

THE PROMISE OF PROGRESSIVE PROSECUTION

G. Ben Cohen*

ABSTRACT

Traditional prosecution begot mass incarceration, racial disparities in sentencing, excessive punishment and wrongful convictions, while failing to reduce recidivism, enhance trust in the criminal legal system or promote safety. Advocates and scholars have debated whether progressive prosecution provides a means to enhance the legal system or whether it merely legitimizes the carceral state. Proponents of progressive prosecution have argued that it can address the excesses of traditional prosecution. Abolitionist critics have suggested that prosecutors can provide no legitimate answer to address flaws in the criminal legal system. Others have argued that prosecutors have little power to achieve reform that addresses problems like mass incarceration, racial discrimination, and wrongful convictions.

This Article focuses on the promise and challenges of progressive prosecution through the lens of the election of Jason R. Williams to Orleans Parish District Attorney's Office. Orleans Parish was the epicenter of mass incarceration, wrongful convictions, violence, and racism over the last thirty years. The election of Jason Williams as District Attorney in 2021 resulted in policy changes in the Orleans Parish District Attorney's Office. In the first two years of the administration, incarceration rates dropped by one-third, impacting over one thousand people. Dozens of individuals serving draconian punishments for low-level offenses were resentenced. Eighteen individuals were exonerated. But as well, compromises were made. Policies articulated in a vacuum were difficult to maintain. Criticism came from progressives and conservatives alike. Many of the salient challenges and possibilities of this reform are detailed to

* Assistant Professor of Law, Akron Law School.

allow participants, practitioners, advocates and scholars to assess the promise of progressive prosecution.

“A government’s respect for the rule of law and a citizen’s belief in the legitimacy of the system that enforces that law is a prerequisite for freedom to genuinely exist within the democracy . . . The administration of criminal justice presents a stark example of the government’s power to curtail one’s freedom.”
— Tamara F. Lawson¹

“America was promises to whom?”
— Archibald MacLeish²

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1. Tamara F. Lawson, “Whites Only Tree,” *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 207, 208 (2009).

The prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimidations While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

Id. at 208–09 (citing Hans P. Sinha, *Prosecutorial Ethics the Charging Decision*, in THE PROSECUTOR 32, 32 (2007)).

2. ARCHIBALD MACLEISH, AMERICA WAS PROMISES 9 (1939).

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INTRODUCTION

This Article examines the possibilities and challenges of progressive prosecution through the lens of the first two years of new leadership of the Orleans Parish District Attorney’s Office.³ It examines the compromises of progressive prosecution, noting both successes and impediments to reform.⁴

3. The origins for this Article are in the Orleans Parish District Attorney’s Office, where I worked under the elected District Attorney, Jason R. Williams, and First Assistant Bob White, as Chief of Appeals from February 1, 2021, through July 31, 2022, as well as a seminar titled “The Promise, Challenge and Compromises of Progressive Prosecution,” that I taught at Tulane Law School, University of Iowa College of Law, the University of Missouri Law School, and Akron University Law School. Throughout this Article, statements and observations are based on my experience in the Orleans Parish District Attorney’s Office and drawn from my direct involvement or awareness of the discussed matters. I am particularly appreciative of my colleagues in the Appeals Division, the Civil Rights Division, and the SAKI Division who tolerated my questions and mistakes. The measure of my appreciation for them can never be fully expressed. I am also thankful to the judges of the Orleans Parish Criminal District Court, the Court of Appeals, and the Louisiana Supreme Court, who were generally gracious beyond measure. Finally, but not least of all, I am deeply appreciative of the students at the law schools who fully engaged in this project and pushed me to think more critically about the opportunities for reform.

4. Where formal citations are absent, such statements should be understood as stemming from my personal experience in this capacity. These statements reflect my own views and not the views of the District Attorney’s Office. Beginning to name the individual

The progressive prosecution movement arose from overwhelming systemic distrust in the criminal legal system.⁵ The election of Jason Williams as District Attorney in Orleans Parish, Louisiana was a part of this effort to reform the criminal legal system through the election of new prosecutors poised to address the problems of mass incarceration, race discrimination, and wrongful conviction.

Because of its vast history of injustice, New Orleans is an especially salient location to consider the challenges and possibilities of progressive prosecution. The history of Orleans Parish is entrenched in racism.⁶ In 1866, between thirty-three and two hundred Black citizens demonstrating for voting rights were lynched in what is known as the New Orleans Massacre of 1866.⁷ In 1896, the Supreme Court upheld the conviction of Homer Plessy for violating Louisiana's Separate Car Act (1890).⁸ In 1898, on the eve of Louisiana's all-white Constitutional Convention, civil rights lawyer Louis Martinet wrote the United States Attorney General decrying the racism in Orleans Parish that was dead set on "secur[ing] white supremacy for all time in Louisiana."⁹ The "Robert Charles Riots of 1900" resulted in the murder of at least twenty-eight people, with many more injuries.¹⁰ The broad disenfranchisement of Black citizens continued unabated through the Civil Rights

prosecutors, victim-advocates, and administrators with whom I worked and from whom I learned, would require a directory of names and risk errors of omission.

5. See generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

6. The rich history of racism in Orleans Parish warrants its own examination and is not the subject of this Article but is noted here to provide context for the challenges and opportunities for reform. It should be noted that New Orleans' history of racism is emblematic rather than unique, as the legal history of the United States of America is entrenched in racism. See generally DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

7. See *Reconstruction in America, Chapter 2: Freedom to Fear: A Terrifying and Deadly Backlash*, EQUAL JUST. INITIATIVE, <https://eji.org/report/reconstruction-in-america/freedom-to-fear/> (last visited Jan. 4, 2025); TriPod: New Orleans at 300, *An Absolute Massacre: The 1866 Riot At The Mechanics' Institute*, WWNO – NEW ORLEANS PUBLIC RADIO (July 14, 2016, 8:30 AM), <https://www.wwno.org/podcast/tripod-new-orleans-at-300/2016-07-14/an-absolute-massacre-the-1866-riot-at-the-mechanics-institute>.

8. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

9. George E. Cunningham, *Constitutional Disenfranchisement of the Negro in Louisiana, 1898*, 29 NEGRO HIST. BULLETIN 147, 147 (1966).

10. Daphne Spain, *Race Relations and Residential Segregation in New Orleans: Two Centuries of Paradox*, 441 ANNALS AM. ACAD. POL. AND SOC. SCI. 82, 89 (1979) (noting whites killed over thirty Black citizens in response to Robert Charles' acts of resistance); cf. WILLIAM IVY HAIR, CARNIVAL OF FURY: ROBERT CHARLES AND THE NEW ORLEANS RACE RIOT OF 1900, 137 (1976).

Movement.¹¹ Racial discrimination in housing, education, and criminal justice remains pervasive.¹²

In 2005, Hurricane Katrina exposed massive racial divisions within the city as “mostly black New Orleans residents [were] stranded on rooftops and crowded amid fetid conditions in what was then the Louisiana Superdome.”¹³ “Hurricane Katrina was a tipping point for the New Orleans criminal justice system. It brought a public unmasking of perverse system practices that were commonplace before the storm and catalyzed a broad rethinking that continues ten years later.”¹⁴ It made clear that the problems that persisted for over two hundred years, persisted today.

11. See, e.g., *Responses Coming from the Civil Rights Movement*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/eyesontheprize-responses-coming-civil-rights-movement/> (last visited Jan. 4, 2025).

12. See, e.g., *Racial Differences in Economic Security: Housing*, U.S. DEP’T TREASURY (Nov. 4, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-housing>; *Post 5: Racial Differences in Educational Experiences and Attainment*, U.S. DEP’T TREASURY (June 9, 2023), <https://home.treasury.gov/news/featured-stories/post-5-racial-differences-in-educational-experiences-and-attainment>; *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT’G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/>.

13. Carroll Doherty, *Remembering Katrina: Wide Racial Divide Over Government’s Response*, PEW RSCH. CTR. (Aug. 27, 2015), <https://www.pewresearch.org/short-reads/2015/08/27/remembering-katrina-wide-racial-divide-over-governments-response/>.

14. *Justice in Katrina’s Wake*, VERA INST. JUST., <https://www.vera.org/news/justice-in-katrinass-wake> (last visited Jan. 4, 2025).

New Orleans, in the first two decades of the twenty-first century, led the state and country, if not the world, in mass incarceration,¹⁵ murder rates,¹⁶ and wrongful convictions.¹⁷

Louisiana leads the nation in incarceration, followed by Oklahoma, Alabama, Arkansas, Mississippi, Arizona, Texas, Missouri, Georgia, and Florida.¹⁸

In 2020, the year Jason Williams was elected District Attorney, Louisiana had the highest per capita prison population in the United

15. See *Demographic Dashboard*, LA. DEPT. CORR., <https://doc.louisiana.gov/demographic-dashboard/> (last visited Jan. 4, 2025) (reporting that as of December 31, 2021, New Orleans contributed 13.9% to the incarcerated population in the state of Louisiana, making it the leading parish in the state); *Mass Incarceration*, ACLU LA., <https://www.laclu.org/en/issues/mass-incarceration> (last visited Jan. 4, 2025) (“Louisiana has the nation’s highest incarceration rate . . .”); LA. DEP’T PUB SAFETY & CORR. & LA. COMM’N ON LAW ENF’T, LOUISIANA’S JUSTICE REINVESTMENT REFORMS 2019 ANNUAL PERFORMANCE REPORT 5 (2019), <https://gov.louisiana.gov/assets/docs/CJR/2019-JRI-Performance-Annual-Report-Final.pdf> (explaining that over the prior two decades, Louisiana led the nation in incarceration multiple times, switching with Oklahoma and Mississippi on singular occasions).

16. See Brendan McCarthy, *N.O. Murder Rate Remains Among Highest in the Nation*, NOLA.COM, https://www.nola.com/news/n-o-murder-rate-remains-among-highest-in-the-nation/article_0193d98a-c967-5f7b-9d68-64dd70bdae9d.html (Jan. 2, 2008) (reporting that between the year 2000 to 2020, New Orleans had the highest murder rate multiple times); *Why Does New Orleans Have More Murders than Similar Cities? Experts Search for Answers*, NOLA.COM (May 11, 2016), https://www.nola.com/news/crime_police/why-does-new-orleans-have-more-murders-than-similar-cities-experts-search-for-answers/article_c78b758a-7214-58d5-81cb-0218ff42f55b.html (“For years New Orleans had the highest murder rate in the country, earning it the moniker, ‘Murder Capital of the United States.’ That’s not been the case in recent years, though New Orleans consistently ranks in the top ten.”); Cameron McWhirter, *Why New Orleans Has the Highest Murder Rate in America*, WSJ (Oct. 14, 2022), <https://www.wsj.com/story/why-new-orleans-has-the-highest-murder-rate-in-america-8d326f07>; Jeff Asher et al., *Why Does Louisiana Consistently Lead the Nation in Murders?*, N.Y. TIMES, <https://www.nytimes.com/2021/02/15/upshot/why-does-louisiana-consistently-lead-the-nation-in-murders.html> (May 9, 2021) (“New Orleans has had the nation’s highest murder rate for any big city a dozen times since 1993, with 424 murders in 1994 at the height of the city’s bloodletting.”).

17. See *Top Ten Counties*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Top-Ten-Counties.aspx> (last visited Jan. 4, 2025) (noting that New Orleans leads the national wrongful convictions—7.92 times more exonerations per capita than the national average); Brentin Mock, *Why New Orleans Leads the U.S. in Wrongful Convictions*, BLOOMBERG (June 9, 2017, 9:32 AM), <https://www.bloomberg.com/news/articles/2017-06-09/new-orleans-the-wrongful-conviction-capital-of-the-u-s> (“New Orleans is the primary driver of those wrongful convictions—Orleans Parish, where the city sits, holds the title for having the highest exoneration rate per capita of all major counties in the country, according to the National Registry’s report on exonerations across the U.S.”).

18. Stephen Ross Johnson, *10 States With the Highest Incarceration Rates*, U.S. NEWS (June 10, 2024, 4:38 PM), <https://www.usnews.com/news/best-states/slideshows/10-states-with-the-highest-incarceration-rates>.

States, with an incarceration rate of 596 per 100,000 residents.¹⁹ In addition to the highest incarceration rate, Louisiana also has the highest percentage of people serving natural life without the possibility of parole at 16.6%.²⁰

Orleans has been the leading carceral parish in the leading carceral state, in the country that leads the world in incarceration. Orleans Parish makes up roughly eight percent of the population in Louisiana,²¹ but has always represented a larger proportion of the prison population.²² In December 2020, individuals out of Orleans made up 13.8% of the total prison population.²³

Orleans Parish has also been the epicenter of injustice. The district had been responsible for *Cage v. Louisiana*,²⁴ *Sullivan v. Louisiana*,²⁵ *Kyles v. Whitley*,²⁶ *Smith v. Cain*,²⁷ and the decision in *Connick v. Thompson*.²⁸ The past three elected prosecutors in Orleans Parish were Harry Connick Sr., who served five terms for thirty years,²⁹ Eddie Jordan, the city's first Black District Attorney who served less than one

19. Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y. INITIATIVE (June 2024), <https://www.prisonpolicy.org/global/2024.html>.

20. James Van Bramer, *Don't Expect Louisiana Incarceration Rates to Drop: Study*, CRIME REP. (Nov. 23, 2022), <http://www.thecrimereport.org/2022/11/23/dont-expect-louisiana-incarceration-rates-to-drop-study/>.

21. *QuickFacts Orleans Parish, Louisiana; Louisiana; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/orleansparishlouisiana,LA,US/PST045222> (last visited Jan. 4, 2025) (reporting that 383,997 people lived in New Orleans in 2020).

22. Greg LaRose, *These Cities and Parishes Have the Most People Incarcerated in Louisiana Prisons*, LA. ILLUMINATOR (July 17, 2023, 8:45 AM), <https://lailluminator.com/2023/07/17/these-cities-and-parishes-have-the-most-people-incarcerated-in-louisiana-prisons/>.

23. *Demographic Dashboard*, *supra* note 15.

24. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (reversing New Orleans conviction based upon use of reasonable doubt instruction that reduced governments evidentiary burden).

25. *Sullivan v. Louisiana*, 508 U.S. 275, 275 (1993) (applying *Cage* to all other pending cases in Orleans).

26. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (holding prosecution failed to turn over favorable evidence in capital murder prosecution).

27. *Smith v. Cain*, 565 U.S. 73, 74–75 (2012) (applying *Kyles* to subsequent capital murder prosecution).

28. *Connick v. Thompson*, 563 U.S. 51, 53 (2011) (holding District Attorney's Office not civilly liable for *Brady* violations, despite exoneration of John Thompson).

29. Oliver Laughland, *Inside the Division: How a Small Team of US Prosecutors Fight Decades of Shocking Injustice*, GUARDIAN, <https://www.theguardian.com/us-news/2022/may/06/prosecutors-new-orleans-mass-incarceration> (June 7, 2022, 4:02 PM) ("The city has been scarred by a series of high-profile *Brady* cases, many under the tenure of New Orleans's longest serving DA, Harry Connick Sr, who was elected in 1973 and, winning five successive elections, held office for 30 years."); see The Editorial Board, *Justice Gone Wrong in New Orleans*, N.Y. TIMES (Oct. 20, 2015), <https://www.nytimes.com/2015/10/20/opinion/justice-gone-wrong-in-new-orleans.html>.

term,³⁰ and Leon Cannizzaro, who served two terms reinstituting many of Connick's harshest policies with zeal.³¹ The District Attorney's Office had received a series of rebukes, including remonstrations at the lectern at the United States Supreme Court,³² lawsuits for using fake subpoenas,³³ and media attention for behaving poorly while in office.

The exercise of raw power unconstrained by constitutional limitation and generating mass incarceration had not made the state or city safer. Louisiana, generally, and New Orleans specifically, has been a leader in the United States murder rates.³⁴

The hard-fought election of Jason R. Williams as District Attorney offered the possibility of change for the city of New Orleans. Williams had not merely been a defense attorney, but he had been the head of the Orleans Parish City Council that fought to bring the Confederate Monuments down in Orleans Parish.³⁵ He had fought for parity for indigent defense funding as head of the City Council, and he had spoken out on the sordid racist history of the death penalty: D.A. Williams was sworn in as District Attorney "promising 'justice that endures.'"³⁶

This Article addresses the way that prosecutorial discretion can have profound effects on the criminal legal system through an analysis of Orleans Parish during the first years of a newly elected reform District

30. *New Orleans District Attorney Resigns*, NPR (Oct. 31, 2007, 4:12 PM), <https://www.npr.org/2007/10/31/15817262/new-orleans-district-attorney-resigns>; see 2005 Inductee: Eddie J. Jordan, Jr., LA. POL. MUSEUM, <https://lapoliticalmuseum.com/inductee/eddie-j-jordan-jr/> (last visited Jan. 4, 2025).

31. See Rory Fleming, *New Orleans' Nightmare Prosecutor Steps Down. Who's Next?*, FILTER (July 28, 2020), <https://filtermag.org/new-orleans-prosecutor-race>; Kevin McGill & Rebecca Santana, *Controversial New Orleans District Attorney Won't Run Again*, AP NEWS, <https://apnews.com/general-news-3d6fb079938cc7666c9e22cd67e70532> (July 24, 2020, 5:01 PM).

32. Lyle Denniston, *Argument Recap: Disaster at the Lectern*, SCOTUSBLOG (Nov. 8, 2011, 4:51 PM), <https://www.scotusblog.com/2011/11/argument-recap-disaster-at-the-lectern>.

33. Jerry Lambe, *Federal Court Denies Immunity to Prosecutors Who Used 'Fraudulent' Subpoenas to Jail Witnesses*, L. & CRIME (Apr. 22, 2020, 8:02 PM), <https://lawandcrime.com/high-profile/federal-court-denies-immunity-to-prosecutors-who-used-fraudulent-subpoenas-to-jail-witnesses>; Matt Sledge, *Federal Judges Scathing on Fake Subpoenas in New Orleans, But Don't Rule on Key Question*, NOLA.COM (Feb. 5, 2020), https://www.nola.com/news/courts/federal-judges-scathing-on-fake-subpoenas-in-new-orleans-but-dont-rule-on-key-question/article_253052ac-484f-11ea-995d-837ba3508ff8.html.

34. See sources cited *supra* note 15 and accompanying text.

35. See Collier Meyerson, *Inside the Fight to Take Down the Confederate Monuments in New Orleans*, NATION (June 19, 2017), <https://www.thenation.com/article/archive/inside-the-fight-to-take-down-the-confederate-monuments-in-new-orleans/>.

36. Nick Chrastil, *Jason Williams Sworn in as Orleans Parish DA, Promising 'Justice that Endures'*, LENS (Jan. 11, 2021), <https://thelensnola.org/2021/01/11/jason-williams-sworn-in-as-orleans-parish-da-promising-justice-that-endures/>.

Attorney. It is situated within the context of the ongoing debate “between the reformist and abolitionist movements.”³⁷ Some scholars and advocates have claimed that the answer to problems in the legal system is the election of progressive prosecutors.³⁸ Others have incisively observed that “[t]he progressive prosecutor does not in himself take power or legitimacy away from the office of the prosecutor” and that “progressive prosecutors’ legitimize the [sic] prosecutorial function by suggesting that the problem is with bad prosecutors rather than the office itself.”³⁹ This Article does not seek to stake out a position between these positions or even “explore[] ways of reconciling these apparent tensions.”⁴⁰ Rather, it uses the first two years of District Attorney Williams’ tenure as Orleans Parish District Attorney to assess the possibilities and challenges of reform so that readers might be more informed as they weigh—not just the rhetorical strengths of each argument—but the practical and lived experience.

The Article begins first with a description of the power of prosecutors, their role in creating mass incarceration, and the progressive prosecution movement, along with an overview of recent scholarship detailing the status of offices engaged in progressive prosecution.

Second, the Article addresses the promise of progressive prosecution, including the impact of policy changes on mass incarceration, and the substantive ameliorative efforts to address past harm achieved in the Orleans District Attorney’s Office. In raw numbers, these policy changes and reform efforts had the impact of: reducing the number of incarcerated individuals by over one thousand; producing eighteen exonerations; addressing 117 non-unanimous convictions; ameliorating sentences from the late 1960s and early 1970s; revisiting habitual offender sentences that imposed draconian punishment for low-level offenses; and

37. See Paul Butler, *Review: Sisters Gonna Work it Out: Black Women as Reformers and Radicals in the Criminal Legal System*, 121 MICH. L. REV. 1071, 1073 (2023) (chronicling the way two books “represent opposing approaches to addressing entrenched problems in the U.S. criminal legal system including mass incarceration, police brutality, and extraordinary race disparities”) (citing DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* (2021) and *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022)).

38. See generally MIRIAM KRINSKY, *CHANGE FROM WITHIN: REIMAGINING THE 21ST CENTURY PROSECUTOR* (2022); KIM TAYLOR-THOMPSON & ANTHONY C. THOMPSON, *PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE* (2022).

39. Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1571 (2022).

40. See Butler, *supra* note 37, at 1073.

addressing life sentences imposed on children and death sentences imposed decades ago.⁴¹

Third, the Article identifies some of the challenges that arose in the midst of attempting to advance criminal justice reform in New Orleans, as well as broader challenges imbued in the concept of progressive prosecution.

Finally, the Article details the compromises that came along with the promise. The effort to reform the criminal legal system is not unencumbered by the realities of governing and electoral politics, the rise and fall in crime rates, and the gravitational pull to exercise power. The article considers whether these compromises are a necessary component of progressive prosecution and asks the reader to assess the worth and value of the effort.

I. THE POWER OF PROSECUTORS TO ADDRESS INJUSTICE

The criminal legal system in the United States incarcerates more people than any other democratic country.⁴² Per capita, in terms of incarceration as of 2022, the United States is sixth behind El Salvador, Rwanda, Turkmenistan, Cuba, and American Samoa.⁴³ The system has not resulted in a safer country.⁴⁴ The United States is in the top six countries in the world for intentional homicides.⁴⁵

Prosecutors have been partly responsible for these incarceration rates.⁴⁶ As John Pfaff observed: “Few people in the criminal justice

41. See *infra* Section II.b.

42. See Einar H. Dyvik, *Countries with the Largest Number of Prisoners as of December 2023*, STATISTA (July 4, 2024), <https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/>; John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/>; *Incarceration Rates by Country 2022*, WORLD POPULATION REV., <https://web.archive.org/web/20220310002531/https://worldpopulationreview.com/country-rankings/incarceration-rates-by-country> (last visited Jan. 4, 2025).

43. *Highest to Lowest - Prison Population Rate*, WORLD PRISON BRIEF, https://web.archive.org/web/20221220164611/https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Jan. 4, 2025).

44. See generally DON STEMEN, *THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER* (2017).

45. *Intentional Homicides*, COUNTRYECONOMY.COM, <https://countryeconomy.com/demography/homicides> (last visited Jan. 4, 2025).

46. See Matt Watkins, *Prosecutor Power #1: John Pfaff on Mass Incarceration*, CTR. FOR JUST. INNOVATION (Apr. 2018), <https://www.innovatingjustice.org/publications/john-pfaff-podcast> (finding that while legislators have been responsible for promulgating laws that enable prosecutors to seek draconian sentences, prosecutors play the predominate and unchecked role in enforcing those laws); Angela J. Davis, *The Carceral Force of Prosecutor*

system are as powerful, or as central to prison growth, as the prosecutor.”⁴⁷ Both to distort or damage the legal system, and as well to improve it. As Angela Davis described:

Prosecutors are the most powerful officials in the American criminal justice system. They control the direction and outcome of all criminal cases, particularly through their charging and plea-bargaining decisions. These decisions have greater impact and more serious consequences than those of any other criminal justice official. The prosecutor’s charging and plea-bargaining decisions are totally discretionary and virtually unreviewable.⁴⁸

Perhaps Professor Davis actually understates the power of a prosecutor. Also essentially unreviewable: what case to accept, which peremptory challenge to exercise, when to advocate for a procedural bar, recidivist enhancements, which policework to defend, which witness to assist, and to which victim to give deference.⁴⁹ Even more significantly, District Attorneys decide what problem is important to address: wage theft, public corruption, environmental crimes, or car burglaries. The raw exercise of power has not produced altogether satisfactory outcomes in terms of mass incarceration, wrongful convictions, racial disparities, the safety of communities, or trust in government.⁵⁰

And yet, as Jeffrey Bellin suggests in *The Power of Prosecutors*, these claims of unlimited power are at best hagiographic, often overstated, and at the least over-simplified.⁵¹ Professor Bellin recognizes that “prosecutors remain just one piece of a complex puzzle,” with contingent power provided by other more powerful criminal justice actors.⁵² This

Associations, Explained, APPEAL (Feb. 26, 2021), <https://theappeal.org/the-lab/explainers/the-carceral-force-of-prosecutor-associations-explained/>.

47. JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127 (2017).

48. Angela J. Davis, *The Power and Discretion of the American Prosecutor*, DROIT ET CULTURES (Oct. 23, 2023), <http://journals.openedition.org/droitcultures/1580>.

49. See BRUCE FREDERICK & DON STEMEN, VERA INST. OF JUST., THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING – TECHNICAL REPORT 26–27 (2012).

50. See, e.g., Ella Wiley, *How Racism in the Courtroom Produces Wrongful Convictions and Mass Incarceration*, LEGAL DEF. FUND (July 20, 2022), <https://www.naacpldf.org/racism-wrongful-convictions-mass-incarceration/>.

51. See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 178–82 (2019).

52. *Id.* at 175, 191 (“If I wanted to influence criminal justice outcomes and could [control] either police or prosecutors, I would choose police.”); *id.* at 194 (“[I]f seeking to make an impact on the criminal justice system, and forced to pick between prosecutors and judges, I would go with judges every day of the week.”); *id.* at 198 (“Legislators are clearly more powerful than prosecutors. No one would pay to watch this lopsided contest. Take any

Article looks at District Attorney Williams' office in the context of this entirely contingent, interdependent position of power.

A. Background on the Progressive Prosecution Movement

Debates concerning the modern origins of the "progressive prosecution movement" accrue.⁵³ Former prosecutor Paul Butler suggests that the origins of the progressive prosecution movement "owes its start to Angela J. Davis's 2009 book, *Arbitrary Justice: The Power of the American Prosecutor*, which argued that prosecutors should use their discretion to reduce mass incarceration and racial disparities."⁵⁴

In the decade between 2010 and 2020, focus shifted to the raw exercise of power of a few punitive prosecutors⁵⁵ and then to the policies of a handful of prosecutors who eschewed that power.⁵⁶ This shift invited the debate concerning the promise and the challenges of progressive prosecution. It spawned a PBS documentary.⁵⁷ And ultimately, it became fodder for the 2024 presidential campaign of Republican candidates.⁵⁸

Against a dark history of exercising power for punitive purposes that resulted in mass incarceration, wrongful convictions, and racism, Emily Bazelon wrote:

criminal justice example and the legislature has greater power. Yes, prosecutors can dismiss marijuana cases. But legislators can legalize marijuana.").

53. Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 738 (2020); see also *id.* at 721 ("This is not the first time that reformers pursued a new approach to prosecution. The Progressive Era reform movement in the late nineteenth and early twentieth centuries included a promise to overhaul an outdated, corrupt criminal justice system, including replacing corrupt prosecutors who belonged to the party machines.").

54. Paul Butler, *The Prosecutor Problem*, BRENNAN CTR. FOR JUST. (Aug. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/prosecutor-problem>.

55. See Campbell Robertson, *The Prosecutor Who Says Louisiana Should 'Kill More People'*, N.Y. TIMES (July 7, 2015), <https://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html>.

56. See Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CAL. L. REV. 1967, 1969 (2019) ("These prosecutors pledge to reduce demands for cash bail, divert more cases out of the criminal justice system, and find ways to support reentry and less punitive outcomes.").

57. See PHILLY D.A. (PBS Apr. 20, 2021).

58. See Sharon Pruitt-Young, *Before Krasner: The Wild and Woolly Saga of Philadelphia District Attorneys*, PBS: INDEPENDENT LENS (Apr. 20, 2021), <https://www.pbs.org/independentlens/blog/before-krasner-the-wild-and-wooly-saga-of-philadelphia-district-attorneys/>; Jenna Spinelle, *Take Note: Philly D.A. Larry Krasner on Reforming the Criminal Justice System from Within*, WPSU (Apr. 17, 2021, 11:00 AM), <https://radio.wpsu.org/crime-and-law-enforcement/2021-04-17/take-note-philly-d-a-larry-krasner-on-reforming-the-criminal-justice-system-from-within>.

[P]rosecutors also hold the key to change. They can protect against convicting the innocent. They can guard against racial bias. They can curtail mass incarceration.

Change who occupies the prosecutor's office, and you can make the system begin to operate differently. The power of the D.A. makes him or her the actor—the only actor—who can start to fix what's broken without changing a single law.

A movement of organizers and activists and local leaders and defense lawyers and professors and students and donors is fighting for that change. This movement is working to elect a new type of D.A. in city after city and county after county. The movement is a groundswell. It's growing. And it's causing the first major shift in politics and incentives of American prosecution in decades.⁵⁹

Bazelon describes the origins of the progressive prosecution movement in a meeting between Whitney Tymas and Chloe Cockburn in 2015.⁶⁰ “Tymas and Cockburn were in touch with a group of death penalty opponents⁶¹ around the country who aimed to unseat prosecutors who sought execution frequently.”⁶² Shortly after this conversation, Justice Breyer, dissenting in *Glossip v. Gross*, cited Smith's *Geography of the Death Penalty and its Ramification*, noting “just 10% of counties in the United States account for all death sentences imposed from 2004 to 2009” and that “1% of counties accounts for roughly 44% of all death sentences[] [and] . . . fourteen counties account for roughly one-third of death sentences nationally from 2004 to 2009.”⁶³ As Bazelon noted, the

59. BAZELON, *supra* note 5, at xxvii.

60. *Id.* at 78–79.

61. See Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 278 (2012) (“The main point is that if community members do not agree that more capital prosecutions are the best way to use the limited public safety dollars available, these community members’ complaints can be funneled to the county prosecutor and the county government rather than to the state legislature.”); *id.* at 272 (“County officials in counties that fund death penalty prosecutions (and defenses) might wish to create these offices to check local prosecutorial practices and reduce back-end spending.”); *id.* at 280 (“It also makes sense to consider the local political environment – for example, is this a county where the district attorney routinely refuses plea offers but where there is a possibility of voting in a different district attorney?”).

62. BAZELON, *supra* note 5, at 79.

63. *Glossip v. Gross*, 576 U.S. 863, 918–19 (2015) (Breyer & Ginsburg, JJ., dissenting) (citation omitted). As evidence of the power of the progressive prosecution movement, a new and more progressive prosecutor was elected in half of the fourteen counties referred to in Smith's article. See Smith, *supra* note 61, at 233–34.

initial campaigns to oust overzealous prosecutors occurred in Caddo Parish, Louisiana, which had the highest death sentence rate per capita of any county in the country.⁶⁴

Darcy Covert suggests that the “progressive prosecutor movement began in earnest in 2015” when “billionaire philanthropist George Soros reached out to Whitney Tymas, then-Director of Vera’s Prosecution and Racial Justice Program, to see how the two could work together to identify and back reform-minded prosecutors with the goal of ending mass incarceration.”⁶⁵

Others will say the movement began earlier when Abbe Smith raised the question: “Can you be a Good Person and A Good Prosecutor?”⁶⁶ Benjamin Levin,⁶⁷ Hana Yamahiro, and Luna Garzon-Montano⁶⁸ suggest such origins. Another potential origin of the progressive prosecution

64. BAZELON, *supra* note 5, at 79; *Tucker v. Louisiana*, 578 U.S. 1018, 1018 (2016) (Breyer & Ginsburg, JJ., dissenting) (“Tucker was sentenced to death in a Louisiana county (Caddo Parish) that imposes almost half the death sentences in Louisiana, even though it accounts for only 5% of that State’s population and 5% of its homicides . . . Given these facts, Tucker may well have received the death penalty not because of the comparative egregiousness of his crime, but because of an arbitrary feature of his case, namely, geography . . . One could reasonably believe that if Tucker had committed the same crime but been tried and sentenced just across the Red River in, say, Bossier Parish, he would not now be on death row. . . . For this reason, and for the additional reasons set out in my opinion in *Glossip*, I would grant certiorari in this case to confront the first question presented, *i.e.*, whether imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”); *see, e.g.*, Smith, *supra* note 61, at 233–235, 278, 281; Robertson, *supra* note 55 (“From 2010 to 2014, more people were sentenced to death per capita [in Caddo Parish] than in any other county in the United States, among counties with four or more death sentences in that time period.”).

65. Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 195–96 (2021); *see also* Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519>; Gary Craig, *PAC Led by George Soros Buys \$800K in Ads for Mitchell in Monroe County DA Race*, DEMOCRAT & CHRON., <https://www.democratandchronicle.com/story/news/2019/10/20/sandra-doorley-shani-curry-mitchell-monroe-county-district-attorney-race-george-soros-pac-buys-ads/3978724002/> (Oct. 20, 2019, 10:25 PM).

66. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 398 (2001) (“There is the question of working for unorthodox, independent-minded, or ‘progressive’ prosecutors.”).

67. Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416 n.6 (2021).

68. Hana Yamahiro & Luna Garzon-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 N.Y.U. REV. L. & SOC. CHANGE 130, 131 (“Two decades ago, Professor Abbe Smith first asked the question, ‘Can you be a good person and a good prosecutor?’ Her answer: ‘I hope so, but I think not.’”).

movement is in Radley Balko's 2013 interview of Sam Dalton.⁶⁹ Radley Balko interviewed Dalton for a piece he wrote titled "*The Untouchables: America's Misbehaving Prosecutors and the System that Protects Them*."⁷⁰ Sam Dalton, like Abbe Smith before him, was reticent about the prospect, but unlike Abbe Smith, he was not dismissive.⁷¹ While Dalton recognized the difficulty of the project, he did not disavow the project altogether.⁷² Dalton answered Balko's question focusing on the moral character of the elected District Attorney and the people administrating the office:

We have a fine, beautiful legal system. But it has been prostituted by bad prosecutors, bad policemen, and indifferent judges. We need to look at what kind of character we want the people who hold those jobs to possess, and we need to understand the character of the people who most want those jobs. When you look at those two things, I think you'll often find that they're contradictory.

If I were running a DA's office, I would go out and recruit my prosecutors myself. I wouldn't wait for applicants to come to me. In theory, just wanting to be a prosecutor should disqualify you from becoming one. I'm speaking on broad strokes here. I'm not talking about hard and fast rules. But that should be the general mindset we take when staffing a DA's office. . . .

We keep getting back to the fundamental problem, which is that the ideal person for a powerful position is someone whose character makes them very reluctant to wield power.⁷³

69. See Radley Balko, *An Interview With Sam Dalton, Now in His Seventh Decade of Criminal Defense Law*, HUFFPOST, https://www.huffpost.com/entry/an-interview-with-sam-dal_n_4520241 (Jan. 23, 2014). Balko describes Dalton as a "legend in Louisiana courtrooms" who had just "entered his seventh decade of practicing law." *Id.* Dalton had "defended more than 300 death penalty cases." *Id.* "Of those, he spared 16 defendants from execution, chartered a model public defender system, and he's currently leading a charge to impose some accountability on Louisiana's more egregiously misbehaving prosecutors." *Id.* Balko described his "favorite thing about him: Outside his office door there's a 'welcome' mat that reads: *Come back with a warrant*." *Id.*

70. Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System That Protects Them*, HUFFPOST, https://www.huffpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana_n_3529891?view=print&comm_ref=false (Dec. 6, 2017).

71. See Balko, *supra* note 69; Balko, *supra* note 70.

72. See Balko, *supra* note 69; Balko, *supra* note 70.

73. Balko, *supra* note 69.

B. The Meaning of Progressive Prosecution

A growing number of prosecutors have sought election based upon commitments to address mass incarceration and promote criminal justice reform.⁷⁴ Some have been elected under the campaign promise of practicing as a progressive.⁷⁵ Commentators note that more than ten percent of the country has prosecutors who identify as progressive.⁷⁶ This has been described as a wave of elected prosecutors pledging to address racial discrimination.⁷⁷ Indeed, so many people claimed the mantle, there are now ongoing debates concerning the meaning of the term “progressive prosecutor.”⁷⁸ Professors Carissa Hessick and Michael Morse recognize

74. BAZELON, *supra* note 5, at 147–73.

75. See Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 989 (2020) (noting “[a] growing number of prosecutors are running and winning elections on criminal justice reform platforms of progressive prosecution”); Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part 1: Internal Constraints*, 61 B.C. L. REV. 32, 32–33 (2020) (“In the past decade, the United States has experienced something of an awakening regarding criminal justice. Politicians on both sides of the aisle have recognized that ‘tough justice’ does not always lead to the most just results. They have also realized that it is very expensive for a state to incarcerate hundreds of thousands of citizens every day. These concerns have led to an appetite for reform. As a result, a new version of the chief prosecutor has emerged: the progressive prosecutor.”).

76. Heather L. Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. B.L. L.J. 73, 88 (2020) (“[F]orty million Americans (i.e., more than 12 percent of America’s population) live in a city or county with a ‘progressive’ prosecutor. Progressive prosecutors’ growing number and national prominence are representative of a burgeoning national push to reform the role of the modern American prosecutor.”); Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 804 (2020) (“[B]urgeoning number of prosecutors and district and state’s attorney candidates have begun to identify as progressive prosecutors. These prosecutors generally favor decriminalizing low-level offenses, using alternatives to incarceration, examining the police more critically, and exercising discretion.”).

77. See Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 69, 71 (2019) (“In recent years, there has been a wave of progressive district attorneys elected to office across the country. These prosecutors campaigned for office by pledging to ‘address racial disparities,’ send fewer people to jail, change the ‘culture’ of the district attorney’s office, recognize crime as a byproduct of poverty, and end mass incarceration. However, if what Silard noticed in the San Francisco District Attorney’s Office was not an isolated phenomenon, and line prosecutors across the country become increasingly punitive over time, changing prosecutorial culture may be harder than simply hiring and training progressive assistant district attorneys. Moreover, even progressive district attorneys are prosecutors who are expected to do their jobs—to prosecute crime, particularly violent crime.”).

78. Heather L. Pickerell, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & POL’Y REV. 285, 287 (2020) (“Voters are increasingly interested in electing district attorneys who reject traditional tough-on-crime policies and aim to reform prosecution. The first nation-wide public opinion poll of voters’ views on

that the term has no single, accepted meaning.⁷⁹ Rather, it encompasses “prosecutorial practices that are intended to make the criminal justice system less punitive.”⁸⁰

Benjamin Levin’s *Imagining the Progressive Prosecutor* devotes itself to cataloging the different kinds of progressive prosecutors. He spends considerable time discussing the lack of a central definition but centers the movement around the recognition that the “criminal system is flawed” and that a “shift in prosecutorial priorities is needed to address widespread racial disparities, massive carceral populations.”⁸¹ He notes that “scholars and advocates have sought to propose best practices, to determine evaluative metrics, and even to introduce scorecards that voters might use,” but that “these attempts to add content to the rhetoric of progressive prosecution . . . often speak to a capacious (and at times conflicting) vision of reform.”⁸²

Ultimately, Professor Levin divides the term “progressive prosecutor” into four archetypes: i) the progressive prosecutor in the political sense, ii) the proceduralist prosecutor focused on making the system fairer, iii) the prosecutorial progressive focused on structural inequality, and iv) the anti-carceral prosecutor.⁸³ The first of these archetypes—the politically progressive prosecutor—is a reformist in name only; it informs the concern that the term “progressive prosecutor” suggests merely a political position undermining its value.⁸⁴

prosecutors—which the ACLU conducted in 2017—found strong bipartisan and geographically diverse support for prosecutors committed to alleviating mass incarceration, reducing racial bias in the justice system, and holding police officers accountable for wrongdoing.”).

79. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1540–41 (2020).

80. *Id.* at 1539–41 (“Our Article contributes to a small, but growing literature that acknowledges the centrality of local prosecutors to criminal justice outcomes . . . Most notably, a motivated group of advocates and their supporters have started a movement to elect progressive prosecutors. The term ‘progressive prosecutor’ does not have a single, accepted meaning . . . In any event, we use the term to refer to prosecutors who have specifically championed or adopted prosecutorial practices that are intended to make the criminal justice system less punitive.”).

81. Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1424–28 (2021) (“Frustratingly, the slipperiness of the progressive prosecutor categorization and its increasing popularity in the media and advocacy circle invites greater uncertainty about prosecutorial elections and—perhaps more provocatively—about whether progressive prosecution even is a worthwhile goal or target for academics and activists committed to dismantling the carceral state.”).

82. *Id.* at 1426.

83. *See id.* at 1417–19.

84. *See id.* at 1430–32.

The subsequent archetypes that Professor Levin describes all include characteristics of a prosecutor exercising discretion.⁸⁵ Perhaps the description of these as three separate archetypes is akin to the *Journal of Modern Medicine* placing doctors into different categories: one that uses soap prior to surgery; one that makes decisions on surgery based upon peer-reviewed science, and the one that provides medical care without regard to the ability of a patient to pay.⁸⁶

Avanindar Singh and Sajid Khan have a broad definition of progressive prosecutor that evokes Dalton's emphasis on a restraint of power approach.⁸⁷ Their view is that "progressive prosecutors can undo past harms and do much good by refraining from practices that drive criminalization, perpetuate mass incarceration, foster systemic racism, and ultimately make our communities less safe."⁸⁸ Rachel Barkow similarly identifies the key metric for determining whether a prosecutor is a real reformer or not—recognizing that it is "no small task"—"is whether or not they are actively pursuing reforms that *limit the leverage they have in criminal cases*."⁸⁹

Jeffrey Bellin expresses caution about over-emphasizing the power of prosecutors and suggests "resist[ing] framing prosecutors as white knights who must be given free rein to deliver justice."⁹⁰ Rather, he suggests that many of the characteristics of a progressive prosecutor could be held within a servant-of-the-law model of the prosecutor:

Progressive prosecution holds great appeal for reformers seeking to undo mass incarceration. A progressive prosecutor can dismiss cases to nullify unjust laws; counteract racial and socioeconomic imbalances in police enforcement or legislative drafting; defang the most severe punishments by declining to trigger them; and aggressively prosecute certain under-prosecuted crimes to

85. *See id.* at 1419–21.

86. District Attorney Jason Williams would capture this idea when he would say: "Nobody asks whether their heart doctor is progressive. They simply want to know whether their doctor uses the best practices, informed by data and science—prosecution should be no different." Discussion between author and Jason Williams, Dist. Att'y (June 10, 2021).

87. *See* Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 475, 476 (2021) ("We define 'progressive prosecution' as the model of prosecution committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity.").

88. *Id.* at 477.

89. Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1366 (2021) (emphasis added); *see also* Gajwani & Lesser, *supra* note 77, at 75–77.

90. Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 715 (2020) (alteration in original).

promote broad policy goals. This progressive wish-list sounds like a challenge to a servant-of-the-law paradigm. In fact, the most concrete aspects of progressive prosecution fit well with a servant-of-the-law model.⁹¹

C. Current Status of Progressive Prosecution Offices

Given the broad divergence of opinions on what a progressive prosecutor is, there is a lack of consensus concerning how many prosecutor offices in the country are engaged in progressive prosecution.⁹² Of the more than 2,300 District Attorney offices across the country, some of the offices that label themselves as progressive prosecutors are undoubtedly not—and others that avoid the label may well be.⁹³ Part of the challenge facing scholars and advocates in assessing prosecutor offices is the black hole of data concerning the operation of traditional and progressive prosecutors.⁹⁴ This lack of transparency makes comparisons between offices difficult.

Perhaps the most known of the progressive prosecutors is Larry Krasner, Philadelphia District Attorney.⁹⁵ Larry Krasner defined the movement when he was first elected—staking out broad and progressive positions; defending politically unpopular decisions.⁹⁶ He has been at the “forefront of the progressive-prosecutor movement since becoming Philadelphia’s district attorney in 2017” and survived electoral challenges and an impeachment effort.⁹⁷ In his recent piece in *Inquest*, Krasner details what he describes as the “partial inventory of decarceration achieved” by the office, noting reform efforts reduced future incarceration by fifty percent, and details how forty-five people who were facing extreme sentences no longer suffer that fate.⁹⁸

91. Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1248 (2020).

92. See, e.g., Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/> (Apr. 23, 2020).

93. See, e.g., *id.*; Ronald Brownstein, *What Does the Philadelphia D.A. Do Now?*, ATLANTIC (Sep. 23, 2022), <https://www.theatlantic.com/politics/archive/2022/09/larry-krasner-philadelphia-impeachment-prosecutor/671521/>.

94. See BESIKI LUKA KUTATELADZE ET AL., FL. INT’L. U. & LOY. U. CHI., PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE 2 (2018).

95. See, e.g., Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner’s Trailblazing First Term*, APPEAL (Mar. 22, 2021), <https://theappeal.org/the-successes-and-shortcomings-of-larry-krasners-trailblazing-first-term/>.

96. See Robertson, *supra* note 55.

97. Brownstein, *supra* note 93.

98. Larry Krasner, *Power to the Voters*, INQUEST (June 25, 2024), <https://inquest.org/power-to-the-voters/>; see also Vaughn, *supra* note 95 (noting incarceration dropped by nearly thirty percent in Krasner’s first term, the number of cases

Miriam Krinsky provides a window into other offices in her collection of essays, *Change from Within: Reimagining the 21st-Century Prosecutor*.⁹⁹ The book is the work product of the advocacy organization *Fair and Just Prosecution*,¹⁰⁰ and has essays of thirteen elected prosecutors who express aspiration for higher standards of “fairness, accountability, healing, and an end to the kind of policing and prosecution that causes harm.”¹⁰¹ Krinsky observes that “[t]hese reformers are fundamentally reimagining and re-creating their role as prosecutors.”¹⁰²

Prosecutors working with criminologists from Florida International University and Loyola University Chicago began to build metrics to “reimagine and redefine success in prosecution.”¹⁰³ The performance indicators were grouped into three separate areas: “Capacity [and] Efficiency; Community Safety [and] Well-Being; and Fairness [and] Justice.”¹⁰⁴ Within the area of *Capacity and Efficiency*, metrics attempted to measure organizational and staff capacity, time and resource prioritization, and timeliness of case processing.¹⁰⁵ Within the area of *Community Safety and Well-Being*, metrics attempted to measure: addressing serious crime; protecting and serving victims; and community outreach and engagement.¹⁰⁶ Within the area of *Fairness and Justice*, the metrics attempted to measure: racial and ethnic differences; minimizing unnecessary punitiveness; and prosecutorial ethics and integrity.¹⁰⁷ The researchers identified several different prosecutor offices attempting to track data that informs commitments to “effective, just, and transparent decision making in prosecution.”¹⁰⁸

dropped by sixteen percent, the prosecution of marijuana possession cases ended, death penalty cases ended, and eighteen people were exonerated).

99. See MIRIAM ARONI KRINSKY, *CHANGE FROM WITHIN: REIMAGING THE 21ST CENTURY PROSECUTOR* 5 (2022).

100. See *A New Vision for the Justice System*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/issues/a-new-vision-for-the-justice-system/> (last visited Jan. 4, 2025).

101. KRINSKY, *supra* note 99, at 4.

102. *Id.*

103. Besiki Luka Kutateladze, *Prosecutorial Performance Indicators: What Constitutes Success in Prosecution*, SAFETY & JUST. CHALLENGE (Dec. 14, 2018), <https://safetyandjusticechallenge.org/blog/prosecutorial-performance-indicators-what-constitutes-success-in-prosecution/>.

104. See *id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. See KUTATELADZE ET AL., *supra* note 94, at 2.

How and what each office tends to track – at least publicly – appear different.¹⁰⁹ Even within the four “pilot” partner sites, the information is not altogether dispositive. The Milwaukee District Attorney performance indicators track four key metrics: i) race and ethnicity of diversion, ii) the number of cases rejected at filing or thereafter; iii) speedy contact with victims, and (iv) Milwaukee county jail sentences.¹¹⁰ The data does not track the number of prison sentences imposed and was last updated in 2020.¹¹¹ The Jacksonville District Attorney’s Office for the 4th Judicial Circuit has more up-to-date information but remains somewhat incomplete: data focused on “Addressing Serious Crime” details the number of gun crimes referred for prosecution in calendar years 2017 through 2023.¹¹² It reveals nothing of what is done with those offenses or other “serious” crimes like rape and murder.¹¹³ The data provided does not appear to capture reduction in incarceration, or efforts to enhance justice. Nor does it address the challenges that arise in trying to accomplish these goals: the pushback from external actors within the justice system or the challenges of transforming a culture within an office. However, a detailed review of actual changes made within an office—and the challenges faced—can inform the various critiques of prosecutor-driven reform.

II. THE PROMISE OF PROGRESSIVE PROSECUTION IN ORLEANS PARISH

With the election of District Attorney Jason Williams, the Orleans District Attorney’s Office engaged in a series of policies to improve the system.¹¹⁴ The impact of these policy changes significantly altered the carceral footprint of Orleans Parish. These policies addressed pre-trial prosecution as well as post-trial handling of appeals and post-conviction

109. See Kutateladze, *supra* note 103 (listing four pilot sites, including the “Office of the State Attorney, 4th Judicial Circuit; Office of the State Attorney, 13th Judicial Circuit; Milwaukee County District Attorney’s Office; Cook County State’s Attorney’s Office”).

110. See *Milwaukee County District Attorney Dashboard*, MILWAUKEE COUNTY DIST. ATT’YS OFF., <https://data.mkedao.com> (last visited Jan. 4, 2025).

111. See *id.*

112. See *Addressing Serious Crime*, SAO4, <https://sao4thdatadashboard.com/addressing-serious-crime> (last visited Jan. 4, 2025).

113. *Id.*

114. See, e.g., Nick Chrastil, *‘Every Single Person in That Office Has to Understand The Culture Shift’: How Jason Williams Plans to Remake Prosecution in New Orleans*, LENS (Dec. 11, 2020), <https://thelensnola.org/2020/12/11/every-single-person-in-that-office-has-to-understand-the-culture-shift-how-jason-williams-plans-to-remake-prosecution-in-new-orleans/>.

cases.¹¹⁵ The policies addressed both low-level and violent offenses.¹¹⁶ They are, as discussed below, organized into three areas: addressing mass incarceration; addressing past injustices; and focusing prosecution on the most serious cases involving violent harm to victims. Additionally, it is important to note that the Orleans District Attorney's Office made a commitment to transparency and tracking data.¹¹⁷ Much of the data associated with this Article is from data available from the Orleans District Attorney's Office. The public display of this data constitutes a transformative example for other prosecutor offices.

A. Prosecutorial Policies Reducing Mass Incarceration

The number of people incarcerated in Angola from Orleans Parish had grown dramatically over the years, resulting in over 3,500 individuals incarcerated from Orleans alone.¹¹⁸ This rate of incarceration per 100,000 was higher than any state in the country.¹¹⁹

Incarceration rates in Orleans Parish—meaning the number of individuals incarcerated in prison from Orleans Parish—dropped by over twenty percent during the first three years of the Williams

115. See, e.g., *id.*; Clancy DuBos, *Clancy DuBos: New Orleans DA Jason Williams 'Invited' into Lions' Den Over Post-Conviction Relief Policy*, NOLA.COM (Aug. 29, 2024), https://www.nola.com/gambit/news/clancy_dubos/clancy-dubos-jason-williams-invited-into-lions-den-over-post-conviction-relief-policy/article_7cc494aa-6637-11ef-ab5d-3b46d9e932da.html.

116. See, e.g., Nick Chrastil, *New Policy Says Orleans Prosecutors Should Refuse All Low-Level Drug Charges Except Those for Heroin and Fentanyl*, LENS (Apr. 13, 2021), <https://thelensnola.org/2021/04/13/new-policy-says-orleans-prosecutors-should-refuse-all-low-level-drug-charges-except-those-for-heroin-and-fentanyl/>; Travers Mackel, *DA Jason Williams Directs Most Violent Crime Cases Involving Teens to Juvenile Court*, WDSU NEWS, <https://www.wdsu.com/article/da-jason-williams-directs-most-violent-crime-cases-involving-teens-to-juvenile-court/35206651> (Jan. 14, 2021, 5:48 PM); see also PFAFF, *supra* note 47, at 185–202 (noting that any effort to address mass incarceration must ultimately address cases with violence: “Any significant reduction in the US prison population is going to require states and counties to rethink how they punish people convicted of violent crimes, where ‘rethink’ means ‘think about how to punish less.’”).

117. *OPDA Data Dashboards*, ORLEANS PAR. DIST. ATT'Y, <https://orleansda.com/our-work/opda-data-dashboards/> (last visited Jan. 4, 2025) (“The District Attorney's Office is committed to ensuring that our prosecutors and staff remain accountable to the public. District Attorney Williams promised the people of New Orleans that transparency would be the cornerstone of his DA's Office . . .”).

118. See *infra* Figure 1.

119. See, e.g., Peter Wagner et al., *Orleans Parish Prison in National Context*, PRISON POLY INITIATIVE (Nov. 30, 2005), <https://www.prisonpolicy.org/articles/opp.html>; *Mass Incarceration*, ACLU LA., <https://www.laclu.org/en/issues/mass-incarceration> (last visited Jan. 4, 2025).

administration.¹²⁰ Over one thousand fewer people were incarcerated from 3,732 in December 2020 compared to 2,659 incarcerated individuals as of September 2023.¹²¹

The reduction in mass incarceration was the intended result of a series of strategic policy choices, including pre-trial policies to limit the prosecution of non-violent offenses, removing procedural bars that prevented past incarceration, and changing the office response to addressing probation and parole.

The drop in incarceration from 2020 to 2023 in Orleans Parish had a dramatic impact on Orleans' percentage of Louisiana's prison population. By September 2023, individuals incarcerated out of Orleans had dropped from 13.8% to less than 9.5% of the total state population of incarcerated people.¹²²

In December 2020, 3,732 individuals were incarcerated from Orleans Parish.¹²³

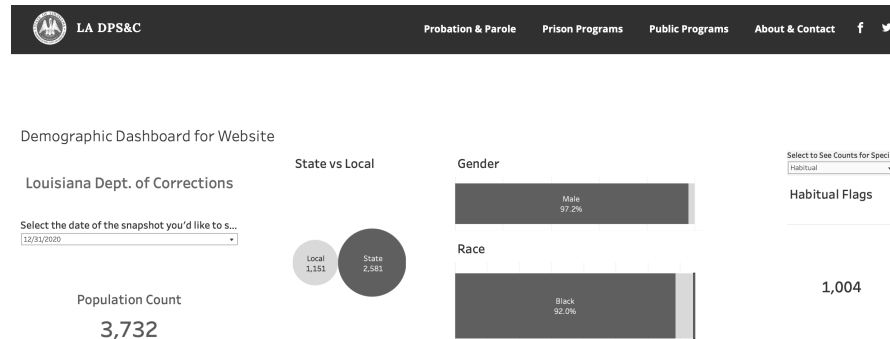


Figure 1. December 2020, Total Incarcerated from Orleans¹²⁴

120. See Raeven Poole, *Orleans Parish District Attorney Jason Williams Responds to Claim That He Has Low Violent Crime Prosecution Rate*, WGNO, <https://wgno.com/news/crime/orleans-parish-district-attorney-jason-williams-responds-to-claim-that-he-has-low-violent-crime-prosecution-rate/> (Mar. 6, 2024, 5:43 PM).

121. Compare *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “12/31/2020” and Parish of Commitment as “Orleans”), with *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “9/30/2023” and Parish of Commitment as “Orleans”).

122. Compare *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “9/30/2023” and Parish of Commitment as “Orleans”), with *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “12/31/2020” and Parish of Commitment as “Orleans”).

123. See *infra* Figure 1.

124. *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “12/31/2020” and Parish of Commitment as “Orleans”).

The number of individuals incarcerated out of Orleans Parish dropped from 3,732 to 2,641 by November 30, 2023.¹²⁵



Figure 2. November 2023, Total Incarcerated from Orleans¹²⁶

Importantly, at the same time, the rate of incarceration of people for violent offenses increased during this period—from 80.7% to 87.2%, meaning that fewer people were incarcerated for non-violent offenses.¹²⁷

Some of the largest percentage drops in incarceration were in people who had been prosecuted for offenses when they were children. In 2020, the total number of individuals who were incarcerated for an offense that occurred when they were under the age of twenty-one was 549.¹²⁸

125. Compare Figure 1, with Figure 2.

126. *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “11/30/2023” and Parish of Commitment as “Orleans”).

127. Compare *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “11/30/2023,” Parish of Commitment as “Orleans,” and “Most Serious Crime”), with *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “12/31/2023,” Parish of Commitment as “Orleans,” and “Most Serious Crime”).

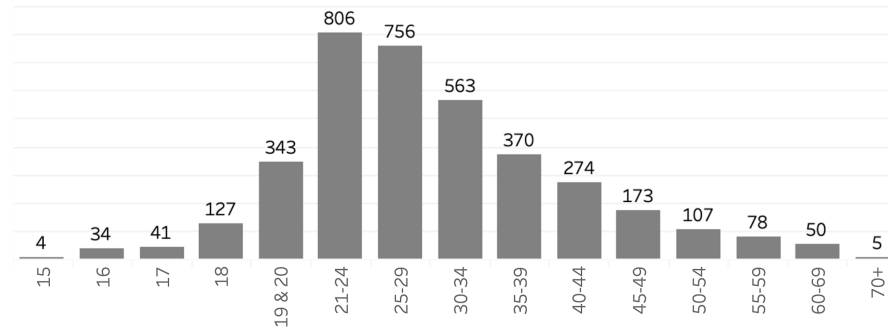
128. See *infra* Figure 3.

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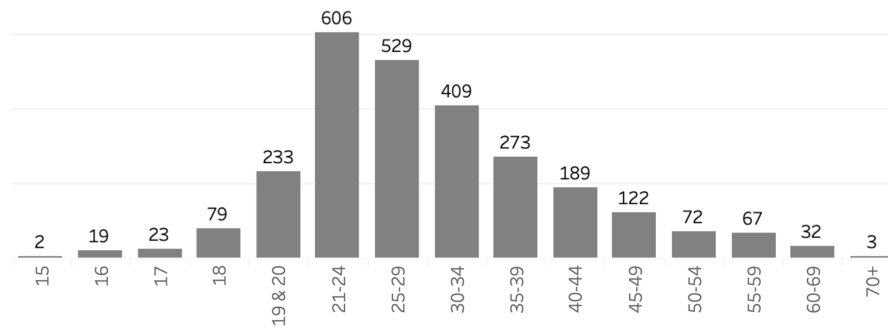
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Age at Admission

Figure 3. December 2020, Age at Admission of Individuals from Orleans¹²⁹

By September 2023, 356 individuals were incarcerated for an offense that occurred when they were under the age of twenty-one.¹³⁰

Age at Admission

Figure 4. September 2023, Age at Admission of Individuals from Orleans¹³¹

Significant drops also occurred in the incarceration of the elderly. In December 2020, 1,038 individuals who were incarcerated were over the age of fifty.¹³²

129. *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “12/31/2020,” Parish of Commitment as “Orleans,” and “Age at Admission”).

130. *See infra* Figure 4.

131. *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as “9/30/2023,” Parish of Commitment as “Orleans,” and “Age at Admission”).

132. *See infra* Figure 5.

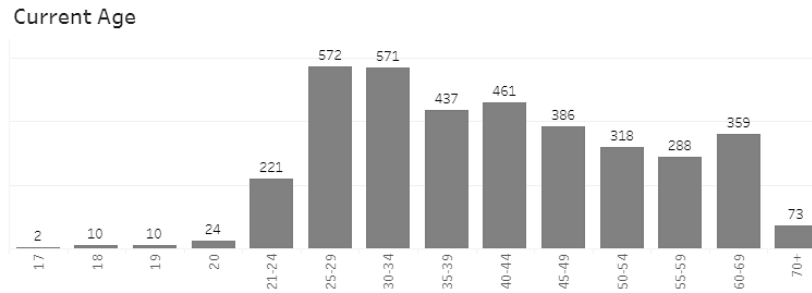


Figure 5. December 2020, Individuals from Orleans' Age at Date of Survey¹³³

By September of 2023, that number was 824.¹³⁴

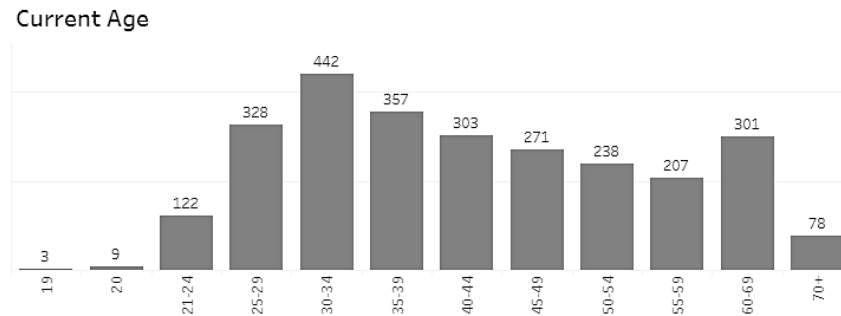


Figure 6. September 2023, Individuals from Orleans' Age at Date of Survey¹³⁵

This is significant as costs of incarceration increase dramatically as individuals age, while recidivism is less common.¹³⁶

As these charts indicate, District Attorney Williams engaged in separate substantive ameliorative policies to reduce incarceration for non-violent offenses, to reduce the incarceration of the elderly and the

133. See *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as "12/31/2020," Parish of Commitment as "Orleans," and "Current Age").

134. See *infra* Figure 6.

135. See *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as "9/30/2023," Parish of Commitment as "Orleans," and "Current Age").

136. See, e.g., Ashley Demyan, *Elderly People in Prison Present Little Risk, But Staggering Costs*, VERA INST. OF JUST. (July 6, 2015), <https://www.vera.org/news/elderly-people-in-prison-present-little-risk-but-staggering-costs>; U.S. SENT'G COMM'N, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* 5 (2016).

transfer of juveniles into adult prison, and to address lengthy sentences in past cases involving violent crimes.

1. Pre-Trial Policies

The largest reductions in incarceration occurred in Orleans through the quiet administration of policies that received little public attention or recognition. Four separate policies were adopted to reduce the influx of individuals into the carceral system: i) general declination to prosecute drug and other status offenses; ii) limitation on transfer of children to adult court; iii) not employing the habitual offender law to enhance sentences or encourage pleas; and iv) limiting the time and number of people under supervision.¹³⁷

Limiting prosecution of drug offenses and other status crimes had a profound impact on incarceration.¹³⁸ In 2018, 574 individuals from Orleans Parish entered DOC custody for drug or property crimes.¹³⁹ In 2022, this number was 184.¹⁴⁰

Moreover, once announced, it impacted policing practices and had a dramatic impact on arrests. The reduction in prosecution for drug offenses resulted in a decrease in arrests from 1,113 felony drug arrests in 2018 to only 179 drug arrests in 2021, 163 in 2022, and only 154 in 2023.¹⁴¹ In terms of other non-violent felonies, drops in arrests went from 1,078 in 2010 to 499 in 2021, and 444 in 2022. Arrests on warrants and

137. This policy decision was enacted by First Assistant Robert White. An article by *The Lens* describes the enactment of the policy:

Emails between an assistant district attorney in the screening division and the DA's first assistant, Bob White, suggested that the office has made the decision to stop prosecuting most low-level drug offenses. On March 25, an ADA in the office's case screening division sent an email to White asking to clarify the policy for drug charges. "I keep getting questions and I want to be consistent and accurate," Paige Cline wrote in the email. "Standalone MJ will be refused, correct? These include 2nd, 3rd, 4th offenses? (We don't see many of these at all). Drugs (cocaine, meth, pills) in small amounts will be refused, correct? I am not comfortable with refusing heroin or fentanyl in any amount- unless it is residue." White responded: "Yes. For now. All of the above."

Chrastil, *supra* note 116.

138. See *id.*; Nick Chrastil, *Jason Williams Has Vowed Never to Use the Habitual Offender Statute. What Does That Mean for Criminal Justice in New Orleans?*, LENS (Feb. 5, 2021), <https://thelensnola.org/2021/02/05/jason-williams-has-vowed-never-to-use-the-habitual-offender-statute-what-does-that-mean-for-criminal-justice-in-new-orleans/>.

139. *Louisiana Dept. of Corrections Admissions Dashboard*, LA. DEP'T OF PUB. SAFETY & CORRS., <https://doc.louisiana.gov/admissions-dashboard/> (last visited Jan. 4, 2025) [hereinafter *Louisiana Corrections Admissions Dashboard*] (setting the following parameters in the interactive data set: year as "2018," Parish of Commitment as "Orleans").

140. *Id.*

141. See *id.*

attachments dropped from 11,894 in 2014 to 763 in 2021 and 787 in 2022.¹⁴² These changes were a direct response to decisions by District Attorney Williams to refrain from prosecuting status offenses, and not pursuing arrests on old writs, warrants, and attachments.

Second, the decision to keep most juvenile cases in the juvenile court system reduced the number of individuals incarcerated out of Orleans Parish.¹⁴³ Under the prior administration, the District Attorney transferred more than eighty percent of the fifteen and sixteen-year-olds charged with transfer-eligible offenses.¹⁴⁴ Between 2009 and 2016, the Cannizzaro administration transferred more than two hundred children to adult court.¹⁴⁵ During this time, seventeen-year-olds were automatically transferred to adult court.¹⁴⁶ As of 2016, Louisiana raised the age of majority to eighteen, and in 2021, upon his election, DA Williams committed to maintaining the majority of these cases in juvenile court.¹⁴⁷ Over time, after a series of high-profile carjackings and murders, the office stepped back from the commitment, and transferred a limited number of juveniles to adult court on murder and other serious

142. *See id.*

143. *See Orleans Parish DA Announces Appointment to Address Juvenile Crime*, WDSU NEWS, <https://www.wdsu.com/article/orleans-parish-da-announcing-appointment-to-address-juvenile-crime/35615357> (Feb. 24, 2021, 6:25 PM).

144. *More Harm Than Good: How Children are Unjustly Tried as Adults in New Orleans*, S. POVERTY L. CTR. (Feb. 17, 2016), <https://www.splcenter.org/20160217/more-harm-good-how-children-are-unjustly-tried-adults-new-orleans>; *see also* Gina Swanson, *Study: Orleans Parish DA Prosecutes 80 Percent of Juvenile Offenders as Adults*, WDSU NEWS, <https://www.wdsu.com/article/study-orleans-parish-da-prosecutes-80-percentage-of-juvenile-offenders-as-adults/3384676> (Feb. 18, 2016, 9:20 PM).

145. S. POVERTY L. CTR., *supra* note 144.

146. *Id.*

147. *See Orleans Parish DA Announces Appointment to Address Juvenile Crime*, WDSU NEWS, <https://www.wdsu.com/article/orleans-parish-da-announcing-appointment-to-address-juvenile-crime/35615357> (Feb. 24, 2021, 6:25 PM); Travers Mackel, *DA Jason Williams Directs Most Violent Crime Cases Involving Teens to Juvenile Court*, WDSU NEWS, <https://www.wdsu.com/article/da-jason-williams-directs-most-violent-crime-cases-involving-teens-to-juvenile-court/35206651> (Jan. 14, 2021, 5:48 PM); *Raise the Age*, LA. CTR. FOR CHILD.'S RTS., <https://lakidsrights.org/we-advocate/raising-the-age/> (last visited Jan. 4, 2025).

charges.¹⁴⁸ However, the number of children transferred to adult court remains less than in prior administrations.¹⁴⁹

Third, the decision not to seek habitual offender prosecutions reduced the number of people who pleaded guilty to avoid lengthy carceral sentences, reduced the length of sentence of individuals who pleaded guilty, and resulted in non-carceral outcomes for a significant number of non-violent offenses that would have resulted in lengthy sentences.¹⁵⁰ This major policy initiative rejected the use of prior convictions to enhance sentences.¹⁵¹ As Williams described it, “[w]e absolutely want to use the discretion differently than how it’s been applied in the past.”¹⁵² The Chief of the Orleans Parish District Attorneys’ newly created Office Civil Rights Division explained that in order to address “racial disparities in the criminal legal system, and mass incarceration, and unequal opportunities,” it was essential to limit the use of the habitual offender law, as “the crimes of a first offense, second offense—are crimes that everyone is committing, but only Black people are policed for.”¹⁵³

148. See Jillian Kramer, *DA Jason Williams Ups the Ante on Violent Youth, Pushes Transfers to Adult Court*, NOLA.COM (Aug. 24, 2023), https://www.nola.com/news/da-jason-williams-ups-the-ante-on-violent-youth-pushes-transfers-to-adult-court/article_00be0472-42c5-11ee-99ab-1f1c400af82a.html; Nick Chrastil, *DA Jason Williams Announces Decision to Prosecute Two Teenagers as Adults, Going Back on Campaign Promise*, LENS (May 24, 2021), <https://thelensnola.org/2021/05/24/da-jason-williams-announces-decision-to-prosecute-two-teenagers-as-adults-going-back-on-campaign-promise/>.

149. Kramer, *supra* note 148 (noting eight juvenile transfers in 2021 and twenty-seven transfers in 2022).

150. The policy was amended in 2023 to permit use of habitual offender laws in cases involving violent offenses with approval of the First Assistant and District Attorney. See generally Arielle Brumfield, *Orleans DA Invokes Habitual Offender Law; Applies it to 1st Case*, WDSU NEWS, <https://www.wdsu.com/article/orleans-da-invokes-habitual-offender-law-applies-it-to-1st-case-orlando-brown-violent/43341116> (Mar. 16, 2023, 6:26 PM).

151. Chrastil, *supra* note 116. It is significant to note that largely, this brought Orleans Parish into the consensus use of habitual offender proceedings for much of the rest of the state. Justice Crichton, concurring in a writ decision, observed:

However, I also embrace Chief Justice Johnson’s view, articulated in this case and many others, that the abusive frequency with which a *de minimis* number of jurisdictions invoke habitual offender laws against non-violent actors appears to do little to protect the people of Louisiana, and depletes the already scarce fiscal resources of this state. I further agree with Chief Justice Johnson’s view that the imposition of life sentences on non-violent offenders at a certain point lacks any meaningful social value and may constitute aberrant cruelty.

State v. Guidry, 16-1412 (La. 03/15/17), 221 So. 3d 815, 831 (Crichton, J., concurring); see also State v. Floyd, 52,183 (La. App. 2 Cir. 08/15/18), 254 So. 3d 38, 41; State v. Thompson, 2022-01391 (La. 05/02/23), 359 So. 3d 1273, 1276; State v. Smith, 2019-1035 (La. 06/22/19), 275 So. 3d 266, 267.

152. Chrastil, *supra* note 138.

153. *Id.*

2. Removing Procedural Bars to Justice

The District Attorney's Office also adopted a policy concerning the use of procedural bars.¹⁵⁴ The policy allowed individuals who had substantive claims for relief but were subject to procedural bars, to have their claims heard in court, resulting in 350¹⁵⁵ interventions by the Civil Rights Division—including 117 reversals of convictions and pleas to lesser offenses, twenty-four dismissals, and 180 sentencing reductions.¹⁵⁶

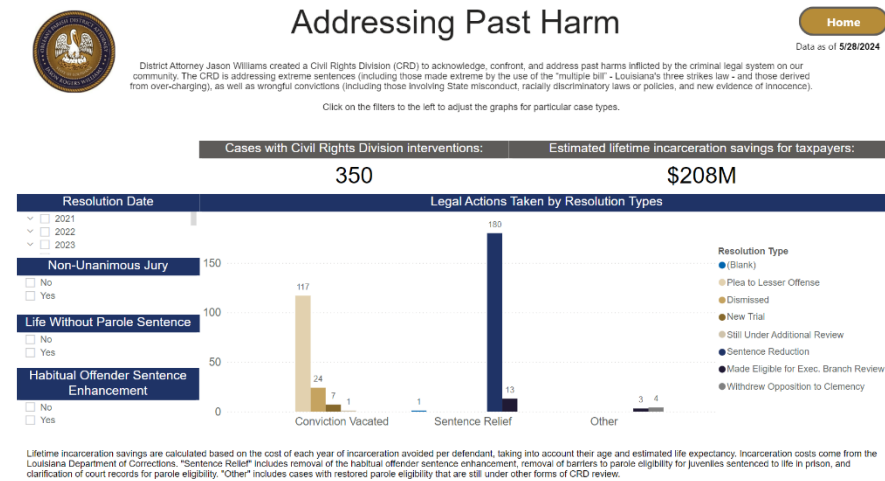


Figure 7. Legal Actions Taken by Resolution Types¹⁵⁷

Many, if not all, of the eighteen exonerations discussed in more detail in Section II(b)(i) were the direct result of this policy. However, beyond the exonerations, this new policy also functioned as part of an effort to reduce litigation and uphold convictions. At least twice, the office waived procedural bars in the Fifth Circuit Court of Appeals, acknowledging the possibility of equitable tolling for a petitioner rather than seeking to

154. Nick Chrastil, *New DA's Office Interim Policy Removes Procedural Barriers for People Challenging Convictions*, LENS (Apr. 8, 2021), <https://thelensnola.org/2021/04/08/new-das-office-interim-policy-removes-procedural-barriers-for-people-challenging-convictions/>; Kate Jane Fernelius, *In Nation's Incarceration Capital, A New D.A. Is Freeing People From Prison*, APPEAL (Apr. 21, 2021), <https://theappeal.org/politicalreport/new-orleans-district-attorney-jason-williams-conviction-reviews/>.

155. See *infra* Figure 7.

156. *Id.* See generally Laughland, *supra* note 29.

157. Civil Rights Division, ORLEANS PAR. DIST. ATT'Y (last visited Jan. 4, 2025), <https://orleansda.com/civil-rights/> [hereinafter Orleans Civil Rights Data] (click "Addressing Past Harm" on embedded application).

prevail on a technicality, while still seeking to uphold the conviction.¹⁵⁸ Judges understood the value of a policy that encouraged merits-based responses to claims. As Fifth Circuit Judge James C. Ho explained:

When defending against a federal habeas petition, *the state may determine that it has a debatable timeliness argument, but a devastating merits argument.* When that happens, the state may rationally elect to pursue the merits argument, and forgo the timeliness argument. ***It may choose that path to give closure to the litigant, deter additional litigation, or further some other objective.*** And if a state decides to make that call, the Supreme Court has told us that we must respect it.¹⁵⁹

The District Attorney's Office argued that respect for the legal system was enhanced by reaching the merits of a claim rather than seeking to prevail based upon a technicality, acknowledging that "equitable tolling may be warranted where a federal petition is dismissed without prejudice in order to allow a pro se petitioner to exhaust state court remedies, and the petitioner's AEDPA clock runs during the pendency of the federal habeas proceeding."¹⁶⁰

3. Changing the DA's Response to Parole

Probation and parole are a driver of mass incarceration.¹⁶¹ This operates in three ways: first, prosecutors oppose the release of individuals who are eligible for parole; second, prosecutors can seek lengthy periods of supervision, which can result in re-incarceration; third, prosecutors can seek to have individuals returned to prison based upon technical violations of parole.¹⁶²

At the outset of DA Williams' administration, the office implemented a policy of deferring to corrections experts concerning the provisions of

158. See *Ficher v. Bickham*, 70 F.4th 257, 258 (5th Cir. 2023); see also *Hardy v. Quarterman*, 577 F.3d 596, 599–600 (5th Cir. 2009).

159. *Ficher v. Bickham*, 70 F.4th at 258 (emphasis added) (citations omitted).

160. *Id.* at 259–60 ("The State doubled down on its decision during oral argument. We asked counsel whether he 'recognize[d] that [the State's] appellate brief is essentially steering [the court] toward affirming on the merits.' He agreed, stating that the State had an interest in obtaining a favorable ruling dismissing *Ficher's* petition on the merits, rather than on timeliness grounds.").

161. See generally VINCENT SCHIRALDI, MASS SUPERVISION: PROBATION, PAROLE, AND THE ILLUSION OF SAFETY AND FREEDOM (2023).

162. *Id.*

parole.¹⁶³ The prior administration had a policy to automatically oppose parole in all cases involving a violent offense.¹⁶⁴ The new policy ordinarily deferred judgment to the parole board and corrections experts, resulting in the release of those individuals the board believed safe to release.¹⁶⁵

This policy change had a direct impact on individual lives and addressed mass incarceration over time.¹⁶⁶ More directly, the change enhanced respect for the legal system by demonstrating a desire to get it right rather than to exercise power.

The office also sought to limit the length of time individuals were sentenced to probation, reducing the likelihood of incarceration for technical offenses.¹⁶⁷ A significant minority of individuals in custody were held on probation or parole holds.¹⁶⁸ In 2012, 128 people were arrested and held in Orleans on probation and parole holds.¹⁶⁹ In 2014, the number was 123.¹⁷⁰ The number descended dramatically during COVID-19, and remained at six for 2021, thirteen in 2022, and eight in 2023.¹⁷¹

In 2018, there were 602 revocations of parole involving Orleans Parish defendants to the Department of Corrections; 366 of these were for drug or property crimes (with 113 coming on technical violations).¹⁷²

163. John Simerman, *Jason Williams Says Office Won't Oppose Parole Bids as New DA Launches Reform Agenda*, NOLA.COM (Jan. 26, 2021), https://www.nola.com/news/courts/jason-williams-says-office-wont-oppose-parole-bids-as-new-da-launches-reform-agenda/article_60463a88-6026-11eb-aafc-2f392551c025.html; Sula Kim, *Orleans DA Directs Staff to No Longer Oppose Pardon, Parole Applications*, WDSU NEWS, <https://www.wdsu.com/article/orleans-da-directs-staff-to-no-longer-oppose-pardon-parole-applications/35328307> (Jan. 26, 2021, 8:10 PM).

164. See Simerman, *supra* note 163.

165. See Kim, *supra* note 163; Fernelius, *supra* note 154 (noting Norris Henderson's observation that "[o]ne of the first policies that [Williams's office] produced was that they were no longer going to send [prosecutors] to parole hearings and contest everything That was the first thing that gave me an indicator that promises made were going to be promises kept.").

166. See, e.g., Fernelius, *supra* note 154.

167. See *New Orleans Arrest Dashboard*, NEW ORLEANS CITY COUNCIL, <https://app.powerbi.com/view?r=eyJrIjoimjdiZmU1MjU0OTA5YS00MjVILThkNzItZTEyMDMyZWMyYjUzIiwidCI6IjFkYzNlZmNmLTVMtQGRkNS1iMjE3LWE3NTBjNW1xMzIyZCI6ImMiOjN9> (last visited Jan. 4, 2025).

168. *Id.*

169. *Id.*

170. *Id.*

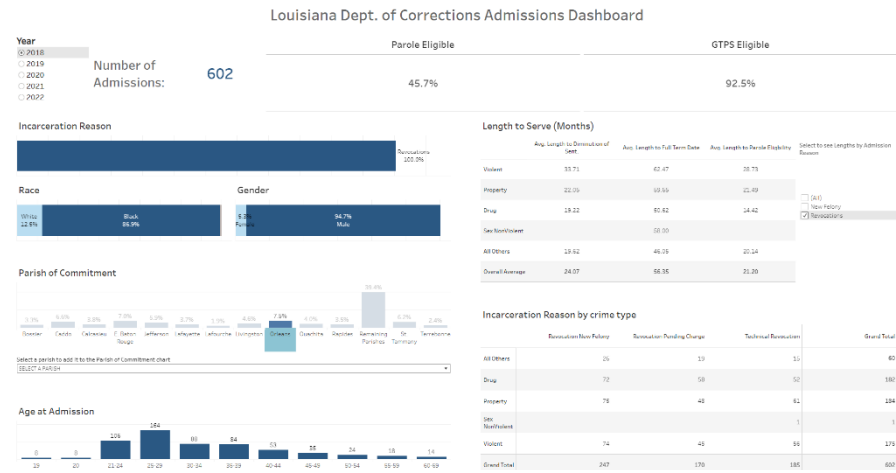
171. Compare *infra* Figure 8, with *infra* Figure 9.

172. See *infra* Figure 8.

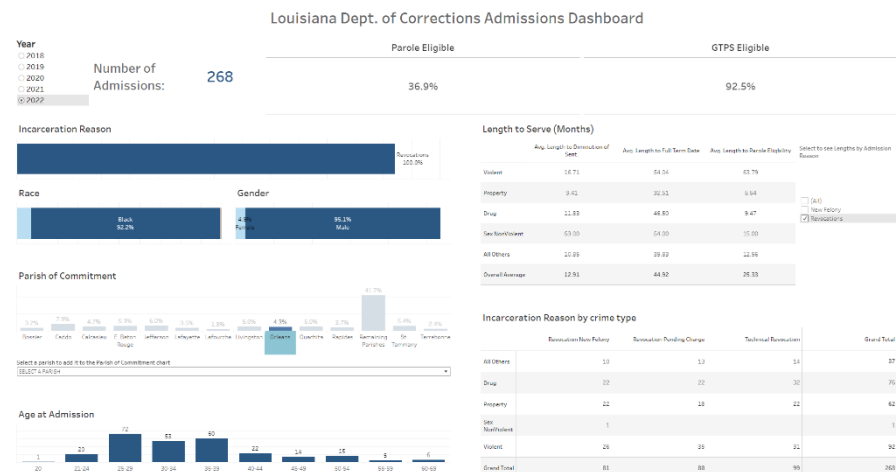
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Figure 8. Louisiana Dept. of Corrections, Orleans 2018 Revocations¹⁷³

In 2022, the total number was 268, with only 136 for drug or property crimes (fifty-four for technical violations).¹⁷⁴

Figure 9. Louisiana Dept. of Corrections, Orleans 2022 Revocations¹⁷⁵

173. *Louisiana Corrections Admissions Dashboard*, *supra* note 139 (setting the following parameters in the interactive data set: year as “2018,” Parish of Commitment as “Orleans”).

174. *See infra* Figure 9.

175. *Louisiana Corrections Admissions Dashboard*, *supra* note 139 (setting the following parameters in the interactive data set: year as “2022,” Parish of Commitment as “Orleans”).

Reducing the number of technical violations that resulted in incarceration had a substantial impact on incarceration.¹⁷⁶

B. Policies Addressing Past Injustices

Civil rights lawyers spent decades trying to transform the criminal legal system.¹⁷⁷ Ultimately, many of these litigation efforts failed to secure reform, as evidenced by a series of Supreme Court decisions declining to secure constitutional protections for defendants. *Herrera v. Collins* held that the execution (and, as a corollary, the incarceration) of an innocent person was not unconstitutional.¹⁷⁸ *McCleskey v. Kemp* held that the Constitution did not prohibit sentencing schemes that produced racially disproportionate outcomes.¹⁷⁹ *Ewing v. California* held that a life sentence for habitual offenses was not a violation of the Eighth Amendment.¹⁸⁰ *Edwards v. Vannoy* held that the decision in *Ramos v. Louisiana*, finding non-unanimous juries borne out of a Jim Crow law,¹⁸¹ was not retroactive to cases that were final on appeal.¹⁸²

Under the direction of the newly elected District Attorney, the office created a Civil Rights Division to address legal outcomes that were unjust, even if still legally constitutional.¹⁸³ The Civil Rights Division's work was described in a series of articles by the Guardian.¹⁸⁴ Oliver Laughland followed the Civil Rights Division for over six months, tracing cases involving defendants such as Maurice Lewis, who was sentenced to life without parole in 1998 for stealing twenty dollars.¹⁸⁵ Ultimately, Lewis' sentence was vacated, and he was released.¹⁸⁶ With a life expectancy of at least twenty more years, keeping Lewis in prison would have cost over a million dollars—to punish him for stealing twenty

176. *See id.*

177. *See, e.g., ACLU History: Applying the Bill of Rights to Criminal Justice*, ACLU (Sept. 1, 2020), <https://www.aclu.org/documents/aclu-history-applying-bill-rights-criminal-justice>.

178. *See Herrera v. Collins*, 506 U.S. 390, 417 (1993).

179. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987).

180. *Ewing v. California*, 538 U.S. 11, 30 (2003).

181. *Ramos v. Louisiana*, 590 U.S. 83, 87 (2020).

182. *Edwards v. Vannoy*, 593 U.S. 255, 258 (2021).

183. *See Orleans Civil Rights Data*, *supra* note 157.

184. Oliver Laughland, *The Division: New Orleans*, GUARDIAN, <https://www.theguardian.com/us-news/series/the-division-new-orleans> (last visited Jan. 4, 2025).

185. Oliver Laughland, *Life in Prison for Stealing \$20: How the Division is Taking Apart Brutal Criminal Sentences*, GUARDIAN, <https://www.theguardian.com/us-news/2022/may/06/life-in-prison-for-stealing-20-how-the-division-is-taking-apart-brutal-criminal-sentences> (Nov. 29, 2022, 11:14 PM).

186. *Id.*

dollars.¹⁸⁷ Other actions were symbolic rather than substantive. One hundred twenty-five years after the landmark ruling, descendants of Plessy and Ferguson sought a posthumous pardon; the DA endorsed and acted on the request, submitting it to the Governor.¹⁸⁸

The office engaged in a series of projects designed to generate confidence in the justice system, including addressing wrongful convictions, ameliorating lengthy sentences for non-violent habitual offenders, resolving non-unanimous convictions, repairing broken promises of parole eligibility, and handing cases involving juveniles sentenced to life without parole.

1. Eighteen Exonerations

The National Registry of Exonerations identifies eighty-five exonerations out of Louisiana since 1989, forty-three exonerations out of Orleans, eighteen of those occurring after the inauguration of the new District Attorney in 2021.¹⁸⁹ These include Sullivan Walter, who was released after thirty-six years for a rape he didn't commit.¹⁹⁰ Kendall Gordon was also released after DNA suggested a different person likely committed the offense.¹⁹¹ In one emblematic case, Kunta Gable, Bernell

187. *Compassionate Release and the Cost of Elderly Inmate Healthcare*, CRIM. CTR., <https://compassionaterelease.com/elderly-medical-costs/> (last visited Jan. 4, 2025) ("The National Institute of Corrections reports that prisons spend at least twice as much to incarcerate elderly inmates as they do for younger prisoners. Experts estimate the cost of incarcerating an elderly prisoner ranges between \$60,000 and \$70,000 per year, primarily due to the increased healthcare needs of this population.")

188. Oliver Laughland, *Plessy v. Ferguson Upheld Segregation—Now Plessy's Family Seeks a Pardon*, GUARDIAN, <https://www.theguardian.com/us-news/2021/nov/12/plessy-ferguson-jim-crow-segregation-pardon-new-orleans> (June 20, 2024, 2:46 PM).

189. *The National Registry of Exonerations*, UNIV. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> (last visited Jan. 4, 2025) [hereinafter *Exonerations Registry*] (select "Exonerated" on registry heading).

190. Jillian Kramer, *New Orleans Man Who Served 36 Years for Rape He Didn't Commit Released From Prison*, NOLA.COM (Aug. 25, 2022), https://www.nola.com/news/courts/new-orleans-man-who-served-36-years-for-rape-he-didnt-commit-released-from-prison/article_fc5b4d52-24c7-11ed-88ac-2bbd247f1139.html ("Withheld evidence and fudged testimony kept Walter, now 53, wrongfully locked away, the Innocence Project New Orleans and the Orleans Parish district attorney's office agreed, as they moved jointly to vacate his sentence and set him free from Elayn Hunt Correctional Center at St. Gabriel.")

191. Matt Sledge, *'God Gave Me the Biggest Christmas Present,' Mother Says After Man Freed From Life Sentence*, NOLA.COM (Dec. 16, 2021), https://www.nola.com/news/courts/god-gave-me-the-biggest-christmas-present-mother-says-after-man-freed-from-life-sentence/article_395e9b68-5ec2-11ec-8326-6f595a4ac3f2.html ("Kendall Gordon's mother Wanda exclaimed, as her son walked out of court a free man for the first time in 12 years. Gordon was serving life in prison for a deadly home invasion in the Lower 9th Ward in 2009. Earlier this week, prosecutors asked a judge

Juluke, and Sydney Hill were released from prison because their prosecution was linked to former NOPD Officer Len Davis, who had been convicted in federal court of civil rights violations based upon, including other things, killing a witness.¹⁹²

The Registry indicates that all eighteen of these individuals were Black, and that fourteen of those exonerations since 2021 were based in part on prosecutorial misconduct.¹⁹³

Last Name	First Name	Age	Race	ST ✓	County of Crime ✓	Tags	OH Tags	Crime	Sentence	Convicted	Exonerated
Count= 44											
Brown	Patrick	20	Black	LA	Orleans	CIU, CV, SA		Child Sex Abuse	Life without parole	1994	2023
Henry	Darrell	26	Black	LA	Orleans	H, IO	PR, OF, NW, WT	Murder	Life without parole	2011	2023
Moses	Larry	39	Black	LA	Orleans	CIU, H, IO	PR, WH	Murder	Life without parole	1995	2023
Brooks	Elvis	19	Black	LA	Orleans	H, IO, P	PR, WH	Murder	Life without parole	1977	2022
Dent	Cedric	22	Black	LA	Orleans	CIU, H, IO	PR, OF, WH, NW, PJ	Murder	Life without parole	1999	2022
Flanks	Raymond	20	Black	LA	Orleans	CIU, H, IO	PR, OF, WH, NW, KP, WT, PJ	Murder	Life without parole	1985	2022
Gabie	Kunta	17	Black	LA	Orleans	CIU, H, IO, JV	PR, OF, WH, NW, PL	Murder	Life without parole	1996	2022
Juluke, Jr.	Bernell	18	Black	LA	Orleans	CIU, H, IO	PR, OF, WH, NW, PL	Murder	Life without parole	1996	2022
Nelson	Leroy	17	Black	LA	Orleans	CIU, H, IO, JV	PR, OF, WH, NW, PL	Murder	Life without parole	1996	2022
Toca, Jr.	George	17	Black	LA	Orleans	CV, H, IO, JV, P	PR, WH	Murder	Life without parole	1985	2022
Walter	Sullivan	17	Black	LA	Orleans	CIU, IO, JV, SA	PR, WH	Sexual Assault	35 years	1986	2022
Williams	Dwayne	22	Black	LA	Orleans	CIU, H	PR, OF, WH	Murder	Life without parole	1995	2022
Briley	Yutico	19	Black	LA	Orleans	CIU, IO	OF, WT	Robbery	60 years	2013	2021
Duncan	Calvin	18	Black	LA	Orleans	CV, H, IO, P	PR, OF, WH, NW, PJ, PL	Murder	Life without parole	1985	2021
Gordon	Kendall	18	Black	LA	Orleans	CIU, H, IO	OF, WH, NW, WT, PJ	Murder	Life without parole	2010	2021
Hudson	Jermaine	20	Black	LA	Orleans	CIU, IO, NC		Robbery	Life	2000	2021
Reeder	Kuantau	20	Black	LA	Orleans	CIU, H	PR, WH, NW, KP, WT, PL	Murder	Life without parole	1995	2021
Rhodes	Troy	34	Black	LA	Orleans		PR, NW, KP	Attempted Murder	149 years	2003	2021
Smith	Kaleigh	31	Black	LA	Orleans	CIU, H, IO	PR, OF, WH, NW, KP, WT	Murder	Life without parole	2010	2021

Figure 10. National Registry of Exonerations, Orleans¹⁹⁴

Notably, the National Registry of Exoneration does not include a number of cases that could also be described as exonerations. This includes instances like Betty Broaden, who was convicted of second-degree murder for killing a man in self-defense.¹⁹⁵ Broaden shot and killed a man who was sexually assaulting her in her own apartment in 1983.¹⁹⁶ She was charged with and convicted of murder and sentenced to life in prison.¹⁹⁷ She was still serving that sentence until the Civil Rights Division intervened.¹⁹⁸ Ms. Broaden was a seventy-six-year-old

to toss his second-degree murder conviction, citing DNA test results and evidence pointing to other suspects.”).

192. Darryl Forges, *New Orleans Men Wrongfully Convicted of Crime Committed by NOPD Cop Now Celebrating Their Freedom*, WDSU NEWS, <https://www.wdsu.com/article/new-orleans-wrongful-conviction-overtaken-len-davis/41768609> (Oct. 26, 2022, 8:14 AM) (“Three New Orleans men who were incarcerated for almost three decades are now free. This comes as all three were found to be wrongly convicted of a murder after new evidence linked the murder to former NOPD officer Len Davis.”).

193. See *infra* Figure 10.

194. *Exonerations Registry*, *supra* note 189.

195. *Betty Jean Broaden Case*, ORLEANS PAR. DIST. ATT’Y (Dec. 1, 2021), <https://orleansda.com/betty-jean-broaden-case/>.

196. *Id.*

197. *Id.*

198. *Id.*

grandmother when she walked out of prison in May 2021 after serving thirty-eight years for an act of self-defense.¹⁹⁹ Her conviction was vacated, and the criminal charges against her were eventually dropped.²⁰⁰

Nor does the Registry include cases like Joseph Alpine's. Alpine was convicted of the 1978 forcible rape, aggravated crime against nature, and aggravated burglary of an elderly woman.²⁰¹ He was sentenced to a total of eighty-five years.²⁰² In 2013, Alpine filed a post-conviction application alleging actual innocence.²⁰³ DNA testing revealed that the seminal fluid on the bed sheets belonged to a different person.²⁰⁴ Despite the victim's testimony at trial that she had not had sexual intercourse in over a decade, and an affidavit from her adult son confirming that his now-deceased mother had not engaged in consensual sex with other men,²⁰⁵ the prior District Attorney's office took the position in 2012 that the seminal fluid could have belonged to someone else—and sought to procedurally bar Mr. Alpine based upon his failure to sign an affidavit asserting his innocence attached to his post-conviction application.²⁰⁶ In 2021, District Attorney Williams' office withdrew procedural bars and did not seek appellate review when the district court granted the defendant a new trial.²⁰⁷ The office dismissed the matter.²⁰⁸

2. Cutting Habitual Offender Sentences by Half

A significant portion of the energy behind the movement was directed at enhancing the "legitimacy" of the criminal legal system.²⁰⁹ The criminal legal system in New Orleans lost all semblance of legitimacy

199. *Id.*

200. *Id.*

201. *State v. Alpine*, 404 So. 2d 213, 214 (La. 1981). The jury trial resulted in a unanimous verdict of guilty of forcible rape and non-unanimous in verdicts of aggravated crime against nature and aggravated burglary. *Id.*

202. *Id.*

203. See generally Supplement to Previously Filed and Still Pending Application for Post Conviction Relief, *Alpine v. Hooper*, 266–289 (La. Crim. Dist. Ct. 2/24/21).

204. *Id.* at Exhibit 3 (Final Report on DNA Testing issued by Bode Technologies on 9/6/2011).

205. *Id.* at Exhibit 3 (Transcript of Alice Hamel's Trial Testimony).

206. *Id.* at Exhibit 3 (State's Response to Post Conviction Relief Application).

207. *Id.* at 9 (court order).

208. Notice of Dismissal of Open Counts, *State v. Alpine*, 266–289 (La. Crim. Dist. Ct. 3/8/2021).

209. See Shima Baradaran Baughman & Jensen Lillquist, *Fixing Disparate Prosecution*, 108 MINN. L. REV. 1955, 1960 (2024) ("Several scholars have documented a movement of 'progressive prosecutors' changing the role from one who seeks 'punitive outcomes' to one 'defaulting to leniency.'"); see also Bellin, *supra* note 90, at 715–26 (describing prosecutors who are more concerned with 'fairness and legitimacy' rather than a desire for convictions).

when life and life equivalent sentences were imposed for offenses such as theft.²¹⁰ While the Supreme Court has declined to hold unconstitutional the three strikes sentencing scheme in *Ewing v. California*,²¹¹ a prosecutor, cognizant of the damage to the legal system, can decline to seek the enhanced sentence or provide avenues for redressing that sentence if it has already been imposed.²¹²

Habitual offender sentences out of Orleans Parish were a significant driver of mass incarceration.²¹³ As discussed in Section II (a)(i), District Attorney Williams' office declined to rely on habitual offender sentencing prospectively.²¹⁴ Significantly, however, the Civil Rights Division attempted to identify individuals currently serving lengthy sentences for habitual offender sentences.²¹⁵

In Orleans, in December of 2020, more than one thousand individuals were incarcerated on habitual offender sentences.²¹⁶ This number was almost one-third of the 3,386 people in the entire state serving habitual offender sentences.²¹⁷ By November of 2023, only 525 individuals were incarcerated out of Orleans Parish on habitual offender sentences (dropping to less than twenty percent of the population of habitual offender sentences in the state).²¹⁸

By May of 2022, the office had "relitigated 82 habitual offender cases, resulting in their sentence enhancement or 'multi-bills' being amended

210. See Matt Sledge, *Man Sentenced to Life in Wallet-Snatching is Free After Orleans DA Drops Sentencing Enhancement*, NOLA.COM (Aug. 16, 2021), https://www.nola.com/news/courts/man-sentenced-to-life-in-wallet-snatching-is-free-after-orleans-da-drops-sentencing-enhancement/article_228ff512-fecd-11eb-bf3c-67173d79d501.html.

211. *Ewing v. California*, 538 U.S. 11, 29–31 (2003) (holding that California's three strike law, was "not grossly disproportionate and therefore [did] not violate Eighth Amendment's prohibition on cruel and unusual punishments" and that imposing a sentence of twenty-five years to life on the petitioner for a felony grand theft was a rational and legislative judgement).

212. See Jillian Kramer, *Jason Williams Remade New Orleans' Justice System. His Own Trial Could Reshape His Legacy*, NOLA.COM (July 9, 2022), https://www.nola.com/news/courts/article_596387e2-feeb-11ec-8cf4-b74c66222e91.html; Matt Sledge, *Sentenced To 23 Years After Stealing Two Shirts, A New Orleans Man Just Walked Free*, NOLA.COM (Apr. 19, 2021), https://www.nola.com/news/courts/article_131641e4-a078-11eb-ac15-47f24c5df738.html; Sledge, *supra* note 210.

213. See Nick Chrastil, *Jason Williams Sworn in as Orleans Parish DA, Promising 'Justice That Endures'*, LENS (Jan. 11, 2021), <https://thelensnola.org/2021/01/11/jason-williams-sworn-in-as-orleans-parish-da-promising-justice-that-endures/>.

214. Chrastil, *supra* note 116.

215. See Chrastil, *supra* note 138.

216. See *Demographic Dashboard*, *supra* note 15 (setting the following parameters in the interactive data set: date as "12/31/2020").

217. See *id.*

218. See *id.*

or revoked, and leading to immediate release from prison.”²¹⁹ By December of 2023, that number was 138.²²⁰

The efforts addressed cases involving individuals like Henry Phillips, who “was convicted of purse snatching for taking a wallet off of a McDonald’s counter in 2009.”²²¹ “He biked away with \$20 in cash after returning the wallet to the victims.”²²² “The prosecutors invoke [*sic.*] the habitual offender, ‘three strikes law’ which required the judge to sentence Mr. Phillips” to life sentence.²²³ In reviewing the case, the Civil Rights Division “weigh[ed] the facts of the case . . . [his] exceptional conduct while incarcerated, and sp[oke] with the victims of the crime. . . In doing so, [they] learned that the victims of the crime, who live[d] out of state, were unaware that he had received a life sentence and supported his release.”²²⁴ Consequently, “Mr. Phillips was re-sentenced to time served and released after serving 12 years,” also saving the taxpayers of Louisiana over a million dollars.²²⁵

Notably, Attorney General Garland has recently issued similar guidance to prosecutors within the Department of Justice, cautioning the use of strikes to initiate mandatory minimum sentences.²²⁶

3. Jim Crow Juries Civil Rights Initiative

In *Ramos v. Louisiana*, the United States Supreme Court recognized the sordid racist history of Louisiana’s non-unanimous jury rule and

219. Laughland, *supra* note 185.

220. See Orleans Civil Rights Data, *supra* note 157 (click “Addressing Past Harm” on embedded application; select “Yes” under “Habitual Offender Sentence Enhancement”; while holding Ctrl key, select years 2021 through 2023 under “Resolution Date” filter).

221. *Henry Phillips Case*, ORLEANS PAR. DIST. ATT’Y (Dec. 1, 2021), <https://orleansda.com/henry-phillips-case/>.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Memorandum from Merrick Garland, Off. of the Att’y Gen., Memorandum for All Federal Prosecutors, Additional Department Policies Regarding Charging, Pleas, and Sentencing in Drug Cases, 1–3 (2022), https://www.justice.gov/d9/2022-12/attorney_general_memorandum_-_additional_department_policies_regarding_charges_pleas_and_sentencing_in_drug_cases.pdf

(“In deciding whether to file an information under 21 U.S.C. § 851 requiring imposition of enhanced statutory penalties, prosecutors in drug cases should be guided by [updated criteria] for charging mandatory minimum offenses, as well as whether the filing would create a significant and unwarranted sentencing disparity with equally or more culpable co-defendants. Prosecutors are encouraged to make the Section 851 determination, and to file any such a notice, at the time the case is charged or as soon as possible thereafter.”).

justified the elimination of such provision.²²⁷ But less than two years later, in *Edwards v. Vannoy*, the Court held that the ruling in *Ramos* was not retroactive to cases that were on final review.²²⁸ In October of 2022, the Louisiana Supreme Court held “using the authority expressly reserved to the states by the Supreme Court to determine which new rules of criminal procedure will be applied retroactively on state collateral review . . . that the *Ramos* jury unanimity rule does not apply retroactively in Louisiana.”²²⁹

District Attorney Williams understood that legitimacy gained by striking down a racist rule is undermined when the decision is not applied to those in prison the longest.²³⁰ The Civil Rights Division created a Jim Crow Juries Civil Rights Initiative to review each of these cases, resolving 111 cases involving non-unanimous jury convictions.²³¹

These cases included defendants like Jermaine Hudson, who served almost twenty-two years in prison after a non-unanimous jury convicted him of armed robbery based on the false testimony of an accuser who later recanted.²³² The accuser contacted the DA’s Office after the election of DA Williams to report that he had concocted the robbery in order to avoid being remonstrated by his father.²³³ The accuser reported that he felt deep remorse for his misrepresentations but did not feel comfortable

227. *Ramos v. Louisiana*, 590 U.S. 83, 87–88, 110–11 (2020).

228. *Edwards v. Vannoy*, 593 U.S. 255, 258, 262–63 (2021) (holding that the recently adopted *Ramos* jury-unanimity rule did not “apply retroactively on federal collateral review” because the arguments for retroactivity had already been squarely rejected in previous decisions that were momentous and consequential).

229. *Compare State v. Reddick*, 2021-01893 (La. 10/21/22), 351 So. 3d 273, 274, with *Watkins v. Ackley*, 370 Or. 604, 634 (Or. 2022) (Baldwin, J., concurring) (“I agree with the majority’s view that petitioner is entitled to post-conviction relief for the denial of his Sixth Amendment right to conviction by a unanimous jury . . . I write separately because I think that a commitment to the rule of law requires us, as Oregonians, to better understand that troubled aspect of our history lest we repeat it and yet again cause great injury to our civic health by the adoption of an exclusionary law.”).

230. See Nick Chrastil, *Orleans DA’s Review of Split-Jury Convictions Has Slowed Since Last Year, But Office Maintains It’s Making Progress*, LENS (Mar. 9, 2022), <https://thelensnola.org/2022/03/09/orleans-das-review-of-split-jury-convictions-has-slowed-since-last-year-but-office-maintains-its-making-progress/>.

231. Orleans Civil Rights Data, *supra* note 157 (click “Addressing Past Harm” on embedded application; select “Yes” under “Non-Unanimous Jury” filter; while holding Ctrl key, select years 2021 through 2023 under “Resolution Date” filter); Chrastil, *supra* note 230.

232. Jillian Kramer, *He Spent Twenty-Two Years in Prison After Being Falsely Accused of a Crime. Now He’s Been Found Not Guilty*, NOLA.COM, (Mar. 17, 2022), https://www.nola.com/news/courts/article_d4fdb036-a625-11ec-8153-3fdf4d11af20.html.

233. Ken Otterbourg, *Jermaine Hudson: Other Orleans Parish Exonerations*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5945> (Mar. 23, 2022).

coming forward until he knew the elected DA would treat his recantation forthrightly.²³⁴

Kaliegh Smith was convicted of second-degree murder by a non-unanimous jury in 2010, after a trial during which prosecutors failed to disclose payments made to, and failed to correct false testimony by, an “essential” witness.²³⁵ His conviction was set aside.²³⁶

Terrance Knox was convicted of second-degree murder by a non-unanimous jury, in proceedings that took less than three hours—from the beginning of voir dire to the end of deliberations and verdict.²³⁷

In sixty-eight of these cases, the non-unanimous conviction was addressed by a plea to a lesser offense; ten were dismissed outright; and four were retried.²³⁸ In twenty-six other cases, sentences were reduced.²³⁹

4. The “10/6ers” Broken Justice Promise Project

In Louisiana, prior to 1973, life-sentenced prisoners who conducted themselves appropriately were “routinely recommended by the superintendent of the prison for commutation of sentence (and parole eligibility) after serving ten years and six months.”²⁴⁰ Eighteen individuals had been sentenced to life prior to 1973, under the belief that their life sentence would be converted to a term of years after ten years

234. See Kramer, *supra* note 212.

235. Matt Sledge, *New Orleans DA Jason Williams Granting New Trials to 22 Convicted by Split Juries*, NOLA.COM (Feb. 26, 2021), https://www.nola.com/news/courts/new-orleans-da-jason-williams-granting-new-trials-to-22-convicted-by-split-juries/article_b3545d42-784d-11eb-9e12-8fb36f86a313.html.

236. Matt Sledge, *New Orleans Judge Tosses Murder Conviction; DA Jason Williams Says Predecessors Withheld Evidence*, NOLA.COM (May 28, 2021), https://www.nola.com/news/courts/new-orleans-judge-tosses-murder-conviction-da-jason-williams-says-predecessors-withheld-evidence/article_f64625d6-bf2e-11eb-84e5-43aac8315447.html; Kaliegh Smith, INNOCENCE PROJECT NEW ORLEANS, <https://ip-no.org/what-we-do/free-innocent-prisoners/client-profiles/kaliegh-smith/> (last visited Jan. 4, 2025).

237. Sledge, *supra* note 236.

238. See Orleans Civil Rights Data, *supra* note 157 (click “Addressing Past Harm” on embedded application; select “Yes” under “Non-Unanimous Jury” filter; while holding Ctrl key, select years 2021 through 2023 under “Resolution Date” filter).

239. *Id.*

240. State *ex rel.* Turner v. Maggio, 463 So. 2d 1304, 1306 (La. 1985); see, e.g., Garrett v. Maggio, 685 F.2d 158, 158-159 (5th Cir. 1982) (“[A] prisoner confined to the Louisiana State Penitentiary for [twenty-three] years, after pleading guilty to [a] charge of murder and being sentenced to life imprisonment, [seeks] habeas corpus because his plea was entered at a time when he could expect release after serving ten and one-half years, and Louisiana law [and policy] [have] since changed so that he ha[s] not been released.”)

and six months; however, they remained in prison decades thereafter, as the courts declined to intervene.²⁴¹

Amongst the eighteen “10-6ers” was eighty-four-year-old Lester Pearson, who served fifty-seven years in the Angola prison after signing a plea agreement in which he was promised an opportunity at parole after serving ten years and six months.²⁴² The opportunity to appear before the parole board never happened.²⁴³ “At the time, Pearson said a guilty plea was the best hope for a Black man charged with murder and facing the electric chair in the Jim Crow South.”²⁴⁴ Ultimately, DA Williams’ office revisited his plea agreement, and he was afforded parole eligibility and released.²⁴⁵

The *New York Times* broadly set out a description of the circumstance of incarcerated individuals known as the “10-6 lifers”:

For dozens of Louisiana’s oldest and longest-serving inmates, the choice could not have been more stark: Risk getting sent to the electric chair for rape or murder, or sign a plea agreement that carried a life sentence.

In 10 years and six months, they were told, they would be eligible for parole.

It was the law—until it wasn’t. In the 1970s, the state raised the parole eligibility requirement to 20 years, and then to 40 years. And by 1979, the chance of parole was gone altogether.

Now, five decades later, many of those languishing inmates are well into their 70s or 80s, and for some, their release is imminent.

The plight of the inmates, most of whom are Black and are known as “10-6 lifers,” drew the attention of Jason Williams, the first-year district attorney for New Orleans.²⁴⁶

241. See Simerman, *supra* note 163.

242. PBS—*Aging Louisiana Prisoners Were Promised a Chance at Parole After 10 Years. Some Are Finally Free*, ORLEANS PAR. DIST. ATTY (Dec. 3, 2021), <https://orleansda.com/aging-louisiana-prisoners-were-promised-a-chance-at-parole-after-10-years-some-are-finally-free/>.

243. *Id.*

244. *Id.*

245. *Id.*

246. Neil Vigdor, *They Were Promised a Chance at Parole in 10 Years. It’s Been 50.*, N.Y. TIMES (Oct. 1, 2021), <https://www.nytimes.com/2021/10/01/us/louisiana-inmates-release.html>.

The Civil Rights Division also addressed individuals like Louis Mitchell, Willie Ingram, and Leroy Grippen, who were sentenced to life as teenagers and young adults, expecting to walk out of prison in the 1980s—only to have the law changed and find themselves incarcerated forty more years.²⁴⁷

5. Juvenile Life Without Parole and Procedural Bars

At the outset of the new administration, the office withdrew notices of intent to seek life without parole against almost thirty individuals who had been convicted of offenses they committed as children and against whom the prior administration had sought life without parole.²⁴⁸

In *Jones v. Mississippi*,²⁴⁹ the Court declined to affirm or extend the principles of *Montgomery v. Louisiana*,²⁵⁰ which had prohibited a life without parole sentence for a person who committed the offense prior to the age of eighteen without a showing of irreparable corruption.²⁵¹ The tremendous power prosecutors have with respect to charging decisions extends to determining whether to seek life without parole against a person who was under the age of eighteen at the time of the offense.²⁵²

247. John Simerman, *Inmates from Another Era, Stuck Behind Bars After State Law Change, To Be Freed by Orleans DA*, NOLA.COM (Sept. 26, 2021), https://www.nola.com/news/courts/inmates-from-another-era-stuck-behind-bars-after-state-law-change-to-be-freed-by/article_b74d5f6a-1d80-11ec-ba99-9ff66da5f489.html; Carla Crowder, *At Age 70, Willie Ingram is Free After Spending Four Decades in Prison for a \$20 Robbery*, ALA. APPLESEED CTR. L. & JUST. (Jan. 4, 2023), <https://alabamaappleseed.org/author/carla-crowder/wille-ingram-is-free-after-spending-four-decades-in-prison-for-a-20-robbery/>.

248. Matt Sledge, *New Orleans DA Jason Williams Begins Course Change from Leon Cannizzaro Era on 'Juvenile Lifers'*, NOLA.COM (Feb. 15, 2021), https://www.nola.com/news/courts/new-orleans-da-jason-williams-begins-course-change-from-leon-cannizzaro-era-on-juvenile-lifers/article_0244874c-6efd-11eb-afa4-139d5d98476b.html.

249. *Jones v. Mississippi*, 593 U.S. 98, 105, 118 (2021) (holding that a state's discretionary sentencing system was sufficient, and accordingly, the appellate court did not err in imposing a life-without-parole sentence on an individual who committed homicide when he was under eighteen, absent an on-the-record sentencing explanation with an implicit finding of permanent incorrigibility).

250. *Montgomery v. Louisiana*, 577 U.S. 190, 213 (2016) (holding "prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.").

251. *Id.*

252. See, e.g., *State v. Lingle*, 2021-0178 (La. App. 4 Cir. 06/09/21), 366 So. 3d 79, 81 ("As in the above, the Louisiana Legislature placed the decision of whether to seek a sentence of life without the possibility of parole for a crime committed before the defendant reached the age of eighteen years prior to August 1, 2017, in the hands of the district attorney."); Rashad Robinson, *No Child Deserves a Life Sentence. But Try Telling Prosecutors That.*, N.Y. TIMES

The notion that children who commit crimes are susceptible to rehabilitation and redemption can be a core component of assuring a community that those that govern understand that, as James Baldwin said, “these are all our children We will profit by, or pay for, what they become.”²⁵³

DA Williams’ office sought to withdraw notice of intent to seek life without parole in twenty-nine cases involving juveniles sentenced, in some instances decades before. In one instance, a district court in Orleans Parish ruled that the prosecution did not have the discretion to withdraw notice of intent to seek life without parole without a hearing.²⁵⁴ Based upon the State’s pleading, the Court of Appeals upheld the authority of the newly elected District Attorney to “withdraw the notice of intent to seek life without parole.”²⁵⁵

The Court of Appeals recognized that:

[A] district attorney has authority over every criminal prosecution instituted by the State of Louisiana in his district The bounds of this discretion extend to determinations of “whom, when, and how [the district attorney] shall prosecute. . . . This authority also includes the “broad discretionary power’ not to institute a prosecution,” which can be exercised in numerous constitutionally-permissible ways.²⁵⁶

Exercising the authority provided to prosecutors across the State, District Attorney Williams sought to vindicate the essence of the Supreme Court’s decision in *Montgomery* and allow juveniles an opportunity to secure parole.

C. Prosecuting the Most Serious Cases in the Most Responsible Manner

The core function of a prosecutor’s office remains to address the most serious cases in the most responsible manner. The goals of this effort included treating serious crime the same across neighborhoods and

(Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/opinion/life-sentence-children-prosecutors.html>.

253. Pat Arthur, *Advocacy to Help Reentering Juveniles Get Back on Track*, 41 CLEARINGHOUSE REV. 222, 222 (2007) (quoting James Baldwin).

254. *Lingle*, 366 So. 3d at 80.

255. *Id.* at 80, 83 (“[B]ecause the district attorney withdrew its notice of intent to seek the penalty of life in prison without the benefit of parole, there is no need to conduct a hearing and the default sentence of life with the benefit of parole should be imposed.”).

256. *Id.* at 81.

ending the justice gap in Orleans Parish's poorest neighborhoods.²⁵⁷ Another example of this effort includes the continued support for the SAKI (Sexual Assault Kit Initiative) Unit at the District Attorney's Office.²⁵⁸ The division focused resources on building cases with DNA evidence connecting the defendant to the offense.²⁵⁹ These cases included the prosecution of a serial rapist charged with committing rapes over a time period spanning 2006 through 2018²⁶⁰ the prosecution of cold-case rape, kidnapping, robbery, and assault in 1996²⁶¹ and the prosecution of a serial rapist engaged in ongoing rapes and kidnappings.²⁶² The guilty plea of one serial rapist "spared him the mandatory life sentences that would have come with his original charges of first-degree rape and aggravated kidnapping" and resulted in a "a 32-year prison sentence."²⁶³ Similarly, the prosecution of a wealthy financial planner for a series of assaults and rapes ensured that perpetrators, regardless of their status, would be held accountable.²⁶⁴ The prosecution of the wealthy financial planner, handled personally by Jason Williams with the SAKI Chief, pitted the former defense attorney, Williams, against the former prosecutor, Cameron Mary.²⁶⁵

After the interruption caused by COVID-19 and a hurricane, District Attorney Williams' office pursued jury verdicts for serious violent

257. See Orleans Parish District Attorney's Office Law Enforcement Referral Dashboard, ORLEANS PAR. DIST. ATT'Y, <https://orleansda.com/our-work/opda-data-dashboards/> (last visited Jan. 4, 2025) (noting refusal rates in the poorest neighborhoods in Orleans Parish compared to the refusal rates in the wealthiest neighborhoods).

258. See Orleans Parish (Louisiana) District Attorney's Office, SAKI, <https://www.sakitta.org/orleansparish/> (last visited Jan. 4, 2025).

259. *Id.*

260. Jillian Kramer, *Man Tied to Three Rapes Over 12 Years, is Sentenced to 10 Years in Prison*, NOLA.COM (May 10, 2023), https://www.nola.com/news/courts/man-tied-to-three-rapes-is-sentenced-to-10-years-in-prison/article_342c2a90-ef6a-11ed-a309-1b5af98cdd9c.html.

261. *The District Attorney's Office Secures Cold Case Conviction in 1996 Kidnapping*, ORLEANS PAR. DIST. ATT'Y (Apr. 20, 2022), <https://orleansda.com/the-district-attorneys-office-secures-cold-case-conviction-in-1996-kidnapping/>.

262. Matt Sledge, *Serial Rapist Pleads Guilty to Five Attacks in New Orleans for 32-Year Sentence*, NOLA.COM (Sept. 29, 2021), https://www.nola.com/news/courts/article_6ce94c78-2162-11ec-a43e-cfb101705528.html.

263. *Id.*

264. See Jillian Kramer, *Financial Planner, Accused of Three Rapes, Convicted of One in His Warehouse District Loft*, NOLA.COM (Mar. 18, 2022), https://www.nola.com/news/courts/financial-planner-accused-of-three-rapes-convicted-of-one-in-his-warehouse-district-loft/article_42a5b8ea-a702-11ec-9a31-439217db1976.html.

265. See *id.*; Jeffrey Gettleman, *Prosecutors' Morbid Neckties Stir Criticism*, N.Y. TIMES (Jan. 5, 2003), <https://www.nytimes.com/2003/01/05/us/prosecutors-morbid-neckties-stir-criticism.html>.

offenses at the same or higher rates as the prior administration.²⁶⁶ In 2018 and 2019, the prior District Attorney's Office handled ninety cases, securing fifty convictions.²⁶⁷ In 2022 and 2023, District Attorney Williams' office handled 120 cases, with fifty-two convictions and seven hung juries.²⁶⁸

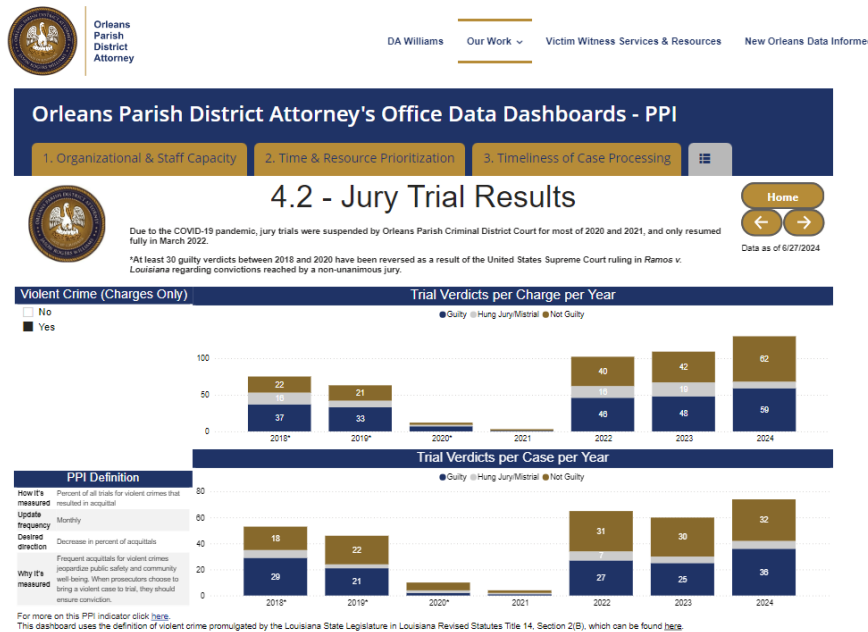


Figure 11. Orleans Parish Jury Trial Results 2018-2024²⁶⁹

III. CHALLENGES OF PROGRESSIVE PROSECUTION

The challenges of progressive prosecution are almost equidistant to the promises. As Benjamin Levin notes in *Prosecuting the Crisis*, “more straightforwardly, the potential for backlash to reformist prosecution is

266. See *infra* Figure 11.

267. *Id.*

268. See *infra* Figure 11. The trials held during 2018 and 2019 under Cannizzaro's District Attorney Office did not require a unanimous verdict, and some thirty of them were reversed because of a lack of unanimity and required a retrial. *Jury Trial Results, Violent Crimes Only, Data Dashboard, fig. 4.2, ORLEANS PAR. DIST. ATT'Y*, <https://orleansda.com/our-work/opda-data-dashboards/> (last visited Jan. 4, 2025).

269. *Orleans Parish District Attorney's Office Data Dashboards - PPI: 4.2 Jury Trial Results, ORLEANS PAR. DIST. ATT'Y*, <https://orleansda.com/our-work/opda-data-dashboards/> (last visited Jan. 4, 2025).

great.”²⁷⁰ Levin continues, “[c]risis narratives and fear of crime are socially salient, and so there’s reason to think that — even with increasing support for criminal justice reform — any perception of crime increasing can easily stymie efforts to repurpose DAs’ offices into sites of decarceration.”²⁷¹

The pushback facing reform in Orleans was similar to pushback facing other progressive prosecutors — both from the left and the right, both substantive and personal. “Some of the attacks directed at progressive prosecutors appear to be little more than political opportunism. But others appear to be attributable, at least in part, to various problems with the progressive prosecution brand.”²⁷²

As the DA sought to enhance credibility in the legal system, it was not forgotten that Orleans was the location in which Oscar James Dunn, the first Black Lieutenant Governor, died mysteriously in office when he pushed for civil rights.²⁷³ Or that the first Black District Attorney in Orleans Parish history was run out of office in 2007.²⁷⁴ Or that Attorney General William Barr came to New Orleans to repeatedly lash out at progressive prosecutors.²⁷⁵ Or that, on the eve of Jason Williams’ formal

270. Benjamin Levin, *Prosecuting the Crisis*, 50 FORDHAM URB. L.J. 989, 1005 (2023).

271. *Id.*

272. Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973, 974 (2023).

273. Channon Hodge, *Oscar James Dunn, The First Black Lt. Governor in the US*, CNN (Mar. 3, 2021), <https://www.cnn.com/2021/03/03/us/history-refocused-oscar-james-dunn-reconstruction/index.html> (“For some experts, the 2021 Capitol riots are a present-day example and a legacy of the same kind of violent push back against the rise of Black men that Dunn and others experienced after the Civil War.”).

274. See Adam Nossiter, *New Orleans Prosecutor Quits Amid Lawsuit Woes*, N.Y. TIMES (Oct. 31, 2007), <https://www.nytimes.com/2007/10/31/us/31orleans.html>.

275. John Pfaff, *A No-Holds-Barred Assault on Prosecutors*, APPEAL (Aug. 13, 2019), <https://theappeal.org/bill-barr-prosecutors/> (“U.S. Attorney General William Barr lashed out at progressive prosecutors in a speech yesterday at the Grand Lodge Fraternal Order of Police’s conference in New Orleans, calling them ‘anti-law enforcement’ and ‘social justice’ reformers’ who will send the cities where they serve back ‘back to the days of revolving door justice’ with the result of ‘more crime, more victims.’”); Matt Sledge, *U.S. Attorney General Bill Barr Blasts Media, ‘Social Justice DAs’ During Speech in New Orleans*, NOLA.COM (Oct. 16, 2020), https://www.nola.com/news/crime_police/u-s-attorney-general-bill-barr-blasts-media-social-justice-das-during-speech-in-new/article_f7c05550-0fdc-11eb-ace7-07c34914e398.html (“As New Orleans voters began casting ballots for the city’s next district attorney, U.S. Attorney General Bill Barr on Friday denounced ‘social justice DAs’ and the media during a meeting of major city police chiefs in the Roosevelt Hotel.”).

announcement that he was running for District Attorney, he was indicted on tax fraud charges.²⁷⁶ He was ultimately acquitted.²⁷⁷

For all of the lauding of the possibilities of criminal justice reform through the exercise of prosecutorial discretion, there is scant commentary on or acknowledgment of the challenges of how to operationalize a more just approach through the unilateral divestiture of power. In Orleans, the effort required a concomitant need to reduce the caseloads of prosecutors while enhancing the screening standards.

A. *Specific Challenges of the Effort at Reform in Orleans*

Numerous challenges existed when District Attorney Williams took office.²⁷⁸ Some of those challenges were reputational.²⁷⁹ Some were historical.²⁸⁰ Some were logistical.²⁸¹ Orleans had a sordid history of race discrimination, as well as a community that had suffered violence at the hands of the police that left community members untrusting of law enforcement.²⁸² This was an office responsible for leading the nation in wrongful convictions and mass incarceration.²⁸³ The former Chief of Appeals, arguing in *Smith v. Cain*, had been chastised for defending a conviction despite obvious *Brady* violations and not conceding relief.²⁸⁴

276. Attorney General William Barr announced his decision prosecute Jason Williams for tax fraud after criticizing progressive prosecution. The prosecution aimed to undermine the office and the prospect of progressive reform. Mr. Williams was acquitted on all charges. See Nick Chrastil, *New Orleans DA Jason Williams Acquitted on All Counts*, LENS (July 28, 2022), <https://thelensnola.org/2022/07/28/new-orleans-da-jason-williams-acquitted-on-all-counts/>.

277. Oliver Laughland & Ramon Antonio Vargas, *Jury Acquits New Orleans' Progressive District Attorney of Tax Fraud Charges*, GUARDIAN, <https://www.theguardian.com/us-news/2022/jul/28/new-orleans-district-attorney-acquitted-tax-fraud> (July 28, 2022, 6:12 PM).

278. See *id.*

279. See *id.* (“Besides almost certainly having to serve a prison sentence, Williams would’ve been forced out of office if he had been convicted by the verdict handed down Thursday.”).

280. See, e.g., *Department of Justice Releases Investigative Findings Involving the New Orleans Police Department*, U.S. DEPT OF JUST. (Mar. 17, 2011), <https://www.justice.gov/opa/pr/departament-justice-releases-investigative-findings-involving-new-orleans-police-department>.

281. See *id.*

282. See *id.*

283. Brentin Mock, *Why New Orleans Leads the U.S. in Wrongful Convictions*, BLOOMBERG (June 9, 2017, 9:32 AM), <https://www.bloomberg.com/news/articles/2017-06-09/new-orleans-the-wrongful-conviction-capital-of-the-u-s>.

284. Transcript of Oral Argument at 50, *Smith v. Cain*, 565 U.S. 73 (2012) (No. 10-8145).

The elected District Attorney, Leon Cannizzaro, had been plagued with criticisms.²⁸⁵ Lawsuits against the office abounded.²⁸⁶

More practically, the District Attorney took over the office in the midst of the COVID-19 pandemic, on the heels of George Floyd protests, and an emerging crime wave, and with a budget that had been encumbered with prior purchases and contracts.²⁸⁷ While attempting to institute new screening procedures, the office had to deal with over two thousand cases, which were pending or had been screened by the prior DA.²⁸⁸ Cases that have been pending for decades are not more trial-ready than recent cases—rather, the opposite is true.

The prior administration, even after the Supreme Court had granted certiorari in *Ramos v. Louisiana*, opposed the defense counsel's request for unanimity-instructions,²⁸⁹ resulting in over forty-five reversals.²⁹⁰

285. See Alan Blinder, *New Orleans Prosecutors Accused of Using Fake Subpoenas*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/us/new-orleans-subpoenas.html>; Emily Bazelon, *Playing Dirty in the Big Easy*, SLATE (Apr. 18, 2012, 4:56 PM), <https://slate.com/news-and-politics/2012/04/new-orleans-district-attorney-leon-cannizzaro-is-being-questioned-for-his-ethics-in-pursuing-convictions.html>; Press Release, ACLU of La., Landmark Settlement Brings An End To Orleans Parish District Attorney's Fake Subpoenas and Unconstitutional Intimidation Practices (Oct. 5, 2021), <https://www.aclu.org/press-releases/landmark-settlement-brings-end-orleans-parish-district-attorneys-fake-subpoenas-and>.

286. See generally *Washington v. Cannizzaro*, 2018-0125 (La. App. 4 Cir. 11/07/18), 259 So. 3d 421; *Singleton v. Cannizzaro*, 372 F. Supp. 3d 389 (2019); *Jones v. Cannizzaro*, 514 F. Supp. 3d 853 (2021).

287. Matt Sledge, *Jason Williams: Leon Cannizzaro Hamstrung DA's Office by Spending Hundreds of Thousands*, NOLA.COM (May 4, 2021), https://www.nola.com/news/courts/jason-williams-leon-cannizzaro-hamstrung-das-office-by-spending-hundreds-of-thousands/article_95ead9e2-ac51-11eb-8287-f39ba1c6eeb9.html.

288. Nick Chrastil, *The System is at a Breaking Point: New DA, Public Defenders Work to Reduce Backlog of Cases at Criminal District Court*, LENS (Jan 20, 2021), <https://thelensnola.org/2021/01/20/the-system-is-at-a-breaking-point-new-da-public-defenders-work-to-reduce-backlog-of-cases-at-criminal-district-court>.

289. See *Ramos v. Louisiana*, 590 U.S. 83, 105–10 (2020) (holding that unanimous jury is require for state-level convictions of serious offenses); Greg Hillburn, *Should All Non-Unanimous Jury Convictions Get New Trials? What Louisiana's AG Says*, LAFAYETTE DAILY ADVERTISER, <https://www.theadvertiser.com/story/news/2022/05/09/what-louisianas-ag-says-non-unanimous-jury-conviction-retrials/9628336002/> (May 9, 2022, 4:44 PM).

290. Notable examples of such cases later reversed upon non-unanimity include *State v. Alridge*, 2017-0231 (La. App. 4 Cir. 05/23/18), 249 So. 3d 260, *vacated by* *Alridge v. Louisiana*, 140 S. Ct. 2710, 206 L.Ed.2d 848 (2020) (reversal of conviction and life sentence of a defendant with schizophrenia and bipolar, seventeen years old at the time of the offense, as a result of an 11-1 verdict; evidence was based on testimony of incompetent co-defendant); *State v. Lewis*, 2016-0224 (La. App. 4 Cir. 12/29/16) 209 So. 3d 202, *vacated by* *Lewis v. Louisiana*, 140 S. Ct. 2711 (2020) (vacating conviction based upon a 10-2 verdict); *State v. Braud*, 2020-0389 (La. App. 4 Cir. 11/18/20), 311 So. 3d 419 (reversing non-convictions for manslaughter, obstruction of justice, and illegal possession of a firearm

These were cases where prosecutors who were willing to use all available tools—material witness warrants, the threat of habitual offender sentencing, and the possibility of draconian sentences on witnesses—to secure convictions had been unable to convince twelve jurors to convict.²⁹¹ The likelihood of success at retrial did not increase without these tools.²⁹²

There were dozens of serious cases that had been in limbo for as long as five, ten, or even twenty years.²⁹³ While any one of these cases might have been tried in a vacuum, none of the cases was trial-ready at the time of transition. In highly unusual circumstances, DA Williams and his leadership team tried to prosecute these cases themselves, rather than turn them over to young prosecutors who may have been in high school when the crimes occurred.²⁹⁴

Not only were these cases not in trial-ready posture, but the systems for managing the cases were antiquated and in disarray. Assistant ADAs were maintaining electronic files on personal hard drives because there was not adequate storage space for materials. Files were on paper in boxes stacked throughout the office, often mislabeled or misorganized without any definite standard. When some prosecutors left, they took

by a convicted felony); *Jones v. Louisiana*, 141 S. Ct. 1041, 208 L.Ed.2d 513 (2021), *vacated by State v. Jones*, 2018-0973 (La. App. 4 Cir. 02/03/21), 314 So. 3d 20 (vacating conviction and remanding for determination of whether conviction for aggravated assault and possession of a firearm by a felon were non-unanimous; unanimous conviction for obstruction of justice was upheld); *State v. Fortune*, 2019-0868 (La. App. 4 Cir. 08/12/20), 310 So. 3d 578 (vacating non-unanimous conviction of Antoinette Fortune for manslaughter); *State v. Brown*, 2019-0248 (La. App. 4 Cir. 10/14/20), 306 So. 3d 506 (non-unanimous conviction of Breyana Brown for manslaughter reversed, and was also convicted of obstruction of justice, possession with the intent to distribute and illegal possession of a stolen firearm by a unanimous jury); *State v. Hayes*, 2017-0789 (La. App. 4 Cir. 02/19/21), 315 So. 3d 251 (non-unanimous conviction of defendant for manslaughter and attempted manslaughter were reversed); on retrial, convicted by a unanimous jury. See also *Man Convicted of Manslaughter in the Killing of Former New Orleans Saints Star Will Smith*, AP NEWS, <https://apnews.com/article/will-smith-shooting-cardell-hayes-manslaughter-retrial-69a369ad5a819653053ee7b62a3610e2> (Jan. 27, 2024, 9:33 AM).

291. See generally Cong. Rsch. Serv., *Amdt 6.4.4.3 Unanimity of the Jury*, CONST. ANN., https://constitution.congress.gov/browse/essay/amdt6-4-4-3/ALDE_00013134/ (last visited Jan. 4, 2025).

292. See Corky Siemaszko, *A Louisiana Man Whose Conviction Was Overturned in a Supreme Court Ruling Against Split Juries is Found Not Guilty at New Trial*, NBC NEWS, <https://www.nbcnews.com/news/us-news/louisiana-man-whose-conviction-was-overturned-supreme-court-ruling-spl-rcna74192> (Mar. 9, 2023, 3:55 PM).

293. See generally *State v. Johnson*, 2018-0409 (La. App. 4 Cir. 06/17/20), 302 So. 3d 142; *State v. Alridge*, 2017-0231 (La. App. 4 Cir. 05/23/18), 249 So. 3d 260, *vacated by Alridge v. Louisiana*, 140 S. Ct. 2710, 206 L.Ed.2d 848 (2020); *State v. Lewis*, 2016-0224 (La. App. 4 Cir. 12/29/16), 209 So. 3d 202, *vacated by Lewis v. Louisiana*, 140 S. Ct. 2711 (2020).

294. See *District Attorney's Office Secures Another Guilty Verdict in Second Degree Rape Case*, ORLEANS PAR. DIST. ATT'Y (Mar. 22, 2022), <https://orleansda.com/das-office-secures-another-guilty-verdict-in-second-degree-rape-case/>.

their personal files with them. Some left painstakingly helpful exit memos detailing the work on their cases; others left a stack of files.

Other management disasters lurked—whether that was contracts for unnecessary services, or lack of employee oversight that failed to account for leave time. Staffing at the Orleans Parish District Attorney’s Office was a challenge prior to the Williams administration,²⁹⁵ but every departure shouldered the pre-existing load on a smaller group of people.²⁹⁶ And moreover, as Professor Shih-Chun Steven Chien observes, “translating reform visions to the everyday practices in a prosecutor’s office can be demanding. Of all the challenges reform prosecutors encounter, perhaps none is greater than changing office culture.”²⁹⁷

In addition to internal challenges, significant external challenges existed. First and most significantly, the history of misconduct in Orleans Parish had eradicated trust in police and prosecutors.²⁹⁸ Under the prior administration, for instance, ninety percent of misdemeanor domestic violence cases were dismissed.²⁹⁹ At the same time, turning the notion of justice on its head, victims who declined to cooperate under the old system were threatened with arrest.³⁰⁰ This lack of faith in the justice system would not change overnight.

295. Matt Sledge, *New Orleans DA, Grappling with Huge Turnover, Asks City Council for \$500,000 Budget Increase*, NOLA.COM (Nov. 14, 2019), https://www.nola.com/news/courts/new-orleans-da-grappling-with-huge-turnover-asks-city-council-for-500-000-budget-increase/article_82b4b1a6-0732-11ea-bb6b-bf8065cd01cd.html (“Orleans Parish District Attorney Leon Cannizzaro says his office has been racked by more than 100% turnover of lawyers over the past four years as experienced prosecutors jump ship for other parishes or private practice. While it’s constantly hiring replacements, the office has lost 37 assistant district attorneys so far this year. Of the eight elite Major Offense Trials prosecutors honored for convicting murderers and rapists in 2016, only three remain.”).

296. *See id.*

297. Shih-Chun Steven Chien, *Cultivating Sense: Cultural Change in the Prosecutor’s Office*, 32 MINN. J. INT’L. L. 1, 13 (2023).

298. *See* Ernest Jacob Rieux, Jr., *Law Enforcement Professionalism: A New Orleans Metro Area Multiple Case Study*, 3 (2016) (Northcentral University) (ProQuest).

299. Jeff Adelson, *New Orleans Prosecutors Dropping Charges in 90% of Misdemeanor Domestic Violence Cases, Council Is Told*, NOLA.COM (Dec. 3, 2019), https://www.nola.com/news/courts/new-orleans-prosecutors-dropping-charges-in-90-of-misdemeanor-domestic-violence-cases-council-is-told/article_f494905e-1630-11ea-a656-d3eff0872fe8.html.

300. *See id.* (noting that district attorney “blamed . . . state lawmakers for a law passed this year that makes it harder for prosecutors to jail victims who are reluctant to testify against their abusers”); Radley Balko, *Report: New Orleans Prosecutors Threatening Witnesses with Fake Subpoenas*, WASH. POST (April 26, 2017, 8:09 PM), <https://www.washingtonpost.com/news/the-watch/wp/2017/04/26/report-new-orleans-prosecutors-threatening-witnesses-with-fake-subpoenas/>; Jeff Adelson, *DA’s Jailing of Crime Victims is ‘Barbaric’ and ‘Misogynistic,’ New Orleans City Council Says*, NOLA.COM (Feb. 7, 2019), <https://www.nola.com/news/das-jailing-of-crime-victims-is-barbaric-and->

Second, and as significant, the New Orleans Police Department was not an immediate partner in the reform effort.³⁰¹ Significant breaches existed, and the media fomented discord by reporting on efforts to reform without detailing the effort to support and enhance policing.³⁰² Efforts to enhance trust in the system—for instance, offering to provide race-neutral reasons for peremptory strikes in the case of Travis Boys, convicted of killing a police officer³⁰³—were often seen as opposing the police.

Third, neither the defense bar nor the elected judges were immediate partners in the reform effort. Almost every effort to improve the system faced criticism as being insufficient.³⁰⁴ Moreover, the switch from prior outright warfare as an adversarial system, to an effort at a fairer system led to more rather than fewer opportunities for litigation. As soon as the office adopted a prospective policy of not seeking to enhance sentences based upon prior convictions, dozens, if not more, of incarcerated individuals sought to withdraw their plea agreements. Simply because the prosecution committed to being fair did not impose a corollary responsibility on the defense function, and zealous lawyers appropriately fought to take advantage. Defendants who would have pleaded guilty under the prior administration now saw the opportunity to proceed to trial. There was nothing unethical in defense counsel seeking to take advantage of reform; indeed, the effort of defense counsel to leverage new policy reforms for the benefit of individual clients may be an essential part of zealous advocacy,³⁰⁵ but it made efforts at reform subject to continuous attack.

As City Council President, prior to his election as District Attorney, DA Williams had successfully promulgated an ordinance that provided for parity funding of the Orleans Public Defender's Office with the

misogynistic-new-orleans-city-council-says/article_adfc2051-02c8-51b6-a243-8b831e1e8216.html.

301. See, e.g., Kevin McGill, *11 Years Later, Still No End to Federal Intervention in Sight for New Orleans Police*, AP NEWS, <https://apnews.com/article/new-orleans-police-reforms-cantrell-katrina-7b24d87b9b96aa99c45a05f5faad01b3> (Feb. 21, 2024, 6:30 PM).

302. See Sarah Childress, *Major Reforms Announced for Troubled New Orleans Police Department*, PBS (July 24, 2012), <https://www.pbs.org/wgbh/frontline/article/major-reforms-announced-for-troubled-new-orleans-police-department/>.

303. See Matt Sledge, *New Orleans Police Miffed that Travis Boys' Defense, DA Seek Review of Jury Selection*, NOLA.COM (April 6, 2021), https://www.nola.com/news/courts/new-orleans-police-miffed-that-travis-boys-defense-da-seek-review-of-jury-selection/article_dc9b60-9711-11eb-a535-9b22d8fc19cf.html.

304. Matt Sledge, *Under Fire for Blown Deadlines, New Orleans DA Jason Williams Admits 'System Breakdown'*, NOLA.COM (Feb. 10, 2022), https://www.nola.com/news/courts/under-fire-for-blown-deadlines-new-orleans-da-jason-williams-admits-system-breakdown/article_ad600238-8acb-11ec-90b5-934e2704b057.html.

305. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2024).

District Attorney's Office.³⁰⁶ The funding supported the creation of one of the strongest public defender offices in the South. But it did not come with an obligation to refrain from fighting the system—and defense counsel (rightly) saw their job as advocating zealously for their current clients even if that subjected future clients to the risk of failed reform. Defense counsel sought to withdraw pleas in cases that had been resolved under the prior administration; where the DA's office returned cases to juvenile court or declined to transfer, defense counsel rejected the ameliorative aspects of the juvenile justice system in favor of due process. While defense lawyers opposing Leon Cannizzaro were reluctant to file bar complaints or raise ethical complaints for fear of retribution, no such trepidation existed under the new administration.³⁰⁷

When the DA's office agreed not to transfer children facing life with parole sentences to adult court if they agreed to juvenile life sentences (ending at age twenty-one), defense attorneys rejected the offer, seeking the due process of adult court but without its punitive sanction. Zealous representation was entirely within ethical bounds—but the cost was ultimately the District Attorney's decision to relinquish a campaign promise to refrain from transferring juveniles to adult court. Indeed, when complaining about the number of children transferred to adult court by District Attorney Williams, one advocate noted, “[w]hen we’ve inquired about how to prevent the transfer, we’ve been told our clients can plead to juvenile life.”³⁰⁸ Under the prior administration, juveniles were transferred to adult court and forced to plead in adult court rather than secure the services attendant to an adjudication in juvenile court; defense counsel's rejection of more favorable treatment resulted in the prospect of the same outcome as before.³⁰⁹

When the DA's office offered early discovery under protective orders in order to protect witness safety and reduce the challenges of discovery, some defense counsel rejected the offer as an interference in their attorney-client autonomy. Civil lawyers representing individuals convicted based upon prior bad practices sought to secure the largest settlement against the new District Attorney's office even though the

306. Nick Chrastil, *City Council Passes Ordinance Bringing Public Defender Budget Closer to DA's Office*, LENS (Aug. 20, 2020), <https://thelensnola.org/2020/08/20/city-council-passes-ordinance-bringing-public-defender-budget-closer-to-das-office/>.

307. See Bazelon, *supra* note 285.

308. Kramer, *supra* note 148.

309. *Id.*

settlements threatened to bankrupt the office and discourage future settlements.³¹⁰

And while the prior administration had cantankerous relationships with judges, the raw exercise of power reduced gamesmanship. It was not by accident that, for the first time in Orleans history, judges declined to authorize post-conviction settlements or even more petty restrictions like not accepting the authority of the DA's office to calendar cases—or closing the prosecution's entrance to the courthouse for victims and assistant prosecutors.³¹¹

Fourth, District Attorney Williams' Office refused to simply give lip service to victims and recognized that the criminal legal system often failed victims and centered the experience of victims as part of that reform. It undertook an earnest effort to engage those harmed by crime and violence. This required far more resources to keep victims safe, to provide them with treatment, and, in some instances, resources that make prosecuting more difficult. At the very least, deciding not to seek material witness warrants against victims meant that some cases would be dismissed when victims chose not to testify.

B. Pushback from Conservatives

District Attorneys elected under a campaign commitment to transform prosecution practices have struggled with the task of effectuating reform, facing harsh criticism from “entrenched political players.”³¹² San Francisco District Attorney Chesa Boudin was run out of office.³¹³ Philadelphia District Attorney Larry Krasner was attacked vehemently, first challenged electorally and then through an impeachment process.³¹⁴ Hillsborough State Attorney Andrew Warren

310. See generally *Reeder v. Williams*, 2023 U.S. Dist. LEXIS 58818 (E.D. La. Apr. 4, 2023); *Dent v. Williams*, 2024 U.S. Dist. LEXIS 164999 (E.D. La. Sep. 13, 2024); *Flanks v. City of New Orleans*, 2024 U.S. Dist. LEXIS 90689 (E.D. La. May 21, 2024).

311. *Orleans DA Pushing to Restore Access to Separate Courthouse Entrance*, WDSU NEWS, <https://www.wdsu.com/article/orleans-da-pushing-to-restore-access-to-separate-courthouse-entrance/41999697> (Nov. 18, 2022, 6:35 AM).

312. The Times Editorial Board, *Editorial: The Empire Strikes Back – Against Progressive Prosecutors*, L.A. TIMES (Oct. 31, 2022), <https://www.latimes.com/opinion/story/2022-10-31/progressive-prosecutors-attacked>.

313. See *id.*

314. Brooke Shultz, *GOP Impeachment Effort Against Philadelphia Prosecutor Lands Before Democratic-Majority Court*, AP NEWS, <https://apnews.com/article/larry-krasner-philadelphia-district-attorney-impeachment-0561893995af353c49e5b11ed55b219d> (Nov. 28, 2023, 5:54 PM); Jacey Fortin, *Pennsylvania House Votes to Impeach Philadelphia's Progressive D.A.*, N.Y. TIMES (Nov. 16, 2022), <https://www.nytimes.com/2022/11/16/us/krasner-impeached-pennsylvania.html>.

was removed for signing statements³¹⁵ that “said he would not pursue criminal charges against seekers or providers of abortion or gender transition treatments . . .”³¹⁶

Professor Laurie Levenson details the challenge of other prosecutors like L.A. District Attorney George Gascón faced from within an office.³¹⁷ Others have tracked the powerful forces organized to oppose reform from outside the office.³¹⁸ Charles Stimson and Zack Smith, writing for The Heritage Foundation, argue that “[r]ogue prosecutors usurp the role of state legislatures, thereby violating the separation of powers between the executive branch and legislative branch.”³¹⁹ Under this theory, prosecutorial discretion does not permit prosecutors to exercise judgment to decline to prosecute entire categories of crimes.³²⁰

All of these challenges existed in Orleans Parish. Almost immediately, pushback from conservative voices complained about policies adopted by the office.³²¹ In Orleans Parish, the first full-throated pushback on policies came following reports that in 2022, speedy trial releases—where individuals were released from jail or their bail obligation because the office had not decided whether to pursue charges—had increased from 127 in 2019 and 2020 to 885 in 2021.³²² Conservatives complained about the releases.

315. Joint Statement from Elected Prosecutors, Fair and Just Prosecution 1, <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> (May 9, 2023).

316. Claire Farrow et al., *Warren Vows Continued Fight; Judge Won't Reinstate Suspended Attorney, but Says DeSantis Violated His Rights*, WTSP, <https://www.wtsp.com/article/news/politics/andrew-warren-ron-desantis-lawsuit-ruling/67-1405a003-03c5-4c7e-9a98-abdb72861e70> (Jan. 25, 2023, 3:37 PM).

317. See Laurie Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors*, 60 AM. CRIM. L. REV. 1495, 1500 (2023).

318. See Jamiles Lartey, *Battles Over 'Progressive' Prosecutors' Decisions Heating Up*, MARSHALL PROJECT (Aug. 19, 2023, 12:00 PM), <https://www.themarshallproject.org/2023/08/19/prosecutors-desantis-warren-worrell-krasner-pamela-price>.

319. CHARLES D. STIMSON & ZACK SMITH, HERATAGE FOUND., “PROGRESSIVE” PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 1 (2020).

320. *Id.* at 11.

321. See Matt Sledge, *Under Fire for Blown Deadlines, New Orleans DA Jason Williams Admits 'System Breakdown'*, NOLA.COM (Feb. 10, 2022), https://www.nola.com/news/courts/under-fire-for-blown-deadlines-new-orleans-da-jason-williams-admits-system-breakdown/article_ad600238-8acb-11ec-90b5-934e2704b057.html.

322. Lee Zurik & Dannah Sauer, *Zurik: Over 880 People, Some Violent Offenders, Released Without Charges in 2021*, FOX8, <https://www.fox8live.com/2022/02/04/zurik-over-880-people-some-violent-offenders-released-jail-without-charges-2021/> (Feb. 3, 2022, 10:56 PM).

[C]ritics, such as the nonprofit Metropolitan Crime Commission, have bemoaned the possibility that violent criminals are walking free, progressives also have a bone to pick with slow charging speeds. They have long argued that prosecutors across Louisiana should make charging decisions more quickly, and that the deadlines should be tightened, so that people in jail aren't held on weak allegations any longer than necessary.³²³

Critics did not care that the standard of probable cause for arrest and the standard to support a conviction (proof beyond a reasonable doubt) necessarily warranted the release of individuals for whom there was not yet sufficient evidence to prosecute,³²⁴ nor connect delays in DNA testing with delay in charging decisions.³²⁵

Additional pushback came when the Chief of the Civil Rights Division, assigned to magistrate court over Mardi Gras, refused a series of misdemeanor gun charges in exchange for surrender of the weapons.³²⁶ What the media failed to report was that a number of the stops had been made by Louisiana State Police enforcing a marijuana possession statute that had been decriminalized in Orleans Parish; that all of the defendants were Black; and that all of the stops were subject to constitutional challenge.³²⁷ In many respects, it could be understood that the refusals in exchange for the surrender of the weapons accomplished everything that would ultimately occur if the cases were accepted for prosecution – except that bail bondsmen and defense attorneys would not

323. Sledge, *supra* note 295.

324. See, e.g., *Evidentiary Standards and Burden of Proof in Legal Proceedings*, JUSTIA, <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/> (last visited Jan. 4, 2025).

325. Compare John Simerman, *Massive Backlog Slows DNA Testing at Louisiana State Police Lab*, NOLA.COM (Feb. 25, 2022), https://www.nola.com/news/courts/massive-backlog-slows-dna-testing-at-louisiana-state-police-lab-official-testifies/article_1bcaa0fc-95b7-11ec-ba11-7b90c7e08c31.html (discussing how DNA testing backlog can stall a number of pending trials), with Natasha Robin, *New Orleans Approved for Rapid DNA Testing at the Orleans Justice Center*, FOX8 (Feb. 27, 2023, 5:47 PM), <https://www.fox8live.com/2023/02/27/new-orleans-approved-rapid-dna-testing-orleans-justice-center/> (discussing the benefit of new rapid DNA testing technology in finding matches for other crimes).

326. See Jillian Kramer, *New Orleans DA's Office Refuses Over a Dozen Gun Charges on Mardi Gras; 16 Men Released*, NOLA.COM (Feb. 22, 2023), https://www.nola.com/news/courts/16-men-released-after-new-orleans-da-refuses-gun-charges/article_718644f4-b313-11ed-9251-eba3d9dc7e8.html.

327. See, e.g., Nick Chrastil, *Gun-Arrest Data Raises Questions About Profiling*, LENS (Feb. 8, 2024), <https://thelensnola.org/2024/02/08/gun-arrest-data-raises-questions-about-profiling/>.

receive compensation for their work.³²⁸ Accepting these cases would have resulted in the exact same outcome. Even critics of the decisions noted that it was highly unlikely that any of the defendants would have been incarcerated for any length of time on misdemeanor gun possession charges, and yet the District Attorney responded to criticism from the Metropolitan Crime Commission by ordering an extensive review and rebuking the prosecutor for dismissing the cases.³²⁹

C. Pushback from Progressives

In many jurisdictions with reform prosecutors, progressives criticize their efforts at reform as insufficient for failing to move far enough. In places like Philadelphia, progressives criticized Larry Krasner for his bail policies.³³⁰ Progressives in Charlottesville (Albemarle, Virginia), challenged the very idea of progressive prosecution. In a statement for CPR, organizers likened progressive prosecution to fancy gift wrap on a damaged cardboard box: “Regardless of how impressive the wrapping of paper is, the box is still damaged— much like the system. You can’t be enmeshed in the system without perpetuating it.”³³¹

Other critics suggest that a better-funded indigent defense system is a more effective way of addressing incarceration.³³²

The Orleans District Attorney reform effort was not immune from criticism by local progressives. Progressives complained about the delay in initiating prosecution of cases – even though thoughtful consideration of cases might mean dismissal of some cases.³³³ “[P]rogressives also have

328. If, after defendants surrendered the weapons, police discovered that the weapons had been involved in other felony offenses, nothing prevented the police from pursuing those charges.

329. See Jillian Kramer, *DA Jason Williams Issues Strong Rebuke of His Deputy’s Decision to Refuse Gun Charges*, NOLA.COM (Feb. 23, 2023), https://www.nola.com/news/courts/da-jason-williams-raps-deputy-emily-maw-over-gun-releases/article_eead9262-b3da-11ed-941b-cf51b5f38cb0.html.

330. PHILA. BAIL FUND, *RHETORIC VS. REALITY: THE UNACCEPTABLE USE OF CASH BAIL BY THE PHILADELPHIA DISTRICT ATTORNEY’S OFFICE DURING THE COVID-19 PANDEMIC* 4–5 (2020).

331. Chloe Lowell, *Cross-Examining the Progressive Prosecutor: The Challenges of Reform from the Inside*, COLUM. POL. REV. (Oct. 12, 2020), <http://www.cpreview.org/articles/2020/10/cross-examining-the-progressive-prosecutor-the-challenges-of-reform-from-the-inside>.

332. See, e.g., Premal Dharia, *The Progressive Prosecutor Movement is Great – But Without Funding Public Defenders it Won’t Work*, SALON (Dec. 14, 2009, 7:00 AM), <https://www.salon.com/2019/12/14/the-progressive-prosecutor-movement-is-great-but-without-funding-public-defenders-it-wont-work/>.

333. See Lee Zurik & Dannah Sauer, *Zurik: 1,500+ Timed Out of Jail or Bond Obligations in 2021*, FOX8 (Feb. 7, 2022, 11:18 PM), <https://www.fox8live.com/2022/02/08/zurik-1500-timed-out-jail-or-bond-obligations-2021/>.

a bone to pick with slow charging speeds. They have long argued that prosecutors across Louisiana should make charging decisions more quickly, and that the deadlines should be tightened, so that people in jail aren't held on weak allegations any longer than necessary.³³⁴ The actual consequence of restricting time is erring on the side of accepting a case. Without full-throated support from progressive allies, the time to accept charges was reduced—and charges were accepted.³³⁵

Some progressives criticized the Orleans District Attorney's Office's transfer of juveniles to adult court under a policy that offered blended sentences.³³⁶ The office dismissed hundreds if not thousands of status and low-level offenses against children, cases that had been pending for years under the prior administration without resolution. The office did this to focus staffing on the difficult cases of armed robbery and carjacking that had previously been sent to adult court and were not being prosecuted in juvenile court.³³⁷ Some advocates for youth complained about the disposition of these cases in juvenile court and sought to enforce adult-level processes on these cases, taking interlocutory appeals to the appellate courts on issues such as denial of continuances, the use of hearsay evidence, and other due process issues. And despite significant drops in prosecuting children and adolescents as adults, members of the coalition that had helped elect the District Attorney called for his resignation when he chose to prosecute two teenagers for murder in adult court.³³⁸

While the office entered into multiple million dollar settlements to resolve civil litigation concerning past *Brady* violations, and had multiple trainings with prosecutors, including trainings with exonerees and victims of *Brady* violations, lawyers at the Innocence Project New

334. Sledge, *supra* note 295.

335. See Julie O'Donoghue, *Louisiana House Votes to Slightly Reduce Jail Time for People Arrested*, LA. ILLUMINATOR (May 4, 2021, 7:45 PM), <https://lailluminator.com/2021/05/04/louisiana-house-votes-to-slightly-reduce-jail-time-for-people-arrested/>.

336. See, e.g., Gina Womack, *I Want My Vote Back!*, LENS (July 27, 2021), <https://thelensnola.org/2021/07/27/i-want-my-vote-back/> (stating conservatives criticized the administration for not transferring enough children to adult court); Garey Forster, *Garey Forster: Elect A Let-'Em-Go DA, and He'll Let the Criminals Go*, ADVOCATE (Nov. 3, 2021), https://www.theadvocate.com/baton_rouge/opinion/garey-forster-elect-a-let-em-go-da-and-hell-let-the-criminals-go/article_9bc54e76-3bdd-11ec-a3ed-4bcfb9be74aa.html; Danae Columbus, *Viewpoint: Progressive Prosecutors like DA Williams are Often in the Hot Seat*, METRO CRIME COMM'N (Mar. 11, 2022), <https://metrocrime.org/viewpoint-progressive-prosecutors-like-da-jason-williams-are-often-on-the-hot-seat/>.

337. See S. POVERTY L. CTR., *supra* note 144; Travers Mackel, *DA Jason Williams Directs Most Violent Crime Cases Involving Teens to Juvenile Court*, WDSU, <https://www.wdsu.com/article/da-jason-williams-directs-most-violent-crime-cases-involving-teens-to-juvenile-court/35206651> (Jan. 14, 2021, 5:48 PM).

338. See, e.g., Womack, *supra* note 336; Chrastil, *supra* note 148.

Orleans criticized the discovery policy saying they were “unimpressed with what the office has put forth as an ostensible ‘policy’—noting that discovery failures are ‘a leading cause of innocent people being convicted.’”³³⁹

D. *Fluctuations in Homicides*

There were 218 murders in Orleans Parish in 2021.³⁴⁰ In 2022, there were 265.³⁴¹ In 2023, there were 193.³⁴² New Orleans has always had a high murder rate. In February of 2021, weeks into the new administration, the *New York Times* wrote,

New Orleans has had the nation’s highest murder rate for any big city a dozen times since 1993, with 424 murders in 1994 at the height of the city’s bloodletting. The city’s murder rate that year stood at 86 murders per 100,000 residents, the single worst ever reported by a big American city.³⁴³

Harry Connick was elected District Attorney in 1994.³⁴⁴ No one ever accused him of being progressive.³⁴⁵

But when progressive prosecutors are in office, and the murder rates go up, there are calls to remove progressive prosecutors.³⁴⁶ Marc Thiessen

339. Nick Chrastil, *Despite Campaign Promises and Settlement Agreement, DA Jason Williams Appears to Lack a Written Policy on Turning Over Evidence*, NOLA.COM (Mar. 28, 2022), <https://thelensnola.org/2022/03/28/despite-campaign-promises-and-settlement-agreement-da-jason-williams-appears-to-lack-a-written-policy-on-turning-over-evidence/>.

340. Ramon Antonio Vargas, *New Orleans Ends 2021 with Most Murders in a Year Since Before Hurricane Katrina: ‘Why?’*, NOLA.COM (Dec. 31, 2021), https://www.nola.com/news/crime_police/new-orleans-ends-2021-with-most-murders-in-a-year-since-before-hurricane-katrina-why/article_e6e8373e-69a4-11ec-9caa-73f736d608ac.html.

341. Missy Wilkinson & Jeff Adelson, *Murder Plunged in New Orleans in 2023. But Not Among Its Kids*, NOLA.COM (Dec. 29, 2023), https://www.nola.com/news/murders-plunged-in-new-orleans-in-2023-but-not-among-its-kids/article_81774302-a694-11ee-9949-4b23cea9e91f.html.

342. Jeff Adelson, *New Orleans Year-to-Date Murders Chart 2023*, NOLA.COM, https://www.nola.com/new-orleans-year-to-date-murder-chart-2023/html_b94e96b6-8bb7-11ed-9345-5b09347ec2d4.html (Feb. 7, 2023).

343. Asher et al., *supra* note 16.

344. See Adam Nossiter, *Harry Connick Sr., New Orleans D.A. Criticized for Overreach, Dies at 97*, N.Y. TIMES (Jan. 27, 2024), <https://www.nytimes.com/2024/01/27/us/politics/harry-connick-sr.html>.

345. See *id.* (“The city’s top prosecutor from 1973 to 2003, he led an office that sent hundreds of Black men to prison and became known for its record of wrongful convictions.”).

346. See Sula Kim, *Petition Calls for the Resignation of Orleans DA Jason Williams*, WDSU NEWS, <https://www.wdsu.com/article/petition-calls-for-the-resignation-of-orleans-da-jason-williams/39050046> (Feb. 11, 2022, 7:48 PM).

argues that high murder rates in Republican-led states are the fault of Democratic cities with progressive prosecutors.³⁴⁷ In some instances, individuals released on bond or after conviction commit serious and tragic crimes.³⁴⁸ But there is rarely any discussion of the circumstances that led to those offenses or whether the release would have occurred under any regime, regardless of the prosecutor. When murder rates go down, attention turns elsewhere. And when murder rates go up, in a place where there are regressive or traditional prosecutors, no one ever blames the prosecutor.

Radley Balko, writing a critique of Marc Thiessen's article, details a University of Toronto study that explains how disconnected murder rates are from political affinity or the election of a progressive District Attorney.³⁴⁹ The study looked at homicide and robbery data from sixty-five major cities and compared the incidence of homicide before and after the election of progressive prosecutors.³⁵⁰ It found "no evidence to support the claim that progressive prosecutors were responsible for the increase in homicide during the pandemic or before it."³⁵¹ In fact, the study itself found no evidence that the election of a prosecutor reduced or increased rates of homicide, robbery, or theft.³⁵² However, while statistical evidence rebuts assertions that increases in release rates or drops in prosecution rates increase crime, occurrences generate sensationalized media attention.³⁵³

347. See Marc A. Thiessen, *The 'Red State Murder Problem'? That's Just a Democratic-Driven Myth.*, WASH. POST (Oct. 19, 2022), <https://www.washingtonpost.com/opinions/2022/10/19/murder-rates-red-states-myth/>.

348. See, e.g., Missy Wilkinson et al., *Ex-Con Accused of Gunning Down Girlfriend Was Freed From Life Sentence by Jason Williams*, NOLA.COM (May 24, 2023), https://www.nola.com/news/crime_police/ex-con-henry-talley-jr-accused-of-gunning-down-asia-davis-on-i-10-service-road-in-new-orleans-east-was-freed-from-life-sentence-by-jason-williams/article_9184575c-f99d-11ed-adc5-87593fbc17ad.html (reporting on arrest of Henry Talley for a domestic violence murder two years after his release from prison after serving twenty-five years for his involvement in a felony murder committed as a juvenile).

349. See Radley Balko, *Washington Post Columnist Regurgitates Nonsense About Crime and "Democrat-Run Cities"*, WATCH (Oct. 22, 2022), <https://radleybalko.substack.com/p/washington-post-columnist-regurgitates>.

350. TODD FOGLESONG ET AL., GLOB. JUST. LAB., VIOLENT CRIME AND PUBLIC PROSECUTION: A REVIEW OF RECENT DATA ON HOMICIDE, ROBBERY, AND PROGRESSIVE PROSECUTION IN THE UNITED STATES 1 (2022) ("We also find weak evidence to support the claim that prosecutors of any broad approach to crime and justice are causally associated with changes in homicide during the pandemic. We conclude that progressive prosecutors did not cause the rise in homicide in the United States, neither as a cohort nor in individual cities. This conclusion echoes the findings of most of the research to date in this field.").

351. *Id.* at 1.

352. See *id.* at 3–4.

353. See *Crime and Justice*, CNN, <https://www.cnn.com/us/crime-and-justice> (last visited Jan. 4, 2025); *Homicide*, FOX NEWS,

Widespread hysteria blamed progressive prosecution for the rise in murders between 2020 and 2022,³⁵⁴ little acclaim is provided when there was a drop in homicides in 2023.³⁵⁵ Problematically, all of the focus on prosecution efforts to address violent crime distracts from data suggesting clearance rates involving police arrests dropped precipitously during this time.³⁵⁶ Jeffrey Asher, in a December 2023 op-ed in the *New York Times*, noted that “[t]he clearance rates—essentially the percentage of crimes leading to arrests—for violent or property crimes have dropped to their lowest levels since the F.B.I. started tracking them in the 1960s.”³⁵⁷ The F.B.I. Closure rates note that national closure rates for homicides were roughly fifty percent.³⁵⁸

<https://www.foxnews.com/category/us/crime/homicide> (last visited Jan. 4, 2025); *Homicide*, AP NEWS, <https://apnews.com/hub/homicide> (last visited Jan. 4, 2025); *Homicide*, N.Y. POST, <https://nypost.com/tag/homicide/> (last visited Jan. 4, 2025).

354. Andrew C. McCarthy, *What's Behind Rising Violent Crime? Progressive Prosecutors' Non-Enforcement of the Law*, HILL (Oct. 10, 2021, 11:00 AM), <https://thehill.com/opinion/criminal-justice/576078-whats-behind-rising-violent-crime-progressive-prosecutors-non/>; Jonah Bromwich, *Can a Progressive Prosecutor Survive a 40% Spike in Homicides?*, N.Y. TIMES, <https://www.nytimes.com/2021/05/17/us/philadelphia-prosecutor-election-Larry-Krasner.html> (May 19, 2021); *Are Progressive Prosecutors to Blame for an American Homicide Wave?*, ECONOMIST (Feb. 19, 2022), <https://www.economist.com/graphic-detail/2022/02/19/are-progressive-prosecutors-to-blame-for-an-american-homicide-wave>; Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged*, N.Y. TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html>.

355. Jeff Asher, *Police Departments Nationwide are Struggling to Solve Crimes*, N.Y. TIMES (Dec. 5, 2023), <https://www.nytimes.com/2023/12/05/opinion/police-crime-data.html>; Jeff Adelson, *New Orleans Year-to-Date Murder Chart 2023*, NOLA.COM, https://www.nola.com/new-orleans-year-to-date-murder-chart-2023/html_b94e96b6-8bb7-11ed-9345-5b09347ec2d4.html (Feb. 7, 2023); see also Wilkinson & Adelson, *supra* note 341.

356. Clearance rates of police are only one indicia of inadequacy. In the *Talley* case, Asia Davis contacted police twice to report Talley for domestic violence without a response, waiting hours on end. Wilkinson et al., *supra* note 348.

357. Asher, *supra* note 355.

358. See *infra* Figure 12.

OPINION | Police Departments Nationwide Are Struggling to Solve Crimes

The F.B.I. released data this fall that gives us a glimpse of how policing in America has changed since the disruption of the pandemic years. The evidence is clear: Police departments across the country are solving far fewer crimes than they did before 2020.

U.S. crime-solving rates fell after 2019

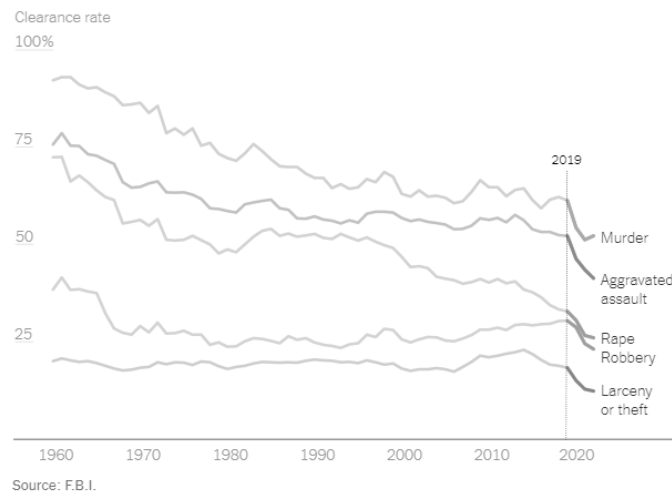


Figure 12. F.B.I. Data on Policing 1960-2020³⁵⁹

Data produced by the New Orleans Police Department as part of the Reported Summary Reporting System reveals a clearance rate of under forty percent.³⁶⁰ In the NOPD Data, the blue line represents reports of murders reaching just over two-hundred and fifty in 2022, and the grey line represents the number of closures—reaching just one hundred in the same year.³⁶¹

359. Asher, *supra* note 355.

360. See *infra* Figure 13; see also *NOPD Data, Summary Crime Reported by the New Orleans Police Department 2012-2022*, FED. BUREAU OF INVESTIGATION, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend> (last visited Nov. 15, 2024) [hereinafter *NOPD Data*].

361. *NOPD Data, Summary Crime Reported by the New Orleans Police Department 2012-2022*, FED. BUREAU OF INVESTIGATION, <https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend> (last visited Nov. 15, 2024) [hereinafter *NOPD Data*].



“A police force’s ability to solve crimes” may be “more effective in deterring crimes than the severity of punishment.”³⁶³ A criminal legal system that promises its citizens safety but arrests only half of the homicides has generated a myth of safety shrouded by the small odds of victimization.³⁶⁴

E. Challenges Arising from Gravitational Forces Opposing Reform

While any large system is resistant to change, the criminal legal system has uniquely strong gravitational forces against reform. Largely under-discussed in the context of progressive prosecution is an analysis of the incentives to wield power.³⁶⁵ The act of wielding immense power makes prosecution easier and cheaper, especially because the District Attorney does not pay for the costs of incarceration directly, but the District Attorney’s office does pay the political cost of releasing or not prosecuting individuals who go on to commit more serious offenses, the

362. *NOPD Data*, *supra* note 360 (select “Homicide” under “Crime Select,” “Louisiana” under “State” and “New Orleans Police Department” under “Agency,” then click “Custom” under “Time Frame” and select January 2012 through January 2022).

363. Asher, *supra* note 355.

364. See Thomas W. Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2049 (2022) (noting “criminal law scholars rarely address the fact that police are not particularly effective at solving crimes and apprehending suspected criminals”); see also Shima B. Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 55 (2020) (“[W]e live in a world where, much more often than not, crimes go unsolved and unaccounted for.”).

365. See WILLIAM M. LANDES, *An Economic Analysis of the Courts*, in ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 164, 167–68 (Gary S. Becker & William M. Landes eds., 1974); see also Oren Gazal-Ayal & Limor Riza, *Economic Analysis of Plea-Bargaining and Prosecution*, CRIM. L. AND ECON. 1, 23–26 (2009).

incentive exists to incarcerate to the maximum extent possible.³⁶⁶ Ceding power—whether that is the power to use habitual offender laws, or material witness warrants, or the felony murder rule and accomplice liability doctrine, or a jury-trial tax—makes prosecution more time consuming and difficult.³⁶⁷ It can reduce the number of pleas and increase the number of trials. And this does not even begin to touch on the mental, cultural and ego shift required of those in power to cede authority. It is certainly more cost-efficient to treat prosecutors as case managers responsible for addressing particular stages, each wielding as much power as possible to resolve cases through a plea. And it is more costly to entrust prosecutors with the responsibility to address problems, with oversight of cases from beginning to end.

The Orleans District Attorney's Office highlighted public cost savings of two hundred and eight million dollars, noting "lifetime incarceration savings are calculated based on the cost of each year of incarceration avoided per defendant, taking into account their age and estimated life expectancy. Incarceration costs come from the Louisiana Department of Corrections."³⁶⁸ In some ways, the District Attorney's dashboard underestimates the cost savings to taxpayers as it only accounts for the interventions conducted by the Civil Rights Division (involving three-hundred and fifty cases) rather than the total drop in incarceration of over one thousand people, from 3,732 in December of 2020 to 2,659 by September of 2023.³⁶⁹ Nor does it account for the economic gains of returning citizens.³⁷⁰

However, the limits of cost-benefit arguments make it more difficult to celebrate the cost savings of reducing incarceration. In practice, it does not appear that the Department of Corrections budget was actually reduced based upon a reduction in the number of incarcerated people—rather, it appears that the corrections budget simply continues to grow

366. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991) ("To judges and prosecutors imprisonment may seem to be available as a free good or service or at least may be viewed as the subject of a major state government subsidy. [We call t]his phenomenon . . . the 'correctional free lunch' . . ."); see also Adam Gopnick, *How We Misunderstand Mass Incarceration*, *NEW YORKER* (Apr. 3, 2017), <https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration> (reviewing John Pfaff's *Locked In* and describing the source of mass incarceration "in short" as "our system has huge incentives for brutality, and no incentives at all for mercy").

367. Gazal-Ayal & Riza, *supra* note 365, at 23–26.

368. See *Orleans Parish District Attorney's Office Law Enforcement Referrals*, ORLEANS PAR. DIST. ATT'Y, <https://orleansda.com/our-work/opda-data-dashboards/> (last visited Jan. 4, 2025).

369. LA. DEP'T PUB SAFETY & CORR. & LA. COMM'N ON LAW ENF'T, *supra* note 15.

370. *Id.*

larger, and the average “total cost per offender per day” rises. More importantly, even to the extent there are cost savings, it does not appear that those cost savings were directed back inside Orleans Parish to address problems like drug addiction or domestic violence.³⁷¹ In fact, Governor Landry’s new budget vetoed funding to assist formerly incarcerated individuals and other services for reducing crime.³⁷²

Transformational change, or even just basic reform, costs money. While the economic benefits of progressive prosecution are not received by the community from which the program emanates, the costs of progressive prosecution are entirely felt by the local District Attorney’s Office.³⁷³ Efforts to provide victim-centered prosecution, vertical prosecution, restorative justice, or even diversion programs all cost more money than basic case management.³⁷⁴ Review of past convictions requires highly skilled attorneys with experience.³⁷⁵ Ultimately, these are real political and functional challenges that progressive prosecutors face.

IV. COMPROMISES

The compromises are real. As Nick Chrastil writes:

Over the past three years, Williams backed off some of his more progressive pledges. He now routinely charges kids as adults, uses the habitual-offender bill, and has applied pressure to judges to set higher bonds. When asked about a year ago about his shifting stances, Williams said: “There are campaign promises, and there’s an oath. The oath is to do this job.”³⁷⁶

371. See generally ZIMRING & HAWKINS, *supra* note 366.

372. See Paul Murphy, *Gov. Landry Vetoes Funding for New Orleans Programs Including Services Vital to the Formerly Incarcerated*, WWL LA., <https://www.wlvt.com/article/news/local/gov-landry-vetoes-funding-for-new-orleans-programs-including-services-vital-to-the-formerly-incarcerated/289-5c3c5c0b-c3ea-4987-829a-bceab390895a> (June 27, 2024, 7:35 AM).

373. See ZIMRING & HAWKINS, *supra* note 366, at 211–14.

374. See Winnie Hu, *Bronx District Attorney Says New System Will Reduce Case Delays*, N.Y. TIMES (July 13, 2016), <https://www.nytimes.com/2016/07/14/nyregion/bronx-district-attorney-darcel-d-clark-to-reduce-case-backlog.html> (discussing that implementation of vertical prosecution will cost Bronx District Attorney’s Office \$3.8 million).

375. See, e.g., *id.*

376. Nick Chrastil, *District Attorney Jason Williams Will Cede Some New Orleans Cases to State Prosecutors. What Does that Mean For Criminal Justice in the City?*, LENS (Feb. 5, 2024), <https://thelensnola.org/2024/02/05/district-attorney-jason-williams-will-cede-some-cases-in-new-orleans-to-state-prosecutors-what-does-that-mean-for-criminal-justice-in-the-city/>.

Some of these compromises were the result of changes in crime—some of the highest murder rates involving child and adolescent defendants in decades.³⁷⁷ Some of these compromises arise because of the significant impediments to changing systems.³⁷⁸

Ultimately, there are at least three explanations for the compromises that occur when trying to reform the system. First, the fear of existential challenges to the entire reform enterprise encourages compromise. Second, the realization that policy choices will be exploited in a manner that undermines larger interests in justice results in compromises of values. Third, and perhaps most fundamentally, many of the systemic problems in past regimes are created not because of ill will or interest in draconian policies but rather because those draconian policies make a system that is under-resourced and designed to exercise government authority more efficient at the cost of fairness and accuracy.

A. *Compromises Driven by Fear*

Fear of existential threats provides an unspoken driver for compromise. Challenges to other prosecutors engaged in reform can have a chilling effect by making clear the reality of threats to an office engaged in reform.³⁷⁹ Prior to the arrival of progressive prosecution, District Attorneys in the United States largely ran unopposed, despite abysmal track records at redressing crime, exorbitant incarceration rates, problems with wrongful convictions, and prosecutorial misconduct.³⁸⁰ Harry Connick Sr. was re-elected four times in Orleans Parish, despite repeated systemic failures and abjectly horrible safety records.³⁸¹ But the

377. Shay O'Connor, *DA Jason Williams Speaks On Recent Spike in Juvenile Crime, and What NOLA Officials are Doing About It*, WDSU News, <https://www.wdsu.com/article/da-jason-williams-speaks-on-recent-spike-in-juvenile-crime-and-what-nola-officials-are-doing-about-it/36402478> (May 12, 2021, 7:26 AM). *But see* Richard Mendel, *Data Reveals Violence Among Youth Under 18 Has Not Spiked in the Pandemic*, SENTENCING PROJECT (June 14, 2022), <https://www.sentencingproject.org/policy-brief/data-reveals-violence-among-youth-under-18-has-not-spiked-in-the-pandemic/>.

378. See Hu, *supra* note 374.

379. See Eric Tegethoff, *Behind the Right's War on Prosecutors*, APPEAL (Aug. 3, 2023), <https://theappeal.org/conservatives-progressive-prosecutors-reform/>.

380. See generally Hessick et al., *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31 (2023).

381. In 1994, during Harry Connick Sr.'s fourth term in office, 424 individuals were murdered in Orleans, almost twice as many as in 2023. See Len Davis, *The Murders of 1994: Lessons from New Orleans' Deadliest Year*, NOLA.COM (June 16, 2016), https://www.nola.com/news/crime_police/the-murders-of-1994-lessons-from-new-orleans-deadliest-year/article_a31d9d4d-1015-5502-b8ea-6c6c5a74f524.html. No one called for DA Connick's removal.

moment newly elected prosecutors started to use discretion in a reform manner, forces aligned to oppose and remove prosecutors.³⁸²

Concerns are not merely electoral. As noted earlier, there is also legitimate fear that discretionary power will be removed from prosecutors engaged in reform.³⁸³ In Florida, Aramis Ayala's authority to prosecute death penalty cases was removed when she articulated a policy of not pursuing capital punishment.³⁸⁴ Then, "[o]n August 4, 2022, Governor Ron DeSantis issued Executive Order 22-176 suspending Petitioner Andrew H. Warren" for issuing "two presumptive non-enforcement policies" pledging to "not promote the criminalization of gender-affirming healthcare or transgender people," "declin[ing] to use [his office's] resources to criminalize reproductive health decisions," and "commit[ting] to exercise [his] well-settled discretion and refrain from prosecuting those who seek, provide, or support abortions."³⁸⁵

In San Francisco, Chesa Boudin was recalled and removed, in part based upon allegations that he declined to prosecute specific crimes and that his policies had led to spikes in crime.³⁸⁶ In Los Angeles, George Gascon was sued by his staff attorneys for implementing policies that restricted their authority to impose harsh sentences and faced a costly recall of his own.³⁸⁷

382. See Julie O'Donoghue, *Louisiana's Conservative State Officials Seek to Block 'Rogue' District Attorneys*, LA. ILLUMINATOR (Apr. 17, 2024, 5:00 AM), <https://lailluminator.com/2024/04/17/louisianas-conservative-state-officials-seek-to-block-rogue-district-attorneys/>.

383. See *id.*

384. Ayala v. Scott, 224 So. 3d 755, 756–57 (Fla. 2017) (upholding Ayala's removal where "Ayala reiterated her intent to implement a blanket 'policy' of not seeking the death penalty in any eligible case because, in her view, pursuing death sentences 'is not in the best interest of th[e] community or in the best interest of justice,' even where an individual case 'absolutely deserve[s] [the] death penalty.'").

385. Warren v. DeSantis, 365 So. 3d 1137, 1139–41 (Fla. 2023) ("[T]he Executive Order describes the first as a policy 'of presumptive non-enforcement for certain criminal violations, including trespassing at a business location, disorderly conduct, disorderly intoxication, and prostitution.' The Executive Order describes the second as a policy 'against prosecuting crimes where the initial encounter between law enforcement and the defendant results from a non-criminal violation in connection with riding a bicycle or a pedestrian violation,' including 'crimes of misdemeanor resisting arrest without violence—for example, fleeing from a law enforcement officer.'").

386. See Sam Levin, *Where Did It Go Wrong for Chesa Boudin, San Francisco's Ousted Progressive DA?*, GUARDIAN (June 9, 2022), <https://theguardian.com/us-news/2022/jun/08/chesa-boudin-san-francisco-recall-analysis>.

387. See James Queally, *When Prosecutor is Defendant: L.A. D.A. George Gascon's Legal Battles with His Own Staff*, LA. TIMES (June 18, 2024), <https://www.latimes.com/california/story/2024-06-18/amid-a-tough-reelection-fight-george-gascon-also-faces-lawsuits-by-his-own-staff>; Soumya Karlamangla, *Efforts to Recall Los Angeles District Attorney George Gascon Fails*, N.Y. TIMES (Aug. 16, 2022), <https://nytimes.com/2022/08/16/us/gascon-recall-district-attorney-los-angeles.html>.

Even where progressive prosecutors were successful in rebutting efforts to remove them—as in Philadelphia, where Larry Krasner faced first a heavily funded effort to run against him and then an impeachment effort—the message was clear: Progressive prosecutors would be attacked and blamed for crime in a way that their successors would not.³⁸⁸

The specter of being removed from office and replaced with a more draconian system persists as an unspoken shadow over reform choices.

B. Compromises Due to Exploitation of Policy Choices

The adversarial nature of the legal system itself undermines reform efforts focused on fairness, which depend on giving up power. Individual defense attorneys operating on behalf of their clients have no obligation to accommodate policy preferences or defer to larger interests of justice but rather have an obligation to zealously represent their individual clients, which can include exploiting policy or rejecting reform efforts that are not in their clients' best interests.

An example of this arose regarding the question of juvenile transfer. DA Williams had campaigned not to transfer children to adult court.³⁸⁹ In Louisiana, where blended sentences are not possible, the decision whether to transfer a child fifteen to seventeen years old to adult court for murder is the difference between a juvenile sentence that is completed at twenty-one and an adult sentence that involves a minimum life sentence with the possibility of parole after twenty-five years. To advance this campaign commitment, his office developed a policy that provided for blended sentencing for youth fifteen to seventeen years old charged with murder.³⁹⁰ The policy provided for maintaining the case in juvenile court until the child was twenty-one and then sentencing the child to manslaughter in adult court at age twenty-one, with credit for time served and a range of five to twenty-five years.³⁹¹ Some defense attorneys simply rejected the concept of the policy,³⁹² seeking to hold District Attorney Williams to the campaign commitment not to transfer children.

Similar compromises occurred with respect to some of the prior convictions by non-unanimous juries. The office tried to ameliorate the past impact of Louisiana's rule permitting non-unanimous verdicts by

388. See Brownstein, *supra* note 93.

389. WDSU Digital Team, *Orleans Parish DA Announces Appointment to Address Juvenile Crime*, WDSU 6 NEWS, <https://www.wdsu.com/article/orleans-parish-da-announcing-appointment-to-address-juvenile-crime/35615357> (Feb. 24, 2021, 6:25 PM).

390. District Attorney's Office, *Juvenile Transfer Policy* (2021) (on file with author).

391. *Id.*

392. See Kramer, *supra* note 148.

offering defendants convicted of second-degree murder or aggravated rape—both offenses generating a mandatory life without parole sentence—to a charge reduction to a lesser included offense. This was consistent with historic practices, which provided for relief for defendants convicted under unconstitutional circumstances.³⁹³ Many defendants understood that this offer was considerably more favorable than the relief available at law. However, some defendants rejected this effort to redress past harms, insisting on relief to which the courts had determined they had no legal right. In other instances, defendants had been convicted unanimously of obstruction of justice in a verdict associated with the non-unanimous verdict for murder or rape. In these instances, as in others where evidence of post-trial misconduct by the defendant arose, decisions were made to compromise on the commitments previously made.³⁹⁴

Other compromises occurred where defendants sought to withdraw prior guilty pleas that had been arguably entered into based upon potential habitual offender sanctions or where defendants sought assurance that no habitual offender sanction would ever be made.³⁹⁵ In an adversarial system where prosecutors attempted to be fair, reluctance to accommodate litigation premised on taking advantage of that fairness resulted in maintaining sentences imposed under habitual offender statutes.

C. *Considering the Compromises*

There is no magic bullet. In this context, Seema Gajwani and Max G. Lesser ask a series of difficult questions:

What if electing enlightened district attorneys is not enough to halt the trajectory of mass incarceration? What if hiring good prosecutors will not help change the culture of the criminal justice system? What if the problem is structural? Given these fundamental challenges, the progress of elected progressive prosecutors will be limited without better strategies to achieve their goals.³⁹⁶

393. See *State v. Craig*, 340 So. 2d 191, 193–94 (La. 1976) (“The defendant has thus been convicted of a crime whose penalty has been declared unconstitutional. This problem is not a new one, however” and remanding for resentencing of defendant “to the most serious penalty for the next lesser included offense.”).

394. *Id.*

395. *Id.*

396. Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y. L. SCH. L. REV. 69, 72 (2019).

Others argue that even if successful, the solution is abolition rather than reform.³⁹⁷ Hana Yamahiro and Luna Garzon-Montano state that “while progressive prosecution is an improvement on traditional prosecution, it does not offer a path to ending mass incarceration, and in fact may distract or detract from that goal.”³⁹⁸ They observe that “[c]urrently, there is likely no city in the United States that would elect a prosecutor that openly supports abolition, or one who, using Levin’s framework, would be considered an anti-carceral prosecutor both because it would not be politically feasible and because prosecution and abolition are antithetical to one another.”³⁹⁹ If measured against abolitionist principles, the compromises of a progressive prosecutor are efforts to establish legitimacy for a project that has none.⁴⁰⁰

An assessment of whether the criticisms of progressive prosecution are valid warrants, at the least, consideration of the massive changes and improvements made during the first two years of the District Attorney Williams administration. Even accepting compromises of the office, the work made profound differences in the lives of thousands of people: mass incarceration dropped precipitously in Orleans; wrongfully convicted were exonerated; individuals convicted by non-unanimous juries were provided some measure of justice; and harsh sentences remediated.

CONCLUSION

While it may not be fully possible to define what justice looks like, the last forty-some years have provided fulsome examples of what it does not. Certainly, for defendants, victims, and communities seeking safety and freedom, the criminal legal system has, for the most part, failed to deliver on America’s promises. Justice Kennedy, writing in *Kennedy v. Louisiana*, observed in a slightly different context: “[t]he tension between general rules and case-specific circumstances has produced results not altogether satisfactory.”⁴⁰¹

Prosecutors have long claimed, without evidence, that harsh punishment enhances public safety, that lengthy sentences provide deterrence, and that retributive punishments provide closure.⁴⁰² These claims are easy to debunk but have unlimited negative downstream

397. See generally *id.*

398. Yamahiro & Garzon-Montano, *supra* note 68, at 130.

399. *Id.* at 135.

400. See Stahly-Butts & Akbar, *supra* note 39 (“From an abolitionist perspective, the prosecutor’s power comes from her ability to leverage the carceral state against individuals, neighborhoods, and communities. The prosecutor’s power is the carceral state’s power.”).

401. *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

402. See, e.g., Lawson, *supra* note 1, at 226.

effects. The costs that they impose on communities are profound.⁴⁰³ Ultimately, the more retributive power the government exercises, the more it risks diminishing respect.

The movement of progressive prosecution has been a reaction to an over fifty-year scheme in which the executive branch extended its power, and the courts refrained from curtailing that power. Progressive prosecution provides a step towards generating respect for “the rule of law and a citizen’s belief in the legitimacy of the system that enforces that law,” which is a “prerequisite for freedom to genuinely exist within the democracy.”⁴⁰⁴ The effort of District Attorney Williams, and his colleagues in the Orleans Parish District Attorney’s Office, has had a meaningful impact on incarceration rates and wrongful convictions. It remains to be seen whether this effort will build trust in the criminal legal system by jurors, victims, defendants, witnesses and the broader community.

But to be clear, progressive prosecution is no panacea. The project of progressive prosecution has clearly visible risks—most broadly: providing legitimacy to law enforcement without ensuring reform and failing to undo the lasting damage caused by a legacy of injustice. It also has risks of the practical sort: releasing individuals from incarceration and returning responsibility for safety to the larger community will result in the inevitable crimes of some small but unknown percentage of individuals. Future scholarship should focus on ways to more fully measure the benefits of progressive prosecution and identify other ways to improve the project. Future District Attorneys should seek ways to integrate policy reform to generate meaningful cultural shifts within an office. And advocates, from reformers to abolitionists, should consider whether the possibilities of progressive prosecution—the promise and the compromises—warrant the initiative.

AFTERWARD

Many of the reforms discussed in Section II of this Article were made more feasible by ameliorative legislative changes in Louisiana. In the 2021 Legislative Session, the Louisiana Legislature promulgated Act 122, which allowed individuals sentenced to more than thirty years who had served more than twenty years, and reached the age of forty-five, to achieve parole eligibility.⁴⁰⁵ At the same time, the legislature authorized

403. *See id.*

404. *See id.* at 208.

405. Mark Ballard, *About 3,000 Inmates in Louisiana Could Get Parole Under New Law; Here’s Who Would Be Eligible*, ADVOCATE (July 31, 2021),

the prosecution to enter into a post-conviction agreement plea agreement for the purpose of amending a petitioner's conviction, sentence, or habitual offender status.⁴⁰⁶ The statute authorized prosecutors to enter into an agreement with defense counsel to address excessive sentences.⁴⁰⁷ Combined, these rules allowed a prosecutor to agree to vacate a long sentence (even a life sentence without parole) in exchange for a plea to a lesser verdict and a term of years that provided for parole eligibility. Additionally, the Louisiana Legislature raised the age of majority for delinquency proceedings to eighteen years old.⁴⁰⁸

In the autumn of 2022, the Louisiana Supreme Court rejected efforts to hold *Ramos v. Louisiana* retroactive under state law. Instead, the Court held that finality and reliance interests, combined with the burden placed upon the admiration of justice, informed by the actions of the citizens of the state and legislature, outweighed the retroactive application of *Ramos*.⁴⁰⁹

Then, Attorney General (soon to be Governor) Jeff Landry intervened in an effort to resolve a conviction and life sentence arising from St. Tammany Parish that had been entered into based upon an agreement under La. C. Cr. P. Art. 930.10.⁴¹⁰ In a divided opinion issued on

https://www.theadvocate.com/baton_rouge/news/politics/legislature/about-3-000-inmates-in-louisiana-could-get-parole-under-new-law-here-s-who/article_6461957c-f234-11eb-9813-677f50cb4b9a.html.

406. LA. CODE CRIM. PROC. art. 930.10 (2021) ("B. Notwithstanding the provisions of Code of Criminal Procedure Article 930.3 or any provision of law to the contrary, the district attorney and the petitioner may, with the approval of the district court, jointly enter into any post conviction plea agreement for the purpose of amending the petitioner's conviction, sentence, or habitual offender status. The terms of any post conviction plea agreement pursuant to this Paragraph shall be in writing, shall be filed into the district court record, and shall be agreed to by the district attorney and the petitioner in open court. The court shall, prior to accepting the post conviction plea agreement, address the petitioner personally in open court, inform him of and determine that he understands the rights that he is waiving by entering into the post conviction plea agreement, and determine that the plea is voluntary and is not the result of force or threats, or of promises apart from the post conviction plea agreement.").

407. Prosecutors in Louisiana have long exercised this authority without a statutory basis. The only limitation on the authority imposed by the adoption of LA. CODE CRIM. PROC. art. 930.10 was that reduction of a sentence for substantial assistance must be made in writing with a memorandum of understanding signed by all parties. See LA. CODE CRIM. PROC. art. 881.6 (Reducing a Sentence For Substantial Assistance); LA. CODE CRIM. PROC. art. 881.7 (Memorandum of Understanding; Limits on Reduction of Sentence for Substantial Assistance).

408. *Raise the Age*, *supra* note 147.

409. *State v. Reddick*, 2021-01893 (La. 10/21/22), 351 So. 3d 273, 283.

410. See John Simerman & James Finn, *Jeff Landry Challenges Law Meant to Help Prosecutors, Judges Fix Bloated Prison Terms*, NOLA.COM (May 23, 2022), https://www.nola.com/news/courts/jeff-landry-challenges-law-meant-to-help-prosecutors-judges-fix-bloated-prison-terms/article_db8093b2-d6f2-11ec-8bb6-ef2fa2878f24.html.

September 8, 2023, the Louisiana Supreme Court held that the statute (La. C. Cr. P. Art. 930.10) giving prosecutors discretion to reduce a sentence was unconstitutional.⁴¹¹ The Court offered that the decision did not “serve as a bar to cooperation between parties in post-conviction proceedings to achieve the ends of justice[.]” but it did hold that were a court to vacate a conviction without a finding that a conviction was invalid, “it would amount to an unconstitutional exercise of the governor’s exclusive pardon power in violation of the doctrine of separation of powers as provided in La. Const. art. II, §2.”⁴¹²

In a 2024 Special Session called to “address . . . crime” by Governor Landry,⁴¹³ the Louisiana Legislature enacted a series of bills to limit grants of post-conviction relief and render it more difficult to receive parole. Act No. 10 amended post-conviction articles, removed the discretion of a prosecutor to waive procedural bars, and required local prosecutors to serve the Attorney General on any effort to supplement or amend a post-conviction petition.⁴¹⁴ Act No. 7 eliminated the provision of good time for any crime committed after August 1, 2024.⁴¹⁵ Act No. 11 amended the requirements for parole requiring a unanimous vote from the Board of Pardons to grant parole.⁴¹⁶ While the legislature had previously raised the age of majority to eighteen, Act No. 13 effectively lowered the age to seventeen by changing the definition of a child for the purposes of the Children’s Code to any person who “commits a delinquent act before attaining seventeen years of age.”⁴¹⁷

These legislative acts aimed to curtail the power of the prosecutor to generate reform.⁴¹⁸ As commentators immediately observed, the “new law could significantly crimp the [Orleans District Attorney’s Office] and other prosecutors seeking to upend dubious convictions or excessive sentences The legislation, which . . . takes effect Aug. 1st, strips

411. *State v. Lee*, 2022-01827 (La. 09/08/23), 370 So. 3d 408, 410.

412. *Id.* at 417.

413. Sara Cline, *A Look at the Tough-On-Crime Bills Louisiana Lawmakers Passed During a Special Session*, AP NEWS, <https://apnews.com/article/louisiana-bill-law-crime-legislature-1463b4d220012d6aa33fe67a9b04dac8> (Feb. 29, 2024, 4:37 PM).

414. 2024 La. Acts No. 10.

415. 2024 La. Acts No. 7.

416. 2024 La. Acts No. 11.

417. 2024 La. Acts No. 13.

418. Larry Krasner, *Power to the Voters*, INQUEST (June 25, 2024), <https://inquest.org/power-to-the-voters/> (“While not all supporters of decarceration view reform prosecution as an effective weapon against mass incarceration and its hegemonic cultural foundations, the (arguably fascist) supporters of mass incarceration clearly do. Reform prosecutors’ antagonists (including Donald Trump, Matt Gaetz, Jim Jordan, and Josh Hawley) know that we reform prosecutors are helping to effectively dismantle the carceral, racist, and unduly frightened culture that sustains them, which is why they spend so much time trying to destroy us.”).

courts and prosecutors of some authority, and it empowers the state Attorney General to appeal judicial orders granting relief.”⁴¹⁹

419. Jillian Kramer, *How a New Law Could Curb New Orleans DA on Relief for Prisoners*, NOLA.COM (Apr. 1, 2024), https://www.nola.com/news/courts/how-a-new-law-could-curb-new-orleans-da-on-relief-for-prisoners/article_24b9e34c-edf5-11ee-8ecb-af3aaaf74390.html.