, earn less than \$12,000 a year before detainment.¹⁷⁷

Given that high cash-bail increases the jail population and causes disproportionate harm to poor people of color, the anti-carceral prosecutor should oppose cash bail. Moreover, choices made by prosecutors influence the judge’s bail decision. For example, Emily Bazelon highlights the New York City Criminal Justice Agency’s finding that the prosecutor’s bail recommendation serves as the most important predictor of a judge’s bail decision.¹⁷⁸

The decision to ask for less bail may also reduce criminal convictions. Sitting in a jail cell makes the process of waiting for trial harder. It additionally puts more pressure on a defendant to plead guilty, says Slansky.¹⁷⁹ Individuals incarcerated before trial have a 400% greater chance of

¹⁷⁴ Bazelon, *Charged*, 36-37.

¹⁷⁵ Nguyen, “Now What?” 340.

¹⁷⁶ Onyekwere, “Cash Bail.”

¹⁷⁷ Alexander, *New Jim Crow*, 155.

¹⁷⁸ Bazelon, *Charged*, 39.

¹⁷⁹ Slansky, “Handbook,” 38.

serving prison time compared to their non-jailed counterparts, per the Brennan Center for Justice.¹⁸⁰ As Emily Bazelon says, “Bail is the first domino in a series of decisions affecting guilty pleas and penalties.”¹⁸¹

Many prosecutors have taken measures to reduce bail. Heather Pickerell contends that district attorneys Michael O’Malley, Kim Foxx, Wesley Bell, and Larry Krasner passed the most progressive bail policies out of their colleagues. These prosecutors have taken two steps to address bail. First, their offices no longer ask for cash bail in low-level, non-violent crimes. Second, they have discouraged their subordinate prosecutors from requesting excessive bail.¹⁸² These steps will help bring down the number of people incarcerated prior to trial.

In addition to diversion, non-prosecution, and forgoing cash bail requests for specific crimes, the anti-carceral prosecutor should work with activists to fight for more robust social policy, says Maybell Romero.¹⁸³ They would also pressure legislators to reduce funding for the police department and the prosecutor’s office, as racial justice activists have called for.¹⁸⁴ In sum, the third part of Levin's ideal is cutting the criminal state (anti-carceral prosecution).¹⁸⁵

Taken together, the ideal anti-carceral prosecutor reduces the reach of the carceral state. They order their subordinates to not prosecute certain crimes, expand diversion, establish restorative justice programs, and do not ask for bail for certain crimes. Furthermore, they demand an increase in funding for social services and a decrease in funding for the prison apparatus. There are a few additional measures that do not fall neatly into one of the three ideal planks. More specifically, the prosecutor should take a more merciful approach to juvenile

¹⁸⁰ Onyekwere, “Cash Bail.”

¹⁸¹ Bazelon, *Charged*, 37.

¹⁸² Pickerell, “Bona Fide Progressive Prosecutor,” 24.

¹⁸³ Romero, “Rural Spaces,” 11.

¹⁸⁴ Levin, “Imagining,” 28.

¹⁸⁵ Levin, “Imagining.”

justice, invite activist monitoring, and lobby the state legislature to reduce penalties for various criminal laws, or otherwise repeal criminal laws.

The paragon of progressive prosecution

The ideal progressive prosecutor, in Levin’s analysis, eliminates misconduct from within the system (procedural justice), prosecutes the powerful (carceral progressivism), and brings down incarceration rates (anti-carceral prosecution).¹⁸⁶ Proponents of the progressive prosecutor project, including Davis, Bazelon, Pickerell, McWithey, Slansky, and Pfaff, believe prosecutors can adopt these principles. Figure 2: Progressive prosecutor ideal metrics contains the core policies that advance each plank of the ideal ranked in order of progressivism

¹⁸⁶ Levin, “Imagining.”

III. BARRIERS TO THE IDEAL

But an opposing scholarly camp, which includes the anonymous Harvard author, Smith, Patton, Barkow, and Romero are skeptical. They argue that a set of internal and external barriers make the ideal impossible.¹⁸⁷ In this section, I discuss the five barriers to progressive prosecution emphasized by skeptics of the progressive prosecutor project. The first barrier, office norms, is internal, while the four additional barriers, the police, judges, state and local officials, and the electorate, are external. My argument in this section is that the skeptics' position brings us to the conclusion that internal and external forces make the progressive ideal impossible. Table 2: Barriers and responses provides the set of obstacles that skeptics claim make the ideal impossible. Table 2 also includes the advocates' responses to these obstacles, which I elaborate on in Part IV.

A. *Office norms*

Urban prosecutors offices are elaborate organizations.¹⁸⁸ Skeptics of progressive prosecution assert that office culture is a force that restricts a prosecutor from achieving the progressive ideal.¹⁸⁹ Urban chief prosecutors oversee between one and eight hundred assistant prosecutors, depending on the office.¹⁹⁰ Elected prosecutors oversee this staff, rather than try cases.¹⁹¹ On the other hand, assistant prosecutors, also known as "line prosecutors," run cases.¹⁹² They make the day-to-day charging, cash bail, plea bargain, and evidence disclosure decisions. There are too many assistant prosecutors, and too many decisions, for the elected prosecutor to

¹⁸⁷ Romero, "Rural Spaces"; Green et al., "Good Prosecutor in 2018"; Note, "Paradox."

¹⁸⁸ Butler, "Conversation," 3; Slansky, "Progressive Prosecutor's Handbook," 27; Pickerell "Race and Power," 83.

¹⁸⁹ Pickerell, "Race and Power," 83; Bazelon *Charged*, 273; 280; Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 77; McWithey, "Internal Constraints," 35; Butler "Conversation," 3; Note, "Paradox," 760; Davis, "Reimagining Prosecution," 25; Smith, "Prosecutors I Like," 417.

¹⁹⁰ McWithey, "Internal Constraints," 43-44.

¹⁹¹ McWithey, "Internal Constraints," 42-43.

¹⁹² McWithey, "Internal Constraints," 42-43; Note, "Paradox," 760.

track every action.¹⁹³ As a result, the assistants have the opportunity to disobey the chief in countless ways.¹⁹⁴ Junior prosecutors with different visions may continue to overcharge, request high cash bail, and withhold evidence from the defense attorney.¹⁹⁵ Managing subordinates is a challenge for progressive prosecutors because many junior prosecutors joined the profession in order to develop their trial skills or to lock up the perceived bad guys.¹⁹⁶ As McWithey points out, these prosecutors are often enthusiastic about promoting defendants' rights and reducing incarceration.¹⁹⁷

But even progressive-oriented prosecutors can become harsher over time.¹⁹⁸ Gajwani and Lesser argue that there are a few factors that cause prosecutors of all philosophies to become tougher. First, prosecutors primarily hear about the accused from police officers and victims.¹⁹⁹ That gives them a limited view of the defendant. Second, prosecutors and defense lawyers often have a hostile relationship due to the competitive culture in criminal litigation.²⁰⁰ Prosecutors may direct that hostility to the defendant.²⁰¹ Emily Bazelon noted assistant prosecutors in Brooklyn request cash bail against DA Erik Gonzalez's orders. Bazelon also saw Brooklyn line prosecutors file charges on the non-prosecution list, ignore the evidence disclosure policy, and stand by a disreputable police officer.²⁰² In sum, skeptics of progressive prosecution assert assistant prosecutors may undermine a chief prosecutor's efforts to improve procedural fairness and reduce incarceration.

¹⁹³ Note, "Paradox," 760; McWithey, "Internal Constraints," 43; Butler, "Conversation," 3.

¹⁹⁴ Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 77-78; Note "Paradox," 760.

¹⁹⁵ McWithey, "Internal Constraints," 43; Note, "Paradox," 761.

¹⁹⁶ McWithey, "Internal Constraints," 36-37.

¹⁹⁷ McWithey, "Internal Constraints," 36-37.

¹⁹⁸ Gajwani and Lesser, "Hard Truths of Progressive Prosecution."

¹⁹⁹ Green et al., "Good Prosecutor in 2018," 23; Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 81.

²⁰⁰ Bellin, "Theories of Prosecution," 129; Gajwani and Lesser, "Hard Truths," 81-82.

²⁰¹ Gajwani and Lesser, "Hard Truths of Progressive Prosecution," 81-82.

²⁰² Bazelon, *Charged*, 273; 280; Pickerell, "Theory and Power," 83-84.

B. Police

Skeptics of progressive prosecution contend that the police force is the second obstacle that constrains a prosecutor from achieving the progressive ideal.²⁰³ Prosecutors rely on police officers²⁰⁴ because the police force is the first screen in the criminal justice system.²⁰⁵ A police officer makes an arrest and then contacts the district attorney's office with the police report.²⁰⁶ Furthermore, police officers are responsible for conducting investigations prior to making an arrest.²⁰⁷ The police force engages in these activities independently from the prosecutor's office.²⁰⁸ Despite the independence, the DA's office relies on the police force to conduct investigations, make arrests, and testify against defendants.²⁰⁹ These responsibilities give the police force the chance to obstruct the progressive ideal.

An interview participant who studies prosecution said they saw a growing divide between the police force and the urban communities in a range of different cities.²¹⁰ Members of the police force, the interview subject told, me "live in whiter, suburban communities. They are often whiter than the people they're policing everyday."²¹¹ Moreover, the police union is a powerful political force that is forceful in its opposition to policies that reduce police power.²¹² At the same time, the police union is disconnected from other labor unions in the area.²¹³ In

²⁰³ Pickerell, "Race and Power," 87; McWithey, "External Constraints," 50; Romero, "Rural Spaces," 12; 14; Note, "Paradox," 760-765; Bellin, "Theories of Prosecution," 1245; Jeffrey Bellin, "Changing Role," 17; Jeffrey Bellin, "Power of Prosecutors," 180; Smith, "Good Prosecutor," 392.

²⁰⁴ Smith, "Good Prosecutor," 392; Pickerell, "External Constraints," 50.

²⁰⁵ Bellin, "Power of Prosecutors," 181; Note, "Paradox," 762.

²⁰⁶ Bellin, "Changing Role," 17; Bellin, "Power of Prosecutors," 181.

²⁰⁷ Bellin, "Power of Prosecutors," 191-192.

²⁰⁸ McWithey, "External Constraints," 53.

²⁰⁹ Bellin, "Changing Role," 24; Bellin, "Power of Prosecutors," 192; McWithey, "External Constraints," 50; Note, "Paradox," 765.

²¹⁰ Phone call with interview subject (February 14, 2021) (on file with author).

²¹¹ Phone call with interview subject (February 14, 2021) (on file with author).

²¹² Phone call with interview subject (February 14, 2021) (on file with author).

²¹³ Phone call with interview subject (February 14, 2021) (on file with author).

addition, the police force is generally more conservative than any given urban county electorate. For example, the Philadelphia police union president, someone who was elected by officers in the union but not by the voters of Philadelphia, called Krasner's campaign "hilarious," and Krasner's base "parasites of the city."²¹⁴ In short, the police force, the police union, and police officers tend to be whiter, more suburban, more rural and more conservative than the voting bases that have elected progressive prosecutors.

A progressive prosecutor might order their subordinates to not prosecute certain crimes in order to reduce incarceration. The police commissioner, however, can order police officers to keep making arrests for the crimes on the nonprosecution list.²¹⁵ The defendants then have to sit in jail until the prosecutor dismisses the case.²¹⁶ When a police officer arrests and jails a defendant, "the process itself becomes the punishment.," as Jeffrey Bellin points out.²¹⁷ Police officers can also reduce a prosecutor's ability to ensure procedural justice. A progressive chief prosecutor might tell her subordinates to not work with dishonest police officers and to penalize police perjury. In response, the police force may refuse to help the district attorney's office with cases.²¹⁸

Additionally, a progressive prosecutor may prosecute police officers who commit crimes or establish an independent entity to prosecute police misconduct. In response, the police union and the police commissioner might criticize or launch attack ads against the chief prosecutor.²¹⁹ In short, police officers can both refuse to comply with the DA's office and attack them politically. Both of these tactics threaten a prosecutor's ability to decrease incarceration, increase

²¹⁴ Feuer, "He Sued Police."

²¹⁵ Bellin, "Power of Prosecutors," 188-189; Bellin, "Theories of Prosecution," 1244; 1246; McWithey, "External Constraints," 50-51.

²¹⁶ Bellin, "Power of Prosecutors," 198-199.

²¹⁷ Bellin, "Theories of Prosecution," 1246.

²¹⁸ Smith, "Good Prosecutor," 392.

²¹⁹ McWithey, "External Constraints," 52.

procedural fairness, and secure convictions against police officers who engage in criminal conduct. Due to the close connection between the police and the prosecutor office and the ideological leanings of most police forces, skeptics posit that the police force constrains the progressive ideal.

C. Judges

A third external pressure against the progressive prosecutor ideal mentioned in the literature is judges. To clarify, skeptics of progressive prosecution place greater emphasis on junior prosecutors and the police force as threats to the ideal, but scholars also mention judges as an additional barrier. Most state judges in the U.S. are elected.²²⁰ Judges have the final say on sentencing, cash bail, and plea bargains.²²¹ If a judge disagrees with a prosecutor's requested sentence, they can impose a higher sentence. Furthermore, a judge can demand cash bail against a prosecutor's wishes.²²² Finally, the judge may reject a plea deal that they believe to be too lenient.²²³ Under the traditional model of prosecution, judges sign off on prosecutor's requests.²²⁴ But progressive prosecutors often face judicial resistance.²²⁵ For instance, judges in Chicago have set bail higher than the amount requested by Kim Foxx's office.²²⁶ To reiterate, prosecutors make cash bail requests and plea deal offers, but judges make cash bail decisions and sentencing decisions. In Philadelphia, judges have rejected plea bargain agreements made by Krasner's

²²⁰ Maura Ewing, "The Search for Progressive Judges," *The Atlantic*, May 17, 2019.

²²¹ John Pfaff, "Pfaff Analyzes Progressive Reform and Warns Not to Fight the Battle on Tough on Crime's Terms," interview by David Greenwald, *The Davis Vanguard*, February 10, 2020; Bellin, "Power of Prosecutors," 211; Pfaff, *Locked in*, 75.

²²² John Pfaff, "John Pfaff on Mass Incarceration," interview by Matt Watkins, *Prosecutor Power #1*, Court Innovation, April 2018.

²²³ Jeffrey Bellin, "Reassessing Prosecutorial Power Through the Lens of Mass Incarceration," *Michigan Law Review* 116 (2018) 849.

²²⁴ Bellin, "Reassessing Prosecutorial Power," 849.

²²⁵ Romero, "Rural Spaces," 12.

²²⁶ Pfaff, "John Pfaff on Mass Incarceration."

office because they believed the sentences were too light.²²⁷ While it may appear that collaborating with judges on reforms would violate the independent status of the judiciary, partnerships with judges are possible, and crucial.

D. State and local officials

State legislators and governors are the fourth external pressure that skeptics contend constrain the ideal. State legislators write the criminal statutes that county prosecutors enforce.²²⁸ Additionally, the state legislature sets the county prosecutor's budget.²²⁹ Legislators can push back against prosecutors who don't enforce their laws. The state legislature might reduce the DA's budget or give police officers the leeway to bring cases to a different DA's office.²³⁰ Governors can also resist progressive prosecution. Orlando provides an example. The state attorney general stated that district attorney Aramis Ayala had to consider the death penalty when appropriate. The governor went on to reassign dozens of murder cases from Ayala's office to a different prosecutor.²³¹ In short, scholars posit that state and local officials have tools to restrict the progressive ideal through budget changes, political attacks, or legislation curbing the local prosecutor's authority. The police, judges, and legislators pose a menacing threat to the progressive ideal, but I still have not covered perhaps the most pressing danger, the citizens.

E. Voters

Skeptics say the district attorney office's electoral basis operates as a major constraint to the progressive prosecutor ideal.²³² The elected prosecutor's reliance on citizen support presents several challenges: the citizens who turn out in district attorney elections tend to be more

²²⁷ Pickerell, "Race and Power," 83.

²²⁸ Bellin, "Reassessing Prosecutorial Power," 181.

²²⁹ Bellin, "Reassessing Prosecutorial Power," 199

²³⁰ Belli, "Reassessing Prosecutorial Power."

²³¹ Davis, "Reimagining Prosecution," 18-19.

²³² Note, "Paradox," 766; Romero, "Rural Spaces," 17; Green et al., "Good Prosecutor in 2018," 22; Covert, "Transforming," 44.

privileged, on average, than the citizens who stay home.²³³ Further, one case gone bad can affect a prosecutor's ability to win re-election, even if the reform program as a whole is successful.²³⁴ As I will explain, this is referred to as the "Willie Horton problem." Also, stereotyping influences voters' attitudes toward criminal justice.²³⁵ Moreover, scholars say that while national public opinion has shifted against mass incarceration for the time being, that could change if crime rises.²³⁶ The first two issues, the "privileged voter" phenomenon, and the "Willie Horton" challenge (when one high-profile mistake dominates an election), are not unique to prosecutor elections. But these issues pose a particular problem for elected prosecutors who strive for the progressive ideal, not least because they work in tandem with both stereotyping and the specter of rising crime.

Overprivileged and overrepresented suburban voters are segregated from underprivileged and underrepresented urban voters.²³⁷ But it is the latter group that is over-incarcerated. Affluent suburbanites are, generally speaking, less enthusiastic about reducing incarceration. And prosecutors respond to their electorate. Hughes describes how most prosecutors frame their campaigns: "Don't worry, you're safe with me. I'll be your attack dog."²³⁸

A high-profile crime often plays a pivotal role in prosecutor elections: scholars call this phenomenon the "Willie Horton problem."²³⁹ William Horton was a participant in a program backed by the then Massachusetts governor Michael Dukakis. The program involved releasing individuals from incarceration for a short period of time. While 99% of program participants did not commit a crime while out of prison, William Horton was an exception. That exception came

²³³ Hughes, "America's Prosecutors."

²³⁴ Pfaff, *Locked In*, 169.

²³⁵ Alexander, *New Jim Crow*, 107.

²³⁶ Barkow, *Prisoners of Politics*; Pickerell, "Race and Power," 85.

²³⁷ Pfaff, *Locked In*, 171.

²³⁸ Hughes, "America's Prosecutors," 5.

²³⁹ Pfaff, *Locked In*, 169-170.

back to haunt Dukakis when he ran for president. His opponent, George H. W. Bush, ran racist campaign ads declaring that Dukakis would endanger the public. Pfaff says that this ad campaign was just the tip of the iceberg for Dukakis. But he also says that elected officials, prosecutors in particular, are scared. They are not only scared that a progressive reform might fail across the board but that one single case gone bad could tank their political future.²⁴⁰

As Krasner has said, “I realize there is this hunt for an anecdote so powerful that it’ll suggest that what we’re doing here is not working.”²⁴¹ Krasner’s quote shows that elected prosecutors often have the Willie Horton concern in the back of their mind. It does not help matters that voters have little else to rely on when they evaluate elected prosecutors.²⁴² After all, prosecutors issue their discovery, cash-bail, and charging policies behind closed doors, and most voters know little about what goes on behind those doors.

Stereotyping activates citizens’ punitive attitude toward crime overall, and not just in high-profile cases. Scholars point out that the “criminalblackman” stereotype gives way to a tough-on-crime attitude among many white citizens.²⁴³ There is a false perception among many white people, grounded in a long history of Black incarceration and made up media images, that Black people are dangerous and unworthy of sympathy.

However, many citizens of color also support tough-on-crime politics.²⁴⁴ In that way, stereotypes are not the whole picture; there are also genuine concerns among citizens of all socioeconomic backgrounds about violent crime. Nevertheless, stereotyping is an important factor behind the electorate’s voracious appetite for tough-on-crime policies.

²⁴⁰ Pfaff, *Locked In*, 169-170.

²⁴¹ Steve Volk, "Philadelphia's District Attorney Is on a Radical Path to Remake the Criminal Justice System," *Newsweek*, October 09, 2018, 13.

²⁴² Wright, “Beyond Prosecutor Elections.”

²⁴³ Alexander, *New Jim Crow*, 162.

²⁴⁴ Forman Jr., *Locking Up Our Own*; Covert, *Transforming*,

Moreover, scholars say that progressive prosecutors may have benefitted from low crime levels. Should crime go up, voters could turn on their progressive prosecutor and instead vote in a more conventional prosecutor.²⁴⁵ Also, skeptics contend that the progressive prosecution movement is unlikely to find success in politically conservative regions.²⁴⁶ In that way, the degree to which citizen backlash emerges against progressive prosecution depends on the political makeup of the district in general, and especially the criminal justice attitudes of citizens in the district.²⁴⁷ While mass incarceration and criminal justice reform efforts are both bipartisan, Republicans tend to be more skeptical about radical reforms. For example, very few members of the progressive prosecutor cohort are Republicans or were elected in Republican districts.

Overall, the electoral basis of the district attorney's office gives rise to several threats to the progressive prosecutor ideal: There is the "privileged voter" phenomenon, the "Willie Horton" problem, stereotyping, and the political necessity of keeping crime in check. On top of these four worries, skeptics are concerned not just about whether the progressive prosecutor can work over time, but whether progressive prosecutors can win elections in conservative districts.

The doomed ideal

Advocates of progressive prosecution have an ambitious ideal type for the progressive prosecutor. They imagine a prosecutor that reduces incarceration, prosecutes the police, and improves procedural fairness. But skeptics say there are obstacles that could make the ideal impossible. Received office norms constrain efforts to bring down incarceration rates and improve procedural fairness. Resistance from police officers limits all three tenets of the ideal.

Pushback from judges may undermine efforts at anti-carceral prosecution. Furthermore, state

²⁴⁵ Pickerell, "Race and Power," 85.

²⁴⁶ Pickerell, "Race and Power," 86.

²⁴⁷ John E. Foster, "Response to Madison McWithey," *Boston College Law Review, E. Supp. Online*, <https://www.bc.edu/bc-web/schools/law/academics-faculty/law-reviews/bclr/e-supp-online/response-to-madison-mcwithey.html>.

legislatures and governors can undermine the chief prosecutor through institutional maneuvers. In the end, the voters determine the prosecutor's fate. Doubters of progressive prosecution believe these obstacles, assistant prosecutors, police officers, judges, state and local officials, and voters, make it impossible for a prosecutor to reach the ideal. Pickerell, an advocate of progressive prosecution, summarizes the skeptics' position: "other actors in the criminal justice system will inevitably clip the wings of any reformist prosecutors' agenda."²⁴⁸ As she points out of the skeptics' stance, "Even if a genuinely progressive prosecutor could overcome the machinations of other actors," the movement's success is still "confined to only certain pockets of the country."²⁴⁹

²⁴⁸ Pickerell, "Race and Power," 82.

²⁴⁹ Pickerell, "Race and Power," 86.

IV. MOVING THE BARRIERS

In this section, I discuss the strategies emphasized by proponents for softening the barriers to the progressive ideal. Advocates of the progressive prosecutor project assert that retraining and replacing junior prosecutors, coordinating and collaborating with the police force, adjusting charging practices, and forming a strong political message will soften pushback from junior prosecutors, the police force, judges, state and local officials, and the electorate. My central argument in this section is that advocates believe that these strategies will put the progressive ideal within reach. A synthesis of both the obstacles to the progressive ideal and the strategies for moving those obstacles can be found under Table 2.

A. Addressing office norms

Proponents of progressive prosecution believe the ideal can be reached despite the barriers. For a progressive prosecutor to succeed, legal scholars say they will need to ensure that her subordinates support her mandate.²⁵⁰ The win-at-all-costs culture in DA's offices flows from the internal incentive structure.²⁵¹ Prosecutors in many offices are promoted based on their conviction rates and the lengths of the sentences that they secure.²⁵² As a result, the prosecutors adopt a harsh mindset. Advocates of progressive prosecution contend the best way to counter the win-at-all costs mentality is to set different expectations for the staff. It will require creativity to come up with a new incentive structure. Professor David Alan Slansky, for example, suggests judging line attorneys on "how scrupulous they are in honoring constitutional rights, how thoughtful they are in crafting fair plea bargains, and how measured they are in exercising their discretion."²⁵³ The Brennan Center for Justice, suggests metrics on "... reducing incarceration,

²⁵⁰ Slansky, "Progressive Prosecutor's Handbook," 29.

²⁵¹ Butler, "Conversation."

²⁵² Slansky, "Progressive Prosecutor's Handbook," 27; Nguyen, "Now What?" 342.

²⁵³ Slansky, "Progressive Prosecutor's Handbook," 30;

pretrial detention, and recidivism.”²⁵⁴ Proponents believe that the best incentive structure will reward line prosecutors for bringing down incarceration and achieving procedural fairness.

In addition to changing the incentives, the chief prosecutor has other tools for reforming the culture in her office. One tool is training programs that aim to make assistant prosecutors more mindful of progressive ideals. Required courses on implicit bias, racial disparities, and poverty are a start.²⁵⁵ But incentives and training, while important, are not enough to win everyone over. Some progressive prosecutors, including Larry Krasner, Beth McCann, and Wesley Bell have fired uncooperative line attorneys.²⁵⁶ It is harsh to let go of career prosecutors, but scholars agree that it is necessary.²⁵⁷ There will be some prosecutors who are too committed to the old model. Nevertheless, it should be mentioned that while in some districts, junior prosecutors are “at will” employees, in unionized prosecutor offices, for instance, mass firings are not possible. In addition to mass firings, the chief prosecutor would be well-served to reform hiring practices. It is advisable to hire a staff that is both diverse and committed to reform.²⁵⁸ Proponents assert the best response to received office norms is changing the incentive structure, introducing new training programs, firing stubborn subordinates, and hiring diverse, progressive-minded replacements.

B. Addressing police pressure

Progressive prosecutors also face a hostile external environment. Advocates of progressive prosecution say that dealing with police pressure requires walking a fine line between working with the police and standing up to police.²⁵⁹ The police force is independent

²⁵⁴ Bazelon, *Charged*, 325.

²⁵⁵ Bazelon, *Charged*, 325; Davis, “Reimagining Prosecution,” 25; Nguyen, “Now What?” 342; Smith, “Prosecutors I Like,” 420-421.

²⁵⁶ Pickerell, “Race and Power,” 84.

²⁵⁷ Butler, “Conversation”; Davis, “Reimagining Prosecution,” 26; Smith, “Prosecutors I Like,” 416.

²⁵⁸ Slansky, “Progressive Prosecutor’s Handbook,” 40.

²⁵⁹ McWithey, “External Constraints,” 55.

from the DA's office.²⁶⁰ And as a result, the prosecutor's office cannot make the police department change their arresting and investigation practices. Progressive DAs instead have to communicate and collaborate to mitigate police resistance.²⁶¹ A prosecutor should tell the police commissioner about the crimes that their office will no longer charge.²⁶² If the police chief disagrees with the change, the prosecutor may need to convince them, or compromise.²⁶³ Angela J. Davis says that it is important that the DA not surprise the police department. She also says that a second strategy for improving the relationship with the police department is to work with them on reform programs. For instance, she says that progressive prosecutor Dan Satterberg of Seattle, Washington, elected in 2007, founded a program called Law Enforcement Assisted Diversion (LEAD). Under LEAD, police officers allowed people who committed certain low-level crimes to enter treatment rather than face criminal charges.²⁶⁴

Nonetheless, police prosecution advocates say prosecutors must stand up to the police force. Traditional prosecutors have a political stake in securing an endorsement from the police union.²⁶⁵ Many progressive prosecutors, on the other hand, were elected on a promise to root out police corruption.²⁶⁶ With the exception of the city council, the prosecutor's office is the best agency for tackling police misconduct.²⁶⁷ Progressive prosecutors should carry forward on challenging police brutality, perjury, and illegal searches.²⁶⁸ They are able to do so because they are an independent agency and have no political debts to the police union.²⁶⁹ In contrast, police

²⁶⁰ McWithey, "External Constraints," 53.

²⁶¹ Davis, "Reimagining Prosecution," 24-25.

²⁶² Davis, "Reimagining Prosecution," 24.

²⁶³ Davis, "Reimagining Prosecution," 24.

²⁶⁴ Davis, "Reimagining Prosecution," 13.

²⁶⁵ McWithey, "External Constraints," 52.

²⁶⁶ McWithey, "External Constraints," 51.

²⁶⁷ Green, et al., "Good Prosecutor in 2018," 16.

²⁶⁸ Green et al., "Good Prosecutor in 2018," 16.

²⁶⁹ McWithey, "External Constraints," 53.

unions generally endorse prosecutors who run tough-on-crime campaigns. In sum, advocates assert a progressive DA should work with the police to the extent that doing so will reduce incarceration but also serve as a check on their power.

C. Addressing judicial pressure

While advocates of progressive prosecution have responded to the office norm threat, the police resistance threat (the two barriers that receive the most emphasis from skeptics), they put less emphasis on the issue of dealing with judicial resistance. Still, Pfaff has discussed this barrier. He says prosecutors have significant influence on the outcome of a criminal proceeding. The prosecutor's decision about what charges to file and how many charges to file restricts the judge's authority.²⁷⁰ When a prosecutor selects charges that carry a lower sentence, the judge will have to impose a sentence that falls within the guidelines for that offense. For Pfaff, a progressive chief prosecutor might exercise that authority to secure lower sentences. At the same time, Pfaff acknowledges that judges present a barrier in reducing cash bail requests.

D. Addressing elected officials and the electorate

There are many political barriers to the progressive prosecutor ideal: Privileged citizens vote in higher numbers than underprivileged citizens, stereotyping depresses white support for progressive criminal justice reforms, many disadvantaged citizens also have a punitive stance toward criminal justice, one high-profile crime or rising crime rates can sink a prosecutor's re-election bid, and it appears that prosecutors cannot get elected in the first place in Republican districts on a progressive platform. How, then, do advocates of progressive prosecution respond?

Advocates often frame the electoral basis of the district attorney's office as an opportunity, rather than a challenge. For example, proponents point to the ACLU's 2017 national

²⁷⁰ Pfaff, *Locked In*, 148.

poll of 1600 registered voters about prosecution.²⁷¹ The ACLU poll found that 83% of Republicans, 94% of Democrats, and 92% of Independents said it was “important” or “very important” for their elected prosecutor to use prison alternatives to reduce incarceration. Moreover, 90% of white voters, 90% of Latinx voters, and 95% of Black voters said it was “important” or “very important” for their prosecutor to reduce racially biased treatment in the criminal justice system, 85% of voters said they are “much more likely” to back a prosecutor who advances data transparency, and 79% of voters said they are “much more likely” to back a prosecutor who sees it as their duty to prosecute police crimes.²⁷² According to the ACLU poll, then, the three key goals of the progressive prosecution movement have broad-based, bipartisan, and multiracial support.

Still, the response from the advocates is more nuanced than the suggestion that voters support progressive prosecution. For example, Pfaff points to a 2016 Vox poll with a sample size of 3,000, which found that 55% of liberals, 62% of moderates, and 68% of conservatives oppose reducing incarceration for violent offenses, even if there is a low probability that the offender commits another crime.²⁷³ The poll also says that over half of the respondents believed that 50% of the prison population is serving time for drug crimes, even though the reality is that 15% of the prison population is serving time for a drug crime. Pfaff highlights the Vox poll to show that many voters *think* they support reducing incarceration because they overestimate the number of individuals confined for low-level drug crimes.²⁷⁴ This misconception is an issue because reducing incarceration for low-level drug offenders will not be enough to fully overturn the system of mass incarceration.

²⁷¹ Pickerell, “Bona Fide Progressive Prosecutor,” 3.

²⁷² “New Polling of Voters’ Opinion Towards Prosecutors,” *ACLU*, David Binder Research, accessed March 19th, 2021.

²⁷³ Pfaff, “A Second Step Act,” 20.

²⁷⁴ Pfaff, “A Second Step Act,” 20-21.

In turn, progressive prosecutors should harness the existing support behind reducing incarceration for low-level offenses. At the same time, elected prosecutors should build on that energy to bring support for reducing incarceration for violent offenses in the long-run.²⁷⁵ Harnessing existing support may entail, for instance, rhetorical appeals to either the fiscal costs or the racial injustices of incarcerating low-level drug offenders.²⁷⁶ The former approach may be especially effective in Republican areas,²⁷⁷ and the latter approach in Democratic areas.

The second step, building on that momentum, is tricky.²⁷⁸ Namely, because voters, in general, do not support reducing incarceration for violent offenders right now.²⁷⁹ In turn, elected prosecutors need to form a strong political message that challenges the dominant notion that incarceration is a good approach for reducing violent crime. That is, elected prosecutors should slowly push the conversation in a new direction: As Smith says, “This [building a counter-message] is the way to beat back the prevailing narrative of incarceration as the answer to every social problem.”²⁸⁰ It is not clear yet how prosecutors can build that narrative, but they might work with movement groups to find a message that works, at least in the short-run.

Elected prosecutors should also promote the long-term goals of the movement by slowly building a new kind of politics under which poverty and socioeconomic disparity are understood as best addressed by way of expanding the welfare state, rather than the carceral state. To be sure, balancing short-term political needs with the long-term goal of changing how people view crime and punishment is easier said than done. The principal long-term rhetorical challenge is that the fiscal costs and racial injustice framings may lose their appeal when the appeals for

²⁷⁵ Gajwani and Lesser, “Hard Truths of Progressive Prosecution.”

²⁷⁶ Gottschalk, *Caught*,

²⁷⁷ Phone call with interview subject (February 14, 2021) (on file with author).

²⁷⁸ Pfaff, *Locked In*.

²⁷⁹ Pfaff, *Locked In*.

²⁸⁰ Smith, “Prosecutors I Like,” 420.

mercy are connected to violent offenders.²⁸¹ In turn, there is uncertainty about what the best counter-narrative would look like, but it is essential that elected prosecutors think about how to move the conversation forward.

Even drawing on existing opposition to mass incarceration will help keep the progressive ideal within reach. In addition, opening up data will help address the “Wille Horton” problem²⁸² and staying connected to community groups will allow the prosecutor to energize their base come re-election.²⁸³ Moreover, the ACLU is mounting a public education campaign that stresses the importance of district attorneys.²⁸⁴ This campaign will help raise voter participation among citizens who support progressive prosecution. Finally, the response to the “privileged voter” problem is that the progressive prosecutor project entails taking power back from the overprivileged and giving it to “more-urban, more-minority voters.”²⁸⁵ That is, progressive prosecutors are winning in urban counties where, unlike in state legislative elections, comparatively socioeconomically disadvantaged voters makeup a greater share of the electorate.²⁸⁶ All that is needed, then, is to mobilize these voters and recruit progressive candidates. Building out the movement into conservative areas, on the other hand, demands drawing on existing Republican support to reduce mass incarceration through either fiscal-based or gun-rights based appeals, which I will elaborate on in my discussion of Melissa Nelson.

In that way, prosecutors need to build a strong political message that works in the short-term, move toward an effective long-term narrative, stays connected to movement groups, supports public education campaigns, and opens up their internal data. These measures will

²⁸¹ Gottschalk, *Caught*; Pfaff, *Locked In*.

²⁸² Wright, “Beyond Prosecutor Elections.”

²⁸³ Davis, “Reimagining Prosecution,” 10.

²⁸⁴ Pfaff, “Political Failures,” 2691.

²⁸⁵ Pfaff, “Political Failures,” 2690.

²⁸⁶ Pfaff, *Locked In*, 171.

promote political support inside and outside liberal regions for progressive prosecution. This is a lot to ask of one elected prosecutor. But the progressive prosecutor project is not just about the progressive prosecutors; it is a team-effort that includes activists, donors, nonprofits, community groups, and faith-based organizations. These groups can work in concert with the elected prosecutor to build political strength.

Reaching the ideal

The ideal may be achievable because there are strategies for progressive to weaken the internal and external pressures. They can reshape the internal incentive structure while retraining and replacing line prosecutors to shift the office culture. To deal with police resistance, the prosecutor will need to persuade the police department to accept their reforms while holding them accountable at the same time. To deal with friction from elected judges and other elected officials, the progressive prosecutor will need to work with movement groups to mobilize and win over voters. A summary of both the barriers and core responses is below in Table 2: Barriers and responses.

Table 2: Barriers and responses

Barriers	Moving the Barriers
Office culture.	Retrain, replace, and adjust incentives.
The police.	Coordinate reforms with the police department.
Elected judges.	Request lower sentences and charge fewer crimes.
State and local officials.	Mobilize progressive voters in these elections.
Voters.	Form a strong political message.

In the following sections, I review three case studies to determine how close a prosecutor who ran on a progressive agenda can reach the ideal in light of the barriers and potential

responses. In testing these cases, I use the metrics shown in Figure 2: Progressive prosecutor ideal metrics, which was discussed in Part II of this thesis. I additionally keep in mind the boundaries and the ways to move those barriers when I examine the cases. Table 2: Barriers and Responses summarizes the boundaries and responses put forward by skeptics and advocates of progressive prosecution, respectively.

V. JOHN CHISHOLM: MULTITERM PROSECUTOR

Background

In this section, I analyze whether and to what extent Milwaukee County prosecutor John Chisholm has achieved the ideals of the progressive prosecutor project relative to his predecessor, and in light of internal and external barriers. Since Chisholm is in his third term, his tenure should provide supporting evidence for the skeptics. On the skeptics' view, political pressure demands that a prosecutor revert to the "win-at-all-costs" model of prosecution to win re-election. It warrants emphasis that Chisholm has been in office for 14 years and has won re-election three times. If the skeptics' argument is right, that is, we should expect Chisholm to fail at advancing the core aims of the progressive prosecutor project over his multiple terms in office. Before launching into my discussion of Chisholm, I will discuss the work of Mike McCann, his predecessor, to provide context on the environment of prosecution in Milwaukee. McCann showed incremental progress toward procedural justice but not toward reducing incarceration or prosecuting police abuse. McCann's progress on the procedural justice plank and lack of progress on the anti-carceral and carceral progressivism planks should be kept in mind as we examine Chisholm's record.

I proceed to argue that Chisholm, by contrast, has made progress toward increasing the fairness of the criminal judicial process through open-data operations, and has also made progress toward reducing incarceration by expanding treatment programs. I also assert that the extent to which Chisholm has been able to push toward the anti-carceral and procedural justice ideals is limited by the compromises that he has had to make. First, Chisholm has opted to introduce treatment orders, rather than non-prosecution orders. Even if Chisholm wanted to pursue non-prosecution, it would be an unwinnable battle because of the pushback that would

ensue from the state legislature and the police force. Second, Chisholm has focused his reforms on non-violent, rather than violent offenders. Theoretically, Chisholm could issue a non-prosecution order for violent crimes. But that would cause problems with other actors. For example, the Republican Wisconsin state legislature, which prohibits local prosecutors from directing state resources to treatment for violent offenders, could cut all his diversion funding. Moreover, the electorate could vote him out. Third, Chisholm has refrained from prosecuting police abuse. These three compromises, diversion over non-prosecution, nonviolent over violent, and not taking action on police abuse have allowed him to build the cooperation he needed from the police force in order to develop his mental health court.

In order to evaluate Chisholm's success in realizing the progressive ideal relative to his predecessor, I will first provide background about the prosecutor who was in office prior to Chisholm. McCann succeeded on the procedural justice plank and failed on both the carceral progressivism and anti-carceral planks. In 2006, Michael McCann concluded his 38-year tenure as the Milwaukee County district attorney and endorsed John Chisholm to take his place.²⁸⁷ The first time Chisholm encountered McCann was in law school.²⁸⁸ McCann had come to deliver a guest lecture, where he said that prosecutors have a special responsibility to achieve justice for the whole community.²⁸⁹ McCann's speech inspired Chisholm to become a prosecutor.²⁹⁰

McCann's biggest progressive achievement occurred during his last year in office. Davis says that McCann was one of only three prosecutors to participate in a study conducted by the

²⁸⁷ Toobin, "Milwaukee Experiment."

²⁸⁸ Erik Gunn, "Invisible No More," *Milwaukee Magazine*, January 21, 2013.

²⁸⁹ Gunn, "Invisible No More."

²⁹⁰ Gunn, "Invisible No More."

Vera Institute of Justice.²⁹¹ The Prosecution and Racial Justice Program (PRJ)²⁹² required elected prosecutors to open their internal data.²⁹³

McCann's transparency to the foundation is a move toward the procedural justice plank of the model progressive prosecutor. That is because fair process requires that prosecutors administer the law impartially, or without regard for race, says Levin.²⁹⁴ On the other hand, McCann was ineffective at prosecuting police abuse. For example, activists organized a protest in McCann's office during his third term.²⁹⁵ The year was 1982.²⁹⁶ A young man named Ernest Lacey had recently died during a police arrest.²⁹⁷ According to observers, three officers pushed Lacey to the ground and one of them placed their knee on him until he suffocated.²⁹⁸ Organizers in a group called the Coalition for Justice for Ernie Lacey held a sit-in at McCann's office to protest that McCann had not pressed charges against one of the officers and only pressed minor charges against the other two.²⁹⁹ McCann has been criticized for a long record of not holding the police responsible for their actions;³⁰⁰ he was "too close to the police."³⁰¹

McCann's failure to prosecute the police violates the carceral progressivism plank of the ideal progressive prosecutor model. To conclude the background on Chisholm's predecessor, McCann's decision to allow researchers to measure racial disparities in his office marked a step

²⁹¹ Angela J. Davis, "In Search of Racial Justice: The Role of the Prosecutor," *New York University Journal of Legislation and Public Policy*, 16 no. 4 (2013): 837.

²⁹² Davis, "Racial Justice," 837.

²⁹³ Davis, "Racial Justice," 837.

²⁹⁴ Levin, "Imagining."

²⁹⁵ "MILWAUKEE POLICE TARGET OF SIT-IN," *The New York Times*, February 7, 1982.

²⁹⁶ "TARGET OF SIT-IN."

²⁹⁷ "TARGET OF SIT-IN."

²⁹⁸ James E. Causey, "James Causey: In 1981, it was Ernest Lacey in Milwaukee. Today, it's George Floyd. Is the US ready to have an honest talk with itself," *Milwaukee Journal Sentinel*, January 22, 2021.

²⁹⁹ "TARGET OF SIT-IN."

³⁰⁰ Jessica McBride, "Opinion; The problem isn't inquest power; it's McCann," *Milwaukee Magazine*, June 28, 2005; "A Saint No More," *Milwaukee Magazine*, November 7, 2007, <https://www.milwaukeeemag.com/asaintnomore/>.

³⁰¹ "A Saint No More."

toward the procedural tenet of the ideal progressive prosecutor. Conversely, McCann's weak record on police brutality violates the carceral progressivism principle.

Chisholm had originally joined McCann's office when he graduated law school in 1994. He started as a rookie prosecutor, handling about 100 cases a day. Within a few years, he was promoted to supervisor of the gun crime division.³⁰² When McCann retired in 2006, Chisholm mounted a campaign for Milwaukee district attorney. Chisholm's opponent in the Democratic primary was a civil rights lawyer named Lorraine McNamara-McGraw.³⁰³ In the primary, McNamara-McGraw said that McCann's office had a record of racial bias; she promised to reduce discrimination, prevent unlawful convictions, and diversify the office.³⁰⁴ Chisholm, on the other hand, found a middle ground between change and continuity.³⁰⁵ Since Chisholm's campaign was less progressive than his primary opponent's campaign, it should be an even greater surprise if his tenure undermines the skeptics' stance that progressive prosecution is impossible over time.

Police violence was a major issue in the election. Shortly before the primary, McCann was unable to reach a conviction against police officers who committed a violent attack against a Black man named Frank Jude Jr.³⁰⁶ Chisholm, in finding the middle ground on prosecuting the police, "threaded the anger on the streets."³⁰⁷ That is, he did not criticize McCann's record on police shooting investigations, but also said that he would upgrade the office's approach. Chisholm doubled the votes of McNamara-McGraw in the 2006 Democratic primary.³⁰⁸ In the

³⁰² Gunn, "Invisible No More."

³⁰³ "Wisconsin Democratic Party: Democratic District Attorney Debate Announced," *Us Fed News, HT Media*, August 21, 2006, LexisNexis Academic.

³⁰⁴ Michael Timm, "Lorraine McNamara-McGraw: A Passion for Justice," *Riverwest Currents*, January 197.

³⁰⁵ "Chisholm posed to become new DA," *AFL-CIO Milwaukee Labor Press*, September 28, 2006.

³⁰⁶ "Michael McCann is not on the ballot," *Station 12 WISN*, October 16, 2006, LexisNexis Academic.

³⁰⁷ "Chisholm posed."

³⁰⁸ Erik Gunn, "Invisible No More."

general election, police accountability was also a key issue. Republican candidate Lew Wasserman said he would change the office's approach to investigating police crimes, while Chisholm said he would improve the approach.³⁰⁹ It is not clear the specific measures that Chisholm proposed for upgrading the office's approach to police shooting investigation. The details of his proposals, that is, have not been documented in the primary source evidence I have reviewed. The reason for that could be that Chisholm did not elaborate on the policy specifics. He went on to dispatch Wasserman with 83% of the vote in the November 2007 general election.³¹⁰

Chisholm's campaign agenda also included promises to focus on violent crimes, reduce prosecutions of low-level crimes, and increase community accountability.³¹¹ "This is not a soft on crime approach, this is a smart on crime approach," Chisholm said in a 2007 radio segment.³¹² Chisholm also said he would start a "public integrity unit."³¹³ That is, a team of prosecutors focused on corruption from elected officials. Chisholm's promise to bring down incarceration of certain crimes is a nod toward anti-carceral prosecution, which refers to policies that reduce the use of prisons, jail, or the death penalty, while his public integrity unit advances carceral progressivism.³¹⁴ In short, Chisholm's agenda included commitments to anti-carceral prosecution for low-level crimes and prosecuting politicians who break the law.

Davis, Bazelon, and Marie Gottschalk describe Chisholm as an early model for progressive prosecution.³¹⁵ These scholars praise Chisholm for building on McCann's

³⁰⁹ "Michael McCann is not on the ballot."

³¹⁰ "Results of Fall General Election," Wisconsin State Elections Board, accessed January 19th, 2021.

³¹¹ Station 4: WTMJ, "No Headline in Original," *Global Broadcast Database*, January 9, 2007, LexisNexis.

³¹² Station 6 WITI, "No Headline in Original," *Global Broadcast Database*, May 6, 2007, LexisNexis.

³¹³ "Michael McCann is not on the ballot."

³¹⁴ Levin, "Imagining."

³¹⁵ Green et al., "Good Prosecutor in 2018," 11; Davis, "Reimagining Prosecution," 13; Marie Gottschalk, *Caught* (Princeton University Press, 2016), xvii; 266; Bazelon, *Charged*, 80.

collaboration with the Vera Institute for Justice.³¹⁶ In addition to Chisholm’s work with the Vera Institute, Emily Bazelon praises Chisholm for his generous evidence disclosure policy.³¹⁷ Chisholm gives the defense attorney full access to his evidence.³¹⁸ Bazelon, Slansky, and Bellin emphasize the importance of transparent evidence disclosure policy.³¹⁹ Evidence disclosure refers to the Supreme Court’s mandate that prosecutors provide “material exculpatory evidence” — facts that are strongly damaging to the state’s case — to the defense.³²⁰ Prosecutors who follow that rarely enforced mandate to the fullest extent make the criminal process fairer, scholars say.³²¹ Taken together, Davis, Bazelon, and Gottschalk claim that Chisholm has made strides toward fairer process and less prison time (procedural justice and anti-carceral prosecution).³²² Heather Pickerell, for her part, says Chisholm has been criticized for his record prosecuting the police (carceral progressivism).³²³ She says that Chisholm did not file charges against the officers who killed Dontre Hamilton.³²⁴

Milwaukee prosecutor Michael McCann allowed researchers to track data in his office, which showed promise on the procedural fairness metric. Still, McCann failed to combat police violence, which reflected weakness in the police prosecution facet of the ideal model. Chisholm, McCann’s predecessor, won on a middle of the road platform. Chisholm is regarded in the literature as a model progressive prosecutor because he expanded on McCann’s procedural

³¹⁶ Bazelon, *Charged*, 270.

³¹⁷ Bazelon, *Charged*, 266.

³¹⁸ Bazelon, *Charged*, 266.

³¹⁹ Bazelon, *Charged*, 104-105; Bellin, “Changing Role,” 12; Slansky, “Progressive Prosecutor’s Handbook,” 33-34.

³²⁰ Bazelon, *Charged*, 104-105; Bellin, “Changing Role,” 12; Slansky, “Progressive Prosecutor’s Handbook,” 33-34.

³²¹ Bazelon, *Charged*, 104-105; Bellin, “Changing Role,” 12; Slansky, “Progressive Prosecutor’s Handbook,” 33-34.

³²² Green et al., “Good Prosecutor in 2018,” 11; Davis, “Reimagining Prosecution,” 13; Gottschalk, *Caught*, xvii; 266; Bazelon, *Charged*, 80.

³²³ Pickerell, “Progressive Prosecutor Bona Fides,” 40.

³²⁴ Pickerell, “Progressive Prosecutor Bona Fides,” 40.

reforms and introduced anti-carceral reforms. Critics of Chisholm, on the other hand, say he failed to prosecute the police effectively.

In this section, I evaluate Chisholm's progressive prosecutor credentials against Levin's three-planked model, relative to McCann. Chisholm, compared to McCann and traditional prosecutors more generally, has made progress toward procedural justice through open-data programs and open-evidence disclosure, as well as progress toward anti-carceral prosecution by expanding treatment alternatives. At the same time, Chisholm's tenure fails to show that prosecutors have the capacity to take on police crimes. Nevertheless, he has shown that a prosecutor can move toward less prison time and fairer process over a sustained period of time. I conclude with the suggestion that progressive prosecutors outsource police investigations. My central contention, though, is that Chisholm's capacity to form relationships with more conservative actors, especially the police force, pretrial services, elected judges, Wisconsin state House and Senate legislators, and the electorate is the most crucial driver of his success. But at the same time, Chisholm's capacity to collaborate with relatively conservative actors prevents him from prosecuting the police and limits the extent to which he can reduce incarceration time and increase procedural fairness. Table 3: Progress toward the ideal summarizes a key reform, key collaborators, key consequence, and key concessions of Chisholm's tenure. Table 3 also provides this information for my second and third case studies, which I discuss in Part VI and Part VII.

As I will show, even if Chisholm wanted to issue a non-prosecution order, he would face immense pushback from state legislators and police officers, who could keep making arrests for those crimes. Even if Chisholm wanted to divert violent offenders, statutory restrictions from the state legislature and political pressure from the public would undercut his ability to do so.

Finally, Chisholm needs participation and agreement from the police department to implement his diversion programs, which constrains him from taking an aggressive approach toward police crimes. To be clear, Chisholm could refuse to compromise and issue a non-prosecution order without the immediate approval of the police force, the state legislature, pretrial services, probation officers, judges, or the electorate. But judges, police officers, other court actors, and legislators could withdraw their cooperation or resist his diversion programs; the police force could continue to make arrests over his non-prosecution order, judges could withdraw from Chisholm’s problem-solving courts, and voters could oust him. Collaboration with more conservative actors, then, is integral for sustainable change, but also places limits on how far a progressive prosecutor can go.

A. Procedural justice

During his time in office, John Chisholm has made significant advancements toward ensuring fair process, the first pillar of the progressive ideal. Chisholm has done so by way of speeding up the review of police reports,³²⁵ providing all evidence to the defense,³²⁶ and compiling data on racial disparities in charging and other decision points.³²⁷ These policies aim to “improve the quality of justice,” as an interview participant with direct knowledge of prosecution in Milwaukee put it.³²⁸ Chisholm’s record of tracking and addressing internal racial disparities has received the most attention.³²⁹ Scholars and observers place particular emphasis

³²⁵ Phone call with interview subject (February 5, 2021) (on file with author).

³²⁶ Bazelon, *Charged*, 266; “Promoting Transparency and Fairness Through Open and Early Discovery Practices,” *Fair and Just Prosecution*; Ellen Yaroshesky, “Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion,” *Temple Political & Civil Rights Law Review* 343 (2010): 352.

³²⁷ Davis, “Racial Justice,” 839.

³²⁸ Phone call with interview subject (February 4, 2021) (on file with author).

³²⁹ Davis, “Racial Justice,” 839; Bazelon, *Charged*, 327; Gottschalk, *Caught*, 266; Toobin, “The Milwaukee Experiment.”

on his work with the Vera Institute for Justice to address racial imbalances in prosecutions.³³⁰ I will discuss the Vera project, but also Chisholm’s work with MacArthur Foundation researchers and Fair and Just Prosecution.

When Chisholm ran for office in 2006, he stressed that he would build trust in his community.³³¹ Chisholm followed through by building on the work of Michael McCann, his predecessor. In 2005, McCann allowed researchers from the Vera Institute for Justice to track his office’s internal data.³³² McCann was one of just two prosecutors to partake in the study. Charlotte, North Carolina’s chief prosecutor Peter Gilchrist was the only other participant.³³³ As I learned from an interview subject with direct knowledge of prosecution in Milwaukee, “Nobody wanted to do that back then. Let an outsider see your data — see if [you’re] charging people evenhandedly.”³³⁴

Chisholm, unlike Gilchrist’s successor, continued the partnership with Vera when he took office in 2007. The Vera Institute, as part of their Prosecution and Racial Justice program, studied whether there were unwarranted racial imbalances in the Milwaukee County Prosecutor office’s handling of crime categories including drug paraphernalia possession, domestic violence, resisting an officer, and prostitution.³³⁵ The researchers studied, for example, whether an assistant Milwaukee prosecutor was more likely to charge a Black defendant for drug paraphernalia possession than a white defendant. The Vera researchers found that there were gaping unjustified racial disparities in the prosecution of drug paraphernalia cases and interracial domestic violence

³³⁰ Davis, “Racial Justice,” 839; Bazelon, *Charged*, 327; Gottschalk, *Caught*, 266; Toobin, “The Milwaukee Experiment.”

³³¹ Phone call with interview subject (February 3, 2021) (on file with author); Phone call with interview subject (February 5, 2021) (on file with author).

³³² Phone call with interview subject (February 5, 2021) (on file with author).

³³³ Davis, “Racial Justice,” 837.

³³⁴ Phone call with interview subject (February 5, 2021) (on file with author).

³³⁵ Davis, “Racial Justice,” 839.

cases: the declination rate for a drug paraphernalia case was 41% for white defendants, compared to 27% for Black defendants.³³⁶ Additionally, there was a 34% higher likelihood of prosecution for domestic violence cases involving a Black offender and a white victim, as compared to domestic violence cases involving a white offender and a white victim.³³⁷

Chisholm held conferences with police officers, anti-domestic violence advocacy groups, probation officers, and his staff to formulate a plan for solving the disparities in interracial domestic violence cases, according to Davis.³³⁸ In an interview, I learned that Chisholm also conferred with pretrial service employees.³³⁹ These meetings support my argument that collaboration with more conservative actors has been a major component of Chisholm's strategy for the successful introduction of procedural justice. In addition, Chisholm held town halls where he asked his constituents for their advice about how to close the racial disparities.³⁴⁰

He then proceeded to establish a series of training programs in 2012 that aimed to reduce racial discrimination in these cases.³⁴¹ In addition, Chisholm introduced policies to reduce incarceration for drug paraphernalia possession and domestic violence.³⁴² I will elaborate on those policies in the anti-carceral prosecution subsection. But the key takeaway is that Chisholm's lauded Vera project involved collaborating with Vera researchers, junior prosecutors, police officers, parole officers, pretrial services, and the community in order to build a robust coalition behind a campaign to identify and address racial disparities. Building that coalition has entailed a progressive, but cautious model of procedural justice. As an interview participant who has direct familiarity with the Milwaukee County criminal justice system said to me,

³³⁶ Davis, "Racial Justice," 839-840.

³³⁷ Davis, "Racial Justice," 843.

³³⁸ Davis, "Racial Justice," 844.

³³⁹ Zoom call with interview subject (February 5, 2021) (on file with author).

³⁴⁰ Davis, "Racial Justice," 844.

³⁴¹ Davis, "Racial Justice," 843.

³⁴² Davis, "Racial Justice," 839; 840-841;

“[Chisholm’s] approach has been a bit longer-term and based on collaboration, measuring the results, and making sure it’s having the impact that we want.”³⁴³

Chisholm later voluntarily published the results of the Vera Project to the public.³⁴⁴ Davis has described his involvement in the Vera Institute for Justice’s Prosecution and Racial Justice Program, “the most successful and long-standing model of the program to date.”³⁴⁵ His work with the Vera Institute for Justice continued until at least 2013.³⁴⁶

One part of the Vera study involved interviews with junior prosecutors about their motivations. Importantly, McWithey stresses the importance of identifying the motivations of junior prosecutors.³⁴⁷ Chisholm discovered that some of his junior prosecutors see their role as doing justice for victims and safeguarding the community. Chisholm’s response to that finding is not to fire those junior prosecutors. “You gotta nurture that,” an interview subject with direct involvement with Chisholm’s office told me of his perspective. But at the same time, Chisholm will often move his victim-focused prosecutors to diversion units or to his community prosecution program in order to give them a more nuanced sense of how to achieve justice for the community.³⁴⁸

The Vera study was followed by similar efforts. “Once you’re in that cycle — you start to get on a roll with it,” an interview subject who has close familiarity with the Milwaukee criminal justice system told me.³⁴⁹ For example, Chisholm later allowed experts at Loyola University and Florida International University (FIU), funded by the MacArthur Foundation, to conduct an

³⁴³ Phone call with interview subject (February 5, 2021) (on file with author).

³⁴⁴ Davis, “Racial Justice,” 847.

³⁴⁵ Davis, “Racial Justice,” 839.

³⁴⁶ Davis, “Racial Justice,” 839.

³⁴⁷ McWithey, “Internal Constraints,” 35.

³⁴⁸ Phone call with interview subject (February 5, 2021).

³⁴⁹ Phone call with interview subject (February 5, 2021) (on file with author).

expansive study of his office’s practices.³⁵⁰ The MacArthur researchers also studied the following prosecutor offices: Melissa Nelson of Jacksonville, Florida, Kim Foxx of Cook County, Illinois and Andrew Warren of Tampa, Florida.³⁵¹

The MacArthur experts analyzed 60,000 cases from 2017 and 2018 in Chisholm’s office.³⁵² They looked at issues including the charging decision (rate at which the office accepted a case from the police department), the charge selection decision (the specific charges that the office brought for every given case), and sentence requests (the length of the sentence that the office asked of the judge for every case).³⁵³ For each of these decisions, the researchers examined whether there were unexplained racial disparities. The joint Loyola-Florida research project of Chisholm’s office was later published into a 62 page report, available to the public.³⁵⁴

In addition to the Vera and MacArthur studies, Chisholm worked with Branden DuPont, a data analyst and Don Stemen, a criminal justice professor to build a “community dashboard.”³⁵⁵ That is, a database with public statistics on alternatives to incarceration over time, the rate at which the office dismisses cases over time, speed at which the office connects with victims over time, and jail sentences over time.³⁵⁶ Chisholm worked with Fair and Just Prosecution, a

³⁵⁰ Phone call with interview subject (February 5, 2021) (on file with author); Phone call with interview subject (February 5, 2021) (on file with author); Bruce Vielmetti, “Race plays little role in prosecutions carried out by Milwaukee County prosecutors, study finds,” *Milwaukee Journal Sentinel*, December 9, 2019.

³⁵¹ Besiki Luka Kutateladze et al., “Race, Ethnicity, and Prosecution in Milwaukee County, Wisconsin,” *Florida International University, Loyola University Chicago, MacArthur Foundation*, September 2019.

³⁵² Kutateladze et al., “Race, Ethnicity, and Prosecution,” 3.

³⁵³ Phone call with interview subject (February 5, 2021) (on file with author); Vielmetti, “Race plays little role;” Kutateladze et al., “Race, Ethnicity, and Prosecution.”

³⁵⁴ Vielmetti, “Race plays little role.”

³⁵⁵ Graham Kilmer, “DA Creates Unique Public Data Dashboard,” *Urban Milwaukee*, September 30th, 2020.

³⁵⁶ “Milwaukee County District Attorney Dashboard,” *Milwaukee County District Attorney’s Office, Milwaukee Community Justice Council*, accessed February 6, 2021, <https://data.mkedao.com/>.

nonprofit that helps reform-oriented prosecutors, to develop these metrics for effective prosecution.³⁵⁷

The data on treatment alternatives and jail sentences goes back to 2015, while the data on dismissals and victim contact goes to 2017.³⁵⁸ In addition to graphs showing change over time, the database allows users to see the tables from which the graphs were created.³⁵⁹ Chisholm has said there will be more data to come.³⁶⁰ For these three initiatives, the 2007 Vera project, the 2017-2017 MacArthur study, and the 2020 community dashboard, Chisholm has held meetings with constituents, defense lawyers, police officers, pretrial services, nonprofits, activists, and religious groups. In those meetings, he has updated these actors about the projects and discussed the results.³⁶¹ Building a coalition inside and outside the court system and across the ideological spectrum has helped ensure the smooth rollout of Chisholm's procedural justice reforms.

Success toward procedural justice is rare. Pfaff and Bazelon call prosecutor offices, "the black box."³⁶² Prosecutors tend to keep their data and internal decisions close to their chest and away from the public, in part, because they are legally allowed to do so, says Davis.³⁶³ Chisholm has shown through the Vera project, the MacArthur study, and the public data dashboard project, that a different approach is possible. Notably, Slansky and Ronald Wright have both called for prosecutors to provide more data to the public.³⁶⁴ Slansky suggests that prosecutors allow external groups to conduct the research to ensure it is not biased: "You should invite them in," he

³⁵⁷ Kilmer, "Unique Public Data Dashboard."

³⁵⁸ "District Attorney Dashboard."

³⁵⁹ "District Attorney Dashboard."

³⁶⁰ Kilmer, "Unique Public Data Dashboard."

³⁶¹ Davis, "Racial Justice," 846; Phone Call with interview subject (February 5, 2021) (on file with author).

³⁶² Pfaff, *Locked In*, 134; Emily Bazelon and Miriam Krinsky, "There's a Wave of New Prosecutors. And They Mean Justice," *New York Times*, December 11, 2018.

³⁶³ Davis, "Racial Justice," 847.

³⁶⁴ Slansky, "Progressive Prosecutor's Handbook," 30-31; Wright, "Beyond Prosecutor Elections," 594.

says.³⁶⁵ In addition, Wright recommends that prosecutors engage with the community about the data.³⁶⁶

Tracking and releasing data marks a step toward fairer process because an office can only correct unfair procedure (e.g., discrimination) if it knows the points at which racial discrepancies are occurring. Moreover, as prosecutor scholars point out, releasing data lets voters make informed evaluations about their elected prosecutor, rather than place exclusive focus on personality, experience, a high-profile crime, crime rates, a tough on crime posture, or conviction rates.³⁶⁷ For that reason, Chisholm's data-tracking supports my claim that he has made progress toward increasing the fairness of the criminal judicial process, which is the first plank of Levein's three-planked ideal model. This is not to downplay Chisholm's other progress toward procedural justice, including his decision to increase the speed at which his office reviews police reports and his decision to allow for open evidence disclosure to the defense. These other policies also mark major progress toward the ideal, but open data initiatives exemplify Chisholm's commitment to procedural justice.

Most crucially, Chisholm's open-data projects entail meetings with the police force, parole officers, domestic violence victims' advocates, pretrial services, and the electorate. These conservative agents are not the best ideological allies, but their support is needed to prevent resistance against progressive prosecution.

B. Carceral progressivism

Chisholm has been less successful on the carceral progressivism plank, compared to his meaningful progress toward fair process. Carceral progressivism is the view that the penal

³⁶⁵ Slansky, "Progressive Prosecutor's Handbook," 31.

³⁶⁶ Slansky, "Progressive Prosecutor's Handbook," 31; Wright, "Beyond Prosecutor Elections," 594.

³⁶⁷ Slansky, "Progressive Prosecutor's Handbook," 31; Wright, "Beyond Prosecutor Elections," 605.

system should focus on lawbreaking police officers, politicians, landlords, wealthy people, and corporations.³⁶⁸ The progressive ideal demands the prosecutor hold powerful offenders to account. Incidents of police brutality have played a significant role in activating mass engagement in district attorney elections; as I mention in the progressive prosecutor ideal section, my carceral progressivism assessment focuses on prosecuting wrongful police behavior. Chisholm has shown weakness in that area: Critics claim he has been unsuccessful at prosecuting police crimes.³⁶⁹ While my research shows that to be true, I have also found that Chisholm has been willing to engage with constituents about the decisions he makes in police shootings.

Pickerell criticizes Chisholm's decision to not pursue a criminal case against the police officer who shot Dontre Hamilton.³⁷⁰ Hamilton was a 31-year old Black man who worked at Starbucks.³⁷¹ He was resting on a park bench in Milwaukee, unarmed, before he was woken up and shot 14 times by a Milwaukee police officer.³⁷² The police killing of Dontre Hamilton on April 30th, 2014 prompted mass protests in Milwaukee: at those protests, over 70 people were arrested and a major highway was shut down, according to local Milwaukee reporter Adam Rogan.³⁷³ Moreover, the death of Hamilton motivated his brother to form the Coalition for Justice, which advanced a set of modest demands for police reform.³⁷⁴ The blowback led to the Milwaukee Police Department's introduction of body cameras, according to Rogan.³⁷⁵ Chisholm

³⁶⁸ Levin, "Imagining."

³⁶⁹ Pickerell, "Bona Fide Progressive Prosecutor," 40.

³⁷⁰ Pickerell, "Bona Fide Progressive Prosecutor" 40.

³⁷¹ Adam Rogan, "4 Years Later: Dontre Hamilton and Dontre Day," *Milwaukee Magazine*, May 4, 2018.

³⁷² Rogan, "4 Years Later."

³⁷³ Rogan, "4 Years Later."

³⁷⁴ Rogan, "4 Years Later;" "Coalition for Justice," *Justicefordontre*, Facebook, https://www.facebook.com/justicefordontre/about/?ref=page_internal.

³⁷⁵ Rogan, "4 Years Later."

said his office found the shooting was in self-defense, but the Wisconsin ACLU, in addition to Pickerell, criticized Chisholm for not filing charges.³⁷⁶

Moreover, there has been extensive news coverage about Chisholm's decision in October 2020 to not bring charges against Joseph Mensah, the police officer who killed Alvin Cole, a 17-year old Black man.³⁷⁷ Mensah had killed two people during his time as a police officer for the city of Wauwatosa before he shot Cole on February 2nd, 2020.³⁷⁸ As a result of the February incident, Mensah stepped down from his post.³⁷⁹ But in January 2021, Mensah was hired as a deputy for the Waukesha County, Wisconsin sheriff's office.³⁸⁰ Mensah's killing of Alvin Cole generated protests close to the mall in Wauwatosa, Wisconsin where Cole died.³⁸¹ "I do not believe that the State could disprove self-defense or defense of others in this case..." Chisholm said.³⁸² Chisholm also said that Cole was armed with a gun.³⁸³ The police force said that Cole shot at the officers, but members of Cole's family, as well as their lawyers, contested that claim.³⁸⁴

As prosecutor scholars point out, we should be cautious about placing too much weight on individual cases, in lieu of a holistic analysis.³⁸⁵ There is disagreement in the literature about

³⁷⁶ Tom Swigert, "Chisholm: Use of force against Dontre Hamilton was self-defense," *On Milwaukee*, December 22, 2014.

³⁷⁷ Evan Casey and Eddie Morales, "Milwaukee County district attorney will not charge Police Officer Joseph Mensah in shooting death of Alvin Cole," *Milwaukee Journal Sentinel*, October 7, 2020; Ashley Luther, "Officers are rarely charged with shootings in Milwaukee County. It's even rarer for them to be convicted," *Milwaukee Journal Sentinel*, October 7, 2020; "Former Wisconsin officer cleared in 3 shootings now a deputy," *AP News*, January 26, 2021; Aaron Maybin, Kasey Chronis and Katie DeLong, "DA: No charges against Officer Mensah in shooting of Alvin Cole," *Fox 6 Milwaukee*, October 7, 2020; Marisa Wojcik, "Wauwatosa Officer Free of Charges," *PBS Wisconsin*, October 9, 2021.

³⁷⁸ Wojcik, "Officer Free of Charges."

³⁷⁹ "Former Wisconsin Officer"; Bill Chappell, "Officer Who Quit Wisconsin Police Job Under Pressure Joins Nearby Sheriff's Dept.," *NPR, WAMU 88.5*, January 28, 2021.

³⁸⁰ Chappell, "Officer Who Quit."

³⁸¹ "Charging decision expected in fatal police shooting of teen," *AP News*, October 6, 2020.

³⁸² Casey and Morales, "Milwaukee County district attorney."

³⁸³ Maybin et al., "DA: no charges."

³⁸⁴ "Charging decision expected."

³⁸⁵ Slansky, "Changing Political Landscape;" Pfaff, *Locked In*.

the best way to investigate and prosecute police crimes. Some scholars believe the prosecutor should investigate and prosecute alleged police crimes “on their own turf.”³⁸⁶ The second option is to have the investigation and prosecution handled by a nearby office, a special team, or a higher level criminal official, such as the state attorney general.³⁸⁷ In Chisholm’s office, outside officials conduct the investigation, while Chisholm makes the charging decision.

Police shootings in Milwaukee have been investigated primarily by the Milwaukee Area Investigative Team (MAIT) since 2016.³⁸⁸ The Milwaukee Area Investigative Team includes various law enforcement officials from nearby counties. The local team conducts the investigations, and then Chisholm determines whether or not to bring charges.³⁸⁹ In one police shooting, members of MAIT provided consistent updates to the police department in which the officer who was being investigated worked, according to Isiah Holmes, a journalist for *Urban Milwaukee*.³⁹⁰ The police department and the investigators even discussed how to handle the media firestorm that would ensue following the announcement of the investigation’s conclusions, says Holmes.³⁹¹

Even with these concerns in mind, it is difficult to make a definitive conclusion about Chisholm’s success in holding officers to account. Still, interview participants I have spoken to have made hints that he has struggled in that area. There were “a number of incidents,” I learned, “where people were upset.”³⁹² I also learned from interview participants that Chisholm has always made himself available to activists and constituents who disagree with his decision in any

³⁸⁶ McWithey, “External Constraints,” 53.

³⁸⁷ Slansky, “Progressive Prosecutor’s Handbook,” 39; Green et al., “Good Prosecutor in 2018,” 17.

³⁸⁸ Isiah Holmes, “How Independent Are Police Shooting Investigations?” *Urban Milwaukee*, December 5, 2020.

³⁸⁹ Holmes, “How Independent.”

³⁹⁰ Holmes, “How Independent.”

³⁹¹ Holmes, “How Independent.”

³⁹² Zoom call with interview subject (February 3, 2021) (on file with author).

given police case.³⁹³ My review of secondary sources confirms that Chisholm has been transparent when it comes to police investigations.³⁹⁴ One interview subject with direct knowledge of activism in Milwaukee County told me that while there is often contention over his decisions, even frustrated constituents respect Chisholm because “he’ll always take the call.”³⁹⁵ That is, Chisholm makes himself available to constituents, including those who disagree with him.

Although he takes the call, Chisholm’s decision to not prosecute the officers responsible for the deaths of Hamilton and Cole crossed the line in the sand set by movement groups who protested these abuses of police power. It should be noted, though, that a failure to hold police officers to account is not unique to Milwaukee County. Prosecutors bring charges in fewer than two percent of police killings, even though the police kill 1,000 people a year.³⁹⁶ To be sure, the challenges of prosecuting the police cannot be overstated. For one, the laws that govern police behavior are more pro-defendant than the laws that govern citizens, according to the lawyer for a family of a man killed by the police in Milwaukee.³⁹⁷ Second, the police force and the prosecutor’s office are connected to each other. “You can’t just have a purely adversarial relationship with law enforcement. In fact, you have to engage with them with the goal of making sure that they do things right,” an interview subject with direct knowledge of Chisholm

³⁹³ Zoom call with interview subject (February 3, 2021) (on file with author); Phone call with interview subject (February 5, 2021).

³⁹⁴ Louis Fortis, “Milwaukee County District Attorney John Chisholm on the Investigation into the Dontre Hamilton Shooting,” *Shepherd Express*, December 16, 2014; Maybin et al., “DA: No charges.”

³⁹⁵ Zoom call with interview subject (February 3, 2021).

³⁹⁶ Green et al., “Good Prosecutor in 2018,” 15; Tom Jackman and Devlin Barrett, “Charging officers with crimes is still difficult for prosecutors,” *Washington Post*, May 29, 2020.

³⁹⁷ Holmes, “How Independent.”

said about his stance.³⁹⁸ Notwithstanding these challenges, scholars stress that prosecutors have the agency to investigate and prosecute police killings.³⁹⁹

The evidence I have presented supports Pickerell's assertion that Chisholm has had "mixed" results when it comes to holding police officers responsible.⁴⁰⁰ His transparency should be praised, but Chisholm should take steps to improve his approach to the investigation and prosecution of police crimes. He could ensure, for instance, that there is not an appearance of a conflict of interest with the investigative team, as Slansky suggests.⁴⁰¹ Moreover, since Chisholm has been hesitant to file charges against officers who have committed wrongdoings, he could consider deferring the charging responsibility to Josh Kaul, the Wisconsin state attorney general.⁴⁰²

Overall, though, I argue that Chisholm's decision to not prosecute certain instances of egregious police abuse was a necessary step for developing the rapport with the police force that he needed for police cooperation on his diversion programs, including a drug court, a mental health court, a domestic violence court, and a veteran's court. To be clear, it is possible that had Chisholm taken on major police shootings, he could still have maintained police cooperation. But given what we know about police unions and police commissioners, it is reasonable to think that if Chisholm took an aggressive tack toward police misconduct, he would lose police cooperation. This claim will be further supported in my discussions of my second two case studies, Nelson and Chisholm.

³⁹⁸ Phone call with interview subject (February 5, 2021) (on file with author).

³⁹⁹ Green et al., "Good Prosecutor in 2018," 15; Pickerell, "Bona Fide Progressive Prosecutor," 12.

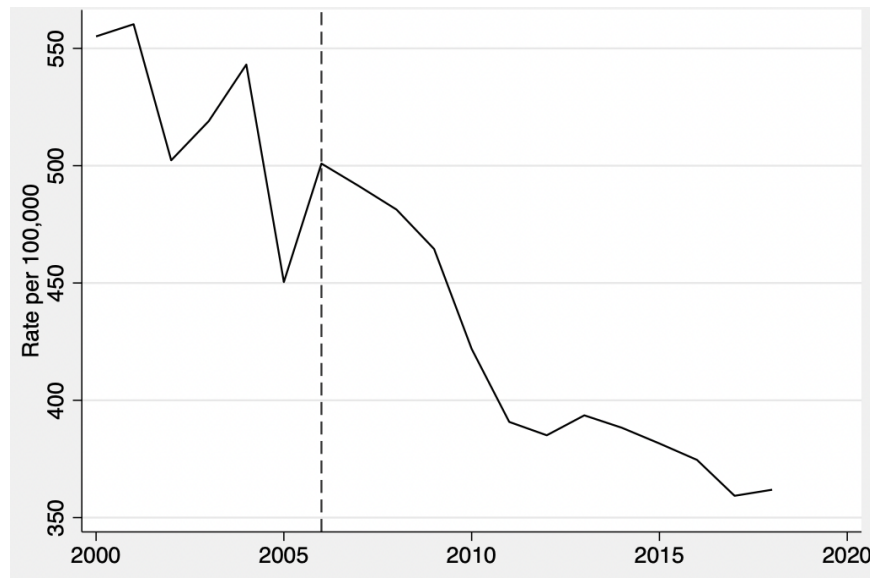
⁴⁰⁰ Pickerell, "Bona Fide Progressive Prosecutor," 40.

⁴⁰¹ Slansky, "Progressive Prosecutor's Handbook," 38.

⁴⁰² Slansky, "Progressive Prosecutor's Handbook," 38.

C. Anti-carceral prosecution

Figure 3: Milwaukee County incarceration rates⁴⁰³



In contrast to his difficulties surrounding police accountability, Chisholm has shown promise on the anti-carceral prosecution plank of the ideal model. Figure 3 shows the jail admissions rate over time in Milwaukee County with a dashed line for when Chisholm took office. As the graph shows, Chisholm has brought the jail population in Milwaukee County.⁴⁰⁴ He has done so by working with judges, defense lawyers, police officers and other criminal legal officials to roll out a range of alternatives to prison and jail over his multiple terms in office.⁴⁰⁵ Those alternatives include a drug court, treatment for certain low-level domestic violence offenders, and treatment for veterans with PTSD.⁴⁰⁶ In addition, Chisholm has piloted a mental

⁴⁰³ Coding assistance from Clare Stevens, Oberlin College '21; Data from "Pretrial jail incarceration rates," *Vera Institute for Justice*, accessed March 23, 2021, <https://trends.vera.org/incarceration-rates?data=pretrial>.

⁴⁰⁴ Green et al., "Good Prosecutor in 2018," 11; Green and Roiphe, "When Prosecutors Politick," 17-18; Bazelon, *Charged*, 80; Gottschalk, *Caught*, 266.

⁴⁰⁵ Phone call with interview subject (February 5, 2021) (on file with author); Zoom call with interview subject (February 5, 2021) (on file with author).

⁴⁰⁶ Phone call with interview subject (February 5, 2021) (on file with author); Zoom call with interview subject (February 5, 2021) (on file with author).

health court.⁴⁰⁷ All of these policies are known as “diversion programs.” In other words, a defendant can avoid criminal prosecution so long as they partake in a designated treatment program and fulfill the other conditions of the agreement, which might, for instance, include drug tests for a period for time.

In 2009, Chisholm worked with judges, public defenders, and a range of other parties to form the Milwaukee County Drug Treatment Court.⁴⁰⁸ “Drug courts were common in other places. But they were radical in Milwaukee,” I learned in an interview.⁴⁰⁹ Chisholm helped develop this program because he saw from the data, and from his time as a prosecutor, wide racial imbalances in incarceration for low-level drug offenses.⁴¹⁰ People who committed a low-level drug crime and meet certain criteria are given the opportunity to enter the drug court. There, they are often required to complete a one year program that includes drug treatment, therapy, and increased treatment after a relapse.⁴¹¹

Most diversion programs work in a similar way: if the individual completes the treatment relevant to the offense and the other conditions of the agreement, they get to avoid jail. In criminal legal circles, diversion programs are often called the “carrot and stick” approach.⁴¹² Under McCann, by contrast, there was no carrot. During the 1980s and 1990s crack epidemic in particular, the office had an exclusive focus on securing incarceration for drug crimes.⁴¹³ Chisholm, a military veteran, has partnered with groups to develop additional diversion

⁴⁰⁷ Phone call with interview subject (February 5, 2021) (on file with author); Zoom call with interview subject (February 5, 2021) (on file with author).

⁴⁰⁸ “District Attorney John Chisholm Leads on Deferred Prosecution for Low-level Drug Offenders,” *Milwaukee Courier*, June 25, 2016.

⁴⁰⁹ Phone call with interview subject (February 5, 2021) (on file with author).

⁴¹⁰ “Chisholm Leads on Deferred Prosecution;” Phone call with interview subject (February 5, 2021).

⁴¹¹ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴¹² Zoom call with interview subject (February 1, 2021) (on file with author); Zoom call with interview subject (February 5, 2021) (on file with author).

⁴¹³ Phone call with interview subject (February 5, 2021) (on file with author).

programs. Since 2010, for instance, his office has worked with Dryhootch, a Milwaukee-based support network for military veterans as well as the Medical College of Wisconsin to provide treatment instead of prison or jail for veterans with post traumatic stress disorder who commit certain low-level crimes.⁴¹⁴

In addition, Chisholm's office started an initiative in 2013 with the Sojourner Family Peace Center, a Milwaukee nonprofit that helps domestic violence victims, to provide treatment alternatives for certain domestic low-level violence offenders.⁴¹⁵ Chisholm obtained \$10 million in grant funding from the Republican governor to institute this domestic violence diversion program.⁴¹⁶ Notably, the program was influenced in large part by domestic violence advocates in Milwaukee, who wanted to reduce reoffense rates in domestic violence cases.⁴¹⁷ Chisholm's Domestic Violence Diversion Court, like all his diversion programs, entails collaboration from the judges, the police force, and his staff.

Furthermore, Chisholm's office received \$2 million in grant funding from the MacArthur Foundation to develop a mental health court in 2016.⁴¹⁸ Chisholm started this program through his work on the Milwaukee Community Justice Council, which includes judges, prosecutors, defense lawyers, correctional officers, psychologists, and other actors.⁴¹⁹ The mental health court allows individuals suffering from mental health issues who commit non-serious crimes to receive treatment rather than be placed in a cell.⁴²⁰ Importantly, the program is designed to ensure that

⁴¹⁴ Zoom call with interview subject (February 5, 2021); Patti Wenzel, "Helping veterans cope with life after the war," *Urban Milwaukee*, September 22nd, 2010.

⁴¹⁵ Phone call with interview subject (February 5, 2021) (on file with author).

⁴¹⁶ Toobin, "Milwaukee Experiment."

⁴¹⁷ Phone call with interview subject (February 5, 2021) (on file with author).

⁴¹⁸ Zoom call with interview subject (February 5, 2021) (on file with author); Lisa Kaiser, "Milwaukee Seeks to Support, Not Jail Those with Mental Illnesses" *Shepherd Express*, June 21, 2016.

⁴¹⁹ Kaiser, "Support, Not Jail."

⁴²⁰ Kaiser, "Support, Not Jail."

people who qualify for the program are not placed in jail after their arrest.⁴²¹ Chisholm has said the program is still in its early stages.⁴²² In the future, he has said that the mental health court may also allow for incarceration alternatives for people who do not have mental health issues and commit non-serious crimes.⁴²³

Chisholm's anti-carceral reforms have included incarceration alternatives for low-level drug offenses, low-level domestic violence crimes, low-level crimes committed by soldiers with PTSD, low-level juvenile crimes, and low-level crimes committed by people with mental health issues. His drug court, domestic violence alternatives, military veteran alternatives, and mental health court have all involved working with people in and outside the criminal legal system. It appears that Chisholm's early data collection efforts influenced his anti-carceral policies. For example, the Vera project studied disparities in low-level drug crimes and domestic violence crimes (drug court and domestic violence alternatives) and Chisholm continued to work with the MacArthur foundation after their study of his office, through the development of the mental health court.

Chisholm has made significant progress toward reducing incarceration. My review of primary and secondary sources confirms the claim in the literature that Chisholm has brought down the jail population,⁴²⁴ and the data shows that to be true.⁴²⁵ Notably, all of Chisholm's programs apply exclusively to nonviolent offenders; "I have to keep my hand on the till, as it were," an interview subject with knowledge of Chisholm's views told me of his practices toward violent crimes.

⁴²¹ Kaiser, "Support, Not Jail."

⁴²² Kaiser, "Support, Not Jail."

⁴²³ Kaiser, "Support, Not Jail."

⁴²⁴ Green et al., "Good Prosecutor in 2018," 11; Green and Roiphe, "When Prosecutors Politick," 18; Bazelon *Charged*, 266; Gottschalk *Caught*, 266.

⁴²⁵ Kilmer, "Unique Public Data Dashboard"; "District Attorney Dashboard."

Additionally, it is important to keep in mind that Chisholm’s anti-carceral reforms are largely “diversion programs.” Covert says diversion programs are disciplinary because they involve supervision: for instance, diversions often demand completion of treatment and other requirements to avoid prosecution.⁴²⁶ The author of the anonymous *Harvard Law Review* note adds that diversion programs expand police funding, which is counterproductive to opposing mass incarceration.⁴²⁷ Moreover, critics charge that prosecutors often funnel people into diversion programs when they think they cannot reach a conviction.⁴²⁸ Finally, there is the criticism that diversion programs are often funded from fees collected by defendants.⁴²⁹ But defense lawyers prefer diversion to incarceration.⁴³⁰ Moreover, these critiques may not apply to Chisholm’s programs. The mental health court, for instance, is funded by a grant from the MacArthur foundation, the domestic violence court was funded by a grant from the governor, and the veteran program is handled by the nonprofit group Dryhootch.

Despite his progress with diversion, one area that Chisholm has avoided is non-prosecution orders. That is, the order that prosecutors never prosecute certain crimes, no matter what. For instance, Mosby’s office has rolled out a non-prosecution order for a range of crimes during the pandemic.⁴³¹ Chisholm’s approach is more incremental. An advantage to his emphasis on diversion over non-prosecution is that diversion is more likely to bring police officers and judges on board. Largely because diversion may be viewed as less of an overreach than non-prosecution. Judges and police officers may view non-prosecution as nullifying a

⁴²⁶ Covert, “Transforming,” 21.

⁴²⁷ Note, “Paradox,” 765-766.

⁴²⁸ Smith, *Guilty People*, 21 (“... even a seemingly benign offer of diversion can undermine the right to trial.”).

⁴²⁹ Note, “Paradox,” 765-766.

⁴³⁰ Smith, *Guilty People*, 20; Covert, “Transforming,” 6 (“If a client wants to enroll in a mental health court, I do not dissuade him on the grounds that problem-solving courts put treatment properly provided by social services within the criminal system’s web”).

⁴³¹ Zoom call with interview subject (February 1, 2021) (on file with author).

criminal law passed by the legislature. Conversely, diversion might be more politically palatable, as the prosecutor can still claim that there is some form of accountability in place.⁴³²

Beyond Chisholm's decisions to focus on nonviolent offenders and diversion programs instead of violent offenders and non-prosecution, he has also made a rhetorical compromise: Chisholm does not self-identify as a progressive prosecutor. According to an interview subject with direct knowledge about Chisholm, he believes it is a "term that's a little overbroad."⁴³³ Moreover, Chisholm takes care to remind the community that he is not only reducing unnecessary incarceration and racial disparities, but also "takes a tough stance on violent crime."⁴³⁴ Chisholm is not unique in this respect: Nearly every progressive prosecutor positions themselves as tough on violent crime and "smart" or "reform-minded" on nonviolent crime. But it is important to keep in mind that stressing a tough posture toward violent crime is a rhetorical concession to the tough-on-crime model.

In short, Chisholm has made progress toward reducing incarceration by way of developing diversion programs for low-level drug crimes, domestic violence crimes, crimes committed by veterans with PTSD, and crimes committed by individuals with mental health issues. He has not, however, issued a non-prosecution order, reformed his approach to prosecuting violent crime, nor prosecuted instances of egregious police abuse. Moreover, Chisholm is rhetorically tough on violent crime. But those concessions may have been wise, as they have allowed him to develop the cooperation with the police, judges, legislators, and the electorate that he needed to introduce a range of diversion programs that have brought down the incarcerated population. Chisholm's 2009 drug diversion program, 2010 veteran diversion

⁴³² Phone call with interview subject (February 5, 2021) (on file with author).

⁴³³ Phone call with interview subject (February 5, 2021) (on file with author).

⁴³⁴ "Meet John," John Chisholm, Milwaukee County District Attorney, accessed March 20, 2021.

program, 2013 domestic violence diversion program, and 2016 mental health diversion initiative were made possible through partnerships with the police force and judges. And yet these programs contradict the critics' claim that prosecutors cannot possibly bring down the incarceration rate over a sustained period of time in light of pressure from the police, judges, legislators, state and local officials, and the electorate. Chisholm has shown it is possible to develop the cooperation and support from these relatively conservative actors needed to adjust to those barriers over the long-term. The same strategy applies to his procedural justice reforms. Chisholm has obtained cooperation from junior prosecutors to implement these programs. In the process, he has nurtured a tough-on-crime spirit, while also working incrementally toward shifting junior prosecutors' attitudes more in line with a progressive-oriented vision. Making compromises to build cooperation has supported Chisholm's capacity to introduce a remarkable set of open-data projects that challenge the "black box" norm. Collaboration with more conservative actors has required concessions, then, but has also proven instrumental to Chisholm's progress toward reducing incarceration and increasing transparency.

The compromises prosecutors must to succeed over time

The evidence I have compiled confirms the claims of Davis, Gottschalk, and Bazelon that Chisholm presents a model for improving the fairness of the criminal process while reducing incarceration at the same time. In the preceding discussion I drew attention to Chisholm's openness with his data, exemplified through his work with the Vera Institute, the MacArthur Foundation, and Fair and Just Prosecution. I also highlighted Chisholm's treatment alternatives for low-level drug offenders, domestic violence offenders, and veterans with PTSD. These efforts are significant. Opening data to the public shows the "black box" brand of prosecution is not an inevitability. Second, expanding treatment alternatives represents a shift from the

“lock-em-up and throw away the key” ethos that dominates prosecutor offices. Still, my findings also affirm Pickerell’s claim that Chisholm has been less effective at holding police officers to account. For example, I learned from interview research that many constituents feel frustrated by Chisholm’s decisions in police shootings. In addition, secondary evidence raises questions about the integrity of the investigative process in Milwaukee County for handling police shootings.

Chisholm’s success in introducing fairer process and reducing incarceration was made possible in large part through relationship-building with some of the actors who are often most resistant to progressive reforms, including the police force, judges, and junior prosecutors. Chisholm could not have established the drug court, the domestic violence program, cognitive behavioral therapy for veterans with PTSD, and the mental health court by himself. He needed “buy-in,” as one interview participant put it.⁴³⁵ Take the Milwaukee County Drug Court, which Chisholm established in 2009. Chisholm brought judges on board.⁴³⁶ He needed their approval to get the program off the ground in no small part because a drug court requires judges to preside over the proceedings.

From my interviews, I found that Chisholm established a good relationship with judges early on. From his time as an assistant prosecutor for McCann, Chisholm made a good impression on judges.⁴³⁷ He established himself as “... the epitome of the best and brightest — tough, thoughtful, and brilliant.”⁴³⁸ Chisholm also helped the courts receive federal funding through the Violence Against Women Act in 1994.⁴³⁹ Chisholm has continued to work with judges throughout his tenure. From one interview, I learned that Chisholm has helped multiple

⁴³⁵ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴³⁶ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴³⁷ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴³⁸ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴³⁹ Zoom call with interview subject (February 5, 2021) (on file with author).

judges get elected.⁴⁴⁰ This is not to say that Chisholm has engaged in improper behavior by helping judges get elected so they would support his reforms. Chisholm's work on judicial campaigns does show, however, that he has looked to help out his colleagues by supporting them in their endeavors. By developing a good working relationship with judges, he may have helped make them more receptive to his ideas.

To be sure, it also helped that Shirely Abrahamson, the Wisconsin Supreme Court justice from 1976 to 2019, has been at the forefront of criminal legal reforms in Milwaukee.⁴⁴¹ Justice Abrahamson noted the racial disparities in drug sentences, and was interested in changing Milwaukee's approach to drug crimes. She went on to approve Chisholm's formation of the drug court.⁴⁴² But that required working together, and it could not have hurt that Chisholm had a good reputation among Circuit and District Court judges in Milwaukee.⁴⁴³

Chisholm has formed a strong relationship with other actors, too. Chisholm built support with activists in the community before he ran for district attorney. As one interview participant told me, "John was just in the group."⁴⁴⁴ Moreover, Chisholm's open data initiatives involved collaboration with outside experts. His work on alternatives for veterans, too, involved working with Dryhootch, the veteran support group in Milwaukee.

Chisholm's success in reducing incarceration also required participation from the police department. For example, the mental health court asks police officers to not jail individuals who qualify for the program. In general, Chisholm's treatment programs oblige police officers to take a different approach than they do for most cases.⁴⁴⁵ Before introducing the diversion programs,

⁴⁴⁰ Zoom call with interview subject (February 3, 2021) (on file with author).

⁴⁴¹ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴⁴² Zoom call with interview subject (February 5, 2021) (on file with author).

⁴⁴³ Zoom call with interview subject (February 5, 2021) (on file with author).

⁴⁴⁴ Zoom call with interview subject (February 3, 2021) (on file with author).

⁴⁴⁵ Phone call with interview subject (February 5, 2021) (on file with author).

Chisholm has told the police department what he planned to do and invited their input, I learned in an interview.⁴⁴⁶ That approach connects with Davis's advice in her 2019 article for the *UCLA Criminal Justice Law Review*.⁴⁴⁷ Overall, one would be hard pressed to find a reform that Chisholm has introduced without the help of more conservative actors.

While Chisholm's goodwill with the police force enabled him to reduce incarceration, it also may have also made him cautious about taking a tougher stance against police misconduct. If Chisholm had found success in his handling of police crimes, the police might have withdrawn their cooperation from his reform programs. For instance officers may have continued to make jail defendants who should have been diverted to his mental health court. Officers have taken similar action in response to Baltimore prosecutor Marilyn Mosby's non-prosecution order.⁴⁴⁸ In sum, Chisholm's anti-carceral prosecution success required a strong relationship with the police force and other actors, but prosecuting the police would have undermined the needed goodwill with the police.

In light of this steep challenge, advocates should consider encouraging progressive prosecutors to fully disconnect themselves from the investigation and prosecution of police crimes. More specifically, advocates should urge prosecutors to put the handling of police shootings entirely in the hands of an independent investigative team and prosecutor unit. By taking that step, the prosecutor might be able to develop the goodwill and cooperation with the police force that is critical to reducing incarceration, while at the same time leaving police accountability to an external actor.

⁴⁴⁶ Phone call with interview subject (February 5, 2021) (on file with author).

⁴⁴⁷ Davis, "Reimagining Prosecution," 24.

⁴⁴⁸ Covert, "Transforming," 14.

Still, outsourcing the investigation and prosecution of police misconduct should be done with care. That is, effort should be made to ensure an independent party handles prosecution.⁴⁴⁹ It should also be kept in mind that outsourcing police prosecution could still cause disillusionment among police officers, the police union, or the police commissioner. An additional caveat is that state attorney generals are often ineffective at prosecuting the police. Nevertheless, outsourcing police prosecutions is less likely to enrage the police force than handling police prosecutions in-house. Moreover, as an interview participant told me, state attorney generals are not reliant on the city police.⁴⁵⁰

In sum, Chisholm's record shows that reducing incarceration and making prosecution fairer requires cooperation with the police force, judges, the state legislature, and voters. Chisholm's incarceration alternatives for low-level drug crimes, low-level domestic violence crimes, low-level crimes committed by veterans with PTSD, and low-level crimes committed by individuals with mental health issues have required police cooperation. As shown in Figure 3: Milwaukee County incarceration rates, these diversion programs have reduced the jail population in Milwaukee County. At the same time, Chisholm's need for a good relationship with the police has constrained his ability to impose police accountability through prison sentences. For example, Chisholm did not prosecute the police killing of Alvin Cole by the officer Joseph Mensah. Furthermore, Chisholm's diversion programs have required cooperation from judges and state legislators, which Chisholm has obtained. Notably though, he has not issued a non-prosecution order and he has focused his progressive reforms on non-violent offenders. I contend that it is precisely because Chisholm has made these concessions that he has been able to build support from more conservative agents needed to develop diversion alternatives. "There

⁴⁴⁹ Slansky, "Progressive Prosecutor's Handbook," 39.

⁴⁵⁰ Phone call with interview subject (February 14, 2021) (on file with author).

aren't many standoffs," a participant with direct knowledge of Chisholm's office told me in an interview.⁴⁵¹

The implication of the Chisholm case is that an elected prosecutor can only make movement toward the progressive ideal over time if they develop a harmonious relationship with the police force, judges, state legislators, junior prosecutors, pretrial services, and the electorate. But those crucial relationships are put in jeopardy when a prosecutor takes a forceful stand against police crimes, makes a non-prosecution order, or changes their approach to violent crimes. When it comes to prosecuting police abuse, I suggest that prosecutors allow the state attorney general to take on the police prosecution role. In doing so, they will be more likely to develop the cooperation from the police force that is needed to reduce incarceration while simultaneously providing an opportunity for ensuring the prosecution of police abuse.

⁴⁵¹ Zoom call with interview subject (February 5, 2021) (on file with author).

VI. MELISSA NELSON: PROSECUTOR IN A CONSERVATIVE DISTRICT

Background

First elected in 2016, Melissa Nelson is the State Attorney for Clay, Duval and Nassau Counties, Florida. Nelson is a Republican who came into office with the support of a Republican electorate. Skeptics of progressive movement doubt that a prosecutor can succeed in moving toward the progressive ideal in Republican areas.⁴⁵² The anonymous Harvard author, for instance, says that the hype behind the progressive prosecutor movement is based on a handful of prosecutors who were elected “in liberal enclaves”⁴⁵³

Proponents, on the other hand, say the progressive prosecutor movement has bipartisan potential.⁴⁵⁴ Heather Pickerell, for her part, points to Nelson to show progressive prosecutors can succeed outside ultraliberal jurisdictions.⁴⁵⁵ I find that Nelson has found success in moving toward two planks of the ideal: fairer process and less incarceration. But she has not made progress toward prosecuting police misconduct. For that reason, Nelson’s case, when it comes to two planks of the ideal, supports the view of advocates that the movement can be replicated in conservative regions. By contrast, her record on police prosecution supports the view of the critics. This finding is similar to my argument about Chisholm: his progress on diversion and open evidence disclosure support the advocates’ claim that prosecutors can be progressive and win re-election multiple times, while his decision to not prosecute the officers who killed Alvin Cole and Dontre Hamilton supports the claim of the critics that police prosecution is impossible because prosecutors rely on the police. Importantly though, Nelson and Chisholm are distinct

⁴⁵² Note, “Paradox,” 767-768; Romero, “Rural Spaces,” 2.

⁴⁵³ Note, “Paradox,” 767-768.

⁴⁵⁴ Pickerell, “Progressive Prosecutor Bona Fides,” 17; Liane Jackson, “Change Agents: A new wave of reform prosecutors upends the status quo,” *ABA Journal*, June 1, 2019.

⁴⁵⁵ Pickerell, “Progressive Prosecutor Bona Fides,” 17.

both in terms of many specific reforms they implemented and because Chisholm is a multiterm prosecutor while Nelson is a Republican.

I will first provide background on the the regressive approach of Angela Corey, Nelson's predecessor, on juvenile justice and the death penalty. Next, I will show that Nelson, by contrast, has introduced a Conviction Review Unit, an expansive open-data program, developed a non-arrest civil citation program for juveniles, reduced death penalty requests, and also expanded her office's juvenile diversion program through a restorative justice project. These results generate a surprising hole in the skeptics' argument. That is because the skeptics' argument indicates that a Republican in a Republican region should not be able to reduce incarceration, reduce death penalty requests, and increase transparency due to pressure from judges, the police, office norms, the electorate, and state and local officials.

In that way, Nelson's case, like Chisholm's, is one where the "paradox" view would lead us to expect her failure on all three of the planks — not just one. But Nelson succeeded on two of the planks, like Chisholm, because she made the following compromises needed to form a coalition with more conservative actors: she abstained from prosecuting police abuse, refrained from issuing a non-prosecution order, and neglected to take a merciful attitude toward violent crime. These compromises have enabled her to build support from the conservative electorate, the police force, judges, other court actors, and voters. Nelson needed the support of the police force, judges, and voters to introduce a restorative justice for juveniles program and to establish a screen against death penalty requests. By developing their support, Nelson ensured these conservative actors would not challenge her progressive reforms. Nelson even needed police support for her data transparency project. Nelson almost lost that support because she rushed the project, so she changed her approach to always check in with the police beforehand. To reiterate,

coalition-building with more conservative actors is both the most integral factor for success but also operates as a constraint because it demands refraining from prosecuting police violence and compromising the extent to which the prosecutor reduces incarceration and, to a lesser degree, the extent to which they increase the fairness of the criminal judicial process.

Nelson's predecessor Angela Corey had a punitive reputation as the State Attorney for Florida's Fourth Judicial District from 2009 to 2016.⁴⁵⁶ Her tenure was the opposite of the progressive prosecutor ideal. "Is Angela Corey the Cruellest Prosecutor in America?" writer Jessica Pishko famously asked in a cover story for *The Nation*.⁴⁵⁷ The article was published after Corey brought a felony murder charge against a 12 year old boy.⁴⁵⁸ Experts have described Corey "... one of the worst in America ..." ⁴⁵⁹ and "... one of the most aggressive in the country..." ⁴⁶⁰ During her time as State Attorney, Corey's office was among the country's leaders in executions⁴⁶¹ and incarceration rates.⁴⁶² Her approach to juvenile justice stood out.⁴⁶³ In addition to Corey's well-known tendency to try children as adults, her office incarcerated youth offenders in "residential lockup facilities" at the highest rates in Florida.⁴⁶⁴ Not to mention that an interview subject with close knowledge of the prosecution in Jacksonville said that corruption was a major problem in Nelson's office.⁴⁶⁵ In short Nelson's predecessor, Angela Corey, is the

⁴⁵⁶ Eli Hager, "'They Got Her This Time, Son,'" *The Atlantic*, July 21, 2020, 3,

<https://www.theatlantic.com/politics/archive/2020/07/limits-restorative-justice-jacksonville/614311/>.

⁴⁵⁷ Jessica Pishko, "Is Angela Corey the Cruellest Prosecutor in America?" *The Nation*, August 16, 2016.

⁴⁵⁸ Pishko, "Cruellest Prosecutor in America?"

⁴⁵⁹ Andrew Pantazi, "State Attorney promised to reform the office. Six months later, has she delivered?" *The Florida Times-Union*, June 29, 2017, 3.

⁴⁶⁰ Bazelon, *Charged*, 149.

⁴⁶¹ Hager, "'They Got Her This Time,'" 3.

⁴⁶² Pantazi, "State Attorney promised," 3.

⁴⁶³ Hager, "'They Got Her This Time,'" 3.

⁴⁶⁴ Tessa Duval, "State attorney candidates differ in their approaches to juvenile offenders," *The Florida Times-Union*, August 26, 2016, 4.

⁴⁶⁵ Phone call with interview subject (February 14, 2021) (on file with author).

epitome of the regressive prosecutor. She earned that distinction by leading the nation in incarceration and executions, as well as by taking a vicious approach to juvenile justice.

Melissa Nelson beat Corey by 38 points in the 2016 Republican primary for State Attorney, before running unopposed in the general election.⁴⁶⁶ Nelson's background included working as an assistant prosecutor in Corey's office for over a decade and as an attorney for an international corporate law firm.⁴⁶⁷ While Nelson and Corey are both Republicans, they have different criminal justice philosophies. For example, Bazelon writes that Nelson left her job as an assistant prosecutor in Corey's office because she became disenchanted.⁴⁶⁸ After Nelson left, she helped defend Cristian Fernandez, the 12-year-old charged with murder by Corey's office.⁴⁶⁹ Nelson and her team made a plea deal with the government for a seven-year prison sentence for Fernandez, far below the life sentence requested by Corey.⁴⁷⁰ When Nelson won, reformers celebrated.⁴⁷¹

Nelson pitched herself as the "tough but fair" candidate.⁴⁷² Slansky says that Nelson separated herself from Corey on juvenile justice, the death penalty, and conviction integrity.⁴⁷³ On juvenile justice, Nelson promised to give police officers more discretion to issue a penalty called civil citations to juveniles.⁴⁷⁴ Civil citations allow young people who commit minor crimes to avoid arrest and prosecution.⁴⁷⁵ As long as the juvenile completes their penalty, e.g., writes an

⁴⁶⁶ Slansky, "Changing Political Landscape," 666.

⁴⁶⁷ Dan Scanlan, "Angela Corey, Melissa Nelson bios and questionnaires for state attorney," August 16, 2016.

⁴⁶⁸ Bazelon, *Charged*, 148.

⁴⁶⁹ Bazelon, *Charged*, 149.

⁴⁷⁰ Bazelon, *Charged*, 149.

⁴⁷¹ Leon Neyfakh, "Is the Defeat of America's 'Cruellest Prosecutor' in Florida Really a Victory for Criminal Justice Reform?" *Slate*, September 1, 2016.

⁴⁷² Andrew Pantazi, "What does Angela Corey's loss say about the changing politics of prosecution?" *The Florida Times-Union*, September 2, 2016.

⁴⁷³ Slansky, "Changing Political Landscape," 667.

⁴⁷⁴ Duval, "State attorney candidates differ."

⁴⁷⁵ Duval, "State attorney candidates differ."

essay or does community service, they do not face criminal consequences.⁴⁷⁶ Corey, on the other hand, was against civil citations.⁴⁷⁷ On capital punishment, Nelson promised to put together a team of experts to determine whether a death penalty request is warranted.⁴⁷⁸ This promise is significant because of Corey's aggressive pursuit of capital punishment. Finally, Nelson said she was open to creating a conviction integrity unit, the first in the state.⁴⁷⁹ These units look at past cases based on shaky evidence, such as mistaken testimony, and help overturn convictions when appropriate.

Still, Nelson's "tough but fair" campaign strategy placed emphasis on the "tough" part. Leon Neyfakh, a reporter for *Slate*, looked at Nelson's campaign website and was startled "... to see the words 'tough prosecutor,' 'tough on crime,' and 'endorsed by the NRA.'"⁴⁸⁰ The fact the National Rifle Association endorsed a progressive prosecutor may appear surprising at first. But James Forman Jr. points out that "gun control" has often meant criminalization, while Pfaff says that "gun rights" can be used as a pitch for reducing criminal penalties for gun possession.⁴⁸¹ Pfaff adds that reform-minded prosecutors in conservative regions should avoid the social justice rhetoric that many progressive prosecutors use.⁴⁸² Pfaff instead encourages reform-minded prosecutors in Republican regions to emphasize gun rights.⁴⁸³ Nelson took an approach that in some ways resembles Pfaff's advice: her campaign spokesperson said that her win was not a victory for the left, and Nelson touted her NRA endorsement on the campaign trail.⁴⁸⁴

⁴⁷⁶ Duval, "State attorney candidates differ."

⁴⁷⁷ Duval, "State attorney candidates differ."

⁴⁷⁸ Larry Hannan, "New state attorney faces expectations, potential pitfalls as she takes office," *The Florida Times-Union*.

⁴⁷⁹ Hannan, "State attorney faces expectations."

⁴⁸⁰ Neyfakh, "America's Cruellest Prosecutor."

⁴⁸¹ Forman Jr., *Locking Up Our Own*, 62; Pfaff, "Pfaff Analyzes."

⁴⁸² Pfaff, "Pfaff Analyzes."

⁴⁸³ Pfaff, "Pfaff Analyzes."

⁴⁸⁴ Slansky, "Progressive Prosecutor's Handbook," 667.

Slansky says that while Nelson's agenda was less punitive than Corey's, on the whole it was in line with the tough-on-crime norm in prosecutor elections.⁴⁸⁵ Nevertheless, scholars classify Nelson as a member of the progressive prosecutor cohort.⁴⁸⁶ Pickerell says that a prosecutor's progressive prosecutor credentials should be based on whether they are addressing the specific problems in their district.⁴⁸⁷ While not revolutionary, Pickerell says that Nelson has focused on addressing the issues important to her district: juvenile justice, the death penalty, and wrongful convictions.⁴⁸⁸

Nelson's focus on wrongful convictions falls under the procedural plank of progressive prosecution, while her focus on reducing juvenile sentences and death penalty requests fall under anti-carceral prosecution. That is because procedural justice promotes adherence to fair prosecutions, such as ensuring that innocent people are not convicted, while anti-carceral prosecution means cutting back incarcerations and capital punishment.⁴⁸⁹

In sum, an NRA-backed Republican in Florida's Fourth Judicial Circuit defeated a harsh incumbent on promises to reduce the incarceration of juveniles, reduce the death penalty, and introduce fairer process. In the next discussion, I test the degree to which Nelson has achieved the progressive ideal. My hypothesis is that Nelson's tenure marks major progress toward the anti-carceral and procedural ideal compared to her predecessor, which is an improvement worth building on. In short, her tenure is a strike against the critics' claim that progressive prosecution cannot succeed in conservative areas.

⁴⁸⁵ Slansky, "Changing Political Landscape," 667.

⁴⁸⁶ Slansky, "Changing Political Landscape," 666-667; Bazelon, *Charged*,

⁴⁸⁷ Pickerell, "Bona Fide Progressive Prosecutor," 15.

⁴⁸⁸ Pickerell, "Bona Fide Progressive Prosecutor," 15.

⁴⁸⁹ Levin, "Imagining."

A. Procedural justice

Melissa Nelson has called herself a “firm believer” in procedural justice, an interview participant told me.⁴⁹⁰ Her policies show that to be true. Since entering office in 2017, Nelson formed a conviction review team,⁴⁹¹ participated in a study funded by the MacArthur foundation to track racial disparities in her office,⁴⁹² and has stressed to her junior prosecutors that they should not file borderline cases — cases that cannot be proven in trial.⁴⁹³ Nelson’s decision to establish a conviction integrity unit has received the most attention.⁴⁹⁴ When she ran for office in 2016, Nelson displayed an openness to forming a conviction integrity unit, says Slansky.⁴⁹⁵ Pickerell adds that wrongful convictions were a particular problem in Angela Corey’s office, Nelson’s hardline predecessor.⁴⁹⁶ She has also made notable compromises: Nelson invites the input of the police before implementing a new policy and her conviction review unit focuses solely on claims of factual innocence instead of excessive sentences. Moreover, she does not describe her fair process reforms as progressive. These compromises may have helped her to build a coalition of junior prosecutors, federal officials, state legislators, police, and voters that was needed to increase procedural fairness in her district. A table of Nelson’s key reform, compromises, concessions, and collaborators can be found in Table 3: Progress toward the ideal.

A year after taking office, on January 5th, 2018, Nelson made the landmark decision to establish the first conviction integrity unit in Florida.⁴⁹⁷ She tapped Shelley Thibodeau, a

⁴⁹⁰ Zoom call with interview subject (February 3, 2021) (on file with author).

⁴⁹¹ Phone call with interview subject (February 10, 2021) (on file with author).

⁴⁹² Andrew Pantazi, “Melissa Nelson was elected to change the State Attorney’s Office. Not All of Her Prosecutors Are Buying It,” *The Florida Times-Union*, December 14, 2018.

⁴⁹³ Zoom call with interview subject (February 3, 2021) (on file with author).

⁴⁹⁴ Pickerell, “Bona Fide Progressive Prosecutor,” 17; 42-43.

⁴⁹⁵ Slansky, “Changing Political Landscape,” 667.

⁴⁹⁶ Pickerell, “Bona Fide Progressive Prosecutor,” 15.

⁴⁹⁷ Andrew Pantazi, “In a Florida first, Jacksonville’s state attorney hired someone to exonerate inmates,” *The Florida Times-Union*, January 29, 2018.

longtime defense lawyer, to lead the team.⁴⁹⁸ Nelson received only \$41,000 from the Florida state legislature to fund the unit.⁴⁹⁹ But the conviction integrity review unit received \$200,000 in grant funding from the Department of Justice’s Bureau of Justice Assistance (BJA) program.⁵⁰⁰ That funding goes toward DNA testing, the investigator, and working with Florida’s Innocence Project chapter.⁵⁰¹ Pickerell describes Nelson’s unit as “robust.”⁵⁰² Currently, the unit consists of director Shelley Thibodeau, an investigator, and a support staff.⁵⁰³ Between 2018 and 2020, the unit received almost 200 innocence petitions and secured exonerations for three individuals.⁵⁰⁴

The interview subject I spoke to who has direct knowledge about the Jacksonville prosecutor’s office described Nelson’s Conviction Review Unit as “essentially an in-house Innocence Project.”⁵⁰⁵ In general, conviction review units investigate claims of innocence and seek exonerations when they find facts to support a given claim. But no two conviction review units are alike.⁵⁰⁶ Nelson’s unit only accepts innocence claims from individuals convicted in Florida’s Fourth Judicial Circuit (Clay, Duval, and Nassau Counties).⁵⁰⁷ Moreover, the unit focuses solely on claims of innocence.⁵⁰⁸ Incarcerated individuals who do not claim innocence and instead claim they received an excessive sentence, for instance, are not eligible.⁵⁰⁹ That is

⁴⁹⁸ Pantazi, “In a Florida first.”

⁴⁹⁹ Pantazi, “In a Florida first.”

⁵⁰⁰ Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰¹ Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰² Pickerell, “Bona Fide Progressive Prosecutor,” 42.

⁵⁰³ Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰⁴ “Conviction Integrity Unit,” *Office of the State Attorney for the Fourth Judicial Circuit*, accessed February 11, 2021.

⁵⁰⁵ Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰⁶ Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰⁷ “Conviction Integrity Unit”; Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰⁸ “Conviction Integrity Unit”; Phone call with interview subject (February 10, 2021) (on file with author).

⁵⁰⁹ “Conviction Integrity Unit”; Phone call with interview subject (February 10, 2021) (on file with author).

different from Brooklyn district attorney Eric Gonzalez’s Post-Conviction Justice Bureau⁵¹⁰ and Mosby’s Sentencing Review Unit,⁵¹¹ which do review those cases. Nelson’s unit has a more narrow scope because of funding limitations, an interview participant told me.⁵¹²

But the budget does not tell the whole story. I assert that Nelson’s focus on factual innocence (rather than extreme sentences and/or cases tainted by an unfair process in which guilt is still clear) marks a strategic decision, rather than a budgetary one. While the unit has only \$241,000 in funding, that money could be evenly allocated across extreme sentences, unfair process, and factual innocence, rather entirely directed toward factual innocence. Certainly, the fact that Nelson is operating under pressure from a conservative electorate and an especially conservative court system may have pushed her to take a less controversial path on conviction integrity review compared to some of her colleagues in more liberal environments.

An incarcerated individual who meets the eligibility criteria can fill out the form on the website and send it to the unit.⁵¹³ One question on the form, for instance, says: “Please explain in detail why you are innocent of this crime.”⁵¹⁴ Next, a member of the review team will look at the petition. If the petitioner is eligible, an employee in the unit will proceed to read the trial transcript to determine whether the information brought in the claim had been considered in court.⁵¹⁵ From there, they may go to the “vault” — the room in the district attorney’s office

⁵¹⁰ “Brooklyn District Attorney Eric Gonzalez Announces Dedicated Post-Conviction Justice Bureau that Will Include Parole and Clemency Unit, Sealing Unit and Nationally Recognized Conviction Review Unit,” *The Brooklyn District Attorney’s Office*, accessed February 11, 2021; Phone call with interview subject (February 10, 2021) (on file with author).

⁵¹¹ David Greenwald, “Newly Sworn-In LA DA George Gascón, Maryland State Attorney Mosby Discuss Plans to Tackle Mass Incarceration,” *The People’s Vanguard of Davis*, December 9, 2020.

⁵¹² Phone call with interview subject (February 10, 2021) (on file with author).

⁵¹³ Phone call with interview subject (February 10, 2021) (on file with author).

⁵¹⁴ “Petition for Review,” *Office of the State Attorney Fourth Judicial Circuit of Florida*, accessed February 11, 2021.

⁵¹⁵ Phone call with interview subject (February 10, 2021) (on file with author).

where physical evidence is stored.⁵¹⁶ The process can also involve returning to the place where the crime occurred, connecting with witnesses who support the petition, speaking with experts who testified at the trial, and running experiments to confirm the innocence claim.⁵¹⁷ The process is called a “re-investigation,” an interview subject who has close knowledge of the process told me.⁵¹⁸ Finally, if the re-investigation supports the innocence petition, the leader of the unit will ask a defense lawyer to file a “post-conviction motion,” which allows the judge to consider the innocence claim.⁵¹⁹ Next, the judge can choose to authorize the claim, which triggers an exoneration.⁵²⁰

In addition to Nelson’s conviction review unit, she has taken measures to track racial disparities and expand transparency. John Chisholm was not the only prosecutor to participate in the John D. and Catherine T. MacArthur Foundation’s joint project between Florida International University (FIU) and Loyola University of Chicago. Nelson, as well as Kim Foxx of Chicago, and Andrew Warren of Tampa also took part.⁵²¹ Nelson allowed the FIU-Loyola researchers to track close to 90,000 cases in the Jacksonville prosecutor’s office over a two-year period, from 2017 to 2018.⁵²² The study investigated whether race influenced five different decisions in Nelson’s office: charging decision (charge, dismiss, or divert), change in the seriousness of the

⁵¹⁶ Phone call with interview subject (February 10, 2021) (on file with author).

⁵¹⁷ Phone call with interview subject (February 10, 2021) (on file with author).

⁵¹⁸ Phone call with interview subject (February 10, 2021) (on file with author).

⁵¹⁹ Phone call with interview subject (February 10, 2021) (on file with author).

⁵²⁰ Phone call with interview subject (February 10, 2021) (on file with author).

⁵²¹ Besiki Kutateladze et al., “Race, Ethnicity, and Prosecution in Clay, Duval, and Nassau Counties, Florida,” *Florida International University, Loyola University Chicago, MacArthur Foundation*, August 2019.

⁵²² Kutateladze et al., “Clay, Duval, and Nassau,” 3.

charge from arrest to filing, change in the seriousness of the charge between the original filing to the conclusion of the case, conclusion of the case, and sentence.⁵²³

Beyond approving the public release of the MacArthur study, Nelson set up a data dashboard in 2021 to increase transparency, based on metrics provided by Fair and Just Prosecution.⁵²⁴ The dashboard, available on her office’s website, provides statistical information on different aspects of the prosecution process.⁵²⁵ For example, there are graphs about charge filing rates across racial groups, the speed at which her office concludes each case, and conviction review investigation rates over time.⁵²⁶ This data dashboard was made possible through Nelson’s work with the FIU-Loyola researchers.⁵²⁷ In addition to the data release, Nelson set up annual training about the importance of complying with evidence disclosure laws⁵²⁸ Florida laws require that prosecutors turn over all critical evidence to the defense, and Nelson emphasizes the importance of evidence disclosure by providing a checklist to attorneys of the evidence that must be handed over.⁵²⁹

Nelson’s procedural reforms have included forming the first conviction review unit in Florida, allowing researchers to study racial disparities in her office, releasing data to the public, and emphasizing the importance of not overcharging. Brought together, Nelson’s reforms increase the fairness of prosecutions in her district. Nelson has addressed the issue of wrongful punishment through the formation of the first conviction review unit in Florida, challenged the

⁵²³ Kutateladze et al., “Clay, Duval, and Nassau,” 7; Andrew Pantazi, “Study: Jacksonville prosecutors rarely influenced by race, except with case dismissals,” *The Florida Times-Union*, September 11, 2019.

⁵²⁴ Bill Bortzfield, “Local State Attorney Nelson Debuts Data Dashboard,” *WJCT News*, January 4, 2021.

⁵²⁵ “SA04 Launches Data Dashboard to the Public,” *Office of the State Attorney for the Fourth Judicial District*, December 29, 2020, <https://www.sao4th.com/data-dashboard-launch/>.

⁵²⁶ “SA04 Launches Data.”

⁵²⁷ “SA04 Launches Data.”

⁵²⁸ Zoom call with interview subject (February 3, 2021) (on file with author).

⁵²⁹ Zoom call with interview subject (February 3, 2021) (on file with author).

“black box” norm through expansive data transparency, and subverted the “win at all costs” convention by instructing junior prosecutors to not overcharge as a means to coerce a plea-deal.

Importantly, Nelson cooperated with non-state actors on her data projects, including the MacArthur Foundation and Fair and Just Prosecution, as well as her junior prosecutors. Moreover, she learned from the open-data project about the importance of conferring with the police force before introducing a new policy. Additionally, Nelson frames the open-data project as furthering “good government,” rather than progressive prosecution. Furthermore, Nelson received funding for a conviction review unit from the Florida state legislature and from the Department of Justice. Her conviction review unit, while significant, also contains the compromise of focusing exclusively on factual innocence instead of excessive sentences. Nelson’s record on procedural justice, then, entailed collaboration from more conservative actors, including state legislators, voters, the police, and the Department of Justice. Nelson may have bolstered her capacity to build support from these actors by making the compromise of telling the police before any new policy, focusing exclusively on factual innocence, and forming a “good government” based justification for her data projects.

B. Carceral progressivism

Nelson has shown promise on procedural justice and anti-carceral prosecution metrics but less progress on police accountability. For example, in August, 2020, Nelson’s office announced that 16 police shootings would not result in criminal charges.⁵³⁰ The investigations of so-called officer-involved shootings are first examined by a unit inside Nelson’s office, while the Jacksonville Sheriff’s Office or Florida’s Law Enforcement division play a primary role in

⁵³⁰ Andrew Pantazi, “In one day, Jacksonville prosecutors clear officers in 14 shootings,” *The Florida Times-Union*, August 31, 2020.

running the investigation.⁵³¹ Nelson makes the charging decisions.⁵³² Nelson has not brought charges against any police officer for excessive force, and there have been 945 use of force incidents between 2017 and 2018.⁵³³ Nelson has also received criticism for the slow pace at which her office investigates police incidents, compared to her predecessor.⁵³⁴ Still, Nelson promised to release body camera footage within a month of police incidents in response to pressure from activists.⁵³⁵

Nelson, like Chisholm, is communicative when it comes to police investigations. The fact that progressive prosecutor advocates encourage prosecutors to release police shooting investigation information indicates that traditional prosecutors often refrain from doing so.⁵³⁶ On the Jacksonville prosecutor office's website, there are folders from 2017 to 2020, which contain information about police shooting investigations.⁵³⁷ Each folder contains documents detailing the office's decisions in specific investigations. The information presented includes the evidence that was examined, the witnesses, and the results of the investigation. Although commentators have criticized the speed at which Nelson's office releases body camera footage, she deserves credit for releasing a significant amount of police shooting investigation information.

One document ends with the following statement: "Based on this review, and our review of applicable Florida law, Deputies Mendez and Cox use of deadly force was justified. We will

⁵³¹ Mindy Wadley, "State to release bodycam footage from FAMU student killed by JSO at conclusion of investigation, memo says," *First Coast News, WTLV-TV*, June 9, 2020.

⁵³² Wadley, "State to release."

⁵³³ Pantazi, "In one day," Hannah Lee, "Breaking Down JSO's Use of Force in the Past Five Years," *CBS 47, Action News Jax*, June 19, 2020.

⁵³⁴ Kelly Wiley, "Records: Longer, multistep review of officer-involved shootings leading to yearslong wait for answers" *News4Jax, Graham Media Group*.

⁵³⁵ Wiley, "Longer, multistep review"; Jim Piggott and Jenese Harris, "Nelson issues new policy on body camera footage in police shootings," *News4Jax, Graham Media Group*, 2020.

⁵³⁶ Slansky, "Progressive Prosecutor's Handbook," 38-39; Bazelon, *Charged*, 329-330.

⁵³⁷ "Officer-Involved Critical Incidents (OICIs)," *Office of the State Attorney for the Fourth Judicial District*, <https://www.sao4th.com/resources/for-the-public/officer-involved-shootings/>.

take no further action.”⁵³⁸ It is hard to judge a prosecutor’s success on police accountability without looking at each case to see whether the office made the correct decision. But Nelson has not filed charges against any officer. It is unclear whether the issue stems from Nelson’s worries about angering the police, the investigative process, or the wording of Florida’s laws surrounding the police use of force. It could also be that the police in Nelson’s jurisdiction have not engaged in an inappropriate use of force, but that is unlikely. For example, Melissa Nelson’s office determined in 2017 that officer Tyler Landreville’s high-profile killing of a young man named Vernell Bing Jr. was justified.⁵³⁹ The killing of Bing Jr. was met with significant media coverage and activist pushback.⁵⁴⁰ In 2019, officers of the Jacksonville Sheriff’s Office killed 6 people.⁵⁴¹ As one community advocate asked at a protest against police brutality in Jacksonville last year, “So, who does Melissa Nelson stand with, the people of Jacksonville or the bullies at the Jacksonville Sheriff’s Office?”⁵⁴² The key takeaway is that Nelson has been relatively transparent about police shooting investigations but has been reluctant to prosecute police abuse.

⁵³⁸ “The Officer-Involved Critical Incident Investigation Regarding Michael Allen Altice December 25, 2016,” *State Attorney’s Office of the Fourth Judicial Circuit of Florida*, September 22, 2020.

⁵³⁹ Ben Conarck, “State Attorney Melissa Nelson rules Vernell Bing, Jr. shooting justified,” *Florida Times-Union*, September 18, 2017.

⁵⁴⁰ Dan Scanlan, “Jacksonville residents continue protests in support of black lives,” *Florida Times-Union*, June 4, 2020.

⁵⁴¹ Teresa Stepzinski, “Jacksonville protesters demand State Attorney indict, convict ‘killer cops,’” *Florida Times-Union*, June 6, 2020.

⁵⁴² Stepzinski, “Jacksonville protesters.”

Anti-carceral prosecution

Figure 4: Florida's Fourth Judicial Circuit incarceration rates⁵⁴³

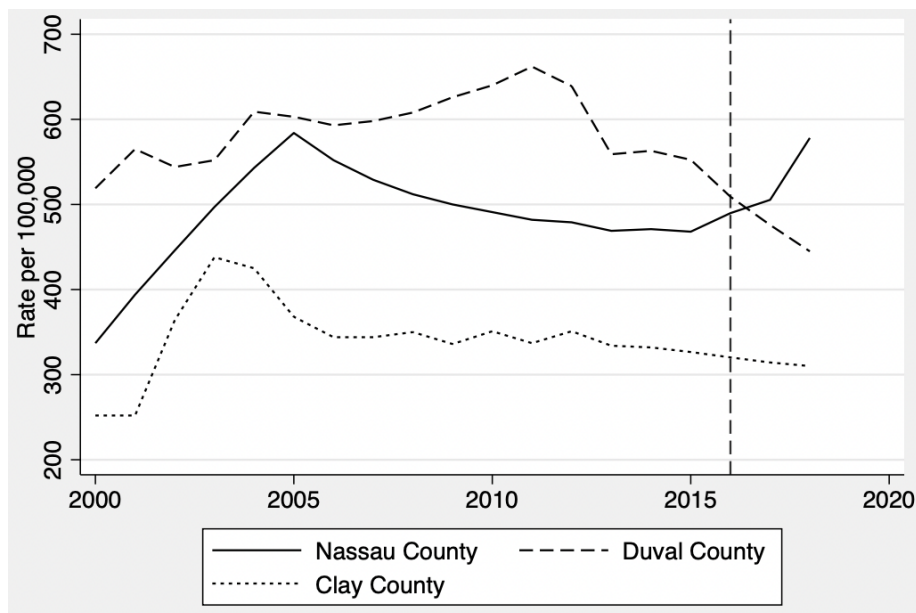


Figure 4 shows that jail admissions in Duval and Clay County have declined since Nelson took office. Nelson's anti-carceral reforms have been impressive: She has established a restorative justice program for juveniles,⁵⁴⁴ extended the civil citation program for young people who commit crimes,⁵⁴⁵ offered a "seal and expunge" event,⁵⁴⁶ and adjusted her office's approach to the death penalty.⁵⁴⁷ Notably, Nelson has taken these steps even though she has only been in office for one term so far: an interview subject with direct knowledge of Nelson's office told me over video chat that cash-bail reform will be prioritized in Nelson's second term.⁵⁴⁸ Nelson's

⁵⁴³ Coding assistance from Clare Stevens, Oberlin College '21; Data from "Pretrial jail incarceration rates," *Vera Institute for Justice*, accessed March 23, 2021, <https://trends.vera.org/incarceration-rates?data=pretrial>.

⁵⁴⁴ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁴⁵ Pantazi, "State Attorney promised," 1.

⁵⁴⁶ Phone call with interview subject (February 12th, 2021).

⁵⁴⁷ Pantazi, "State Attorney promised," 1.

⁵⁴⁸ Zoom call with interview subject (February 3, 2021) (on file with author).

interest in restorative justice has been documented by Bazelon,⁵⁴⁹ as well as Olivia Dana and Sherene Crawford.⁵⁵⁰ In *Charged*, Bazelon describes Nelson’s early experimentation with restorative justice in a pair of murder cases.⁵⁵¹ Bazelon says the experience inspired Nelson to form an advisory committee to explore restorative justice.⁵⁵² The advisory committee, formed early in Nelson’s tenure, included judges, prosecutors, defense lawyers, academics, nonprofit directors, the mayor, the sheriff, and members of community groups.⁵⁵³ Lauren Abramson, the leader of a restorative justice unit in Baltimore, also gave Nelson advice about how to bring her vision into action.⁵⁵⁴ Later, Nelson’s director of Victim Services and director of the Juvenile Division submitted a successful grant proposal to the Victims of Crime Act (VOCA) Fund to hire a restorative justice director.⁵⁵⁵ Nelson established the role in November 2019 and filled it in mid-January 2020: It is “the first position of its kind in any State Attorney’s office in Florida,” an interview participant with close knowledge of Nelson’s internal operations told me.⁵⁵⁶

Right now, the restorative justice program is available only for young people. However, Nelson’s office hopes to later expand the initiative to include adults.⁵⁵⁷ Moreover, the program is primarily used in nonviolent cases. But Nelson’s “endgame,” I learned from an interview, is to use restorative justice for violent crimes, as well.⁵⁵⁸ As of now, the juvenile restorative justice program in Nelson’s office works as follows: First, a prosecutor or a defense lawyer sends a case

⁵⁴⁹ Bazelon, *Charged*, 169-173.

⁵⁵⁰ Olivia Dana and Sheren Crawford, “Restorative Prosecution? Rethinking Responses to Violence,” *New York Law School Review* 64, no. 2 (January 2020): 65.

⁵⁵¹ Bazelon, *Charged*, 169-173.

⁵⁵² Bazelon, *Charged*, 173.

⁵⁵³ Tessa Duvall, “State Attorney Melissa Nelson to launch juvenile justice advisory board,” *The Florida Times-Union*, September 21, 2017.

⁵⁵⁴ Bazelon, *Charged*, 171.

⁵⁵⁵ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁵⁶ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁵⁷ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁵⁸ Zoom call with interview subject (February 3, 2021) (on file with author).

to the Center for Children’s Rights (CCR), a Jacksonville-based legal resource and advocacy group.⁵⁵⁹ From there CCR will review the case. If they want to move forward, CCR will reach out to the victim, the person who committed the crime, and the lawyers to ensure everyone agrees to pursue restorative justice. Next, the group chooses a convenient location to convene a meeting. At the meeting, the participants discuss the incident and the harm it caused. The parties then decide a plan for the person who caused the harm to show they will not cause similar harm again — for instance, the person responsible might promise to take classes at a local community college. Generally the timeframe is two to four months, and the plan needs to be feasible.⁵⁶⁰ From there, the Center for Children’s Rights will contact the director of the juvenile restorative justice program once the arrangement has been fulfilled. Next, the director will inform the prosecutor, who will drop the case.⁵⁶¹

The restorative justice program is a part of the office’s juvenile justice diversion program.⁵⁶² Diversion refers to incarceration alternatives. The most frequent cases resolved through restorative justice include burglary and theft, while domestic and sexual violence cases are generally handled with traditional prosecutions.⁵⁶³ With that said, each case is considered on an individual basis.⁵⁶⁴ Moreover, the agreement that is made in the conference can go in different directions:⁵⁶⁵ The facilitator, victim and person responsible, determine the best course of action given the harm and the context of the harm.⁵⁶⁶ Restorative justice allows the victim and the perpetrator to talk to each other, which does happen in the traditional criminal process.⁵⁶⁷ By

⁵⁵⁹ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶⁰ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶¹ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶² Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶³ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶⁴ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶⁵ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶⁶ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶⁷ Phone call with interview subject (February 12, 2021) (on file with author).

launching the first in-house restorative justice program in Florida, Nelson’s office seeks to “redefine justice.”⁵⁶⁸

In addition to Nelson’s restorative justice program, she has established a civil citation program for juveniles.⁵⁶⁹ Civil citations were a dividing issue between Nelson and Corey on the campaign trail. In May 2017, Nelson announced an expansion of the civil citation program alongside the Jacksonville Mayor, the Sheriff, a judge, and the superintendent of Duval County Public School.⁵⁷⁰ The civil citation program allows eligible young people to avoid arrest and a criminal record altogether.⁵⁷¹ Indeed, the program gives police officers the option to place juveniles who commit non-serious crimes into a teen court, where they may receive a penalty such as community service or writing an essay.⁵⁷² Nelson increased the crimes that can be resolved with civil citation to include low-level battery and non-violent resistance to an arrest.⁵⁷³ Moreover, Nelson made it such that a police officer can grant a civil citation without receiving authorization from a prosecutor.⁵⁷⁴ The decision to extend the civil citation program was not made by Nelson alone: almost two dozen correctional, law enforcement, judicial, and child service agencies approved the expansion.⁵⁷⁵

The key distinction between the civil citation and juvenile restorative justice programs is that the former is set up to avoid an arrest and an ensuing record while the latter does not always allow the participant to avoid an arrest record.⁵⁷⁶ Still, Nelson’s office held a “Sealing and

⁵⁶⁸ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁶⁹ Zoom call with interview subject (February 3, 2021) (on file with author).

⁵⁷⁰ A.G. Gancarski, “Melissa Nelson rolls out juvenile civil citations,” *Florida Politics*, May 10, 2017,

⁵⁷¹ Phone call with interview subject (February 12, 2021) (on file with author).

⁵⁷² Tessa Duvall, “More kids in trouble will be eligible for second chances under new civil citations policy,” *The Florida Times-Union*, May 9, 2017.

⁵⁷³ Duvall, “More kids in trouble.”

⁵⁷⁴ Duvall, “More kids in trouble.”

⁵⁷⁵ Duvall, “More kids in trouble.”

⁵⁷⁶ Phone call with interview subject (February 12, 2021) (on file with author).

Expunging Fair” in January of 2020.⁵⁷⁷ At that fair, residents could make a request to have their criminal records cleared.⁵⁷⁸

Beyond Nelson’s restorative justice program for children, expansion of civil citations, and her office’s Sealing and Expunging fair, Nelson also shifted her office’s approach to the death penalty: she requires her prosecutors to receive authorization from a committee of nine supervisors in order to request the death penalty.⁵⁷⁹ Nelson’s policy follows how most progressive prosecutors in states with capital punishment approach the death penalty.⁵⁸⁰ An exception is Florida prosecutor Aramis Ayala, whose refusal to seek the death penalty, resulted in a legal battle with the Florida state attorney general and governor, and her eventual resignation.⁵⁸¹ Another exception is Denver prosecutor Beth McCann, who has a policy to never seek the death penalty.⁵⁸² Moreover, Beth McCann banded with other district attorneys in her state to lobby the Colorado state legislature to overturn the death penalty.⁵⁸³

Nelson’s decision to establish the first restorative justice unit within a prosecutor office in Florida, broaden the civil citation program, and reduce death penalty requests marks progress toward anti-carceral prosecution. Nelson’s anti-carceral policies are especially important in the context of her predecessor’s draconian approach to juvenile justice and the death penalty. Corey’s tenure, that is, provides an indication about the kinds of practices that would likely still be occurring in Florida’s Fourth Judicial District had a progressive prosecutor not come to power. Moreover, Nelson’s restorative justice program stands out because it pushes against the

⁵⁷⁷ Phone call with interview subject (February 12, 2021) (on file with author); “Sealing and Expunging Fair,” *Office of the State Attorney for the Fourth Judicial Circuit*.

⁵⁷⁸ Phone call with interview subject (February 12, 2021).

⁵⁷⁹ Pantazi, “State Attorney promised.”

⁵⁸⁰ Pickerell, “Bona Fide Progressive Prosecutor,” 27.

⁵⁸¹ Davis, “Reimagining Prosecution,” 18-19.

⁵⁸² Elise Schmelzer, “Death penalty repeal bill divides Colorado district attorneys — the very people who choose whether to pursue execution,” *The Denver Post*, March 20, 2019.

⁵⁸³ Schmelzer, “Death penalty repeal.”

narrow confines of the adversarial system. Nelson’s anti-carceral reforms accord with how an interview subject with direct experience in her office described her philosophy: “we do not always have to do things the way they’ve always been done.”⁵⁸⁴

Notably, Nelson has obtained either cooperation or approval from more conservative actors for all her anti-carceral reforms. Nelson’s civil citation program received approval from the Sheriff, the Mayor, junior prosecutors, correctional staff, and judges. In addition, her restorative justice committee consists of judges, prosecutors, the mayor and the sheriff. Finally, her death penalty screen consists of senior prosecutors in her office. Nelson has also needed citizen support for these changes. Nelson may have been able to obtain cooperation from more conservative court and non-court actors because she made certain compromises. More specifically, her civil citation and juvenile justice programs apply primarily to nonviolent offenders and she has set up a screen against requesting the death penalty rather than a refusal to seek death against a defendant.

The compromises progressive prosecutors must make in conservative areas

Nelson has made commendable progress toward procedural justice and anti-carceral prosecution. On the issue of procedural justice, Nelson formed the first conviction review unit in Florida, participated in an open-data initiative through a research project funded by the MacArthur foundation, and emphasized evidence disclosure. These policies display an effort to make prosecutions fairer. On the anti-carceral prosecution front, Nelson has expanded civil citations, introduced a restorative justice department for juveniles, put in place a screen against requesting the death penalty, and offered an event to clear criminal records. These policies are a departure from the tough practices toward juvenile justice and the death penalty put in place by

⁵⁸⁴ Phone call with interview subject (February 12, 2021) (on file with author).

her predecessor. When it comes to carceral progressivism, however, Nelson, like most prosecutors, has not been successful in securing convictions against officers who commit wrongdoings.

In that way, Nelson's success tracks Chisholm's success. Both prosecutors have been effective at expanding the range of options for avoiding prison and jail sentences. Figures 3 and 4 document trends in incarceration rates in Milwaukee County and Florida's Fourth Judicial Circuit with a dashed line for when Chisholm and Nelson were elected. Moreover, both prosecutors have improved procedural fairness by opening their data to the public and through other measures. At the same time, both Nelson and Chisholm have yet to challenge the perception that prosecutors are too friendly in their approach to handling police shootings. For that reason, advocates should consider whether local prosecutors are well-equipped to reign in the police while working with the police on reforms to reduce incarceration at the same time. It may be that the local prosecutor should allow the state attorney general to handle police shooting investigations, as some scholars and one interview subject I spoke to suggest.⁵⁸⁵

Nelson's partnerships with progressive non-state actors and more conservative agents have proven critical to her success on the procedural justice and anti-carceral prosecution planks. For instance, Nelson's data initiative involved assistance from MacArthur-backed researchers. That collaborative effort supports Nelson's efforts to develop the tools for additional data tracking. The Foundation, for example, gave Nelson's office the funding to hire two statisticians to help the office to continue tracking and releasing data.⁵⁸⁶ Partnerships have also proven essential to Nelson's ability to roll out anti-carceral reforms. Her civil citations program entails

⁵⁸⁵ Phone call with interview subject (February 14, 2021) (on file with author); Slansky, "Progressive Prosecutor's Handbook," 38.

⁵⁸⁶ Ryan Nelson, "State Attorney's Office reveals new data dashboard in push to increase transparency," *CBS 47, Fox 30, Action News Jax*, December 29, 2020.

working with the Jacksonville Sheriff to ensure police officers write out non-criminal penalties for eligible juveniles, rather than place them under arrest. It should be noted that police officers, judges, and child service agencies signed on to the expansion of the civil citation program. In addition, Nelson had support from the superintendent of Duval County Public School. Also, Nelson's restorative justice program involves working with the Center for Children's Rights in Jacksonville, who help coordinate and facilitate the conferences. That project was informed in large part by input from Nelson's Juvenile Justice Advisory Committee, which includes judges, defense lawyers, nonprofit groups, and other actors.

Notably, Nelson faced blowback when she released the public data dashboard because she did not reach agreement with other actors beforehand: "It stressed some people out," an interview participant told me.⁵⁸⁷ I learned that "people [Nelson] works with, not in the office," were anxious the data dashboard might put them in a bad light.⁵⁸⁸ An interview participant told me Nelson had not checked in with those actors to let them know about the dashboard before putting it out to the public.⁵⁸⁹ Nelson's experience with the data dashboard supports Davis's suggestion that prosecutors should invite input from other actors before rolling out a new policy.⁵⁹⁰

In addition to forming partnerships, Nelson's framing strategy for her procedural justice and anti-carceral prosecution reforms stand out. Since Nelson is a rare example of a Republican progressive prosecutor in a Republican area, it is interesting to see how she pitches her reforms. Nelson advances the "return on investment" framing. The "return on investment" argument is the idea that a massive prison and jail population is not worth the fiscal costs because the benefits

⁵⁸⁷ Zoom call with interview subject (February 3, 2021) (on file with author).

⁵⁸⁸ Zoom call with interview subject (February 3, 2021) (on file with author).

⁵⁸⁹ Phone call with interview subject (February 3, 2021).

⁵⁹⁰ Davis, "Reimagining Prosecution," 24-25.

are minimal.⁵⁹¹ For example, the Jacksonville prosecutor’s website calls the civil citation program, “... a solution that offers [juveniles] an alternative to entering the criminal justice system and saves taxpayer dollars.”⁵⁹² Nelson’s op-ed with prosecutor Andrew Warren in *The Tampa Bay Times*, also exemplifies the sentiment. The article starts with the statement, “Government cannot be run like a business, but it can — and should — adhere to certain business principles.”⁵⁹³ The article goes on to explain that data tracking helps Nelson and Warren ensure efficiency and fairness in service of promoting “better government.”⁵⁹⁴ Nelson is not alone in her “return on investment” strategy. Larry Krasner, for his part, received extensive attention for his memo requiring assistant prosecutors to tell the judge the financial costs of the requested sentence and the reason for which the cost is justified.⁵⁹⁵

Nelson does not self-describe as a progressive prosecutor. I learned from an interview subject with direct knowledge about the Jacksonville prosecutor’s office that Nelson does not share observers’ characterization of her campaign against Corey. Her position, said the interview participant, is that “[She] was attacking what [she] believed to be an abuse of the office. But, it’s been recast as reform-minded prosecutor versus antiquated prosecutor.”⁵⁹⁶ Nelson finds the progressive prosecutor label “intriguing,” said the interview participant, but does not adopt the label because “progressive, if tagged as that, puts [her] in a liberal camp.”⁵⁹⁷ Similarly, Nelson

⁵⁹¹ Phone call with interview subject (February 14, 2021) (on file with author); Zoom call with interview subject (February 16, 2021) (on file with author).

⁵⁹² “Programs and Initiatives,” *Office of the State Attorney for the Fourth Judicial Circuit*, accessed February 16, 2021, <https://www.sao4th.com/about/programs-and-initiatives/>.

⁵⁹³ Andrew Warren and Melissa Nelson, “As prosecutors, we’re working to be more accountable and transparent,” *Tampa Bay Times, Opinion*, October 20, 2020.

⁵⁹⁴ Warren and Nelson, “As prosecutors.”

⁵⁹⁵ Davis, “Reimagining Prosecution,” 11; Smith, “Prosecutors I Like,” 416.

⁵⁹⁶ Zoom call with interview subject (February 3, 2021) (on file with author).

⁵⁹⁷ Zoom call with interview subject (February 3, 2021) (on file with author).

describes her forward-looking policies as “Smart Justice reforms and initiatives,” rather than progressive initiatives.⁵⁹⁸

Nelson’s significant success toward anti-carceral prosecution and procedural prosecution has been driven by her ability to build alliances with more conservative actors. That same cooperation could be the reason behind Nelson’s less than stellar record on prosecuting the police. In that way, it is difficult to ask the police to cooperate with non-arrest reform, while also prosecuting them. A prosecutor could choose to prioritize prosecuting police misconduct, but that might come at the expense of reducing incarceration. In addition, Nelson has used the “return on investment” tactic as justification for her policies. That approach, as I mentioned before, has critics. Marie Gottschalk, for her part, says the fiscal argument is too practical and undermines long-term movement action.⁵⁹⁹ Michelle Alexander, for her part, says the “return on investment” approach will dissolve when economic conditions improve,⁶⁰⁰ and John Pfaff says the financial costs of incarceration are exaggerated and pale in comparison to the fiscal costs of expanding the social safety net.⁶⁰¹ Not to mention that fiscal arguments are usually limited to calls for mercy for nonviolent drug offenders.⁶⁰²

Even with the criticisms against Nelson’s framing in mind, her tenure shows a prosecutor can make progressive reforms toward reducing incarceration and improving the fairness of the criminal process in a conservative district. Moreover, Nelson’s early experimentation with restorative justice in murder cases and willingness to express interest in finding alternative ways to deal with violent crimes show that, despite her emphasis on fiscal concerns, she is willing to push against the dominant reform consensus.

⁵⁹⁸ Interview participant, Email message to author, February 8, 2021 (on file with author).

⁵⁹⁹ Gottschalk, *Caught*, 3-4.

⁶⁰⁰ Alexander, *New Jim Crow*, 14.

⁶⁰¹ Pfaff, *Locked In*, 95; 99;

⁶⁰² Gottschalk, *Caught*; Pfaff, *Locked In*.

It warrants emphasis that Nelson has obtained cooperation from conservative voters, the police, the Sheriff, the mayor, correctional officers, judges, and her staff in order to introduce her civil citation program and restorative justice for juveniles. She also received cooperation from her senior prosecutors in her office to introduce a screen against the death penalty. Even Nelson's procedural justice reforms, including her conviction review unit and open-data project have involved collaboration with legislators, federal officials, and junior prosecutors. Moreover, Nelson's progressive reforms have required support from the electorate, which she has promoted through a "return on investment" framing.

Nelson's reforms have been significant but have also entailed bowing to the limits imposed by the need for collaboration with more conservative actors. Table 3: Progress toward the ideal summarizes her key collaborations. Nelson has not issued a non-prosecution order, has not focused reforms on violent offenders, has not issued a categorical refusal to request the death penalty, and has pursued the "return on investment" framing to justify her policies. Furthermore, Nelson's conviction review unit focuses only on factual innocence. Obtaining cooperation through compromise and concessions has been essential for her success toward increasing fair process and reducing incarceration, but coalition-building also prevents her from prosecuting police abuse and limits the extent to which she can reduce incarceration or increase procedural fairness. Nelson is distinct from Chisholm because she is a Republican in a conservative area.

The compromises I have highlighted in the Chisholm and Nelson cases are often informal. That is, Nelson and Chisholm do not tell the police and other more conservative actors that they will not prosecute abuse, will not focus on violent crimes, will not issue a non-prosecution order, and will disconnect themselves from the progressive prosecutor label in order to receive cooperation for diversion and open-data projects. When we consider the

counter-example of Marilyn Mosby, who has not made many of these compromises, it becomes clear that these informal compromises promote success toward reducing incarceration and increasing procedural fairness even though they limit the extent to which those two planks can be pursued and prevent the realization of prosecuting police abuse altogether.

VII: MARILYN MOSBY: UNCOMPROMISING PROSECUTOR

Background

The anonymous author of the *Harvard Law Review* note highlights Mosby to show that progressive prosecution is impossible. I find that Mosby has been bold in her efforts to increase the fairness of the judicial process: her office expanded funding for her conviction integrity unit in 2018, re-examined cases connected to a disreputable officer in response to a July, 2017 incident, established a “do not call” list in December, 2019, a “no-knock” prohibition in October, 2020, a deportation-mindfulness memo in April, 2017, lobbied legislators to require compensation for the wrongly convicted in February, 2020, and introduced a Sentencing Review United in December, 2020. While Mosby’s procedural justice orders were bolder than her counterparts in Jacksonville and Milwaukee, she later backtracked on some of them. For example, Mosby later said her office would still call on the officers in the “do not call” list for testimony.

Second, Mosby made waves on the carceral progressivism front when she prosecuted the killers of Freddie Gray in 2015. And yet, the case was unsuccessful. Second, the failed prosecution made the police force *and* activists angry, albeit for different reasons. Also, Mosby’s office dumped 15 charges into Keith Davis Jr., who had been shot at 44 times by the police during a chase in June, 2015.

Third, Mosby has taken remarkable anti-carceral measures, including a 2015 diversion program called AIM to B’More, a June, 2019 marijuana non-prosecution order, and an expansive COVID-19 non-prosecution order in March, 2020. Yet the police officers continued to make arrests for the marijuana non-prosecution order, the governor attacked Mosby, and activists were

upset because Mosby's office continued to prosecute conduct that, they said, should have fallen under the non-prosecution order.

Mosby's rocky tenure, for the Harvard author, shows that progressive prosecution is impossible. By contrast, I posit that Mosby has been too uncompromising. Table 3: Progress toward the ideal provides a sketch of Mosby's progress and concessions along with the progress and concessions of her counterparts in Milwaukee County and Jacksonville, Florida. She has moved too fast and too hard through her non-prosecution orders in particular, which has generated extensive pushback. Moreover, Mosby's decision to take on the police who killed Freddie Gray, while commendable, may have lost her the goodwill with the police that she needed to find success in moving forward smoothly with non-prosecution. In addition, Mosby, unlike Chisholm and Nelson, has embraced the "progressive prosecutor" label. Her embrace of the label and the force of her rhetoric, however, have not enabled her to push through her reforms in a manner that is sustainable.

Baltimore City State's Attorney Gregg Bernstein held office for just four years when Marilyn Mosby, then a 34-year-old⁶⁰³ lawyer for an insurance company, beat him in the 2014 Democratic primary.⁶⁰⁴ As Mosby's background shows, not all progressive prosecutors are former civil rights lawyers or activists. But all progressive prosecutors do share a commitment to at least one of the three core goals of the progressive prosecutor project highlighted in Part II. During his short time as Baltimore's head prosecutor, Bernstein formed two units within his office that concentrated on gang activity and sex crimes, respectively.⁶⁰⁵ In addition to these units, Bernstein's self-proclaimed legacy included securing guilty verdicts against 200 of "the

⁶⁰³ Slansky, "Changing Political Landscape," 654.

⁶⁰⁴ Ian Duncan, "Mosby unseats Bernstein in city state's attorney's race," *The Baltimore Sun*, June 25, 2014.

⁶⁰⁵ Ian Duncan, "Baltimore prosecutor hits streets to start re-election campaign," *The Baltimore Sun*, April 19, 2014; Duncan, "Mosby unseats Bernstein."

city's worst criminals"⁶⁰⁶ and increasing the office's felony conviction rate.⁶⁰⁷ Reflecting on his four years as elected prosecutor, Bernstein said, "the office is much more efficient, more effective, it's more focused."⁶⁰⁸

Bernstein also started a wrongful prosecution unit and introduced community based prosecution.⁶⁰⁹ Wrongful prosecution units look at old cases to ensure the evidence merits a conviction. Community prosecution, on the other hand, means assigning specific prosecutors to work exclusively in specific neighborhoods. Bernstein's prosecution integrity unit advanced fair process. At the same time, Bernstein increased felony conviction rates. In that way, the Bernstein case supports Benjamin Levin's claim that a prosecutor can improve the procedures of their office and still be pro-carceral.⁶¹⁰

Notably, Patricia Jessamy, the prosecutor who preceded Bernstein, had established a "do not call" list, which shows a historical commitment to fair procedure in the Baltimore office.⁶¹¹ A do not call list is a register of police officers deemed uncredible. The "do not call" list caused problems for Jessamy, whose uneasy relationship with the police department contributed to her loss to Bernstein.⁶¹² Once in office, Bernstein, a white man, faced controversy when he declined to pursue a case against the police officers connected to the killing of Tyrone West, a 44 year old Black painter from Baltimore.⁶¹³

⁶⁰⁶ Duncan, "Baltimore prosecutor hits streets."

⁶⁰⁷ Slansky, "Changing Political Landscape," 654; Duncan, "Baltimore prosecutor hits streets."

⁶⁰⁸ Gregg Bernstein, "Outgoing Baltimore City State's Attorney Gregg Bernstein On His Time in Office," interview by Sheila Kast, *Maryland Morning with Sheila Kast, WYPR 88.1FM HD1*, December 17, 2014, audio, 08:40.

⁶⁰⁹ Ben Mook, "Bernstein outlines changes made, to come," *Maryland: The Daily Record*, January 9, 2012.

⁶¹⁰ Levin, "Imagining."

⁶¹¹ Ron Cassie, "There's a New Sheriff In Town," *Baltimore Magazine*, February 2011.

⁶¹² Cassie, "New Sherrif in Town."

⁶¹³ Slansky, "Progressive Prosecutor's Handbook," 654; "Black Lives Matter: Remembering Tyrone West," *Atlanta Black Star*, March 20, 2015.

After Mosby's victory over Bernstein in the primary, she easily claimed victory in the general election, winning 94 percent of the vote against a write-in candidate.⁶¹⁴ Mosby's victory was a significant development, as only one percent of chief prosecutors are women of color.⁶¹⁵ Moreover, Mosby is described in the literature as an early progressive prosecutor (she was elected in 2014, a year before the movement took fire).⁶¹⁶

Slansky writes that Mosby ran a "tough-on-crime" campaign with a twist.⁶¹⁷ Mosby's rhetoric surrounding violent crime was traditional, says Slansky:⁶¹⁸ she stressed that she would take a harder line against repeat violent offenders than the incumbent.⁶¹⁹ At the same time, Mosby broke convention by saying she would take on police misconduct.⁶²⁰ Mosby also promised to act more forgiving toward first time low-level offenders.⁶²¹

Mosby had to deal with a fundraising disadvantage and limited experience as a prosecutor.⁶²² Still, Mosby came from a family of police officers and her husband was a former City Council member.⁶²³ Even so, Bernstein did not acknowledge Mosby for much of the race, says Slansky.⁶²⁴ Bernstein's campaign criticized Mosby for her lack of experience in the final stretch of the race.⁶²⁵ Mosby, for her part, had worked for five years as an assistant prosecutor for the Baltimore State Attorney's office followed by a three year period as a lawyer for a big

⁶¹⁴ "Official 2014 Gubernatorial General Election results for Baltimore City," Maryland Board of Elections, accessed January 25, 2021.

⁶¹⁵ Romero, "Rural Spaces."

⁶¹⁶ Covert, "Transforming," 7-8.

⁶¹⁷ Slansky, "Changing Political Landscape," 654-655.

⁶¹⁸ Slansky, "Changing Political Landscape," 655.

⁶¹⁹ Duncan, "Mosby unseats Bernstein."

⁶²⁰ Slansky, "Changing Political Landscape," 655.

⁶²¹ Rebecca McCray, "Can Marilyn Mosby Still Make Good on Her Progressive Promises?" *The Appeal*, September 11, 2017.

⁶²² Slansky, "Progressive Prosecutor's Handbook,"

⁶²³ Wil S. Hylton, "Baltimore vs. Marilyn Mosby," *The New York Times*, Sept. 28, 2016.

⁶²⁴ Luke Broadwater, "Mosby's focus on crime helped unseat Bernstein," *The Baltimore Sun*, June 25, 2014.

⁶²⁵ Duncan, "Mosby unseats Bernstein."

insurance company before she took office in 2014.⁶²⁶ Observers were surprised by Mosby's 55-45 percent win over Bernstein in the primary.⁶²⁷ Her victory made her the youngest big-city prosecutor in the country.⁶²⁸

Four months into Mosby's tenure, she made a move that garnered her national prominence.⁶²⁹ Mosby brought charges against the six police officers who killed Freddie Gray, a twenty-five year old Black man from West Baltimore, on April 12, 2015.⁶³⁰ The killing of Gray had been met with mass protests against police brutality.⁶³¹ Mosby's decision to bring second-degree murder, second-degree assault, and false imprisonment charges against the officers⁶³² was widely praised by racial justice advocates.⁶³³ Slansky says the decision may have pacified the unrest in Baltimore.⁶³⁴ Nevertheless, three of the officers were eventually acquitted and Mosby went on to dismiss the charges against the final three officers.⁶³⁵ Still, the anonymous author of the *Harvard Law Review* note says it was Mosby's decision to prosecute the officers in the Gray case that led commentators to designate her a progressive prosecutor.⁶³⁶

In December of 2020, Mosby made a statement that showed a willingness to identify as part of the progressive prosecutor cohort:

⁶²⁶ Jacob Gershman, "5 Things to Know About Baltimore Prosecutor Marilyn Mosby," *Wall Street Journal*, May 1, 2015.

⁶²⁷ Derek Valcourt, "Mosby Upsets City State's Attorney Bernstein, Wins Democratic Primary," *CBS Baltimore*, June 25, 2014.

⁶²⁸ "Baltimore's Prosecutor Faces Big Test 4 Months Into Job" *CBS Baltimore*, May 1, 2017.

⁶²⁹ "Baltimore's Prosecutor Faces Big Test."

⁶³⁰ Note, "Paradox," 748-749.

⁶³¹ Slansky, "Progressive Prosecutor's Handbook."

⁶³² Scott Calvert, Kris Maher, and Joe Palazzolo, "Six Baltimore Police Officers Charged in Freddie Gray Death," *The Wall Street Journal*, May 2, 2015.

⁶³³ Note, "Paradox," 749.

⁶³⁴ Slansky, "Changing Political Landscape," 656.

⁶³⁵ Slansky, "Changing Political Landscape," 656; Note, "Paradox," 656.

⁶³⁶ Note, "Paradox," 750.

Many other cities understand and recognize that we have to release those individuals that pose no public safety risk. You look at Aisha Braveboy in the state of Maryland, you look at Dan Satterberg, Larry Krasner, Chesa Boudin's office, Eric Gonzalez's office and now George Gascón. This is what we're attempting to do.⁶³⁷

Mosby made this statement during an interview with *The Appeal*, a news outlet that reports on progressive prosecutors. She was referring to her rollout of a sentencing review unit, a team of prosecutors who look at old sentences to see if they are too heavy.⁶³⁸

In the literature, Mosby is regarded as a member of the progressive prosecutor group.⁶³⁹ But the Harvard author is skeptical: "... Her zeal obscures her complicity," they write.⁶⁴⁰ Additional scholars who have given Mosby specific attention include Slansky and King County defense lawyer Darcey Covert. Slansky draws on the Mosby case to highlight a new dynamic in prosecutor elections: It is now possible for a challenger to win by promising to be tougher on the police.⁶⁴¹ Additionally, King County defense lawyer Darcy Covert touches on Mosby in his forthcoming article for the *Wisconsin Law Review*. Covert observes that the Baltimore police department continued making arrests over Mosby's nonprosecution orders.⁶⁴² Covert draws on that to show that the police present a barrier to progressive prosecution.⁶⁴³ But Mosby's tenure, with the exception of the Harvard author, Slansky, and Covert, has not received significant individual attention in the literature. In the following section, I examine the degree to which Mosby has achieved the progressive ideal. I predict that Marilyn Mosby represents an

⁶³⁷ Greenwald, "Newly Sworn-In."

⁶³⁸ Greenwald, "Newly Sworn-In."

⁶³⁹ Pickerell, "Progressive Prosecutor's Handbook," 18; Green and Roiphe, "When Prosecutors Politick," 18.

⁶⁴⁰ Note, "Paradox," 750.

⁶⁴¹ Slansky, "Progressive Prosecutor's Handbook," 667.

⁶⁴² Covert, "Transforming," 14.

⁶⁴³ Covert, "Transforming," 14.

overlooked model for progressive prosecution because of her anti-carceral policies and her commitment to prosecuting police misconduct. The fact that different scholars can come to different conclusions about a district attorney's progressive prosecutor credentials reflects the lack of scholarly consensus about what policies or traits constitute progressive prosecution. But applying Levin's three-planked model provides a helpful framework for evaluating a prosecutor's progressivism because, as I asserted in Part II, nearly every advocate of progressive prosecution is invested in advancing at least one of the three planks. A full list of key reforms and concessions under each plank of the progressive prosecutor model for Mosby, Nelson, and Chisholm can be found under Table 3: Progress toward the ideal. I also refer the reader to Figure 5, which provides the incarceration rates in Baltimore, City over time with a dashed line when Mosby took office.

A. Procedural justice

Marilyn Mosby has initiated six reforms that connect to the procedural justice ideal. She bolstered her office's Conviction Integrity Unit,⁶⁴⁴ re-examined previous cases handled by a police officer who engaged in wrongful conduct,⁶⁴⁵ developed a do-not-call list,⁶⁴⁶ took a stand against no-knock warrants,⁶⁴⁷ and established a Sentencing Review Unit.⁶⁴⁸ Finally, her lead assistant issued a memo reminding assistant prosecutors to remain mindful of deportation implications in low-level cases against undocumented immigrants.⁶⁴⁹ Despite these movements toward the procedural plank of the ideal, interview participants I spoke to describe Mosby's

⁶⁴⁴ Tim Prudente, "Baltimore State's Attorney Marilyn Mosby hires public defender to free elderly prisoners," *Baltimore Sun*, December 7, 2020.

⁶⁴⁵ McCray, "Can Marilyn Mosby."

⁶⁴⁶ Daniel Nichanian, "The Politics of Prosecutors," *The Appeal*, February 2021.

⁶⁴⁷ Kelsey Kushner, "Mosby Announces Her Office Won't Authorize New No-Knock Warrants; Police Union Calls Move 'Irresponsible,'" *CBS Baltimore*, October 14, 2020.

⁶⁴⁸ George Gascón and Marilyn Mosby, "Resentencing Units can Rectify, Rehabilitate, and Restore," *The Appeal*, December 8, 2021.

⁶⁴⁹ McCray, "Can Marilyn Mosby."

Sentencing Review Unit as symbolic and assert Mosby's office accepts countless cases from the police force that it should not.⁶⁵⁰ I will start by discussing Mosby's procedural reforms and then their significance before moving on to critiques against these reforms made by interview subjects who have experience watching court proceedings in Jacksonville and secondary sources.

Mosby's most significant procedural justice reform is her work on conviction integrity. When she took office in 2015, Mosby inherited a Conviction Integrity Unit from her predecessor, Gregg Bernstein. In 2014, Bernstein's unit helped wipe Walter Lomax's record, a Black man who was wrongfully convicted in 1968 and released from prison in 2006.⁶⁵¹ During the transition, Mosby promoted Antonio Gioia, Bernstein's Conviction Integrity Chief, to the position of deputy state's attorney of major crimes.⁶⁵² She went on to promote assistant prosecutor Lauren Lipscomb to take Gioia's place and serve as the Conviction Integrity Chief.⁶⁵³ Mosby was unable to convince state or local lawmakers to provide the necessary funding for the unit, but her office acquired \$219,000 in grant funding from the Innocence Project in collaboration with the Baltimore City defense attorney bar in 2018.⁶⁵⁴ In addition, her office secured federal grant funding to finance the initiative in partnership with the University of Baltimore's Innocence Project Clinic and the Mid-Atlantic Innocence Project in the same year.⁶⁵⁵ Two years earlier, the unit had consisted of three assistant prosecutors, three administrative staffers, and an intern.⁶⁵⁶ As

⁶⁵⁰ Phone call with interview subjects (February 16, 2021) (on file with author).

⁶⁵¹ Maurice Possley, "Walter Lomax," *The National Registry of Exonerations*.

⁶⁵² "For Mosby's office, a time of transition," *Dolan Media Newswires*, LexisNexis Academic.

⁶⁵³ "Conviction Integrity," *Office of the State's Attorney for Baltimore City*, accessed February 20, 2021.

⁶⁵⁴ "Prosecutors and Wrongful Convictions: 'Pay Now or Pay Later,'" *The Crime Report, Center on Media Crime and Justice at John Jay College*, February 20, 2018.

⁶⁵⁵ "Conviction Integrity."

⁶⁵⁶ Daniel Denvir, "Debacle in Baltimore: Prosecutors, part of the problem, struggle with solutions," *Salon*, July 24, 2016.

a result of the grant funding, Mosby hired an investigator to join the team, which at that point also included an additional assistant prosecutor and two law clerks.⁶⁵⁷

Mosby's Conviction Integrity Unit (CIU) has worked alongside the Innocence Project to secure exonerations for nine individuals who were wrongfully convicted; In 2016, for example, her unit helped exonerate Malcolm Bryant, a Black man who had been incarcerated for almost two decades in connection to a murder committed by someone else.⁶⁵⁸ Mosby asserts her unit is the first in the state.⁶⁵⁹ That assertion is somewhat misleading, as Bernstein, the former Baltimore prosecutor, had established a conviction integrity unit prior to Mosby.⁶⁶⁰ Still, only 1.5% of prosecutor offices across the country had a conviction integrity unit in 2017.⁶⁶¹ Notably, well over a third of the offices with a conviction integrity unit had yet to secure a single exoneration as of 2017.⁶⁶² Moreover, five units had only exonerated one person.⁶⁶³ Mosby's Conviction Integrity Unit examines at least 300 innocence petitions annually.⁶⁶⁴ Just a week after establishing the SRU, Eraina Pretty, a woman who was imprisoned for 42 years, was granted release from incarceration.⁶⁶⁵ The "post-conviction" motion was filed by Jan Bledsoe, on behalf of the SRU, as well as Leigh Goodman and Lila Meadows, two lawyers for the University of Maryland.⁶⁶⁶

⁶⁵⁷ "Conviction Integrity."

⁶⁵⁸ "Conviction Integrity"; "FREE AFTER 36 YEARS: Marilyn Mosby Exonerates Three Men Imprisoned Since 1983 For A Crime They Didn't Commit," *Office of the State's Attorney for Baltimore City*, November 25, 2019 (The additional people exonerated by the unit include Alfred Chestnut, Ransom Watkins, Andrew Stewart, Kenneth McPherson, Eric Simmons, Clarence Shipley, Jerome Johnson, and Lamar Johnson).

⁶⁵⁹ "Conviction Integrity."

⁶⁶⁰ Mook, "Bernstein outlines changes made."

⁶⁶¹ Josie Rice, "Do Conviction Integrity Units Work?" *The Appeal*, March 22, 2018.

⁶⁶² Rice, "Do Conviction Integrity Units."

⁶⁶³ Rice, "Do Conviction Integrity Units."

⁶⁶⁴ "Conviction Integrity Unit."

⁶⁶⁵ Hannah Gaskill, "Maryland's Longest-Incarcerated Woman Prisoner Set to Be Released," *Maryland Matters*, December 15, 2020.

⁶⁶⁶ Gaskill, "Maryland's Longest-Incarcerated Woman."

Mosby built on her Conviction Integrity Unit during the coronavirus pandemic. On December 7, 2020, she established a Sentencing Review Unit (SRU).⁶⁶⁷ In the press release announcing the new unit, Mosby’s office explained that “94% of the more than 800 prisoners sentenced to life in Baltimore City are Black,” while Black individuals comprise under a third of Maryland’s total population.⁶⁶⁸ According to the press release, if you are an incarcerated individual hoping to have your petition for release reviewed, you will need to meet two conditions: First, you need to be in the Center for Disease Control's high-risk category, as it relates to COVID-19. Second, you need to have been incarcerated for at least 25 years under a lifetime prison sentence and be older than 60. But if you are younger than 60 and spent at least 25 years for a lifetime prison sentence in connection to a crime that occurred while you were under 18, you will also be eligible.⁶⁶⁹ In all capital letters the press release states:

AT A TIME WHEN BUDGETS ARE ALREADY TIGHT DUE TO COVID, IT IS A WASTE OF MONEY TO INCARCERATE THOSE WHO POSE NO PUBLIC SAFETY RISK: INDIVIDUALS OVER THE AGE OF 60 ARE NOT A THREAT TO PUBLIC SAFETY.⁶⁷⁰

Mosby frames the unit as a measure to address racial injustice, the unique dangers COVID-19 poses to the incarcerated population, and a way to save taxpayer money without endangering the public. In that way, Mosby appeals to racial justice, the need for a sound “return on investment,” and the urgency of the pandemic to build support for her efforts to reduce incarceration. I learned from an interview participant that Mosby seeks “... to reduce mass

⁶⁶⁷ “State’s Attorney Announces Creation of Sentencing Review Unit,” *Office of the State’s Attorney for Baltimore City*, December 7, 2020.

⁶⁶⁸ “Creation of Sentencing Review Unit.”

⁶⁶⁹ “Creation of Sentencing Review Unit.”

⁶⁷⁰ “Creation of Sentencing Review Unit.”

incarceration [and] reduce racial disparities . . . all in a manner consistent with public safety.”⁶⁷¹

Notably, Mosby hired Becky Feldman, the Former Deputy Public Defender of Maryland to lead the Sentencing Review Unit.⁶⁷²

It should be noted that Sentencing Review Units are even rarer than Conviction Integrity Units. The idea of a Sentencing Review Unit is a new concept advanced by just a handful of prosecutors. Other prosecutors who have assembled similar teams include George Gascón, the Los Angeles prosecutor, Aisha Braveboy, the Prince George, Maryland prosecutor, and Dan Satterberg, the Seattle prosecutor.⁶⁷³ Mosby’s efforts on conviction integrity have extended beyond policy. In February 2020, she lobbied the Maryland state legislature to pass legislation obligating compensation for those who have been incarcerated and later found innocent or to have received an excessive sentence.⁶⁷⁴ Demetrius Smith also spoke at the hearing. He had been imprisoned for five years before he was found innocent by federal authorities and exonerated. Smith said that receiving money to help makeup for the 5 years that were wrongfully imposed on would give him the chance to build out the landscaping business he started after he was exonerated.⁶⁷⁵

In addition to Mosby’s conviction integrity and sentencing review work, she has made four other procedural reforms of note, which I will briefly review. First, recall from Part II prominent prosecutor scholar and police prosecution advocate Vida B. Johnson’s reference to an incident in July 2017, in which Baltimore police officers were recorded placing incriminating evidence onto individuals they stopped.⁶⁷⁶ Mosby called for the re-examination of 100 cases in

⁶⁷¹ Zoom call with interview participant (February 1st, 2021) (on file with author).

⁶⁷² Prudente, “free elderly prisoners.”

⁶⁷³ Gaskill, “Maryland’s Longest-Incarcerated Woman.”

⁶⁷⁴ Bryan Renbaum, “Mosby Emphasizes Her Support for Legislation Mandating Compensation to Exonerated Prisoners,” *Maryland Matters*, February 26, 2020.

⁶⁷⁵ Renbaum, “Mosby Emphasizes Her Support.”

⁶⁷⁶ Green et al., “Good Prosecutor in 2018,” 16.

which those officers made the arrest and helped discard nearly half those cases within a month.⁶⁷⁷ Second, in December 2019, Mosby put together a document containing the names of 305 police officers, 15% of the Baltimore police force.⁶⁷⁸ She asserted that her office viewed those officers as incredible, and her prosecutors would not bring those officers forward as witnesses.⁶⁷⁹ Mosby had submitted the document to the state Commission to Restore Trust in Policing.⁶⁸⁰ The Baltimore police department's "Commissioner of the Public Integrity Unit," for his part, said he had concerns about only 22 of the officers listed in the document.⁶⁸¹ Puzzlingly, Mosby's office later said there was no guarantee her office would not rely on the officers listed in the document, only that their credibility issues would be shared with the defense.⁶⁸²

Third, in October 2020, Mosby issued a statement prohibiting her junior prosecutors from granting approval for officers to engage in searches without knocking on the door first — that is, "no knock" warrants.⁶⁸³ The president of the police union called the decision "... irresponsible and an overreach, though predictable."⁶⁸⁴ Mosby's decision came in response to the killing of Breonna Taylor, an emergency room operator in Louisville, Kentucky who police officers gunned down in March, 2020.⁶⁸⁵ Mosby, on the other hand, asserted that "the ends do not justify the means."⁶⁸⁶ Fourth, Michael Schatzow, Mosby's top assistant, issued a memo in April 2017 directing junior prosecutors to keep in mind the potential deportation consequences in low-level

⁶⁷⁷ McCray, "Can Marilyn Mosby."

⁶⁷⁸ Nichanian, "The Politics of Prosecutors."

⁶⁷⁹ Nichanian, "The Politics of Prosecutors."

⁶⁸⁰ Jessica Anderson, "Mosby flags 305 Baltimore police officers for possible credibility issues; department downplays claim," *Baltimore Sun*, December 3, 2019.

⁶⁸¹ Anderson, "Mosby flags 305."

⁶⁸² Tim Prudente, "Baltimore State's Attorney Marilyn Mosby, public defenders strike deal on more disclosures of tainted cops," *The Baltimore Sun*, February 19, 2020.

⁶⁸³ Tim Prudente, "Citing death of Breonna Taylor in Louisville, State's Attorney Marilyn Mosby wants to ban no-knock warrants in Baltimore," *The Baltimore Sun*, October 14, 2020.

⁶⁸⁴ Prudente, "Death of Breonna Taylor."

⁶⁸⁵ Prudente, "Death of Breonna Taylor."

⁶⁸⁶ Prudente, "Death of Breonna Taylor."

cases against noncitizens.⁶⁸⁷ The memo encouraged junior prosecutors to consider not pursuing such cases at all, and was issued in response to the Trump justice department's crackdown on undocumented immigrants.⁶⁸⁸ In short, Mosby's procedural reforms include obtaining grant funding for the Conviction Integrity Unit, establishing a Sentencing Review Unit, compiling a robust "do not call" call list, opposing "no knock" warrants, and promoting a mindful approach to the immigration consequences of prosecutions.

Despite Mosby's apparently strong efforts on the issue of conviction integrity and sentencing review integrity, a pair of interview subjects who watch court proceedings everyday were critical: "She fought the defense attorneys, they're the ones who made it happen, she fought them to the end — and then took the credit."⁶⁸⁹ In addition, the interview participants told me Mosby has helped release about five individuals incarcerated for life as children. But, they said, there are hundreds of other individuals in Baltimore who received lifetime sentences as children and are still behind bars. The interview subjects also asserted that Mosby's prosecutors have continued to seek life sentences against "little kids, 14 year old kids," while touting the Sentencing Review Unit at the same time. The subjects expressed worry that fifty years from now, the Baltimore prosecutor in office at the time can "use them as PR for themselves," and receive praise from the media just as Mosby did.⁶⁹⁰

The interview subjects asserted an additional criticism: They posited that Becky Feldman, the former chief Maryland defender turned Sentencing Review Unit director for Mosby's office, was handling bail reviews in less than a month after she was brought on as the Sentencing Review Unit chief. In other words, the subjects suggested Feldman was requesting judges keep

⁶⁸⁷ McCray, "Can Marilyn Mosby."

⁶⁸⁸ Justin Fenton, "Baltimore Prosecutor told to consider consequences for prosecuting illegal immigrants for minor crimes," *The Baltimore Sun*, April 28, 2017.

⁶⁸⁹ Phone call with interview (February 16, 2021) (on file with author).

⁶⁹⁰ Phone call with interview subjects (February 16, 2021) (on file with author).

individuals in jail, even though her role, as established in the press release, was “to head the SRU.” By contrast, in Feldman’s previous role, she was helped to defend individuals. “Clearly she [Mosby] takes very seriously the need to have people be put in and held in jail.”⁶⁹¹

Still, these criticisms should not be taken to say that conviction integrity units are necessarily a net bad: In 2017, a third of exonerations occurred as a result of in-house prosecutorial conviction integrity units.⁶⁹² But the information put forward by interview subjects show the importance of activist oversight for monitoring the roll out of progressive reforms. In addition, the interview subjects rejected the view that Mosby has stopped bringing cases based on unreliable police testimony: According to the subjects, “She marches her ASAs [Assistant State Attorneys] into court *every single day* telling the most ludicrous tales from the cops.”⁶⁹³

Mosby’s prohibition against “no knock” warrants also has a caveat. As Patricia DeMaio, a top deputy for Mosby conceded, the decision to issue a no-knock warrant is made by the judge, not the prosecutor.⁶⁹⁴ Still, DeMaio said the order sends a message to the Baltimore Police Department that the prosecutor’s office does not condone those kinds of searches.⁶⁹⁵ Moreover, the prosecutor determines whether or not to move forward with a case based on the police report. Nevertheless, a defense lawyer in Baltimore stated that such warrants are rare. In addition, officers, he said, can gently touch the door and mutter under their breath that they are present as a way to get around a “no knock” prohibition.⁶⁹⁶

In short, Mosby’s efforts on the procedural justice plank have been extensive but not every reform is as progressive as it appears. Interview subjects asserted that the Sentencing

⁶⁹¹ Phone call with interview subjects (February 16, 2021) (on file with author).

⁶⁹² Rice, “Do Conviction Integrity Units Work?”

⁶⁹³ Phone call interview subjects (February 16, 2021) (on file with author).

⁶⁹⁴ Prudente, “Death of Breonna Taylor.”

⁶⁹⁵ Prudente, “Citing death of Breonna Taylor.”

⁶⁹⁶ Prudente, “Death of Breonna Taylor.”

Review Unit chief was handling bail reviews, the “do not call” list was all for show, and a defense lawyer also indicated the “no knock” prohibition was not going to make a big difference. These critiques comport with a previous quote I mentioned from anonymous — that Mosby’s “zeal obscures her complicity.”⁶⁹⁷ Still, Mosby has done a lot on the procedural justice plank: her work on conviction integrity and sentencing review units have impacted the specific individuals exonerated, including Malcolm Bryant; her response to the July 2017 evidence planting scandal had an impact on the 50 individuals whose cases were dropped, while her “do not call” list, her deputy’s immigration memo, and her “no knock” stance sent signals that her office stands for fair conduct.

B. Carceral progressivism

Mosby’s work on police accountability has been controversial. Slansky notes that Mosby emphasized police accountability when she ran for Baltimore City State Attorney in 2014.⁶⁹⁸ Sure enough, Mosby’s unsuccessful prosecution in 2015 of the officers who took Freddie Gray’s life catapulted her into the national spotlight. The prosecution of those officers was “the jewel in her crown,” said a pair of interview participants sarcastically when asked about her record on police accountability.⁶⁹⁹ But Mosby deserves credit for pressing charges against the officers responsible for Gray’s death. Ultimately, a prosecutor cannot assure a conviction, they can only bring charges and then either make a plea deal or prove guilt beyond a reasonable doubt, either to the jury or a judge. Mosby also endured a significant amount of criticism, vitriol, and death threats for her decision to prosecute the six officers who killed Gray.⁷⁰⁰

⁶⁹⁷ Note, “Paradox,” 750.

⁶⁹⁸ Slansky, “Changing Political Landscape,” 655.

⁶⁹⁹ Phone call with interview subjects (February 16, 2021) (on file with author).

⁷⁰⁰ Christina Carrega, “For the few black women prosecutors, hate and ‘misogynoir’ are part of life,” *ABC News*, March 21, 2020.

The bigotry directed at Mosby affirms Davis’s observation that Black women prosecutors often face sexist and racist attacks and greater pushback overall than white male progressive prosecutors.⁷⁰¹ The racism and sexism that Black women prosecutors confront also connects to the role that stereotyping plays in reducing white support for progressive criminal justice reforms that I mentioned earlier. Since prosecutors in the U.S. are publicly elected, racial bias within the electorate presents an obstacle to progressive prosecution, as discussed in Part III.

Unsurprisingly, the criminal prosecution of the officers did not go over well with the Baltimore police department, “It’s a fractured relationship,” said one officer.⁷⁰² Moreover, five of the six officers attempted to sue Mosby for prosecuting them.⁷⁰³ Trump also criticized Mosby for her decision.⁷⁰⁴ In Baltimore, the police department handles the investigation, while the decision to bring the case to a grand jury falls to Mosby.⁷⁰⁵ That commonly used approach is problematic because a prosecution is only as good as the investigation; Asking an agency to investigate its own is bound to be an issue, according to Slansky.⁷⁰⁶

Mosby found early on that the police force was looking to sabotage the investigation, and even the state police refused to provide meaningful support.⁷⁰⁷ In addition, she asserted the police commissioner fumbled the investigation, while the mayor also undermined the investigation in public comments.⁷⁰⁸ More specifically, Mosby asserted the police failed to search the officer’s phone, despite the importance of obtaining that evidence.⁷⁰⁹ Ultimately, the acquittals and dismissals that followed illustrate the broken nature of the police investigation process in

⁷⁰¹ Davis, “Reimagining Prosecution,” 24.

⁷⁰² Hylton, “Baltimore vs. Marilyn Mosby.”

⁷⁰³ Elliot McLaughlin, “Freddie Gray officers suing prosecutor Marilyn Mosby,” *CNN*, July 28, 2016.

⁷⁰⁴ Hylton, “Baltimore vs. Marilyn Mosby.”

⁷⁰⁵ Hylton, “Baltimore vs. Marilyn Mosby.”

⁷⁰⁶ Slansky, “Progressive Prosecutor’s Handbook,” 39.

⁷⁰⁷ Hylton, “Baltimore vs. Marilyn Mosby.”

⁷⁰⁸ Hylton, “Baltimore vs. Marilyn Mosby.”

⁷⁰⁹ Hylton, “Baltimore vs. Marilyn Mosby.”

Baltimore. Nevertheless, commentators still give Mosby credit; Slansky notes Mosby's willingness to bring charges differed from the Ferguson and Staten Island prosecutors' lack of action in response to the 2014 police killings of Michael Brown and Eric Garner, respectively.⁷¹⁰ A reporter for *The New York Times* additionally asserts that one result of the investigation was the Baltimore police department's revision of their use of force policy and decision to put cameras inside police vehicles.⁷¹¹

Still, other commentators have criticized Mosby's record on police accountability. According to one local outlet, her office only released police shooting investigation information after pressure from a reporter for a *Baltimore Sun* reporter.⁷¹² As of now, there are 20 reports that stretch from 2016 to 2019: "... The level of force used by the officers was justified and reasonable," asserts one report from 2016.⁷¹³

There is also a 2017 report in *The Appeal* asserting Mosby's office prosecuted a victim of a police shooting. In June, 2015, the Baltimore police department fired 44 shots at a man named Keith Davis Jr., hitting him three times in the process of a chase. Though wounded, Davis Jr. miraculously survived. From there, Mosby's office laid 15 charges into Davis, helped detain him for almost a year pre-trial, and secured a conviction against him on a gun possession charge. Later, the Baltimore office charged Davis Jr. for murder. But activists assert that evidence was planted by the police department to frame Davis Jr. of a crime for which he was innocent. Davis Jr.'s lawyer, in addition, said the prosecution disregarded the requirement to overturn important evidence. Later, Davis was convicted based on the testimony of a so-called jail-house snitch who

⁷¹⁰ Slansky, "Changing Political Landscape," 656.

⁷¹¹ Hylton, "Baltimore vs. Marilyn Mosby."

⁷¹² Brandon Weigel, "After nudges from reporter, Mosby's office releases old use-of-force reports," *Baltimore Fishbowl*, July 24, 2019.

⁷¹³ "Police Involved Shooting. Date: 4-28-16. Location of Shooting: 2000 West 41st. Investigated by: Baltimore Police Department," *Office of the State's Attorney for Baltimore City*, accessed February 24, 2021.

said Davis had admitted to the murder in jail. The judge later ordered a retrial, and the Baltimore prosecutors still did not drop the case.

The anonymous Harvard author claims that Mosby embodies the larger “paradox of progressive prosecution.”⁷¹⁴ According to the anonymous author of the *Harvard Law Review* note, Mosby said “I heard your calls for ‘no justice, no peace’” to announce charges against Gray’s killers but soon after asked her investigative deputies to intensify their drug enforcement tactics on the street corner in which Gray was killed.⁷¹⁵ Finally, interview subjects I talked to posited that Mosby sometimes files charges against a police officer, and then goes on to rely on that same police officer for testimony.⁷¹⁶

In that way, Mosby’s track record on prosecuting the police has been beyond controversial. She experienced public criticisms, political attacks, and even a lawsuit from huge swaths of the criminal legal and political establishment in Baltimore and beyond when she prosecuted the officers in the Gray case — not to mention hate mail and death threats from members of the public. In addition, Mosby has shown transparency related to police shootings, but reportedly because of media pressure. Finally, Mosby’s office prosecuted a police victim, intensified drug investigations on the block where Gray was killed, and allegedly has used the testimony of officers she has indicted. My view is that Mosby’s record on police prosecution has been more focused on building up her image rather than consistently taking on the police.

Anti-carceral prosecution

Figure 5: Baltimore City incarceration rates⁷¹⁷

⁷¹⁴ Note, “Paradox.”

⁷¹⁵ Note, “Paradox” 749-750.

⁷¹⁶ Phone call with interview subjects (February 16, 2021) (on file with author).

⁷¹⁷ Coding assistance from Clare Stevens, Oberlin College ‘21; Data from “Pretrial jail incarceration rates,” *Vera Institute for Justice*, accessed March 23, 2021, <https://trends.vera.org/incarceration-rates?data=pretrial>.



Mosby has introduced several bold initiatives that fall under the anti-carceral prosecution plank of the ideal, the results of which are shown in Figure 5. Although these results are significant, I assert that they are unsustainable. Mosby has implemented a juvenile diversion program called AIM to B’More,⁷¹⁸ a non-prosecution order for marijuana,⁷¹⁹ and a broader non-prosecution order during the pandemic.⁷²⁰ Near the beginning of her tenure, in 2015, Mosby introduced a diversion program called AIM to B’More.⁷²¹ AIM to B’More gives eligible individuals who committed a low-level felony drug crime the chance to avoid incarceration.⁷²²

For an individual to be qualified, they need to have been charged either with first time felony drug distribution or nonviolent felony drug distribution.⁷²³ Moreover, candidates must fill out an “amenability assessment.” If selected, the individual is put under supervised probation for two years. During that period, they engage in 100 hours of community service, receive tutoring

⁷¹⁸ “Aim to B’More,” *Office of the State’s Attorney for Baltimore City*, accessed February 21, 2021.
⁷¹⁹ Ethan McLeod, “Baltimore Plays Catch-and-Release for Weed Arrests,” *City Lab*, March 22, 2019.
⁷²⁰ Zoom call with interview subject (February 1, 2021) (on file with author);
⁷²¹ “AIM to B’More.”
⁷²² “AIM to B’More.”
⁷²³ “AIM TO B’MORE ELIGIBILITY CRITERIA,” *Office of the State’s Attorney for Baltimore City*, accessed February 22, 2021.

from a career coach, and are obligated to find and keep a full time job for a year. Once those conditions are met and the probation comes to a close, a Baltimore prosecutor clears the participant's criminal record, according to the Baltimore City prosecutor's website.⁷²⁴

In addition, the program description on the Baltimore City prosecutor's website asserts 98% of participants in the program are Black and 86% are male.⁷²⁵ Moreover, the description says 60% of individuals in the program are either younger than 24 or possess a high school degree.⁷²⁶ Finally, the program description boasts, "Remarkably, AIM's success rate is 68% and its recidivism rate (32%) is well below the national average (68%). To date, 98% of AIM graduates have full time employment."⁷²⁷

A May 14, 2015 article in *The Baltimore Sun* and an article in *WBAL TV* say that while supervised probation lasts two years, there is an additional year of unsupervised probation after the enrollee obtains a full time job.⁷²⁸ In addition, the authors say the career mentorship is provided by the Baltimore Center for Urban Families' STRIVE initiative.⁷²⁹ Mosby's AIM to B'More program has received praise in the news media. In an ABC news article published in March, 2020 the author asserts that while Mosby has faced an avalanche of hate mail as a Black woman prosecutor, she still pushed forward on her agenda, with the AIM to B'More program as an example.⁷³⁰ The *Baltimore Sun* article is also positive, "Mosby: New program gives nonviolent offenders a second chance," reads the headline.⁷³¹ The article then mentions that 30

⁷²⁴ "AIM to B'More."

⁷²⁵ "AIM to B'More."

⁷²⁶ "AIM to B'More."

⁷²⁷ "AIM to B'More."

⁷²⁸ Alison Knezevich, "Mosby: New program gives nonviolent offenders a second chance," *The Baltimore Sun*, May 14, 2015; Saliqa Khan, "Marilyn Mosby announces Aim to B'More Program," *WBAL TV 11*, accessed February 22, 2021.

⁷²⁹ Knezevich, "Mosby: New program"; Khan, "Aim to B'More."

⁷³⁰ Carrega, "Hate and 'misogynoir.'"

⁷³¹ Knezevich, "Mosby: New program."

individuals enrolled in the program at its outset.⁷³² Finally, the AIM to B'More program received positive coverage in the outlet *Afro News*.⁷³³ In short, Mosby's AIM to B'More program is a well-received incarceration alternative for low-level felony nonviolent drug offenders that involves probation for three years with the opportunity for expungement.

Four years later, Mosby initiated another notable anti-carcer reform: In January 2019, she issued a statement that her prosecutors would no longer prosecute marijuana possession, irrespective of how much marijuana an individual possessed and irrespective of an individual's criminal record.⁷³⁴ This directive, which prosecutor scholars call a "non-prosecution order," is significant. As shown in the discussion of Chisholm and Nelson, Mosby is the only prosecutor out of the three case studies in this article to take that measure. To be sure, Nelson's civil citation program and Chisholm's drug court similarly reduce incarceration. But those programs have eligibility criteria, which does not apply to Mosby's non-prosecution order. An interview subject with direct knowledge about marijuana legalization efforts I spoke to calls these refusals to prosecute a certain crime or crimes "depenalization."⁷³⁵ This policy is a signature feature of the progressive prosecutor ideal.

The interview subject I spoke to noted that ballot measures have proven most effective for marijuana decriminalization efforts.⁷³⁶ More specifically, she asserted that while multiple states have decriminalized marijuana, only one state, Illinois, did so by way of the state legislature. "Every single other state that has passed legalization," she said, "did it through ballot measures."⁷³⁷ As Pfaff contends in his book, state legislators, for various reasons, are generally

⁷³² Knezevich, "Mosby: New program."

⁷³³ Stephanie Cornish, "With Aim to B'More Program, Mosby Looks to Address Structural Issues Driving Crime," *Afro News: The Black Media Authority*, June 24, 2015.

⁷³⁴ McLeod, "Catch-and-Release."

⁷³⁵ Zoom call with interview subject (February 16, 2021) (on file with author).

⁷³⁶ Zoom call with interview subject (February 16, 2021) (on file with author).

⁷³⁷ Zoom call with interview subject (February 16, 2021) (on file with author).

tentative to soften or eliminate criminal laws.⁷³⁸ With those difficulties in mind, Mosby’s marijuana non-prosecution order shows that state legislatures and ballot measures are not the only avenues through which to oppose criminal penalties for drug offenses.

While Mosby’s marijuana non-prosecution order was significant, the anti-carceral measure she took during the onset of the coronavirus pandemic was even more noteworthy. In March, 2020, Mosby stated that her office would no longer prosecute a set of low-level crimes, including: Possession or attempted distribution for any drug including cocaine, heroin and fentanyl, drug paraphernalia possession, prostitution, minor traffic crimes, urinating and/or defecating in public, open container, and breaking into a car.⁷³⁹ The decision to stop prosecuting these offenses indicates the coronavirus pandemic may have enabled Mosby’s office to push the envelope. I learned from an interview subject with direct knowledge about Mosby’s office that a staffer in her office had been setting the groundwork for this policy with Mosby’s support for a while.⁷⁴⁰ The employee had visited Dan Satterberg and Larry Krasner’s office, met with drug reform experts, and started putting together a memo for the executive team — the top staffers in Mosby’s office. “But then,” the interview subject said “Coronavirus happened.” From there, the interview subject told me, Mosby’s office got the “show on the road,” and implemented the policy like a “shock doctrine.”⁷⁴¹ Importantly, Mosby’s office said the order would stay in effect when the pandemic ends.⁷⁴²

Notably, Mosby’s office also helped cancel about 600 open arrest warrants for the crimes on the new non-prosecution list.⁷⁴³ Under the policy, if an individual committed a drug crime as

⁷³⁸ Pfaff, *Locked In*.

⁷³⁹ “Mosby announces elimination of nearly 600 warrants related to minor offenses,” *WBAL TV 11*, accessed February 21, 2021.

⁷⁴⁰ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁴¹ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁴² Prudente and Jackson, “Stop prosecuting drug possession.”

⁷⁴³ “Mosby announces elimination.”

well as a crime not on the list, the prosecutor would not press charges for the drug crime.⁷⁴⁴ An interview subject who has familiarity with the office told me that while no assistant prosecutor verbally protested that part of the policy, they sensed a degree of frustration among some junior prosecutors.⁷⁴⁵ Namely because prosecutors often use a drug offense as an extra tool in their plea bargain negotiations.⁷⁴⁶ That is, imagine you are charged for assault and drug possession. A prosecutor might offer to make the drug charge disappear in exchange for your pleading guilty for assault.⁷⁴⁷ That kind of plea bargain negotiating strategy, the interview subject told me, was made impossible by the non-prosecution order.⁷⁴⁸ An additional element was that the non-prosecution order precluded treatment requirements, and applied to drug parole and probation violations.⁷⁴⁹ “Not prosecuting means ... not prosecuting at all,” an interview subject said. The policy was put in place by way of a memo to each office and conversations with the section chiefs.⁷⁵⁰

In a major American city, to not prosecute drug possession regardless of amount and with no sort of diversion programs. To not prosecute sex work, including the clients, the johns, whatever. That hasn’t been before.⁷⁵¹

Given the rarity of conviction integrity review units, it should not come as a surprise that expansive non-prosecution orders are not a common occurrence.

Mosby’s AIM to B’More program and marijuana non-prosecution order were significant reforms, while her expanded COVID-19 non-prosecution order and accompanying

⁷⁴⁴ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁴⁵ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁴⁶ Zoom call with interview subject (February 1, 2021) (on file with author); Pfaff, *Locked In*, 35.

⁷⁴⁷ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁴⁸ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁴⁹ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁵⁰ Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁵¹ Zoom call with interview subject (February 1, 2021) (on file with author).

warrant-cancellation policy was unprecedented, according to an interview subject.⁷⁵² Still, there was pushback to these policies. First, Mosby’s marijuana non-prosecution did not go as smoothly as one may have hoped. As Covert points out, the Baltimore police department kept making arrests for marijuana possession even with the order in place.⁷⁵³ The Baltimore police department asserted they would still arrest individuals in possession of over 10 grams of marijuana. The result was what a *Bloomberg* journalist called a “catch-and-release situation.”⁷⁵⁴ Individuals in Baltimore would get arrested, held in jail, and then let go after a prosecutor dismissed the case within a day.⁷⁵⁵ For example, a pair of men were incarcerated and released soon after.⁷⁵⁶ A major issue that arises from this lack of coordination is the fact that an arrest brings a criminal record.⁷⁵⁷

It is unclear whether Mosby’s COVID-19 non-prosecution policy has faced the same challenge. In March 2020, the Baltimore Police department refused to answer *Baltimore Sun* reporters Tim Prudente’s and Phillip Jackson’s inquiry about whether the police would stop arresting people for the crimes on Mosby’s list.⁷⁵⁸ Similarly, Lary Hogan, the Maryland governor, did not comment when asked whether he would follow Mosby’s request that he release every state prisoner over the age of 60 and all imprisoned people set to finish their sentence within a year.⁷⁵⁹ An interview participant who has familiarity with the policy asserted that “the police are pretty happy with how it [the COVID-19 non-prosecution order] turned out.” The subject also said drug possession arrests are down 75 percent.⁷⁶⁰

⁷⁵² Zoom call with interview subject (February 1, 2021) (on file with author).

⁷⁵³ Covert, “Transforming,” 14.

⁷⁵⁴ McLeod, “Catch-and-Release.”

⁷⁵⁵ McLeod, “Catch-and-Release.”

⁷⁵⁶ McLeod, “Catch-and-Release.”

⁷⁵⁷ Phone call with interview subject (February 12, 2021) (on file with author).

⁷⁵⁸ Prudente and Jackson, “Stop prosecuting.”

⁷⁵⁹ Prudente and Jackson, “Stop prosecuting.”

⁷⁶⁰ Zoom call with interview subject (February 1, 2021) (on file with author).

While the pushback was immense, I spoke to progressive-oriented interview subjects with direct knowledge of court proceedings in Baltimore City that the non-prosecution order did not bring about the results that they wanted. The number of Baltimoreans held in pre-trial detention, the subjects told me, has not decreased since the pandemic.⁷⁶¹ “So what they’re doing is they’re tacking on other charges,” the interview subjects informed me.⁷⁶² For example, the participants said that Mosby’s prosecutors have been charging people for distribution when the conduct is right on the line between possession and distribution.⁷⁶³ Restated, the claim is that Mosby’s junior prosecutors are filing charges for crimes that should be exempt from prosecution. According to the interviewees, the problem is not that junior prosecutors are defying Mosby’s order, but that Mosby wants them to engage in these practices: “When she came in, she cleaned house. She’s not afraid to fire people,” they said.⁷⁶⁴

A July, 2020 article in *The Appeal* affirms the information provided by the interview subjects. According to an original investigation in *The Appeal*, a third of defendants are still held on no-bail.⁷⁶⁵ That is, they are jailed pre-trial without even the opportunity to post bail. *The Appeal* posits this was the same proportion of people held without bail prior to the pandemic. To be fair, the article also says the office has brought 34% fewer cases.⁷⁶⁶ Still the high number of people put in jail during the pandemic is confirmed in a February, 2021 opinion piece in *The New York Times* by Philadelphia Bail Fund director Malik Neal.⁷⁶⁷ There is an additional assertion in *The Appeal* article that supports the claim of my interview participants: drug possession with

⁷⁶¹ Phone call with interview subject (February 16, 2021) (on file with author).

⁷⁶² Phone call with interview subject (February 16, 2021) (on file with author).

⁷⁶³ Phone call with interview subject (February 16, 2021) (on file with author).

⁷⁶⁴ Phone call with interview subject (February 16, 2021) (on file with author).

⁷⁶⁵ Jerry Iannelli, “As COVID-19 Permeates Prisons and Jails, Baltimore Defendants Continue to be Held without Bail,” *The Appeal*, July 14, 2020.

⁷⁶⁶ Iannelli, “As COVID-19 Permeates.”

⁷⁶⁷ Malik Neal, “What the Pandemic Revealed About ‘Progressive’ Prosecutors,” *The New York Times*, February 4, 2021.

intent to distribute was one of the three most prevalent charges for people who were not given the chance to avoid pre-trial detention.⁷⁶⁸ Put differently, there is reason to believe that Mosby's office is charging drug possession cases as drug possession with intent to distribute because the former crime is on the non-prosecution list, while the latter crime is not.⁷⁶⁹

In short, Mosby's anti-carceral record has been a roller coaster. She established AIM to B'More, a diversion program for nonviolent drug offenders, a marijuana non-prosecution order, and a broader COVID-19 non-prosecution order. The marijuana non-prosecution order was ignored by the police who decided to still make arrests, while it is unclear the extent to which police ignored her COVID-19 order. In addition, critics have attacked Mosby for her record on pre-trial detention during the pandemic, and asserted that her office is simply upcharging against defendants for drug distribution, which is not on her non-prosecution list, instead of drug possession, which is on the list. Nevertheless, Mosby has without question reduced incarceration in Baltimore as a result of her AIM to B'More program, marijuana non-prosecution order, and COVID-19 non-prosecution order.

The risks that come with not compromising

In closing, Mosby has endured an almost unimaginable amount of scrutiny during her tenure as Baltimore City State's Attorney. Mosby has established a conviction review unit, a sentencing review unit, a diversion program called AIM to B'More, and two non-prosecution orders. In the process, she has infuriated the Baltimore police department and been attacked by the mayor. Moreover, the Governor issued an executive order commanding the state attorney general to prosecute violent crimes in Baltimore.⁷⁷⁰ She also has been the subject of immense

⁷⁶⁸ Iannelli, "As COVID-19 Permeates."

⁷⁶⁹ Phone call with interview subject (February 16, 2021) (on file with author).

⁷⁷⁰ Pamela Wood, "Maryland Gov. Hogan plans extra funding for crime prosecution in Baltimore," *The Baltimore Sun*, December 11, 2019.

hatred, racism, and death threats. In addition, anti-mass incarceration advocates assert Mosby's assistant attorneys have continued a range of harsh conduct, including needlessly requesting pre-trial detention against scores of Baltimoreans, including someone in a wheelchair.⁷⁷¹ Given the complexities of Mosby's tenure — for example, she issued an expansive non-prosecution order but also allegedly upcharged crimes that would have otherwise been on the list — it is no wonder the anonymous Harvard author paints Mosby as emblematic of the “paradox of progressive prosecution.”⁷⁷² That is, Mosby's tenure, for the anonymous author of the *Harvard Law Review* note, conveys the larger message that progressive prosecutors are accomplices to mass incarceration through their actions, while their rhetoric indicates they oppose the phenomenon.⁷⁷³ But I argue that Mosby has been too uncompromising. Her decisions to issue non-prosecution orders and prosecute the killers of Freddie Gray, while commendable, generated immense backlash from more conservative actors, which constricted her anti-carceral agenda. In turn, Mosby's approach to progressive prosecution may not be workable over a sustainable period of time or in Republican areas.

⁷⁷¹ Iannelli, “As COVID-19 Permeates.”

⁷⁷² Note, “Paradox.”

⁷⁷³ Note, “Paradox.”

VIII. THE COMPROMISE OF PROGRESSIVE PROSECUTION

Chisholm, Nelson, and Mosby illustrate what I call the “compromise of progressive prosecution,” which is distinct from the “paradox of progressive prosecution” claim advanced by the skeptics. My hypothesis, based in the literature, is that Chisholm’s, Nelson’s, and Mosby’s progressive success depend on the extent to which they rework office culture, coordinate and collaborate with the police force, and form a compelling political message.

I find that coordination and collaboration, including with junior prosecutors, is the most key factor for success. Furthermore, the need to collaborate with more conservative actors prevents a prosecutor from prosecuting the police and restricts the degree to which they can reduce incarceration, and to a lesser level, restricts the extent to which they can increase fair process. Collaboration with the police force and judges also promotes a prosecutor’s ability to reduce incarceration and increase the fairness of the criminal judicial process.

A central component of my argument is that the sustainable roll-out of anti-carceral reforms and procedural justice policies requires a coalition with more conservative agents. Reducing incarceration and increasing fair process, that is, demands cooperation from police officers, judges, pretrial services, correctional officers, voters, junior prosecutors, prosecutors in supervisory positions, state and local officials, and citizens. Nelson and Chisholm both secured that cooperation because, unlike Mosby, they refrained from issuing a non-prosecution order and have kept a greater rhetorical distance between themselves and the “progressive prosecutor” label.

Table 3: Progress toward the ideal⁷⁷⁴

	Key reform (1)	Key collaborators (2)	Key consequence (3)	Key concessions (4)
Chisholm				
Procedural justice	2007 Vera Institute project	Vera researchers and junior prosecutors	Challenged the "black box" norm	Nurtures the tough-on-crime spirit
Carceral progressivism	Transparent about police shootings	Police force and MAIT	Community appreciates transparency	Didn't prosecute 2 major police shootings
Anti-carceral prosecution	2013 Domestic Violence Diversion Program	Governor, police, judges, staff	Reduced incarceration rates	Foregoes non-prosecution
Nelson				
Procedural justice	2018 Conviction Review Unit	FL legislature and Dept. of Justice	1st CRU in FL	Doesn't review excessive sentence claims
Carceral progressivism	Transparent about police shootings	Sheriff, state police	Public access to investigation details	Hasn't prosecuted a police officer
Anti-carceral prosecution	2017 civil citation expansion	Mayor, sheriff, police force, staff	Reduced incarceration	Focuses on nonviolent crimes
Mosby				
Procedural justice	Expanded conviction integrity unit	Innocence Project & junior prosecutors	9 exonerations	N/A
Carceral progressivism	Prosecuted major police shooting	City & state police	Police revised use of force policy	Prosecution was unsuccessful
Anti-carceral prosecution	2019 marijuana nonprosecution order	Staff & police	Reduced incarceration rates	Police ignored the directive

The relatively uncompromising approach that Mosby took, detailed in Table 3, caused her to lose the cooperation that she needed. Her COVID-19 non-prosecution order, marijuana non-prosecution order, and decision to prosecute Gray's killers mark points at which she broke with the restraints imposed by the compromise of progressive prosecution. Breaking the core compromises comes with costs. For example, the Maryland governor and Baltimore police force undercut Mosby's reforms and her junior prosecutors have continued a range of harsh practices along the way. Mosby's ambitious moves toward reducing incarceration and prosecuting police misconduct, then, broke apart the coalition she needed in order to make a difference over time.

To be clear, Mosby has also made concessions. Her anti-carceral reforms, like Chisholm's and Nelson's, are restricted to non-violent crimes. Moreover, despite Mosby's "do-not-call" list, her office has continued to call on these officers for testimony. Further, Mosby poured 15 charges into Keith Davis Jr. who had been shot at 44 times by the police in June, 2015. Nonetheless,

⁷⁷⁴ Coding assistance from Clare Stevens, Oberlin College '21.

Mosby has taken on the police and has issued not one, but two non-prosecution orders. Furthermore, although Mosby has embraced the “progressive prosecutor” label, she has also deployed both the “return on investment” and “New Jim Crow” framings to justify her reforms to the electorate.

Issuing a non-prosecution order annoys people: “It’s interesting to see how you can achieve that change that you think is the right direction to go [reducing incarceration], without necessarily having to jam it in everybody’s face that you’re here to save the world by fiat,” an interview subject with close knowledge of the Milwaukee County District Attorney’s office told me.⁷⁷⁵ The quote supports my claim that issuing a non-prosecution order will start political fires with police officers, legislators, junior prosecutors and judges that will be hard to put out. To provide just one example, an interview subject with direct knowledge of the Baltimore City State’s Attorney’s office informed me that many junior prosecutors in Mosby’s office were skeptical about Mosby’s COVID-19 non-prosecution order.

By avoiding non-prosecution, a progressive prosecutor will be better-equipped to develop the cooperation needed in order to introduce diversion programs, a conviction review unit, and open-data projects over a sustained period of time and in politically tough districts. I view diversion programs and civil citation programs as the most important progressive policies because they reduce incarceration. Diversion programs are more likely to attain a broad-based coalition because they are set by statutory law, and are in turn more collaborative than the decision to override a statutory law. For example, Mosby’s AIM to B’More policy, Chisholm’s drug court, and Nelson’s civil citation program all received backing from law enforcement. By contrast, the Baltimore police force disagreed with Mosby’s 2019 marijuana non-prosecution

⁷⁷⁵ Phone call with interview subject (February 5, 2021) (on file with author).

order and continued to make arrests for that crime. Moreover, the governor challenged Mosby by assigning a different prosecutor to manage violent crimes in Baltimore City. It is not clear how the police have responded to Mosby's COVID-19 non-prosecution order. It is a warning sign that the police spokesperson refused to tell reporters whether they would continue to make arrests for crimes on Mosby's COVID-19 non-prosecution list.

Even though compromise prevents full realization of the progressive ideal, I am a proponent of the progressive prosecutor project. This thesis indicates that despite the limits that collaboration imposes, there is room for an elected prosecutor to move toward reducing incarceration and increasing fair process over the long-haul: "the path isn't impossible. The path is hard," an interview subject with direct knowledge of the Milwaukee criminal justice system told me.⁷⁷⁶ To clarify, I do concede the skeptics' claim that there is much less room, if there is any at all, to move toward prosecuting the police. But a compromise is distinct from a paradox because it is not that progressive prosecutors are all talk and no action: Nelson's civil citation program, Chisholm's drug court, and Mosby's AIM to B'More measure, while imperfect, have made a difference.

Moreover, the concessions progressive prosecutors must make in order to build a coalition depends on the context of the area. For example, Nelson's decision to set up a committee to approve death penalty requests rather than refuse to ever seek capital punishment may have gone over well with conservative agents in her district for whom she depends upon for cooperation on programs including civil citation, restorative justice, and conviction review. Conversely, the death penalty has been abolished in Wisconsin and Maryland, which makes that concession unnecessary for Chisholm and Mosby.

⁷⁷⁶ Phone call with interview subject (February 22, 2021) (on file with author).

The more generalizable necessary concessions include focusing progressive policies on non-violent crimes, avoiding non-prosecution, not prosecuting police abuse, and a rhetorical framing strategy that eschews a connection to the “progressive prosecutor” label. My findings indicate that a progressive prosecutor must make at least some of these concessions in order to develop diversion programs, conviction review units, open-data programs, and restorative justice over time and in districts with a strong conservative presence. I will leave the matter of whether the concessions needed to reduce incarceration and increase procedural justice over time and across the country are worth it to the activists who ushered the new crop of prosecutors to power.

One area that this thesis does not cover but is worthy of attention is whether and to what degree elected prosecutors can pursue other facets of carceral progressivism, namely prosecuting landlords, politicians, corporations, and rich people. My findings indicate that prosecuting police abuse while working with the police on reforms is impossible namely because of the prosecutor’s dependence on the police force. On the other hand, county prosecutors are not dependent on landlords or corporations and may have more space to prosecute these actors for wrongdoings. A second avenue for further research would be an article exploring what the best strategy is for framing progressive prosecution in service of short-term and long-term success. I will now provide a set of recommendations to help progressive prosecutors be more effective.

Best practice #1: Collaborate with the police force

I recommend that county prosecutors build a good working relationship with the police force by working together on reforms, letting a state level official take on police crimes, and being communicative with the police commissioner. Developing a good relationship with the police is imperative because a resistant police force restricts an elected prosecutor’s ability to reduce incarceration. Prosecutors are also dependent on the police for programs that increase fair

process. When it comes to prosecuting the police, prosecutors are also dependent on the police. Since prosecutors are dependent on the police to make progress, they should build a good relationship with the police. One way to do so is to work together on reforms, such as a drug court, a mental health court, or a civil citation program.

My second recommendation is for progressive county prosecutors to not prosecute police abuse. I instead suggest that the county prosecutor allow the state attorney general, with the help of the state police, to prosecute police crimes. A second suggestion for strengthening the relationship with the police is for the prosecutor to keep in close contact with the police commissioner about any and all reforms they plan to implement, including ones that they think the police commissioner would support. A relevant cautionary tale is that Nelson's data transparency project caused issues with the police force because she had not contacted them before releasing the data.

A critic might assert that it is outrageous to suggest that a progressive prosecutor build a strong working relationship with the police force by working with the police on reforms, shifting police prosecution to an external actor, and staying in close contact with the police commissioner. The critic might add that it would be regressive to work with the police because of pervasive police corruption, killing, brutality, violations of constitutional rights, lying on the witness stand and racial profiling. Moreover, they might assert that the local prosecutor has the authority to take on police abuse, which makes it incumbent on them to do so. Finally, the critic could say that the state attorney general could be a Republican, which makes shifting the responsibility an ineffective solution.

Indeed, a local prosecutor could focus their efforts on police prosecution and handle that role internally. In my view though, prosecuting police crimes comes at the cost of reducing

incarceration over time. The way out is to have the state attorney general, who will ideally be a progressive, handle the prosecution of police crimes. But the critic would be right to say that is not always the case. Some elected prosecutors, such as Nelson, may find that they need to decide between prosecuting police violence or reducing the incarceration of ordinary people. I suggest that progressive prosecutors emphasize reducing incarceration instead of prosecuting police misconduct. Reducing incarceration will ensure that more vulnerable people will be able to vote and organize in their communities. In that way, the benefits incarcerating fewer people are greater than the benefits of deterring police misconduct. In short, I suggested that progressive prosecutors collaborate with the police by working together on anti-carceral reforms, not prosecuting police violence but instead asking an external actor to do so, and keeping in touch with the police commissioner.

Best practice #2: collaborate with judges

I suggest that elected prosecutors develop a good working relationship with the judiciary. Since judges make the final determinations about bail and sentences, it would behoove the elected prosecutor to build a harmonious relationship with judges. I have found through my research that the best way to do that is to work with judges on reforms. For example, Nelson worked with judges on her civil citation program and Chisholm worked with judges on his drug court. Chisholm also helped judges secure federal funding. It has helped Chisholm that he is an experienced prosecutor, so judges know him. In turn, elected prosecutors who have experience working in their district are well-equipped to build a strong relationship with judges. My core suggestion, though, is for the prosecutor to communicate with judges about reforms, not surprise them, and assist them with their specific goals, for example by helping elected judges secure funding from the federal government.

Best practice #3: collaborate with junior prosecutors

My third suggestion is that progressive prosecutors focus on building up morale in their office, while also pushing junior prosecutors in a more progressive-minded direction. I have found that advocates are correct that changing the internal incentive structure, hiring progressives in supervisory positions, and implicit bias training programs help stifle punitive office norms. Elected prosecutors, though, should tread with caution when it comes to firing junior prosecutors. Firing junior prosecutors in large numbers can create a morale problem. The office needs a high morale to take on the challenges of prosecuting in accordance with fairness and prosecuting fewer ordinary people. More specifically, a good progressive prosecutor should require their staff to review police reports quickly, not overcharge, dismiss cases based on unreliable evidence, not discriminate, refer defendants into diversion programs, and remain aware of the immigration consequences of prosecutions. These practices require more nuance than seeking a high conviction rate. I suggest the elected prosecutor not fire too many junior prosecutors and also always remind their team that a high conviction rate does not advance the mission of the office.

Best Practice #4: Frame reforms the right way

Developing support from the electorate and from state and local officials is integral for progressive prosecution. Building political support for a progressive model of prosecution, however, is not without its challenges. I have found that the only way to do so is for the prosecutor to not accept the progressive label, as Chisholm and Nelson have done. By taking this step, citizens and elected officials will not see progressive reforms as ideologically motivated. Scholars point out, however, that pretending to not be a progressive but acting progressive is demoralizing for activists. In turn, an elected prosecutor must balance a strong relationship with

progressive activists and movement groups while not alienating conservative citizens and officials. One way they can do that is through transparency about their plans. But ultimately, the best strategy for framing progressive prosecution for short-term and long-term success is an open question, and another avenue for further research.

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