

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2024

The Difference a DA Makes

Victoria Smiegocki

Shem Vinton

Pamela R. Metzger

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

The Difference a DA Makes

Victoria M. Smiegocki,* Shem Vinton,** Pamela R. Metzger***

During his 2018 campaign to become Dallas County District Attorney, John Creuzot promised to decline prosecution of low-level marijuana misdemeanors.¹ After his election, District Attorney Creuzot (DA Creuzot) honored this campaign promise, issuing policies designed to radically reduce misdemeanor marijuana prosecutions.² Analyzing qualitative and quantitative data, the authors describe police enforcement changes associated with the Dallas County District Attorney's Office's (DAO) marijuana prosecution policies. The authors also explore how the DAO's Intake Unit successfully implemented and enforced these marijuana prosecution policies.

The authors show that DA Creuzot's policies were associated with a significant decrease in marijuana misdemeanor arrests and an even greater decline in marijuana misdemeanor prosecutions. However, the DA's non-prosecution policies were not associated with a similar reduction in racial disparity among the marijuana misdemeanor arrests that the police referred for prosecution. Some police departments showed increased racial disparity among marijuana arrests and referrals. Other departments almost eliminated those disparities, but those dramatic decreases coincided with a virtual cessation of marijuana misdemeanor enforcement.

This article concludes by situating DA Creuzot's policy within the national landscape of prosecutorial reform. The authors explain how progressive prosecutors must navigate legislative attempts to control prosecutorial discretion.

* Assistant Director of Research, Deason Criminal Justice Reform Center, SMU Dedman School of Law.

** Policy Attorney, Deason Criminal Justice Reform Center, SMU Dedman School of Law.

*** Professor of Law and Executive Director, Deason Criminal Justice Reform Center, SMU Dedman School of Law.

¹ See David Wilfong, Race, Justice and the Heated Contest for Dallas DA, BLACKPRESSUSA (Nov. 3, 2018), <https://blackpressusa.com/race-justice-and-the-heated-contest-for-dallas-da/?amp> [<https://perma.cc/PF53-KGXL>]; Vote Your DA, ACLU SMART JUST. TEX., <https://www.dallasda.org> [perma.cc/5XUY-7J4D] (last visited Sept. 14, 2023); Christopher Connelly, How John Creuzot Plans to Reform Criminal Justice in Dallas County, THE SERIES: THE PRICE OF PRISON (Dec. 18, 2018), <https://stories.kera.org/price-of-prison/2018/12/18/how-john-creuzot-plans-to-reform-dallas-county-criminal-justice/> [perma.cc/JZ3E-KFC3]; Dallas County DA Faith Johnson Concedes to John Creuzot, FOX 4 NEWS DALLAS-FORT WORTH (Nov. 7, 2018), <https://www.fox4news.com/news/dallas-county-da-faith-johnson-concedes-to-john-creuzot/> [perma.cc/S6VD-72EQ].

² John Creuzot, Our Mission is Working, RE-ELECT JOHN CREUZOT, DALL. CNTY. DIST. ATT'Y, <https://johncreuzot.com/platform.html> [perma.cc/AH7X-CWML] (last visited Sept. 14, 2023) [hereinafter Creuzot, Our Mission is Working].

<i>I. Introduction</i>	333
<i>II. Why Focus on Marijuana Misdemeanors</i>	334
<i>A. Misdemeanors Matter</i>	334
<i>B. The Public Supports Reform of Marijuana Laws</i>	335
<i>C. Marijuana Enforcement Has a Demonstrably Disparate Impact</i>	337
1. Demographics in Dallas County and the Surrounding Area.....	338
2. Marijuana Misdemeanor Laws in Texas.....	339
<i>III. Dallas County Marijuana Non-Prosecution Polices</i>	341
<i>A. DA Creuzot’s Non-Prosecution Policy</i>	341
1. DA Creuzot Shares His Policies with Law Enforcement.....	342
2. DA Creuzot Announces His Policies to the Public.....	343
<i>B. DA Creuzot Requires Laboratory Reports for Marijuana Cases</i>	347
1. Texas Legalizes Hemp	347
2. DA Creuzot Requires Laboratory Reports for Marijuana Referrals	349
<i>IV. Changes Associated with the Marijuana Non-Prosecution Policy</i> ...	350
<i>A. Changes in the DAO’s Marijuana Possession Declination Rates</i>	350
<i>B. Changes in Police Referrals Associated with the Non-Prosecution Policy</i>	353
1. The Data.....	353
2. Overall Changes in Case Volumes and Racial Disparity	355
3. A Deeper Dive into Variations in Municipal Police Department Referrals.....	357
<i>V. Lessons Learned from the Dallas Experiment</i>	363
<i>A. A Model for Reform Implementation</i>	363
<i>B. Prosecutor-Led Drug Reform Cannot Eliminate Arrests or their Punitive Consequences</i>	366
<i>C. Police Non-Enforcement May Be the Most Effective Way to Reduce Racial Disparity</i>	367
<i>VI. THE PENDULUM SWINGS</i>	368
<i>A. Texas Legislative Backlash against Non-Prosecution Policies in Dallas and Beyond</i>	368
<i>B. Taming the “Rogue Prosecutor”</i>	371
1. Analyzing the DAO’s Policies Under HB 17	371
2. Comparing the DAO’s Policies with National Standards on Screening and Charging Criminal Cases	374
3. Accepting Limits and Championing Reform	375
<i>VII. CONCLUSION</i>	376

I. INTRODUCTION

During his 2018 campaign to become Dallas County District Attorney, John Creuzot promised to decline prosecution of several low-level misdemeanors, including first-time marijuana possession.³ After winning the election, District Attorney Creuzot (“DA Creuzot” or “the DA”) honored this campaign promise, issuing (among others) a non-prosecution policy designed to radically reduce misdemeanor marijuana prosecutions in the Dallas County District Attorney’s Office (“DAO” or “the Office”).⁴

DA Creuzot’s announcement marked a significant shift in Dallas County marijuana prosecution. In 2018, the DAO accepted 5,294 marijuana misdemeanor cases. In 2019, DA Creuzot’s office only accepted 686. This dramatic reduction in acceptance eliminated thousands of marijuana prosecutions. Its impact on racial disparity was less clear-cut.

To better assess the efficacy of the marijuana non-prosecution policy (“non-prosecution policy” or “declination policy”), DA Creuzot asked the Deason Criminal Justice Reform Center (“Deason Center” or “Center”) to analyze the DAO’s marijuana prosecution data. A memorandum of understanding (MOU) between the Deason Center and the DAO gave the authors complete access to the DAO’s administrative data. The authors also interviewed DA Creuzot and the screening and charging prosecutors who implemented the marijuana declination policy.

Using qualitative and quantitative data, the authors describe police enforcement changes associated with DA Creuzot’s policy of declining to prosecute most first-time marijuana misdemeanor offenses. The authors also explore how the DAO’s Intake Unit successfully implemented and enforced this non-prosecution policy. The authors conclude with observations about new legislative challenges that confront progressive prosecutors.

³ Wilfong, *supra* note 1; Vote Your DA, *supra* note 1; Connelly, *supra* note 1; Christopher Connelly, In Dallas County DA Race, Both Candidates Say They’re Change Agents for Criminal Justice, KERA: POLITICS (October 30, 2018, 6:00 AM), <https://www.keranews.org/politics/2018-10-30/in-dallas-county-da-race-both-candidates-say-theyre-change-agents-for-criminal-justice> [<https://perma.cc/PF53-KGXL>]; Dallas County DA Faith Johnson Concedes to John Creuzot, *supra* note 1.

⁴ Press Release, Dall. Cnty. Dist. Att’y’s Office, Dallas County Criminal District Attorney John Creuzot Announces Sweeping Justice Reform Policies (Apr. 11, 2019), https://www.dallascounty.org/Assets/uploads/docs/district-attorney/press-release/2019/PR_ReformPolicyChanges_041119.pdf#:~:text=%28Dallas%2C%20Texas%29%20-%20Dallas%20County%20Criminal%20District%20Attorney,to%20race%20or%20financial%20standing%20in%20the%20community [perma.cc/3M3D-95FS].

II. WHY FOCUS ON MARIJUANA MISDEMEANORS

Politicians of all political persuasions have proposed legal reform of marijuana offenses.⁵ Why are marijuana misdemeanors such popular targets of criminal legal reform? And why should researchers and reformers care about marijuana reform in Texas?

A. Misdemeanors Matter

Misdemeanor offenses overwhelmingly account for most prosecutions in the criminal legal system,⁶ and most sentences are misdemeanor sentences.⁷ In 2021, people charged with misdemeanor offenses comprised approximately 76% of the nation's trial court caseloads.⁸ In Texas, the Office of Court Administration reported 841,939 total misdemeanor cases on the 2021 criminal docket, including 304,064 newly filed cases.⁹ With caseloads dominated by misdemeanor allegations, "most Americans who experience the criminal system do so via the [misdemeanor] process."¹⁰ The result is a high volume of low-level convictions.¹¹

Many researchers and reformers have a low degree of confidence in the accuracy and fairness of these misdemeanor convictions.¹² Misdemeanor arrests often lack the investigative thoroughness that accompanies felony offenses.¹³ As a result,

⁵ Natalie Fertig & Mona Zhang, *New GOP Weed Approach: Feds Must 'Get Out of the Way'*, POLITICO (Nov. 22, 2021, 11:29 AM), <https://www.politico.com/news/2021/11/21/cannabis-democrats-republicans-523119> [perma.cc/8ACM-C94J]; Natalie Fertig, *Three Republicans Stand in the Way of Federal Weed Legalization*, ROLLING STONE (July 17, 2019), <https://www.rollingstone.com/culture/culture-features/cannabis-weed-federal-legalization-crapo-graham-mcconnell-857036/> [perma.cc/UA86-R4W3].

⁶ CSP STAT Criminal: Trial Court Caseload Overview, COURT STATISTICS PROJECT, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal> [https://perma.cc/U46S-4BME] (last updated Oct. 9, 2023).

⁷ Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 177 (2017).

⁸ *Id.*

⁹ Tex. Ct. App., *County-Level Courts Misdemeanor Case Activity Detail January 1, 2021 to December 31, 2021*.

¹⁰ Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015).

¹¹ *Id.*

¹² See Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 976–87 (2020); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

¹³ Natapoff, *supra* note 10, at 1063–64 (citing Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313).

prosecutors may have less information, and a poorer quality of information, about the alleged crime and the alleged offender.¹⁴

Meanwhile, misdemeanor legal practice can be haphazard and sloppy.¹⁵ While police submit new cases to prosecutors, an actual prosecution requires that an attorney screen the submission for legal sufficiency and file a formal charging document with the court. Comparing the time prosecutors spend reviewing cases to the rate at which cases are accepted or dismissed, the thoroughness of this review is questionable.¹⁶ Because they rely on police to initiate cases and conduct investigations, prosecutors may file formal charges that simply echo police allegations, without considering the quality of any evidence that substantiates those allegations.¹⁷

Notwithstanding this deeply flawed system, misdemeanors have serious collateral consequences—many occur even if a person is never convicted.¹⁸ With a conviction, these consequences can become permanent. While misdemeanor punishments lack the severity of felony sentences, their collateral consequences create indirect punishments that can outweigh any directives ordered by the court.¹⁹ A filtered search for any misdemeanor in the National Inventory of Collateral Consequences of Conviction matches 7,806 entries with 9,365 consequences.²⁰ Additionally, a misdemeanor conviction can ensure a longer sentence if the State convicts the defendant of a subsequent crime.²¹

B. The Public Supports Reform of Marijuana Laws

There is widespread public support for legalizing marijuana. According to an October 2022 Gallup poll, 68% of respondents nationwide supported marijuana

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Brian J. Ostrom et al., *Timely Justice in Criminal Cases: What the Data Tells Us*, NATIONAL CENTER FOR STATE COURTS (misdemeanor disposition data examined indicated that 25% of misdemeanors were dismissed, surpassed only by guilty pleas).

¹⁷ Natapoff, *supra* note 12, at 1328, 1337-74; Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST., May 2018, at 8-9 (Most people carry implicit racial biases, and prosecutors' implicit biases can aggravate an already racialized process).

¹⁸ Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997-99 (2019).

¹⁹ *Id.* at 201.

²⁰ Collateral Consequences Inventory, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [perma.cc/3Y7K-DBRJ] (last visited Sept. 14, 2023).

²¹ Natapoff, *supra* note 12, at 1326.

legalization.²² This popular support is not new. Combined results from Gallup polls conducted between 2018 and 2022 indicate a 67% approval rate for the legalization of marijuana.²³ As of May 2023, 23 states, as well as the District of Columbia and Guam, had legalized the recreational use of marijuana.²⁴ Several other states considered the issue in 2023, either in state legislative sessions or by popular referenda.²⁵

Recent polls in Texas demonstrate similar statewide support for legalizing marijuana possession. In a 2023 poll by the Hobby School of Public Affairs at the University of Houston, 67% of Texans supported legalizing “the recreational use of marijuana for any purpose legal for those age 21 and older, with 47% strongly in support of legalization.”²⁶ A 2022 poll by the University of Texas produced similar results—55% of respondents favored legalizing personal use quantities of marijuana.²⁷

Texans’ support for decriminalizing marijuana was even more robust. In the Hobby School poll, 81% of respondents favored decriminalization, and 49% of respondents strongly supported it.²⁸ Among the University of Texas respondents, 72% supported decriminalization.²⁹

In Texas’ deeply divided political environment, support for marijuana reform has been surprisingly bipartisan. In 2018, the Republican Party of Texas approved a

²² Jeffrey M. Jones, *Marijuana Views Linked to Ideology, Religiosity, Age*, GALLUP (Nov. 15, 2022), <https://news.gallup.com/poll/405086/marijuana-views-linked-ideology-religiosity-age.aspx> [perma.cc/ZM6X-M4YM].

²³ *Id.*

²⁴ Claire Hansen et al., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS & WORLD REP. (Nov. 8, 2023), <https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization> [https://perma.cc/J9GT-2457].

²⁵ German Lopez, *Marijuana Majority*, N.Y. TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/briefing/legal-weed-marijuana.html?searchResultPosition=4> [perma.cc/5NKR-RG7R]; Alix Martichoux & Nexstar Media Wire, *Where Will Marijuana Be Legal in 2023?*, THE HILL (Dec. 31, 2022, 9:01 AM), https://thehill.com/homenews/nexstar_media_wire/3789873-where-will-marijuana-be-legal-in-2023/ [perma.cc/ACQ7-SNAC].

²⁶ René Cross & Mark P. Jones, *Texas Legislative Issues 2023 Marijuana*, UNIV. OF HOUS. HOBBY SCH. OF PUB. AFF. 4, <https://www.uh.edu/hobby/tx2023/marijuana.pdf> [perma.cc/K9T7-R5BN] (last visited Sept. 14, 2023).

²⁷ *Legalization of Marijuana*, THE TEXAS POLITICS PROJECT AT THE UNIV. OF TEX. AT AUSTIN, <https://texaspolitics.utexas.edu/set/legalization-marijuana-december-2022> [perma.cc/AQ4H-W5F4] (last visited Sept. 13, 2023). Among those surveyed, 32% responded that possession of small amounts of marijuana should be legal, and 23% agreed that possession of any amount of marijuana should be legal.

²⁸ Cross & Jones, *supra* note 26, at 4.

²⁹ *Legalization of Marijuana*, *supra* note 27.

marijuana decriminalization platform that would have made “possession a civil, and not a criminal, offense” and subjected personal use possession to a maximum fine of \$100.³⁰ In 2022, even Texas’ ultra-conservative governor, Greg Abbott, supports decriminalization.³¹

C. Marijuana Enforcement Has a Demonstrably Disparate Impact

Broadly, most misdemeanor crimes are quality-of-life offenses; often, they are the byproduct of racialized policing in “high-crime neighborhoods.”³² Hot-spot and “Broken Windows” policing strategies subject communities of color to more frequent, more rigorous, and more intrusive interactions with law enforcement.³³ Police arrest people from these communities—especially Black men—at higher rates, particularly for misdemeanor offenses.³⁴ Because police disproportionately arrest (and book) Black men for these kinds of offenses, misdemeanor policing effectively converts racially disparate arrest practices into formal criminalizations.³⁵

Marijuana enforcement practices may provide the clearest example of racially disparate enforcement. Researchers rarely know the frequency with which different groups commit different crimes. But marijuana use is different. For decades, the United States has collected data about marijuana use, and the results are clear—Black and non-Black people use marijuana at similar rates.³⁶

Nevertheless, Black and non-Black people have vastly different experiences with marijuana enforcement.³⁷ The ACLU’s report, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, tracks racial disparity in marijuana arrests from 2010 to 2018. Nationally, police were 3.65 times more likely

³⁰ Republican Party of Texas, Report of 2018 Permanent Platform & Resolutions Committee (2018).

³¹ Most Texans Support Legalizing Pot, But Gov. Greg Abbott Says No, NBC DFW (May 18, 2022, 2:42 PM), <https://www.nbcdfw.com/news/local/texas-news/most-texans-support-legalizing-pot-but-gov-greg-abbott-says-no/2971640/> [perma.cc/3KMJ-X2J5].

³² Natapoff, *supra* note 10, at 1064.

³³ Natapoff, *supra* note 12, at 1370.

³⁴ *Id.*

³⁵ Natapoff, *supra* note 10, at 1065.

³⁶ AM. CIV. LIBERTIES UNION, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests* 4 (2013); Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race, THE HAMILTON PROJECT (Oct. 21, 2016) <https://www.hamiltonproject.org/data/rates-of-drug-use-and-sales-by-race-rates-of-drug-related-criminal-justice-measures-by-race/> [perma.cc/6VE6-Y5VR].

³⁷ See AM. CIV. LIBERTIES UNION, ACLU Research Report: *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020).

to arrest Black people for possession than White people.³⁸ In some states, Black people were six to ten times more likely to be arrested than White people.³⁹

Across the country, Black people face an unfair heightened risk of misdemeanor prosecution compared to their non-Black counterparts. Dallas County, Texas, is no different. In 2018, Black people comprised 23% of the Dallas County population,⁴⁰ but Black people were defendants in 54% of the misdemeanor marijuana possession cases referred for prosecution.⁴¹ Black people were four times more likely than non-Black people to have their marijuana possession case referred to the DAO.

1. Demographics in Dallas County and the Surrounding Area

The 2020 Decennial Census reported that Dallas County, Texas had approximately 2,613,539 residents—nearly 9% of the Texas population.⁴² Of the almost 3 million residents, 22% identified as “Black or African American,”⁴³ and 14.6% reported living below the poverty level.⁴⁴ Coming in slightly below the statewide median, Dallas County reported an estimated median household income of \$61,870.⁴⁵ In the 2020 presidential election, Dallas County voters overwhelmingly supported the Democratic candidate, with only 33.4% of voters backing the Republican candidate.⁴⁶

³⁸ *Id.* at 8 (Montana, Kentucky, Illinois, and West Virginia were noted as having the highest arrest rates).

³⁹ *Id.*

⁴⁰ American Community Survey 5-Year Data (2009–2021), U.S. CENSUS BUREAU (June 15, 2023), <https://www.census.gov/data/developers/data-sets/acs-5year.2018.html#list-tab-1036221584> [perma.cc/GKQ2-TYF5] [hereinafter 5-Year Estimates].

⁴¹ Data on file with authors.

⁴² DP1 Profile of General Population and Housing Characteristics, U.S. CENSUS BUREAU, https://data.census.gov/table?q=Dallas+County,+Texas&g=040XX00US48_050XX00US48113&y=2020&d=DEC+Demographic+Profile [perma.cc/655A-ZUW8] (last visited Sept. 15, 2023).

⁴³ *Id.*

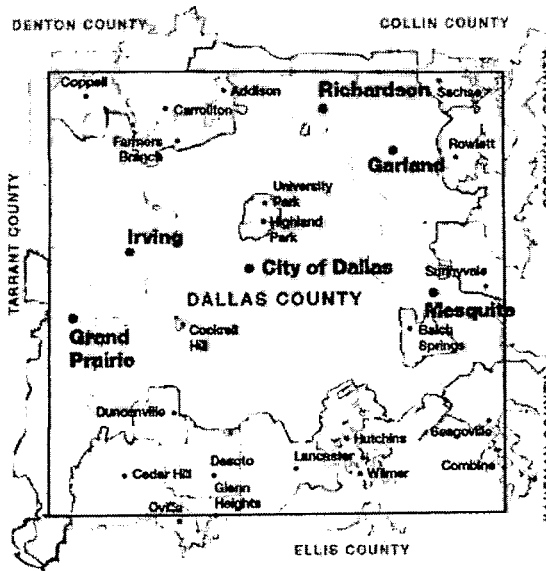
⁴⁴ S1701 Poverty Status in the Last 12 Months, U.S. CENSUS BUREAU, https://data.census.gov/table?q=Dallas+County,+Texas&t=Income+and+Poverty&g=040XX00US48_050XX00US48113&y=2020&tid=ACSST5Y2020.S1701 [perma.cc/SQR6-N8WV] (last visited Sept. 15, 2023).

⁴⁵ S1903 Median Income in the Last 12 Months (In 2020 Inflation-Adjusted Dollars), U.S. Census Bureau, https://data.census.gov/table?q=Dallas+County,+Texas&t=Income+and+Poverty&g=040XX00US48_050XX00US48113&y=2020&tid=ACSST5Y2020.S1903 [https://perma.cc/JYN9-YMNX] (last visited Sept. 15, 2023).

⁴⁶ Texas Election Results, TEX. SEC’Y OF STATE, <https://results.texas-election.com/county> [perma.cc/KP59-MRP6] (last visited Sept. 15, 2023).

Dallas County shares a border with Collin, Denton, Ellis, Kaufman, Rockwall, and Tarrant Counties. There are 31 municipalities in Dallas County,⁴⁷ and many of these cities extend into neighboring counties.⁴⁸ Each city has at least one law enforcement agency. Specialty police departments, such as public transit, university, and public hospital police departments, also serve the area.

Figure 1: Map of Dallas County, showing municipalities and neighboring counties⁴⁹



2. Marijuana Misdemeanor Laws in Texas

Marijuana possession was illegal in Texas during the studied period (2018–2022). Possession of fewer than two ounces of marijuana constituted a Class B misdemeanor, punishable by up to 180 days in a local jail.⁵⁰ Possession of between two and four ounces of marijuana was a Class A misdemeanor, punishable by up to

⁴⁷ Cities, DALLAS CNTY., <https://www.dallascounty.org/about-us/cities/> [https://perma.cc/9QMM-NANC] (last visited Sept. 13, 2023).

⁴⁸ See Map of Dallas Cnty.

⁴⁹ Pamela R Metzger et al., The ABCs of Racial Disparity Enforcement of Low-Level Drug Crimes in Dallas County in 2018, THE DALLAS PROJECT, DEASON CRIM. JUST. REFORM CTR., 7 (May 2021), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1004&context=deasoncenter> [https://perma.cc/SL2E-BB2H].

⁵⁰ TEX. HEALTH AND SAFETY § 481.121(b)(1)–(2) (2021).

one year in a local jail.⁵¹ Quantities above four ounces were punished as felonies.⁵² Possession of marijuana paraphernalia and attempted misdemeanor possession of marijuana were Class C misdemeanors, punishable only by a fine or community service.

During the studied period, the DAO prosecuted felonies and Class A and B misdemeanors in the County Criminal Court. City attorneys prosecuted Class C misdemeanors in municipal or justice-of-the-peace courts.⁵³

Figure 2: Marijuana Misdemeanor Offenses in Texas (2018-2022)

Misdemeanor Category:	Offense:	Prosecuted by:	Maximum Punishment
Class A	Possession of 2–4 oz. marijuana	District Attorney	1 year in custody
Class B	Possession of 0–2 oz. marijuana	District Attorney	180 days in custody
Class C	Attempted possession of less than 2 oz of marijuana	Municipal Attorney	Up to \$500 fine
Class C	Possession of drug paraphernalia	Municipal Attorney	Up to \$500 fine

To generate a baseline for assessing the impact of DA Cruzot's marijuana reforms, the Deason Center collected data about municipal police marijuana enforcement in each of Dallas County's 31 municipalities. While the Center did not evaluate marijuana enforcement patterns from other types of police departments, it did assess countywide marijuana enforcement patterns, as measured by the aggregated activity of all Dallas County police departments. Consistent with the DAO's non-prosecution policy, the Center studied only Class A and B misdemeanor marijuana possession offenses.

⁵¹ Id.

⁵² TEX. HEALTH AND SAFETY § 481.121(b)(3)–(6) (2021).

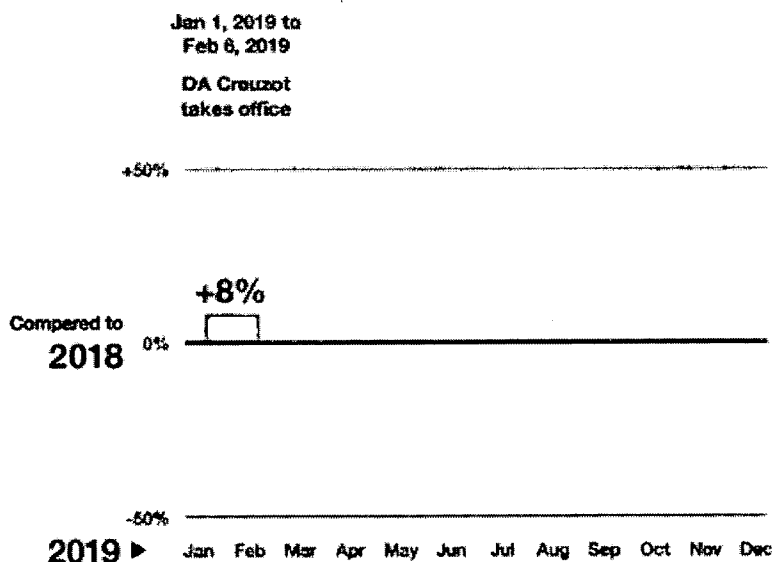
⁵³ TEX. PENAL CODE ANN. §§ 12.21–12.22.

III. DALLAS COUNTY MARIJUANA NON-PROSECUTION POLICES

A. DA Creuzot's Non-Prosecution Policy

Throughout his election campaign, DA Creuzot promised to address the staggering backlog and prosecution of low-level marijuana.⁵⁴ When he assumed office on January 1, 2019, that campaign promise had been well-publicized.⁵⁵ Yet, when he took office, there was no immediate reduction in police marijuana enforcement practices. Indeed, during the DA's first five weeks in office, police submitted 8% *more* misdemeanor marijuana referrals than they had in 2018.⁵⁶

Figure 3: Change in Referrals After DA Creuzot Took Office⁵⁷



⁵⁴ Laura Harris, Dallas Co. DA Gives Closer Look at Plans for Criminal Justice Reform, NBC DFW (May 9, 2019, 5:27 PM), <https://www.nbcdfw.com/news/local/dallas-co-da-gives-closer-look-at-plans-for-criminal-justice-reform/139936/> [<https://perma.cc/26GG-RJ7L>].

⁵⁵ Id.; see also Shawn Shinnerman, The Era of Dallas County District Attorney John Creuzot Is Almost Here, D MAGAZINE (Nov. 26, 2018, 3:10 PM), <https://www.dmagazine.com/frontburner/2018/11/the-era-of-dallas-county-district-attorney-john-creuzot-is-almost-here/> [perma.cc/3CUZ-Y27S].

⁵⁶ Pamela Metzger et al., A Dallas Project Report, Budding Change, DEASON CRIM. JUST. REFORM CTR., 15 (2021), <https://www.smu.edu/-/media/Site/Law/Deason-Center/Publications/Prosecution/DALLAS/DALLAS-Budding-Change-v1.pdf> [<https://perma.cc/5ERY-XDCZ>]. This statistic compares the marijuana referral volume across all Dallas County municipal police departments in 2018 versus 2019.

⁵⁷ Id. at 20.

1. DA Cruzot Shares His Policies with Law Enforcement

On February 7, 2019—five weeks after he took office—DA Cruzot sent all Dallas County law enforcement agencies a memorandum describing changes to the DAO’s prosecution policies.⁵⁸ He explained that:

Prosecution will be declined on misdemeanor possession of marijuana cases for first-time marijuana offenders. . . Offenses occurring in drug-free zones, involving the use or exhibition of a deadly weapon, or cases with evidence of delivery of marijuana will not be declined, regardless of first-time offender status.⁵⁹

For purposes of this policy, DA Cruzot adopted an expansive definition of “first-time” offender:

Only offenses occurring after February 7, 2019, will be considered in determining whether a person has a prior marijuana offense. For example, if a person committed offenses in 2018, or before, any of those offenses will not be counted. If an offense occurred on February 7, 2019, or thereafter, that offense will be considered for calculating prior offenses.⁶⁰

In effect, the DAO wiped the slate clean for all marijuana offenses that occurred before February 7, 2019.⁶¹

DA Cruzot acknowledged the limitations of his authority as district attorney, noting that his policies “pertain[ed] to how the DA’s Office will handle cases once submitted for prosecution,” and not to “a peace officer’s right to make a lawful arrest.”⁶² Although the non-prosecution policy was not public, some police chiefs in Dallas County openly doubled down on their anti-marijuana-reform positions.

On March 26, 2019, police chiefs from Dallas County were among “two dozen Texas police chiefs and sheriffs” who gathered at the state capitol to urge “lawmakers and the public to keep the state a bulwark against the national marijuana legalization movement.”⁶³ Steve Dye, Police Chief for Grand Prairie, urged that

⁵⁸ Letter from John Cruzot, Dall. Cnty. Dist. Att’y, to Dall. Cnty. Law Enforcement Agencies, Changes to Case Filing Policies (Feb. 7, 2019) (on file with authors) [hereinafter Cruzot Letter].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Bob Sechler, Police Officials Blast Efforts to Ease Pot Restrictions, AUSTIN-AMERICAN STATESMAN (March 26, 2019, 5:24 PM),

Texas “resist the billion-dollar pro-marijuana industry's agenda to progressively desensitize the public to this very addictive and dangerous drug.”⁶⁴ Sheriff Jim Skinner of Collin County—adjacent to Dallas County—concurred with Dye, opposing both the legalization of marijuana and the reduction of criminal penalties for marijuana possession.⁶⁵

Meanwhile, the DAO quietly began to enforce the new non-prosecution policy. Between February 7, 2019, and April 11, 2019, there was a slight but steady decline in marijuana cases that police referred to the DAO for prosecution.

2. DA Creuzot Announces His Policies to the Public

On April 11, 2019, DA Creuzot released a letter describing his new policies to the citizens of Dallas County.⁶⁶ DA Creuzot grounded his marijuana non-prosecution approach in well-documented Dallas County enforcement disparities between Black and non-Black people.

Although African Americans and people of other races use marijuana at similar rates, in Dallas County African Americans are three times more likely to be prosecuted for misdemeanor marijuana possession than are people of other races. After arrest, African Americans are assessed money bonds at a higher rate for marijuana possession and are assessed higher bond amounts than other races. African Americans are more likely to be convicted of marijuana possession once charged and are more likely to serve a jail sentence. The District Attorney must take action to end that disparity.⁶⁷

Announcing the non-prosecution policy, DA Creuzot explained that his office would “decline[] prosecution on misdemeanor possession of marijuana cases for first-time offenders whose offenses do not occur in a drug-free zone, involve the use or exhibition of a deadly weapon, or involve evidence of delivery.”⁶⁸ Repeat

<https://www.statesman.com/story/news/politics/government/2019/03/26/some-texas-police-officials-blast-efforts-to-ease-pot-restrictions/5606332007/> [perma.cc/X27L-TY4M].

⁶⁴ Id.

⁶⁵ Id. (While U. René Hall, Chief of Police for the City of Dallas did not attend, she released a statement advocating “alternatives to incarceration for smaller quantities of marijuana possession.”)

⁶⁶ Letter from John Creuzot, Dall. Cnty Dist. Att’y, to the People of Dall. Cnty. (April 11, 2019) (on file with the Deason Center).

⁶⁷ Id. (DA Creuzot also addressed the disparity in pretrial release conditions, pointing out that “African Americans are assessed money bond at a higher rate[s] for marijuana possession and are assessed higher bond amounts than other races.”).

⁶⁸ Id.

offenders would be offered a diversionary program that, “if successfully completed, will keep their record clear.”⁶⁹ DA Creuzot also announced his intention to dismiss “all pending misdemeanor marijuana cases filed before [he] took office,” so long as those cases comported with the new non-prosecution policy.⁷⁰

Local political response was swift. Dallas community activists applauded DA Creuzot’s decisions, but many local police departments fiercely (and now publicly) opposed the new policies.⁷¹ While the DA’s most hotly debated policy was the non-prosecution of retail thefts of \$750 or less of items that constituted the “necessities of life,”⁷² the DAO’s marijuana policies also stirred political backlash.

State and county politicians debated the DA’s choices in editorials and on social media.⁷³ A strong adverse reaction came from the Texas Governor, Greg Abbott, who submitted a letter to the Texas District and County Attorney’s Association on July 18, 2019.⁷⁴ The Dallas Police Association (DPA) and the Texas Municipal

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Kevin Reece, *How Store Owners, Police Agencies and Reformed Criminals Responded to Dallas DA's Reforms*, WFAA (April 12, 2019, 8:38 PM), <https://www.wfaa.com/article/news/store-owners-police-agencies-and-reformed-criminals-respond-to-dallas-das-reforms/287-1955d4e0-8feb-43d2-aa85-08fb9719ce01> [perma.cc/5887-LKY7]; Dana Branham & Sarah Sarder, *Texas Police Union Calls for Dallas DA's Removal over His Plan Not to Prosecute Certain Crimes*, THE DALL. MORNING NEWS (April 18, 2019, 10:30 PM), <https://www.dallasnews.com/news/2019/04/18/texas-police-union-calls-for-dallas-da-s-removal-over-his-plan-not-to-prosecute-certain-crimes/> [perma.cc/G3PU-4RPS]; Matt Goodman, *Gov. Greg Abbot Does Not Appear to be Happy with Da John Creuzot's Reforms*, D MAGAZINE (April 15, 2019, 12:51 PM), <https://www.dmagazine.com/politics-government/2019/04/gov-greg-abbott-does-not-appear-to-be-happy-with-da-john-creuzots-reforms/> [https://perma.cc/P9S5-AHPW].

⁷² Sarah Sarder, *Dallas DA's Plan to Give Petty Criminals a Pass Could Backfire, Police Leaders Argue*, THE DALL. MORNING NEWS (Apr. 12, 2019, 6:58 PM), <https://www.dallasnews.com/news/courts/2019/04/12/dallas-da-s-plan-to-give-petty-criminals-a-pass-could-backfire-police-leaders-argue/> [https://perma.cc/VA5S-QNPY] [hereinafter Sarder, DA’s Plan] (“[N]othing concerned them more than the decriminalization of theft of necessities worth up to \$750.”); Greg Abbott (@GregAbbott_TX), TWITTER (Apr. 14, 2019, 10:42 PM), https://twitter.com/GregAbbott_TX/status/1117634208405557248 [https://perma.cc/GS5C-US6Z] [hereinafter Greg Abbott, TWITTER] (Governor Greg Abbott tweeted that DA Creuzot was promoting socialism and “wealth redistribution by theft.”); see also Sarah Sarder, *'That's Socialism': Texas Gov. Abbott Says Dallas DA's Justice Reform Plan is 'Wealth Distribution'*, THE DALL. MORNING NEWS (Apr. 15, 2019, 2:57 PM) <https://www.dallasnews.com/news/politics/2019/04/15/that-s-socialism-texas-gov-abbott-says-dallas-da-s-justice-reform-plan-is-wealth-distribution/> [https://perma.cc/58CN-TX2L] [hereinafter Sarder, Socialism].

⁷³ See Sarder, *Socialism*, supra note 71; Greg Abbott, TWITTER, supra note 71.

⁷⁴ July 18 Letter, supra note 84. That letter was also signed by the Lieutenant Governor, the Texas Attorney General, and the Speaker of the Texas House of Representatives. Written before DA Creuzot announced the requirement that police submit a laboratory report, the Governor’s letter insisted that the state had not decriminalized marijuana and argued that courts had never required laboratory reports for marijuana possession convictions.

Police Association held a joint news conference to express their disapproval of DA Cruzot's reforms.⁷⁵ Even as the DPA conceded that the DAO's new policies would "decreas[e] the jail population [and] eas[e] the workload for police officers,"⁷⁶ local police were resistant.

Fifteen local police chiefs wrote a public letter responding to DA Cruzot's new policies. While they did not specifically reference the marijuana non-prosecution policy, they were clear in their opposition to prosecutor-led legal reform.

As the Police Chiefs of your communities, we have a legal duty to enforce the laws as written and adopted by our State [sic] lawmakers. We do not substitute our opinions in place of those you have elected to create laws, however, your local police departments always strive to be procedurally just and deploy proper discretion when enforcing the law by evaluating each circumstance on its own unique merits.⁷⁷

The letter also suggested that the DA's new policies would hinder drug rehabilitation by reducing the frequency of DA- and court-mandated treatment.

The new, unilateral policies implemented by the Dallas County District Attorney, refusing to prosecute certain crimes, hamper our abilities to evaluate each criminal offense individually to determine the best course of action for the victim, the offender, and the community as a whole. This is especially true as the policies limit the access that first-time, low level offenders (those most likely to be rehabilitated) will have to beneficial treatment, diversion, and educational programs which are regularly offered through modern county courts.⁷⁸

Finally, the letter urged continued prosecution at the municipal level.

While the Dallas County District Attorney has stated he will not prosecute many offenses at the county level, there are lesser offenses included in the prohibited conduct that are still within the jurisdiction of city municipal courts. While charging these offenses at the city level offers fewer resources in terms of diversion courts, treatment plans, community service, education/awareness, and monitored probation, our municipal

⁷⁵ Branham & Sarder, *supra* note 71.

⁷⁶ Sarder, DA's Plan, *supra* note 71.

⁷⁷ Letter from 15 Chiefs of Municipal Police Departments in Dallas, Derick Miller, Ely Reyes, Joseph Costa, Robert D. Brown, Jr., David Hale, Jeff Bryan, Steve Dye, Rick Pyle, Jeff Spivey, Charles Cato, Jimmy Spivey, Mike Broadnax, Greg Spradlin, & Anthony Henderson, to the People of the Dall. Comty. (April 23, 2019) (on file with the Deason Center).

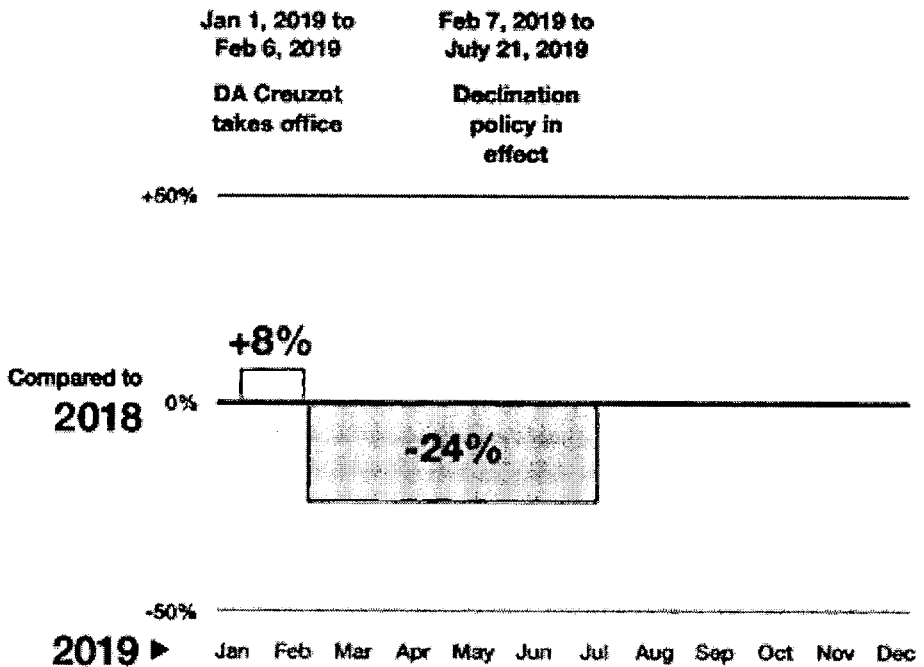
⁷⁸ *Id.*

prosecutors have assured us they will continue to accept and prosecute these cases . . .⁷⁹

For example, DeSoto Chief of Police Joseph Costa insisted that local police “have to follow state law”⁸⁰ and instructed DeSoto police “to continue to make arrests as necessary...regardless of the initiatives implemented by the District Attorney.”⁸¹ He promised that any DeSoto marijuana cases rejected by the DAO would instead be prosecuted in the DeSoto municipal court (presumably as Class C misdemeanors of possession of paraphernalia or attempted possession of marijuana).⁸²

Despite these negative responses, as discussed *infra* in Section IV, the DAO’s non-prosecution policy was associated with a significant decrease in marijuana referrals relative to the number of referrals in 2018.

Figure 4: Change in Referrals After Non-Prosecution Policy⁸³



⁷⁹ Id.

⁸⁰ Sarder, DA’s Plan, *supra* note 71.

⁸¹ Id.

⁸² Id.

⁸³ Metzger, *supra*, note 56, at 20.

B. DA Creuzot Requires that Laboratory Reports Accompany Marijuana Referrals

In the summer of 2019, the Texas legislature legalized hemp and issued a new definition of illegal cannabis, thereby throwing marijuana prosecutions statewide into chaos. The revised definitions required prosecutors and police to reconsider their approach to marijuana enforcement.

1. Texas Legalizes Hemp

Hemp and marijuana both come from the cannabis plant, which is almost entirely illegal in Texas.⁸⁴ Effective June 10, 2019, the Texas Hemp Farming Act (hereinafter referred to as the “Hemp Act”) defined cannabis and cannabis byproducts according to their chemical compositions. It defined legal cannabis (hemp) as having less than 0.3% concentration of tetrahydrocannabinol (THC), the chemical primarily responsible for the “high” associated with marijuana use.⁸⁵ Cannabis products with more than 0.3% concentration of THC remained illegal.

For decades, police officers and other witnesses had testified, under oath, that they could identify a substance as marijuana based on their past experiences and the “simple use” of their senses.⁸⁶ But after the Hemp Act, many prosecutors believed a conviction required forensic proof that a substance’s THC concentration was more than 0.3%.⁸⁷

⁸⁴ TEX. HEALTH & SAFETY CODE ANN. § 481.002(26) (2019).

⁸⁵ TEX. AGRIC. CODE ANN. § 121.001 (2019); TEX. HEALTH & SAFETY CODE ANN. § 481.002(26)(F) (2019); Cannabis (Marijuana) and Cannabinoids: What You Need to Know, NAT’L CTR. FOR COMPLEMENTARY AND INTEGRATIVE HEALTH, <https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know> [<https://perma.cc/K9SQ-7565>] (Nov. 2019) (“THC is the substance that’s primarily responsible for the effects of marijuana on a person’s mental state.”).

⁸⁶ Ex parte Owens, 515 S.W.3d 891, 899 (Tex. Crim. App. 2017).

⁸⁷ See, e.g., Jolie McCullough & Alex Samuels, This Year, Texas Passed a Law Legalizing Hemp. It also has Prosecutors Dropping Hundreds of Marijuana Cases, THE TEXAS TRIB. (July 3, 2019), <https://www.texastribune.org/2019/07/03/texas-marijuana-hemp-testing-prosecution/> [<https://perma.cc/7NLJ-EAQ7>]; Interim Update: Hemp, TEXAS DIST. AND CNTY. ATT’YS ASSOC. (June 24, 2019), <https://www.tdcaa.com/legislative/interim-update-hemp/> [<https://perma.cc/H5PQ-FE8A>] [hereinafter Interim Update: Hemp]; Letter from Greg Abbott, Governor of Tex., Dan Patrick, Lieutenant Governor of Tex., Dennis Bonnen, Speaker of the Tex. H.R., and Ken Paxton, Att’y Gen. of Tex., to Texas District and County Attorneys (July 18, 2019) (on file with authors) [hereinafter July 18 Letter] (“[L]ab tests are not required in every case”); see also Ryan Golden, Dazed & Confused: The State of Enforcement of Marijuana Offenses after the Texas Hemp Farming Act, 72 BAYLOR L. REV. 737, 759 (2020).

While some prosecutors promised to prosecute marijuana misdemeanors without regard to the new law,⁸⁸ others began to drop all marijuana cases.⁸⁹ Still, others required that police include, with each marijuana referral, a laboratory report substantiating the THC concentration of the confiscated substance.⁹⁰

Police and politicians also reacted to the Hemp Act. On July 10, 2019, the Texas Department of Public Safety (DPS)—Texas' largest statewide law enforcement agency—amended its policies to respond to the Hemp Act.⁹¹ Under the new policies, state troopers would continue to enforce marijuana-related offenses, but would issue citations to misdemeanor offenders rather than making an arrest.⁹² A DPS statement indicated that this change was necessary to facilitate marijuana enforcement if local prosecutors refused to pursue misdemeanor cases.⁹³ DPS advised all commissioned personnel that DPS crime labs did not “have the capacity to measure the THC concentration level”⁹⁴ and it would be “several months” before those labs could “definitively distinguish between hemp and marijuana.”⁹⁵ While officers were “expected to continue enforcing marijuana related offenses,” DPS seemed to instruct them to use “cite and release” procedures in lieu of arrest.⁹⁶

Laboratory tests rapidly became crucial for marijuana enforcement. But requiring laboratory proof raised severe financial and timing challenges. In 2019, tests that could measure THC concentration were scarce.⁹⁷ They were also

⁸⁸ Golden, *supra* note 87, at 746 (Galveston, Montgomery, and El Paso Counties).

⁸⁹ See McCullough & Samuels, *supra* note 87; Interim Update: Hemp, *supra* note 84.

⁹⁰ See McCullough & Samuels, *supra* note 87.

⁹¹ Memorandum from Randall Prince, Deputy Dir. of the Dept. of Public Safety, to all commissioned personnel (July 10, 2019), <https://static.texastribune.org/media/files/6bb887232ae43ab238d88d50d18b196f/DPS-citerelease2019.pdf> [<https://perma.cc/L537-CRCP>].

⁹² *Id.*

⁹³ Jolie McCullough, Texas DPS Officers Told not to Arrest in Low-level Marijuana Cases after New Hemp Law, TEX. TRIB. (Aug. 1, 2019, 4:00 PM), <https://www.texastribune.org/2019/08/01/texas-dps-marijuana-cite-and-release-hemp/> [<https://perma.cc/A2SZ-99UG>].

⁹⁴ Prince, *supra*, note 91.

⁹⁵ *Id.*

⁹⁶ *Id.* The memorandum only authorized citations for suspects who resided in the county where the offense occurred. Confusingly, the memorandum also instructed that that “[b]efore implementing this directive,” DPS divisions should “discuss custody arrests preferences with their local prosecutor and follow each prosecutors’ direction regarding whether to cite or arrest.” And in a final blow to ordinary comprehension, the memo concluded that “custody arrests should only be used when necessary: to have a violator forthcoming in court; to protect the violator or the public from injury; or when required by law.”

⁹⁷ Matt Goodman, Is the City of Dallas Ready to Loosen Marijuana Possession Charges?, D MAGAZINE (October 13, 2020, 5:25 PM), <https://www.dmagazine.com/frontburner/2020/10/is-the->

expensive, costing as much as \$275 each.⁹⁸ Austin police and DPS labs estimated it could take upwards of “eight to [twelve] months before THC concentrations can be tested.”⁹⁹ In addition to predicting dramatic delays in case processing, laboratory experts projected new equipment costs of between \$300,000 and \$500,000.¹⁰⁰

2. DA Creuzot Requires Laboratory Reports for Marijuana Referrals

In response to the Hemp Act, the DAO asserted that “[c]ircumstantial evidence is [no longer] sufficient to prove a marijuana/THC case without a lab analysis because the concentration of THC determines if the substance is illegal, and there is no way to circumstantially prove a concentration of .3% THC or greater.”¹⁰¹ Therefore, Dallas County prosecutors would reject any marijuana referrals that were submitted without “a laboratory analysis ... showing that the substance was .3% or greater THC concentration.”¹⁰² The office returned all cases with offense dates later than June 9, 2019, promising that police could resubmit those cases when (or if) they could produce a laboratory report.¹⁰³

Following the enactment of the Hemp Act and the DAO’s laboratory report policy, there was a substantial decrease in police referrals.

Figure 5: Change in Referrals After Laboratory Report Requirement¹⁰⁴

city-of-dallas-ready-to-loosen-marijuana-possession-charges [<https://perma.cc/PEZ9-8TED>]; see, e.g., McCullough & Samuels, *supra* note 87; Interim Update: Hemp, *supra* note 87; July 18 Letter, *supra* note 87 (“lab tests are ...more affordable than initial reporting indicated.”); see also Golden, *supra* note 87, at 745.

⁹⁸ Goodman, *supra* note 97; Golden, *supra* note 87, at 760.

⁹⁹ McCullough & Samuels, *supra* note 84.

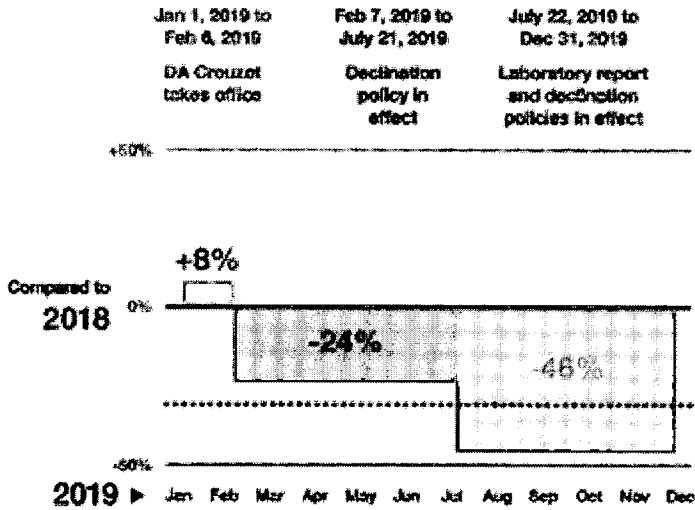
¹⁰⁰ *Id.*

¹⁰¹ Memorandum from Ellyce Lindberg, Admin. Chief of Dall. Cnty. Dist. Att’y’s Off., to Dall. Cnty Law Enf’t Agencies (July 22, 2019) (on file with authors).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Metzger, *supra*, note 56, at 20.



IV. CHANGES ASSOCIATED WITH THE MARIJUANA NON-PROSECUTION POLICY

A. Changes in the DAO’s Marijuana Possession Declination Rates

In 2019, there was a rapid and radical decrease in marijuana referrals and marijuana prosecutions. In 2018, under DA Faith Johnson, the DAO’s Intake Unit accepted almost all the marijuana possession cases sent to the office for prosecution, rejecting less than one percent of those referrals.¹⁰⁵ Trial prosecutors later offered deferred adjudications or dismissals to many defendants, thereby providing an off-ramp from the criminal process.¹⁰⁶ Ultimately, DA Johnson’s office resolved thousands of marijuana cases with conditional dismissals.

In contrast, DA Cruzot preferred front-end declinations over post-acceptance dismissals.¹⁰⁷ As a result, in 2019, the DAO’s marijuana declination rate skyrocketed to nearly 77% of low-level marijuana possession cases. Setting aside brief data anomalies in March and October of 2019, these data show steady increases in monthly marijuana declinations. By the end of 2019, the office’s declination rate was nearly 100%.¹⁰⁸ This high declination rate persisted in 2020 and 2021, when

¹⁰⁵ Data on file with authors (on file with authors).

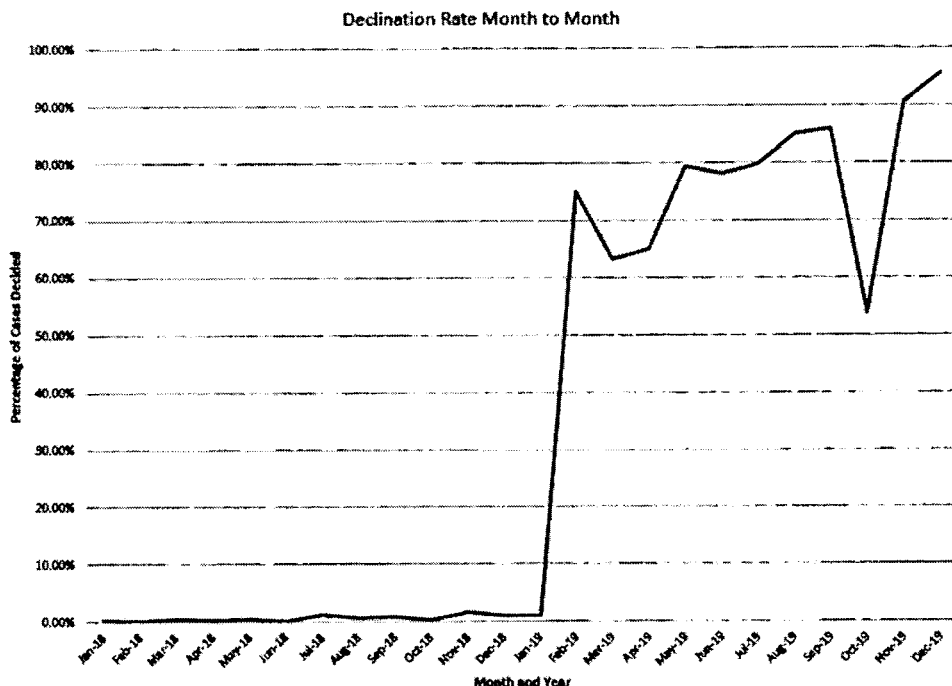
¹⁰⁶ Anonymous interview with DAO attorney (on file with author).

¹⁰⁷ Cruzot Letter, supra note 58.

¹⁰⁸ The authors investigated the sharp decrease in declinations in October 2019 and concluded that the decrease was anomalous.

intake prosecutors declined over 80% of the misdemeanor marijuana cases referred for prosecution.¹⁰⁹

Figure 6: Monthly Marijuana Declination Rates, 2018 and 2019.¹¹⁰



These changes in Dallas County marijuana prosecution occurred within the context of a statewide reduction in marijuana prosecutions following Texas’ decision to legalize hemp for industrial use.¹¹¹ As discussed above in Section II.A.1, some prosecutors responded to the Hemp Act by pledging to charge marijuana cases as before and seeking additional funding for laboratory testing.¹¹² Others, like the Dallas County District Attorney, did not. It is, therefore, important to consider whether changes in Dallas County merely reflect a statewide trend.

¹⁰⁹ Data on file with authors (on file with author).

¹¹⁰ Data on file with authors (on file with authors).

¹¹¹ Texas Industrial Hemp Program, TEX. DEPT. OF AGRIC., <https://www.texasagriculture.gov/Regulatory-Programs/Hemp> [https://perma.cc/6GNJ-35RB] (last visited Nov. 21, 2023).

¹¹² Memorandum from Greg Willis, Crim. Dist. Att’y, to Collin Cnty. Comm’rs. (Oct. 19, 2020) (on file with author).

Compared to 2018, most Texas counties prosecuted fewer Class A and B misdemeanor marijuana cases in 2019.¹¹³ However, the non-prosecution policy in Dallas was associated with a far more profound reduction than seen in other counties.

In 2018, Texas district attorneys filed 70,832 new misdemeanor marijuana possession cases.¹¹⁴ That same year, Texas county courts disposed of 73,292 marijuana possession cases, doling out 25,198 convictions, 14,397 deferred adjudications, and 26,229 dismissals.¹¹⁵ Of the 73,292 cases disposed in 2018, 17,992 included a local jail sentence.¹¹⁶

By comparison, in 2019, district attorneys statewide filed about 32% fewer (48,389) new misdemeanor marijuana possession cases.¹¹⁷ Courts also disposed of fewer cases—(69,778 cases in 2019 as opposed to 73,292 in 2018) with 18,856 convictions—a decrease of over 25%.¹¹⁸ Additionally, there were fewer deferred adjudications, with a total of 10,201 deferrals or a decrease of approximately 30%.¹¹⁹ Finally, the number of dismissals increased substantially across Texas. In 2019, Texas courts dismissed 34,243 cases—almost 31% more than they had dismissed in 2018.¹²⁰

In comparison to neighboring North Texas counties, Dallas County also saw far more dramatic decreases in its marijuana case filings—filing approximately 64% fewer cases than it had in 2018.¹²¹ The next closest county in filing reductions was Ellis County, with a decline of 37%. Tarrant County (arguably the most comparable to Dallas County), filed only 34% fewer misdemeanor marijuana possession cases compared to Dallas' reduction of 64%. And in Denton County, misdemeanor marijuana prosecutions actually increased, from 1,107 cases in 2018 to 1,136 cases in 2019.¹²²

¹¹³ COUNTY-LEVEL COURTS, MISDEMEANOR CASE ACTIVITY DETAIL JAN. 1, 2018 TO DEC. 31, 2018, TEX. OFF. OF CT. ADMIN., [https://card.txcourts.gov/ReportCriteria.aspx?ddlReportName=114&ddlReportType=4980&ddlReportPeriod=\[https://perma.cc/9EAX-6G5V\]](https://card.txcourts.gov/ReportCriteria.aspx?ddlReportName=114&ddlReportType=4980&ddlReportPeriod=[https://perma.cc/9EAX-6G5V]) (last visited Mar. 14, 2024) [hereinafter 2018 Report]; COUNTY-LEVEL COURTS, MISDEMEANOR CASE ACTIVITY DETAIL JAN. 1, 2019 TO DEC. 31, 2019, TEX. OFF. OF CT. ADMIN., [https://card.txcourts.gov/ReportCriteria.aspx?ddlReportName=114&ddlReportType=4980&ddlReportPeriod=\[https://perma.cc/9EAX-6G5V\]](https://card.txcourts.gov/ReportCriteria.aspx?ddlReportName=114&ddlReportType=4980&ddlReportPeriod=[https://perma.cc/9EAX-6G5V]) (last visited Mar. 14, 2024) [hereinafter 2019 Report]. Analysis by authors.

¹¹⁴ 2018 Report, *supra* note 113.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 2019 Report, *supra* note 113.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*; 2018 Report, *supra* note 113. Changes in new misdemeanor marijuana case filings in six neighboring counties: Dallas -64%; Collin -30%; Denton +2.6%; Ellis -37%; Kaufman -36%; Rockwall -32%; Tarrant -34%.

¹²² Zaira Perez, Misdemeanor Marijuana Cases in Denton County Down after 2019 Law Change, DENTON RECORD-CHRONICLE (Mar. 19, 2021), <https://dentonrc.com/news/misdemeanor-marijuana->

B. Changes in Police Referrals Associated with the Non-Prosecution Policy

Overall, in 2019, municipal police sent fewer misdemeanor marijuana cases for prosecutor action than they did in 2018. Although 2019 saw significant reductions in the volume of referred marijuana cases, police change was neither immediate nor uniform across Dallas County municipalities.¹²³ Additionally, racial disparity in marijuana referrals did not decline at the same rate as referral volumes. Because marijuana referral changes were inconstant across time and police departments, the authors evaluate this data at the municipal level.

1. The Data

a. Case Data

For each misdemeanor marijuana case that police referred to the DAO in 2018 and 2019, the authors gathered data about the race of the arrested person and the municipality of the arresting police department.¹²⁴ The authors analyzed both countywide data and municipal department data. Because the non-prosecution policy excluded cases occurring in a drug-free zone, involving the use or exhibition of a deadly weapon, or involving evidence of delivery, the authors removed those cases from the data set.¹²⁵

b. Data about Racial Disparity

cases-in-denton-county-down-after-2019-lawchange/%20article_41361b6c-d9c8-5a02-be71-ab4a43b0a971.html [https://perma.cc/W5MD-TCU7].

¹²³ The volume of marijuana cases captures the number of misdemeanor marijuana cases police referred to the DAO for prosecution in each time period.

¹²⁴ Case Status Reports, DALL. CNTY., <https://www.dallascounty.org/government/district-attorney/case-status.php> [https://perma.cc/EQL7-5MDG] (last visited Nov. 21, 2023). All data were taken from the Dallas County District Attorney's Office case management system. While some Dallas County municipalities cross multiple counties, the data only capture offenses allegedly committed within Dallas County.

¹²⁵ Creuzot Letter, *supra* note 58; Letter from John Creuzot, Dall. Cnty Dist. Att'y, to the people of Dall. Cnty. (April 11, 2019) (on file at the Deason Center) (All misdemeanor marijuana cases that met the policy's criteria were considered in the analysis. If a case included multiple charges, but the marijuana possession offense fit the policy criteria, the authors included the marijuana referral in their analysis).

To measure racial disparity, the authors used two measures of racial composition. First, the authors measured the percentage of people in the county or municipality who were Black or non-Black.¹²⁶ Second, the authors divided marijuana misdemeanor suspects into two categories: Black and non-Black.¹²⁷ The authors combined these race composition data with data about marijuana referrals to generate two assessments of racial disparity.

First, the authors compared the number of Black (or non-Black) people referred for prosecution to the total number of Black (or non-Black) people in the population. (Variance between the local population and the referral population is one measure of racialized disparity in marijuana enforcement.) Because Black and non-Black people use marijuana at approximately the same rate, in a non-disparate system, the relative number of Black and non-Black people referred for prosecution should reflect their presence in the general population. In other words, because the population of Dallas County was 23% Black, a racially proportionate referral of marijuana cases should have produced a suspect pool in which 23% of referrals involved Black suspects.¹²⁸

Second, the authors calculated a relative likelihood of referral statistic, which captured the likelihood that police would refer a Black person, compared to a non-Black person, for marijuana prosecution. The authors calculated this risk ratio by computing the disproportion between the number of Black people referred for prosecution and the number of non-Black people referred, using their presence in the population as a baseline.¹²⁹

¹²⁶ 2014–2018 ACS 5-Year Estimates, U.S. CENSUS BUREAU, <https://www.census.gov/data/developers/data-sets/acs-5year/2018.html> [<https://perma.cc/5P75-HTDJ>] (Dec. 8, 2021). County and city-level population and demographic data came from the United States Census Bureau’s 2018 American Community Survey (ACS). The Census Bureau advises researchers to use 1-year ACS population estimates when studying changes over time. However, 1-year estimates are less accurate and have large margins of error. This article uses the 5-year 2018 ACS to quantify populations and demographics to avoid misstating the size and direction of changes in referral disparities. City population data reflect the total population of each Dallas County municipality, regardless of how many county boundaries each city crosses.

¹²⁷ Because of the way Dallas police and prosecutors captured racial and ethnicity information, the authors were unable to break down the Non-Black group into its component parts of Asian American, Hispanic, Pacific Islander, White, and other racial groups. The authors used the DAO’s records to categorize suspects as “Black” or “non-Black”.

¹²⁸ 2015–2019 ACS 5-Year Estimates, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/technical-documentation/table-and-geography-changes/2019/5-year.html> [<https://perma.cc/ET3U-WJBF>] (Dec. 8, 2021).

¹²⁹ See generally Erik J. Girvan et al., Tail, Tusk, and Trunk: What Different Metrics Reveal About Racial Disproportionality in School Discipline, 54 *EDUC. PSYCH.* 40 (2019); Jessika H. Bottiani, et al., Are We Moving the Needle on Racial Disproportionality? Measurement Challenges in Evaluating School Discipline Reform, 60 *AM. EDUC. RSCH. J.* 293 (2022) (Risk ratios are the most commonly accepted and easily digestible measure of racial disproportionality. The authors considered

To derive this number, the authors divided the number of Black and non-Black people referred for prosecution by the total number of Black and non-Black people in the population. This calculation quantifies the “risk” of referral for each group. To compare the relative referral risks, the authors then divided the Black group’s risk by the risk of the non-Black group. The result is a ratio between the risks that police would refer members of the Black and non-Black groups for prosecution.

If police had arrested and referred Black and non-Black people at rates proportionate to their presence in the general population, the relative likelihood of referral would have been “1.” Any number above “1” would reflect a disproportionate likelihood of marijuana referral for Black people. For example, a risk ratio of “2” would mean that a Black person faced twice the risk of referral for prosecution than a non-Black person, given the racial composition of the general population.

2. Overall Changes in Case Volumes and Racial Disparity

a. Baseline data from 2018

In 2018, police sent 6,652 misdemeanor marijuana possession cases to the DA’s Office for prosecution. On average, Dallas County intake prosecutors reviewed 554 marijuana cases monthly.

Although the racial composition of the Dallas County population was approximately 23% Black,¹³⁰ police accused Black people in 54% of the cases they referred for prosecution. Black people were thus substantially overrepresented among 2018 marijuana referrals. Calculating the relative risk of referral for Black and non-Black people yields a risk ratio of “4.” In other words, police in Dallas County were four times more likely to refer a Black person than a non-Black person for prosecution after factoring in their prevalence in the county population generally.

b. Changes in 2019

Throughout his election campaign, DA Cruzot promised to reduce the prosecution of low-level marijuana cases.¹³¹ Despite this well-publicized campaign

the metrics proposed in these articles and determined that, although risk ratios have analytic limitations, they were the best choice for this study).

¹³⁰ 2014–2018 ACS 5-Year Estimates, *supra* note 121. Racial composition measures the percentage of people in the county or municipality population identified as Black or non-Black, using 2018 United States Census Bureau American Community Survey 5-year estimates.

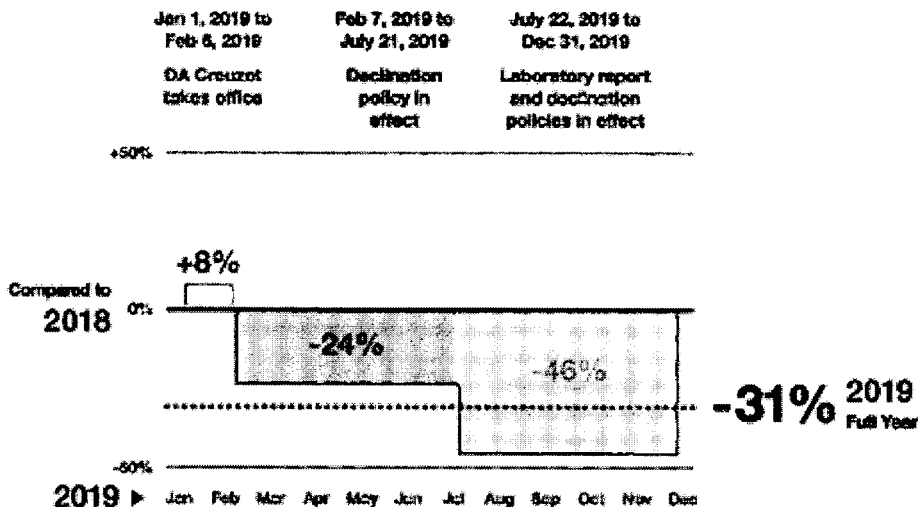
¹³¹ Shinnerman, *supra* note 55; Cruzot, *Our Mission is Working*, *supra* note 2; Farah Stockman, How ‘End Mass Incarceration’ Became a Slogan for D.A. Candidates, *N.Y. TIMES* (Oct. 25, 2018),

commitment, DA Creuzot’s first five weeks in office were not associated with any reduction in marijuana arrests or case filings by police agencies.¹³² Instead, compared to 2018, police referred 8% more misdemeanor marijuana cases for prosecution countywide.

However, after DA Creuzot released his written non-prosecution policy—first to law enforcement and then to the public—marijuana misdemeanor referrals decreased.¹³³ During the first six months of the non-prosecution policy’s implementation, police referred 24% fewer marijuana cases for prosecution than they did in 2018. After the legalization of hemp and DA Creuzot’s laboratory test requirement, police filings dropped further, producing a 46% decrease in marijuana referral volume between July 2019 and the end of the year. This reduction was nearly twice as large as the reduction associated with the February non-prosecution policy.

Overall, across 2019, police sent Dallas County prosecutors only 4,610 marijuana possession cases—31% fewer than the year before. As a result, the DAO’s marijuana case review burden dropped to about 384 cases per month.

Figure 7: Changes in Dallas County Marijuana Referrals, 2018 to 2019¹³⁴



Although police referred 31% fewer cases in 2019 than they had in 2018, their marijuana misdemeanor enforcement was not fairer. While Black and non-Black people benefitted from the changes associated with the non-prosecution policy,

<https://www.nytimes.com/2018/10/25/us/texas-district-attorney-race-mass-incarceration.html> [<https://perma.cc/WNL2-LQDA>].

¹³² Metzger, *supra* note 55, at 15.

¹³³ Creuzot Letter, *supra* note 56; Creuzot, *Our Mission is Working*, *supra* note 2.

¹³⁴ Metzger, *supra*, note 56, at 20.

Black people were even more overrepresented in the cases that police submitted for prosecution. In 2019, police accused Black people in a greater proportion (56%) of Dallas County marijuana referrals than in 2018 (54%). As a result, in 2019, Black people in Dallas County were 4.4 times more likely than non-Black people to face a referral for marijuana possession prosecution. This change was an increase of 10% over their relative likelihood of referral in 2018.

3. A Deeper Dive into Variations in Municipal Police Department Referrals

Compared to 2018, in 2019 almost all municipal police agencies in Dallas County reduced their marijuana possession referrals by at least 11%. However, there was wide variation in the timing and the degree of those reductions.

a. Inverse Relationship Between High Volumes in 2018 and Significant Reductions in 2019

Among the municipal police departments that reduced their number of marijuana and referrals, an inverse relationship existed between the volume of their 2018 referrals and the degree of their 2019 reductions. More than 80% of marijuana cases referred to the DAO originated from municipal police in just six places—the City of Dallas, Garland, Grand Prairie, Irving, Mesquite, and Richardson. Yet, these six cities collectively produced the smallest percentage of reductions in 2019 marijuana referrals.

Seventeen other municipal police departments accounted for only 19% of 2018 referrals.¹³⁵ Yet, compared to the six larger departments, collectively, these small departments had twice the reduction in their 2019 referrals. The smaller cities reduced their marijuana arrests by 55%, while arrests in the six largest cities decreased by only 29%.

¹³⁵ The 17 small Dallas County municipal police departments include Addison, Balch Springs, Carrollton, Cedar Hill, Coppell, DeSoto, Duncanville, Farmers Branch, Glenn Heights, Highland Park, Hutchins, Lancaster, Rowlett, Sachse, Seagoville, University Park, and Wilmer.

Figure 8: Referrals Decreased in Seventeen Small Cities¹³⁶

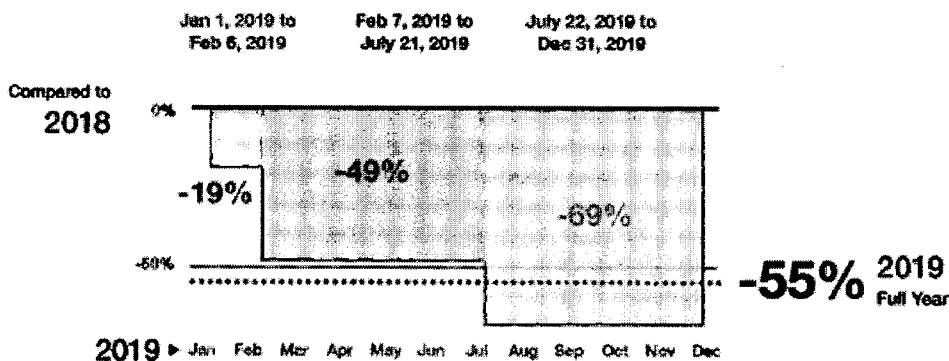
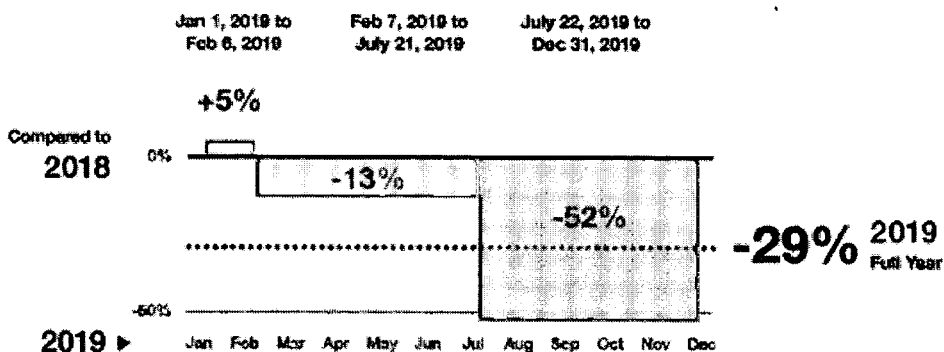


Figure 9: Referrals Decreased in Six Large Cities¹³⁷



b. Six Large Municipalities: Variation in Change in Referrals Associated with the DAO’s Policies

Overall, in 2019, the six largest municipal police departments in Dallas County reduced their marijuana possession referrals. However, neither the timing nor the degree of change was uniform across departments. Of the six departments, only two—Irving and Richardson—actually decreased their number of marijuana referrals immediately after DA Cruzot took office. The remaining four municipal

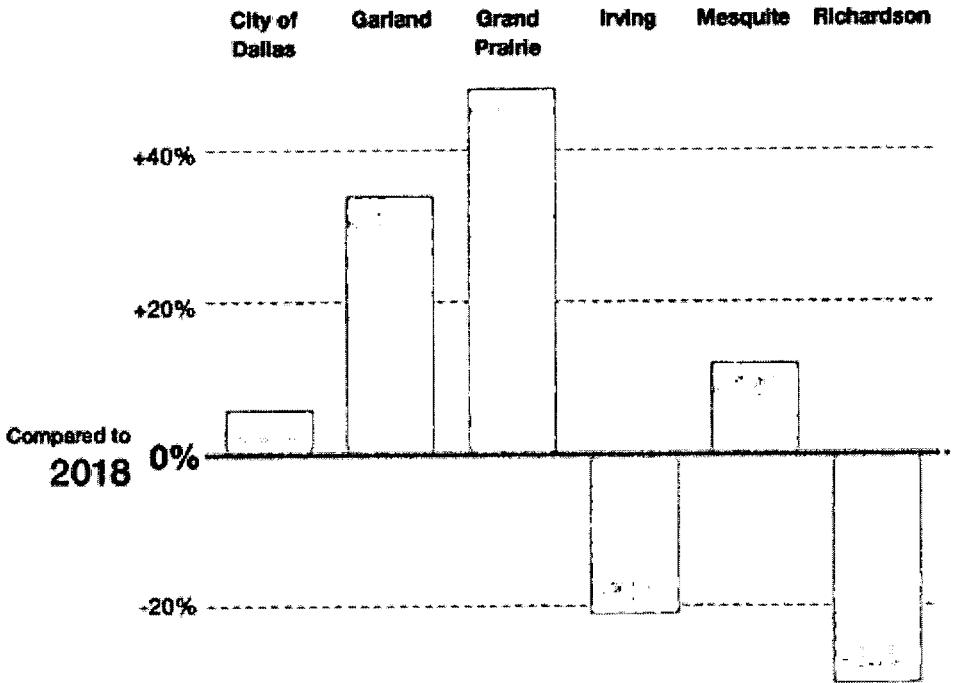
¹³⁶ Metzger, supra, note 56, at 29.

¹³⁷ Metzger, supra, note 56, at 29.

departments experienced increases in referrals, ranging from a modest 6% increase in the City of Dallas to a 48% increase in Grand Prairie.

This outcome is not entirely surprising—many of the police chiefs (including the chief of the Grand Prairie police department) explicitly stated that they would not change their marijuana referral policies.¹³⁸

Figure 10: Referrals During First Five Weeks After DA Creuzot Took Office (January 1 – February 6, 2019, compared to 2018)¹³⁹

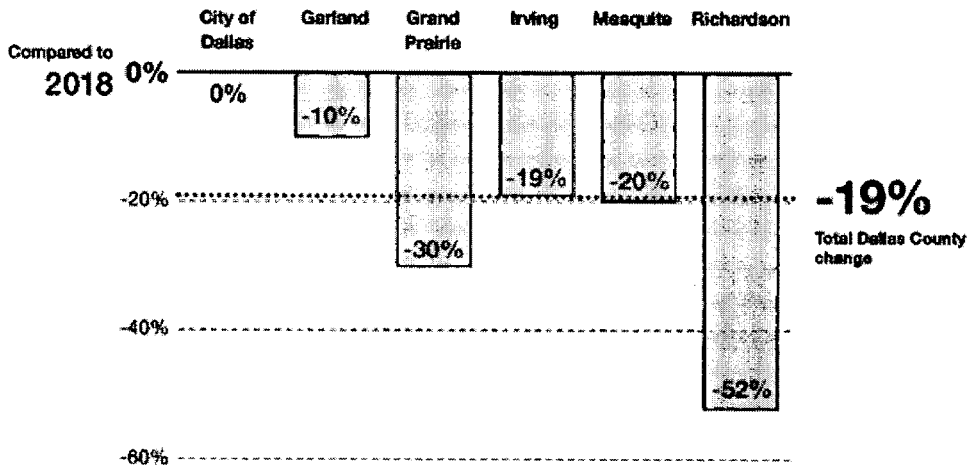


¹³⁸ Sechler, supra note 63.

¹³⁹ Metzger, supra, note 56, at 33.

During the first five weeks of DA Creuzot’s term—before any new policy had been announced, there was no consistent trend in changes in marijuana referrals. In February however, after DA Creuzot provided police with his new marijuana policy, all six municipal police departments changed their referral practices. In five of the six departments, referrals decreased—ranging from 10% in Garland to 52% in Richardson. Four of the six departments showed modest decreases in volume after DA Creuzot informed them of his plans for marijuana possession offenses. Only one large department—the City of Dallas—showed no change in the number of referred arrests, as compared to 2018. In short, between the announcement of the non-prosecution policy to police and the announcement of DA Creuzot’s second laboratory report requirement, only the City of Dallas maintained a referral load comparable to the previous year.

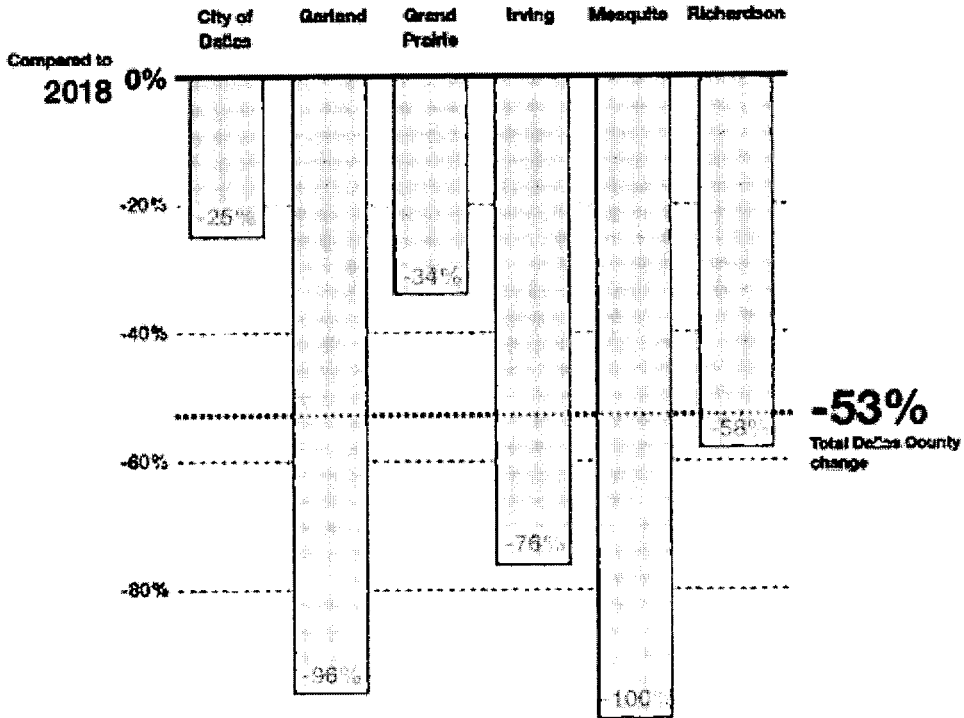
Figure 11: Referrals After Announcement of Non-Prosecution Policy (February 7 – July 21, 2019, compared to 2018)¹⁴⁰



After the enactment of the Texas Hemp Law and the announcement that DA Creuzot would require laboratory reports, there were substantial changes in how Dallas County police handled marijuana possession offenses. Two departments—Garland and Mesquite—all but eliminated marijuana possession referrals. The other municipal departments drastically changed their arrest patterns, producing reductions that ranged from a 25% decrease in the City of Dallas to a 76% decrease in Irving.

¹⁴⁰ Metzger, *supra*, note 56, at 34.

Figure 12: Referrals After Announcement of Laboratory Report Requirement (July 22 – December 31, 2019, compared to 2018)¹⁴¹



c. Six Large Municipalities: Variation in Racial Disparity Associated with the DAO’s Policies

To compare departmental changes in racial disparity, the authors maintained their focus on the six largest municipalities.¹⁴² Before DA Cruzot adopted his marijuana policies, Black people were overrepresented in marijuana referrals in all six large police departments. In 2018, Black people comprised between 10% (Richardson) and 26% (Mesquite) of each municipality’s general population.¹⁴³ Yet, police accused Black people in between 34% (Irving) and 64% (City of Dallas) of their marijuana referrals.

In 2019, each of the six large municipal police departments sent far fewer marijuana cases to the DAO. However, this reduction in case volumes did not

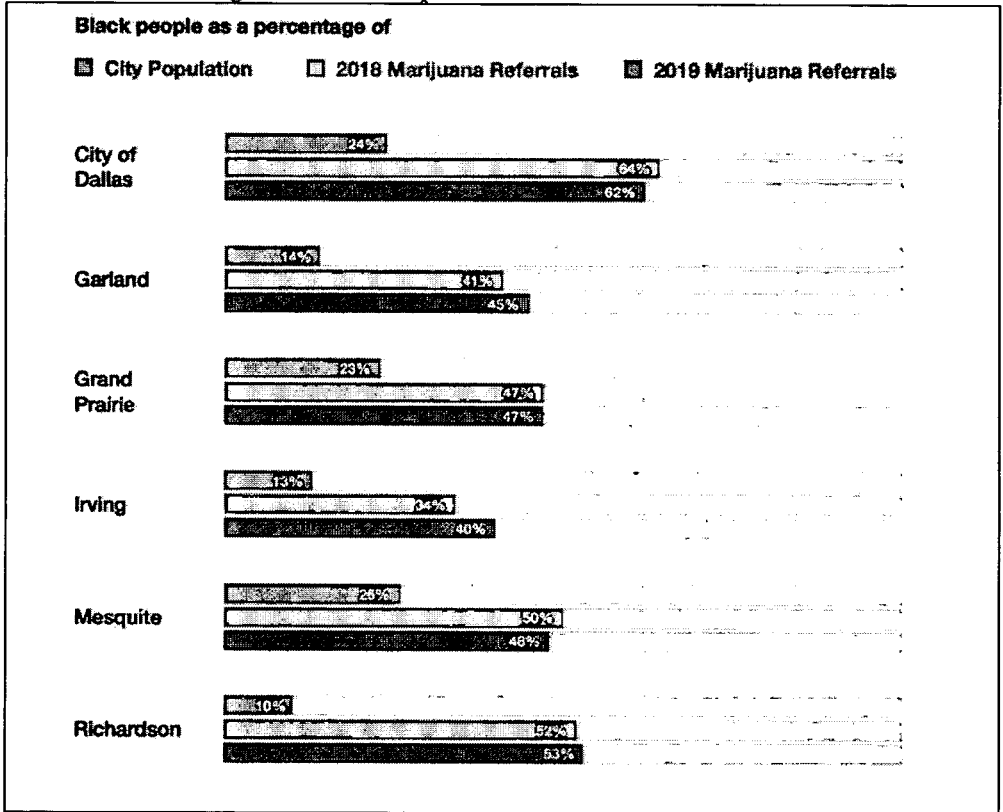
¹⁴¹ Metzger, supra, note 56, at 35.

¹⁴² The smaller municipalities had case volumes too small to use for conclusions about risk ratios.

¹⁴³ 5-Year Estimates, supra note 40.

uniformly reduce racial disparity. In 2019, the racial breakdown of marijuana referrals became more equitable in only two large cities—the City of Dallas and Mesquite. In three cities—Garland, Irving, and Richardson—the percentage of police referrals involving Black people increased. Only the Grand Prairie police department maintained a consistent proportion of Black referrals.

Figure 13: Comparing the Percentage of Black People in the Population to the Percentage of Black People that in Police Referrals 2018–2019¹⁴⁴

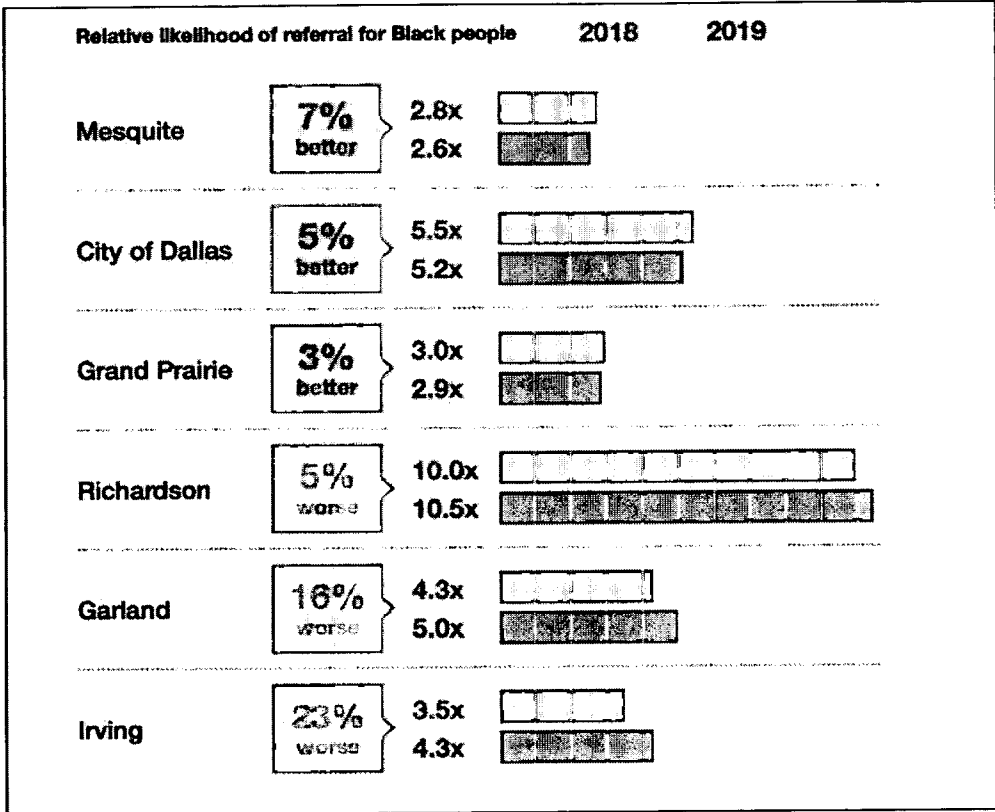


Moreover, the relative likelihood of referral between Black and non-Black people did not improve. Across the six cities, Black people were still at least twice as likely to be referred for prosecution for low-level marijuana possession as compared to their non-Black neighbors. In some cities—Richardson, Garland, and Irving—a Black person’s relative risk of referral increased. In Richardson, Black

¹⁴⁴ Smiegocki, V. M. et al., Fewer, Not Fairer, THE DALLAS PROJECT, DEASON CRIM. JUST. REFORM CTR. 17 (November 2021), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1006&context=deasoncenter> [<https://perma.cc/76EQ-KGCC>].

people remained over ten times more likely to be referred for prosecution than non-Black people.

Figure 14: Relative Likelihood of Referral for Black People, 2018–2019¹⁴⁵



V. LESSONS LEARNED FROM THE DALLAS EXPERIMENT

A. A Model for Reform Implementation

In theory, elected district attorneys exercise almost exclusive control over the cases that their offices prosecute. Properly executed, their charging policies can dramatically, unilaterally, and immediately change the nature of their local criminal court system. But prosecutors’ offices, like other large bureaucracies, can be

¹⁴⁵ Id. at 18.

resistant to change.¹⁴⁶ Reforming policies to keep more defendants out of the criminal legal system may contradict long-held beliefs about the role of the prosecutor.¹⁴⁷ Further, many well-intentioned DAs fall victim to ambiguous policies or breakdowns in communication that undermine their efforts at meaningful reform.¹⁴⁸

The Dallas County District Attorney's Office employs approximately 280 attorneys working within 14 units in a busy metropolitan area.¹⁴⁹ Just 19 lawyers make most of the office's charging decisions.¹⁵⁰ These veteran prosecutor staff at the Intake Unit that accepts or declines most new cases and takes felony cases to the grand jury.

For years, the Intake Unit routinely accepted thousands of police requests to prosecute low-level marijuana misdemeanors. But in a matter of months, DA Cruzot shifted that prosecutorial paradigm. What accounts for his success?

The answer cannot lie in his campaign promises. Long before DA Cruzot took office, Dallas County police and prosecutors knew that he intended to eliminate most misdemeanor marijuana prosecutions. On the campaign trail, DA Cruzot had repeatedly promised non-prosecution of marijuana misdemeanors.¹⁵¹ But during the 37 days after DA Cruzot took office, prosecutors in the Intake Unit declined only 5 of the 395 marijuana cases submitted to them or approximately 1%.

However, once DA Cruzot announced his policy, intake practices changed dramatically. Thirty-seven days after the DA announced the policy, intake prosecutors had declined 66% of misdemeanor marijuana possession cases. The authors hypothesize that three factors account for this rapid success.

First, former DA Faith Johnson's administration had laid a foundation for successful marijuana reform. Her office encouraged the implementation of the City of Dallas' cite-and-release program for Class A and B marijuana offenses.¹⁵²

¹⁴⁶ See generally Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403 (2023) (discussing resistance experience by elected progressive prosecutors from line prosecutors within their offices).

¹⁴⁷ Rebecca Richardson & Besiki Luka Kutateladze, *Tempering Expectations: A Qualitative Study of Prosecutorial Reform*, 58 J. RSCH. CRIME DELINQ. 41, 45–46, 54 (2021).

¹⁴⁸ *Id.* at 59–62.

¹⁴⁹ E-mail from Marsha Edwards, Dir. of Special Programs, Dall. Dist. Att'y's Off. to Victoria Smiegocki, Rsch. Assoc., Deason Crim. Just. Reform Ctr. (Feb. 24, 2022, 08:03) (on file with author).

¹⁵⁰ *Id.*

¹⁵¹ Harris, *supra* note 54; Tasha Tsiaperas, *Democrat John Cruzot Wins in Race for Dallas DA Against GOP Appointee*, THE DALL. MORNING NEWS (Nov. 6, 2018, 10:53 PM), <https://www.dallasnews.com/news/2018/11/07/democrat-john-cruzot-wins-in-race-for-dallas-da-against-gop-appointee/> [<https://perma.cc/XA8U-RA6V>]; Shinnerman, *supra* note 55.

¹⁵² Naomi Martin, *Now if You're Caught with Weed in Dallas, You Won't Go Directly to Jail*, THE DALL. MORNING NEWS (Oct. 17, 2017, 1:17 PM)

Additionally, her internal policies promoted alternative prosecutorial approaches to marijuana enforcement. Although her office accepted thousands of marijuana prosecutions, it also dismissed thousands of those cases through a conditional dismissal program.¹⁵³

Second, DA Creuzot built consensus around his formal, written marijuana policies. The DA developed these policies in consultation with prosecutors in the Intake Unit. The DA committed his policies to writing and disseminated them to Dallas County police agencies. Simultaneously, DA Creuzot shared his policies with the entire DAO staff, including the Intake Unit (which was most affected by the change).¹⁵⁴

Clearly, putting the policy in writing made a difference for some prosecutors. Certainly, written policies can limit prosecutors' discretion to deviate from office policies.¹⁵⁵ As one explained, "your expectations are certainly clearer when you have something written . . . it's critical for law enforcement, for us, for the defense bar, for the baby misdemeanor prosecutors in court, just for everyone. It gives you guidance."¹⁵⁶

Communication was also critical.¹⁵⁷ To clarify policies and to prevent erroneous interpretations, DA Creuzot held met with prosecutors and encouraged them to ask questions about the marijuana policies.¹⁵⁸ If attorneys had questions when applying the policy, they were encouraged to ask for DA Creuzot's interpretation. Additionally, after DA Creuzot sent the non-prosecution policy to staff, some of the Intake Unit staff met with DA Creuzot to discuss recurring questions and determine

<https://www.dallasnews.com/news/2017/10/17/now-if-you-re-caught-with-weed-in-dallas-you-won-t-go-directly-to-jail/>; anonymous interview with DAO attorney, *supra* note 106.

¹⁵³ Anonymous interview with DAO attorney, *supra* note 106.

¹⁵⁴ *Id.*

¹⁵⁵ Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 *GEO. IMMIGR. L.J.* 141, 186 (2021).

¹⁵⁶ *Id.*

¹⁵⁷ Compare E. Rely Vilciã et al., *Challenges to Bail Reform in the Era of Progressive Prosecution: Lessons from Philadelphia*, Presentation at the American Society of Criminology (2023); Jeff Ward et al., *What are the Policy Goals of Progressive Prosecution? Views from Internal and External Stakeholders*, Presentation at the American Society of Criminology (2023); Jesse Brey et al., *Progressive Prosecution and Inter-Organizational Relationships*, Presentation at the American Society of Criminology (2023); E. Rely Vilciã, *Advances in Research of Prosecutor's Offices: Lessons from Interviews with DAO Staff*. *Innovations in Criminal Justice: The 2023 Quattrone Center Spring Symposium at the University of Pennsylvania* (2023) (Researchers interviewed prosecutors within the Philadelphia District Attorney's Office who cited lack of communication—among other factors—as contributing to the dysfunction between their office and judges, police, external stakeholders, etc., resulting in hindered policy implementations.)

¹⁵⁸ Anonymous interview with DAO attorney, *supra* note 106.

bright line rules.¹⁵⁹ As one interviewee explained, this steady flow of information meant that DA Creuzot's policies were well-received by the staff—the policies “made sense” to them.¹⁶⁰

Finally, the DAO used a “gatekeeper” approach to policy implementation. While attorneys in the Intake Unit shared responsibility for reviewing new cases, the office eventually assigned one senior prosecutor to review all marijuana misdemeanor cases.¹⁶¹ By funneling marijuana case review to this individual, DA Creuzot eliminated the risk that different attorneys might apply his policy in different ways or reach different conclusions about similar cases. So, while the new policies had widespread support from DAO staff, to ensure their consistent application, the DAO consolidated implementation responsibility in only one person.

B. Prosecutor-Led Drug Reform Cannot Eliminate Arrests or their Punitive Consequences

As discussed earlier, misdemeanor arrests have consequences, regardless of case disposition.¹⁶² First, there is the deprivation of liberty, which is theoretically justified by a finding of probable cause.¹⁶³ Next, there are the collateral consequences of an arrest: permanent arrest records that are accessible to the police and others, violations of probation or parole (if the police arrest a person who is under court supervision), the suspension of driver's and occupational licenses, civil asset forfeiture, bars on public benefits, and more.¹⁶⁴

Similarly, pretrial detention is effectively a punishment without an adjudication. Following arrest, an accused person is booked into jail and held, at least initially, for their first appearance before a judicial officer, the setting of bond, and determination of pretrial conditions.¹⁶⁵ If their first appearance occurs soon after arrest, the accused may be spared the onerous consequences of lengthy pretrial detention. However, if

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Anonymous interview with DAO attorney, *supra* note 106.

¹⁶² Roberts, *supra* note 17, at 991 (citing Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for Police*, 86 GEO. WASH. L. REV. 1525, 1530 (2018)).

¹⁶³ See Natapoff, *supra* note 11, at 1331 (a growing volume of literature indicates that police routinely arrest people for reasons other than probable cause); see also Natapoff, *supra* note 9, at 1064.

¹⁶⁴ Roberts, *supra* note 17 at 997–998. Professor Roberts expands this litany to include privately imposed employment consequences such as refusals to hire, disciplinary actions, suspensions, reassignments, and terminations.

¹⁶⁵ See generally Deason Center research and publications regarding the crisis of initial appearance.

the criminal legal system delays these preliminary steps, or if the accused cannot make bond, there may be irreparable harm to the accused, their family, and their defense,¹⁶⁶ and defendants can remain in pretrial custody for years.¹⁶⁷

Prosecutors cannot singlehandedly eliminate these consequences. In Dallas County, the DAO helped thousands of people who had been arrested for marijuana possession avoid long-term entanglement in the criminal legal system. Yet, the office could neither prevent their arrest for marijuana possession nor eliminate the consequences of that arrest. Perhaps as a result, several cities and counties have instituted cite-and-release policies, whereby police give suspects a summons to appear, rather arrest them.¹⁶⁸ Elsewhere, governments have simply instructed local police not to issue citations or make arrests for misdemeanor quantities of marijuana.¹⁶⁹

C. Police Non-Enforcement May Be the Most Effective Way to Reduce Racial Disparity

In addition to underscoring the limited power prosecutors have over arrests and their consequences, the Dallas experiment also suggests that police non-enforcement may be more effective at reducing racial disparity than prosecutorial declination policies. An inquiry that goes beyond the risk ratio calculations described in Section IVB1b illustrates this concept.

Because risk ratios are derived by comparison to annual population data, they cannot show incremental changes that occur over shorter time periods. Therefore, risk ratio data about the relative likelihood of referral will not capture significant changes in volume that occur during some fraction of the year. Indeed, in the cities of Garland and Mesquite, the risk ratio calculations provide misleading, albeit technically accurate, data.

As calculated annually, in 2019, Black people in Garland and Mesquite were 5.0 (Garland) and 2.6 (Mesquite) times more likely to be referred to the DAO for misdemeanor marijuana prosecution. But, by the end of 2019, both Garland and Mesquite had nearly stopped sending marijuana possession cases for prosecutor review. In the last half of 2019, Garland and Mesquite referred only 7 and 24 people,

¹⁶⁶ Pamela R. Metzger & Janet C. Hoeffel, *Criminal (Dis)appearance*, 88 GEO. WASH. L. REV. 392, 406–08 (discussing the harms experienced by pretrial detainees); see also Natapoff, *supra* note 11, at 1322–23 (discussing overcrowding, violence, and the spread of communicable diseases).

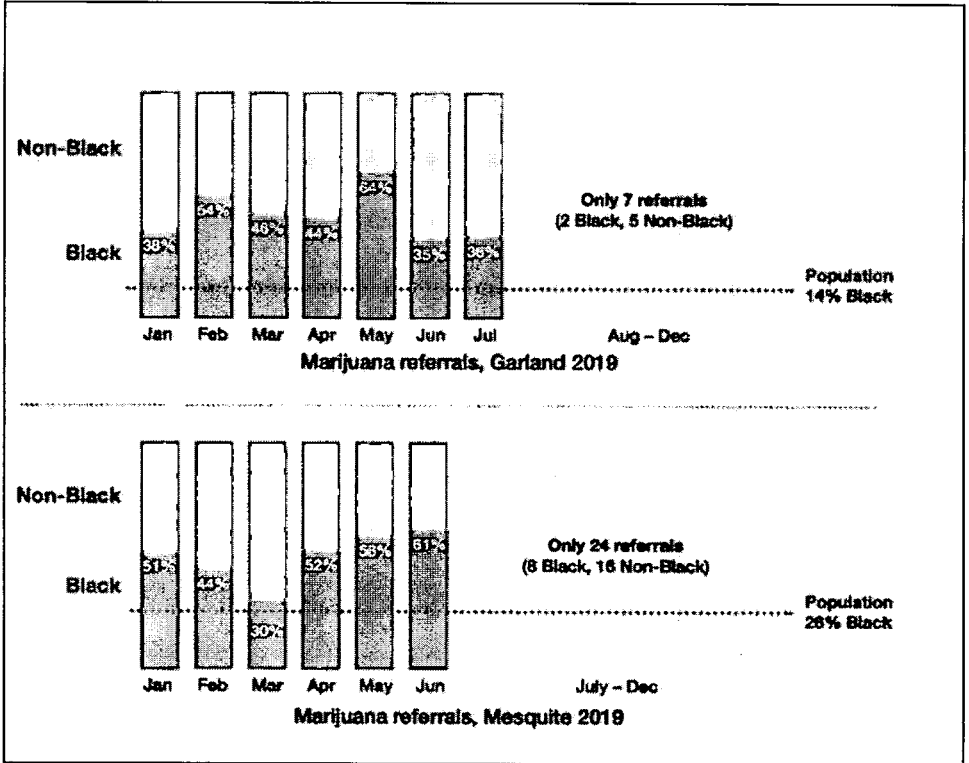
¹⁶⁷ Natapoff, *supra* note 11, at 1321.

¹⁶⁸ Texas Local Decriminalization, NOMRL, <https://nomrl.org/laws/local-decriminalization/texas-local-decriminalization/> [<https://perma.cc/MF3C-AGFR>] (last visited Sept. 17, 2023) (San Antonio, Cedar Park, Dallas, El Paso, Houston, Hays County, Plano County, and Williamson County).

¹⁶⁹ *Id.* (Austin, Denton, Elgin, Killeen, San Marcos).

respectively, for prosecution. By getting to (almost) zero, these police departments virtually eliminated racial disparity in their marijuana case referrals.¹⁷⁰ But these were policing decisions—far beyond the control of the DAO.

Figure 15: Monthly Marijuana Referrals by Race, in Garland and Mesquite, 2019¹⁷¹



VI. THE PENDULUM SWINGS

A. Texas Legislative Backlash against Non-Prosecution Policies in Dallas and Beyond

When he released his non-prosecution policy, DA Cruzot experienced some pushback from police associations and individual agencies.¹⁷² However, this

¹⁷⁰ The relative presence of Black people in both city’s July–December case data still exceeded their presence in the overall population. However, the sample size was too small to allow meaningful statistical analysis.

¹⁷¹ Smiegocki, *supra* note 144, at 23.

¹⁷² Cruzot Letter, *supra* note 58; Cruzot, *Our Mission is Working*, *supra* note 2.

discontent did not result in any effort to recall or replace DA Creuzot.¹⁷³ Indeed, in the November 2022 district attorney election,¹⁷⁴ DA Creuzot defeated former Dallas County District Attorney Faith Johnson, whose platform promised to undo some of Mr. Creuzot's policies.¹⁷⁵ But a larger political effort to constrain prosecutorial discretion ultimately ended DA Creuzot's marijuana reforms.

In 2022, several prosecutors—including DA Creuzot—announced non-enforcement policies related to the criminalization of abortion¹⁷⁶ and gender-affirming care for transgender children.¹⁷⁷ In January 2023, as the Texas Legislature convened its 88th session, some legislators sought to curtail these “rogue” district attorneys.¹⁷⁸ Their exercise of prosecutorial discretion proved to be more than conservative activists and Republican lawmakers could stomach (a trend seen elsewhere in the country).¹⁷⁹ Some Texas legislators proposed statutes that would

¹⁷³ See Krista M. Torralva, Dallas County District Attorney John Creuzot, Faith Johnson Rematch for Top Prosecutor, *THE DALL. MORNING NEWS* (Nov. 2, 2022, 8:30 AM), <https://www.dallasnews.com/news/politics/2022/11/02/dallas-county-district-attorney-john-creuzot-faith-johnson-rematch-for-top-prosecutor/> [<https://perma.cc/8M7F-5MA6>] (DA Creuzot did discuss rolling back his policy concerning misdemeanor theft if reelected).

¹⁷⁴ Krista M. Torralva, Dallas County District Attorney John Creuzot Defeats Faith Johnson, *THE DALL. MORNING NEWS* (Nov. 9, 2022, 9:02 AM), <https://www.dallasnews.com/news/elections/2022/11/08/dallas-county-district-attorney-john-creuzot-faith-johnson-face-off-again/> [<https://perma.cc/7D27-JW9U>].

¹⁷⁵ *Id.*; Torralva, *supra* note 175.

¹⁷⁶ Zoë Richards, Dozens of Elected Prosecutors Say They Will Refuse to Prosecute Abortion Care, *NBC NEWS* (June 24, 2022, 10:38 PM), <https://www.nbcnews.com/politics/politics-news/dozens-elected-prosecutors-say-will-refuse-prosecute-abortion-care-rcna35305> [<https://perma.cc/5ST7-7FEB>].

¹⁷⁷ Julián Aguilar, Local District and County Attorneys Push Back Against Texas Directive on Transgender Medical Care, *KERA NEWS* (Feb. 24, 2022, 4:24 PM), <https://www.keranews.org/texas-news/2022-02-24/local-district-and-county-attorneys-push-back-against-texas-directive-on-transgender-medical-care> [<https://perma.cc/X4BY-3NKA>].

¹⁷⁸ Krista M. Torralva, Texas Republicans Want to Rein in ‘Rogue’ Prosecutors like Dallas County DA John Creuzot, *DALL. MORNING NEWS* (Jan. 19, 2023, 5:23 PM), <https://www.dallasnews.com/news/politics/2023/01/19/texas-republicans-want-to-rein-in-rogue-prosecutors-like-dallas-county-da-john-creuzot/> [<https://perma.cc/HMA9-KQE2>].

¹⁷⁹ Alexandra Berzon & Ken Bensinger, Inside Ron DeSantis’s Politicized Removal of an Elected Prosecutor, *N.Y. TIMES* (Mar. 11, 2023), <https://www.nytimes.com/2023/03/11/us/politics/desantis-andrew-warren-liberal-prosecutor.html> [<https://perma.cc/U8N2-L2M2>]; House Votes to Impeach Philadelphia DA Larry Krasner, *PA. HOUSE REPUBLICAN CAUCUS*, <https://www.pahousegop.com/phillycrime> [<https://perma.cc/S4XK-287Y>] (last visited Sept. 17, 2023); Bill Melugin, Prosecutors’ Union Files Civil Lawsuit over Gascón’s New Directives, *FOX 11 L.A.* (Dec. 30, 2020, 11:13 AM), <https://www.foxla.com/news/prosecutors-union-files-civil-lawsuit-over-gascon-new-directives> [<https://perma.cc/Q4E5-98X3>]; Rachel Denny Clow & Bryan Hofmann, Petition Filed Seeking Removal of Nueces County District Attorney Mark Gonzalez, *KRIS 6 NEWS CORPUS CHRISTI* (Jan. 25, 2023, 2:41 PM), <https://www.kristv.com/news/6->

remove elected prosecutors for “official misconduct,”¹⁸⁰ while others proposed an oversight committee to investigate elected prosecutors and file petitions for their removal.¹⁸¹

The only successful bill—House Bill 17 (HB 17)—proposed amending the Local Government Code’s definition of “official misconduct” warranting removal from office.¹⁸² Under this law, an elected district attorney engages in official misconduct if they adopt or enforce a policy of non-prosecution, or instruct law enforcement not to arrest people suspected of committing “a class or type of offense under state law.”¹⁸³ This provision effectively outlawed discretionary non-prosecution policies, including DA Creuzot’s marijuana declination policy.¹⁸⁴

Responding to HB17, on August 18, 2023, DA Creuzot released a new policy:

Going forward, the Dallas County Criminal District Attorney’s Office will, consistent with the law, conduct an individual review of each case filed with our office. My staff will investigate and analyze each case for sufficient evidence and use our prosecutorial discretion in charging and in the final disposition of the case. This statement supersedes any other policy to the contrary announced during my administration.¹⁸⁵

On September 1, 2023, HB 17 became effective. Just two weeks later, the district court clerk in Hays County, Texas, filed a petition to remove the elected district attorney, based on his policy of non-prosecution for several offenses, including simple possession of marijuana.¹⁸⁶ As of May 2024, no similar petitions have been filed against DA Creuzot.

investigates/petition-filed-seeking-removal-of-nueces-county-district-attorney-mark-gonzalez [https://perma.cc/B9V2-TFMB].

¹⁸⁰ E.g., H.B. 17, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 1350, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 3307, 88th Leg., Reg. Sess. (Tex. 2023); S.B. 20, 88th Leg., Reg. Sess. (Tex. 2023).

¹⁸¹ E.g., H.B. 200, 88th Leg., Reg. Sess. (Tex. 2023); H.B. 1732, 88th Leg., Reg. Sess. (Tex. 2023).

¹⁸² TEX. LOC. GOV’T CODE ANN. § 87.013(a) (West 1987); H.B. 17, 88th Leg., Reg. Sess. (Tex. 2023).

¹⁸³ Tex. Loc. Gov’t Code Ann. § 87.011.

¹⁸⁴ Torralva, *supra* note 158; Torralva, *supra* note 159.

¹⁸⁵ DALL. CNTY. DIST. ATT’Y’S OFF., Prosecution Guidelines Effective August 18, 2023 (2023), <https://www.dallascounty.org/Assets/uploads/docs/district-attorney/policies/Prosecution%20of%20Crime%202023.pdf> [https://perma.cc/ZGM2-EL6Y].

¹⁸⁶ Sarah Al-Shaikh, Hays County District Clerk Files Petition to Remove DA, Citing New Texas Law, KXAN NEWS (Sept. 14, 2023, 9:30 PM), <https://www.kxan.com/news/local/hays/hays->

B. *Taming the “Rogue Prosecutor”*

DA Creuzot’s strategic decision to rescind his non-prosecution policy was undoubtedly a response to HB 17. But was it necessary? The authors posit that DA Creuzot’s policy of non-prosecution of marijuana possession and his requirement that police include a laboratory report complied with HB 17 and with national standards for declination policies.

1. Analyzing the DAO’s Policies Under HB 17

Under HB 17, “official misconduct” by prosecutors includes:

(B) a prosecuting attorney’s adoption or enforcement of a policy of refusing to prosecute a class or type of criminal offense under state law or instructing law enforcement to refuse to arrest individuals suspected of committing a class or type of offense under state law, except a policy adopted:

(i) in compliance with state law or an injunction, judgment, or other court order;

(ii) in response to a reasonable evidentiary impediment to prosecution; or

(iii) to provide for diversion or similar conditional dismissals of cases when permissible under state law; or

(C) permitting an attorney who is employed by or otherwise under the direction or control of the prosecuting attorney to refuse to prosecute a class or type of criminal offense under state law or instruct law enforcement to refuse to arrest individuals suspected of committing a class or type of offense under state law for any reason other than a reason described by Paragraph (B)(i), (ii), or (iii).¹⁸⁷

Subsection (B) prohibits two types of prosecutorial directive—one that regulates prosecutorial choices and one that regulates police behavior. The latter would be inapplicable, as DA Creuzot specifically eschewed any effort to regulate police arrest powers:

county-district-clerk-files-petition-to-remove-da-citing-new-texas-law/
67VV].

[<https://perma.cc/9U9A-67VV>].

¹⁸⁷ H.B. 17, 88th Leg., Reg. Sess. (Tex. 2023); Jasper Scherer & Austin Bureau, Gov. Greg Abbott Signs Bills Aimed at ‘Rogue’ DAs and Boosting Rural Law Enforcement, HOUS. CHRONICLE (June 6, 2023, 5:04 PM), <https://www.houstonchronicle.com/politics/texas/article/gov-greg-abbott-signs-bills-targeting-18137535.php> [<https://perma.cc/94BY-NUDS>].

[t]he policies included in this agency letter do not address a peace officer's right to make a lawful arrest; they pertain to how the DA's Office will handle cases once submitted for prosecution.¹⁸⁸

The DAO never challenged the use of police discretion, and law enforcement retained exclusive authority to decide whether and when to arrest marijuana suspects.¹⁸⁹

HB 17's prohibition against directives for the non-prosecution of "a class or type" of offense requires a closer analysis. Ultimately the authors conclude that neither of the DAO's marijuana non-prosecution policies would have violated HB 17. DA Creuzot's non-prosecution policy—articulated in his February memorandum to police and reiterated in his April memorandum to the public—presents the closest case. Was it a "policy of refusing to prosecute a class or type of criminal offense?" The public rhetoric associated with the policy certainly implied as much. News media vastly oversimplified the policy, reporting that the DAO "is no longer prosecuting first-time offenders for misdemeanor marijuana possession."¹⁹⁰

However, a close reading of the DAO's non-prosecution policy reveals a more nuanced instruction to charging prosecutors. Some misdemeanor possession of marijuana cases would be prosecuted—others would not. "Offenses occurring in drug-free zones, involving the use or exhibition of a deadly weapon, or cases with evidence of delivery of marijuana," [would not be] declined, regardless of first-time offender status."¹⁹¹ This was hardly a wholesale refusal to prosecute a "class or type"

¹⁸⁸ Creuzot letter, *supra* note 58.

¹⁸⁹ Memorandum from Eddie Garcia, Dall. Chief of Police, to the Mayor and City Council (April 16, 2021), https://dallascityhall.com/government/citymanager/Documents/FY%2020-21%20Memos/Dallas-Police-Department-Cannabis-Enforcement-Update_Memo_041621.pdf [<https://perma.cc/ZF7L-7QC3>]; Eline de Bruijn, If You Get Caught with Weed in North Texas, Will You be Taken to Jail? It Depends, WFAA (Apr. 19, 2021, 3:45 PM), <https://www.wfaa.com/article/news/local/marijuana-weed-north-texas-arrest-citation-thc-testing-dallas-denton-grand-prairie-denton-garland/287-67de0e01-234b-4496-9c89-4763c9501109> [<https://perma.cc/2W3B-FQ36>].

¹⁹⁰ See, e.g., Ryan Osborne, Dallas County's Marijuana Policy Now as Lenient as Any Other in Texas, WFAA NEWS (April 12, 2019, 6:27 AM), <https://www.wfaa.com/article/news/local/dallas-county/dallas-countys-marijuana-policy-now-as-lenient-as-any-other-in-texas/287-bdb82685-0624-4f38-bc5f-68a126a8a71e> [<https://perma.cc/T39Y-7Z9V>]; Silas Allen, Dallas County DA Will No Longer Prosecute First-Time Marijuana Offenders, DALLAS OBSERVER (April 12, 2019), <https://www.dallasobserver.com/news/dallas-county-district-attorneys-office-will-no-longer-prosecute-first-time-marijuana-offenders-11638751> [<https://perma.cc/6JHQ-A8J5>].

¹⁹¹ Letter from John Creuzot, Dall. Cnty. Dist. Att'y, to Dall. Cnty. Law Enforcement Agencies, Changes to Case Filing Policies (Feb. 7, 2019) (on file with authors) [hereinafter Creuzot Letter].

of offense. Rather, this policy required a fact-specific assessment of each arrest for first-time marijuana possession.

First, the policy required prosecutors to assess each suspect's criminal and arrest history—a common factor in the exercise of charging discretion across all classes of cases.¹⁹² Second, the policy required prosecutors to conduct a case-by-case review of the facts (allegedly) associated with each arrest. For example, prosecutors had to determine not only whether the suspect was in possession of a gun, but also whether they had “used or exhibited [the gun] as part and parcel” of the offense.¹⁹³ So, for example, if a defendant in physical possession of marijuana also had an illegal gun in the trunk of their car, the reviewing prosecutor would refuse the marijuana possession charge, but prosecute the defendant for the unlawful carrying of a weapon.¹⁹⁴

Similarly, prosecutors had to carefully consider whether the alleged facts aligned with the spirit of the non-prosecution policy. For example, the non-prosecution policy excluded marijuana possessions that occurred in a drug-free zone but, as one prosecutor explained, not every arrest in a drug-free zone warranted prosecution. For example, “an arrest on “a Saturday night at 2 a.m. . . . at the 7-Eleven that happens to be in a school zone” would be refused “because that is not a true school zone case.”¹⁹⁵ Likewise “a drug-free zone is a park and [but] if you've got kids that [are] just in there smoking weed . . . that's not going to be a drug-free zone.”¹⁹⁶ In contrast, a case of possession in an “actual school . . . [would be] filed every time, [even], if they have it in the parking lot. That is in the school zone.”¹⁹⁷ Again, these are classic exercises of prosecutorial discretion.¹⁹⁸

Finally, DA Creuzot's second marijuana prosecution policy—the laboratory report requirement—fell squarely within the HB17 exceptions. Section (B)(ii) excepts non-prosecution policies from “official misconduct” if those policies are responsive to “a reasonable evidentiary impediment to prosecution.”¹⁹⁹ After the legalization of hemp, prosecutors, police, judges, and juries faced the difficult problem of distinguishing (illegal) marijuana from (legal) hemp. Neither investigative nor lived experience could conclusively establish whether substance had a THC concentration of 0.3% or greater.

¹⁹² See discussion in *supra* at pp. 15–18.

¹⁹³ Interview with anonymous DAO employee (on file with authors).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See discussion *supra* at pp. 15–18.

¹⁹⁹ H.B. 17, 88th Leg., Reg. Sess. (Tex.2023); Scherer & Bureau, *supra* note 179.

In its laboratory report letter to Dallas County police agencies, the DAO emphasized that circumstantial evidence could not prove a substance's chemical content.²⁰⁰ Rather, to distinguish legal hemp from illegal cannabis, "evidence in a criminal case [would have to] include proof of the THC concentration."²⁰¹ The laboratory report policy thus responded directly to an evidentiary problem. Further, the policy was a procedural prerequisite to prosecutorial case review—not a declination of prosecution. Marijuana cases would be returned to law enforcement for compliance and reconsidered if police produced a laboratory report.²⁰²

2. Comparing the DAO's Policies with National Standards for Screening and Charging Criminal Cases²⁰³

Both the American Bar Association (ABA) and the National District Attorney Association (NDAA)²⁰⁴ publish national prosecution standards. These aspirational standards "provide guidance for the professional conduct and performance of prosecutors."²⁰⁵ Each set of standards describes the factors that prosecutors should consider in exercising their discretion to initiate or decline criminal charges.

ABA Standard 3-4.4 has an extensive list of factors that should be considered as part of the screening and charging decision.²⁰⁶ They include the unwarranted disparate treatment of accused persons;²⁰⁷ the possible influence of any cultural, ethnic, socioeconomic, or other improper biases;²⁰⁸ and the fair and efficient distribution of limited prosecutorial resources.²⁰⁹ DA Creuzot's policies clearly

²⁰⁰ Memorandum from Ellyce Lindberg, *supra* note 95.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Screening is an early-stage review of a criminal complaint, that usually occurs close in time to arrest, whereas charging usually takes place at a later stage in the criminal process. Screening is a recommended best practice because it has the potential to weed out cases that should be declined for evidentiary, or even equitable, reasons.

²⁰⁴ NDAA Mission, NAT'L DIST. ATT'Y'S ASSOC., <https://ndaa.org/ndaa-mission/> [<https://perma.cc/C62T-KXPV>] (last visited Sept. 17, 2023) (NDAA describes itself as the "largest association for prosecutors in the country" and its mission includes supporting "prosecutors in their efforts to . . . promote a fair, effective, and accountable criminal justice system.").

²⁰⁵ CRIM. JUST. STANDARDS: PROSECUTION FUNCTION 3-1.1(b) (AM. BAR ASS'N 2017) [hereinafter ABA Prosecution Function]; NAT'L PROSECUTION STANDARDS 1 (NAT'L DIST. ATT'Y ASS'N 2023).

²⁰⁶ ABA Prosecution Function, *supra* note 196 at 3-4.4(a).

²⁰⁷ *Id.* at 3-4.4(a)(ix)

²⁰⁸ *Id.* at 3-4.4(a)(xii).

²⁰⁹ *Id.* at 3-4.4(a)(xiv).

sought to reduce the unwarranted disparate treatment of Black people and promote a more efficient use of his office's resources.

While NDAA's standards are silent on the issue of racial equity, they endorse nuanced consideration of proportionality.²¹⁰ Screening considerations include the imposition of "undue hardship" on the accused²¹¹ and the relationship between the harm caused by the alleged crime and the consequences of criminal prosecution.²¹² Charging considerations include the cost of prosecution relative to the seriousness of the offense,²¹³ the proportional consequences of charging and conviction relative to the severity of the offense, and the use of prosecutorial resources.²¹⁴ These considerations correspond with DA Creuzot's goal of ensuring his office spent its limited resources doing the "most good."²¹⁵ Although DA Creuzot's policies did not explicitly invoke these national standards, their relevance remains—particularly in the context of the emerging war on prosecutorial discretion.

3. Accepting Limits and Championing Reform

It is frequently said that prosecutors are the gatekeepers of the criminal justice system. In some ways, this may be correct. When a prosecutor accepts a case for prosecution, they usher a defendant into the criminal legal system, where they are subject to the vagaries of the criminal legal process. But as the Dallas County experience shows, prosecutorial discretion and power have their limits.

Police refer cases to prosecutors, who decide whether to accept or decline the case for prosecution. Elected prosecutors, like DA Creuzot, can implement policies that discourage the police from making arrests for certain crimes. But discouraging an arrest does not decriminalize or legalize the underlying behavior.

The data reflect this reality. While many law enforcement agencies in Dallas County significantly decreased arrests and referrals for marijuana cases, others did not. And decreases in referred arrests did not always decrease the racial disparity in police enforcement. Thus, the onus for addressing inequitable gatekeeping begins with police. In that sense, prosecutorial reform is, at best, an imperfect post-hoc correction of policing behavior.

²¹⁰ NDAA's list of considerations captures two substantive stages in their standards: screening and charging. Screening is an early-stage review of a criminal complaint, usually occurring close in time to arrest, whereas charging takes place at a later stage in the criminal process. See NAT'L PROSECUTION STANDARDS, *supra* note 196 at 4-1.3, 4-2.4.

²¹¹ *Id.* at § 4-1.3(k).

²¹² *Id.* at 4-1.3(q).

²¹³ *Id.* at 4-2.4(j).

²¹⁴ *Id.* at 4-1.3(k), 4-1.3(q), 4-2.4(j).

²¹⁵ Press Release, *supra* note 4.

Still, prosecutorial charging discretion matters. Whether used as a wedge issue²¹⁶ or framed as a legitimate jurisprudential dispute, the backlash against progressive prosecutors shows no signs of abating.²¹⁷ So, as prosecutors seek to make reforms in unfriendly jurisdictions, they must recalibrate their strategies.

Among other strategies, prosecutors might pursue curative legislation that addresses the unequal impact of certain criminal laws. In her article, *Pitfalls of Progressive Prosecution*, Professor Carissa Hessick recommends that progressive prosecutors use their political influence to lobby for non-criminal approaches to public safety, e.g., increased funding for social services and drug treatment.²¹⁸ Taking this a step further, if prosecutor-led legislative efforts to shrink the criminal justice system are successful,²¹⁹ perhaps a prosecutor lobby can one day achieve decriminalization—or even outright legalization—of marijuana possession.

VII. CONCLUSION

DA Creuzot sought to reform the justice system in Dallas County by eliminating the racial disparity in misdemeanor marijuana prosecutions. His policies were associated with a significant reduction in arrests and cases referred to the DAO. Although disparity persisted in marijuana enforcement, the scale of that enforcement decreased significantly. Thus, DA Creuzot's policies made a difference. But the chronology of criminal case processing means that arrest is the first critical step in the machinery of criminal justice. As downstream actors, prosecutors can only achieve partial and post hoc corrections of policing injustices. Meanwhile, legislative limitations on prosecutorial discretion further cabin the use of that discretion, notwithstanding evidence that non-prosecution policies can make substantial corrections to systemic injustice. Going forward, prosecutors will have to recalibrate their efforts so that they can discourage disparities in law enforcement while remaining within the bounds of emerging law.

²¹⁶ Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 *FORDHAM URB. L. J.* 973, 975 (2023).

²¹⁷ See J. David Goodman, *With an Array of Tactics, Conservatives Seek to Oust Progressive Prosecutors*, *N.Y. TIMES* (Aug. 12, 2023), <https://www.nytimes.com/2023/08/12/us/conservatives-progressive-district-attorneys.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/3XRU-TN2Q>].

²¹⁸ Hessick, *supra* note 217, at 986–87.

²¹⁹ *Id.*