

## WHY ATTACKS ON PROSECUTORIAL DISCRETION ARE ATTACKS ON DEMOCRACY

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*As communities across the United States have increasingly elected reform-minded prosecutors to lead their local district attorney's offices, the broad discretion afforded to American prosecutors has faced unprecedented scrutiny. Opponents of criminal justice reform have vigorously contested prosecutorial policies aimed at presumptively ending the prosecution of certain offenses, reducing extreme sentences, and shrinking the criminal legal system's overall footprint. These challenges have leveraged legislative, executive, and judicial channels to restrict the power of, or even remove from office, prosecutors who implement such policies.*

*In this Article, we contextualize the policies of contemporary reform-minded prosecutors within a historical and political framework. By tracing the lineage of American prosecutorial discretion to its origins, we demonstrate that the policies pursued by today's reform-oriented prosecutors align with the conception of prosecutorial discretion that has been broadly accepted throughout the American legal system for over a century and a half. We then analyze the value of reform policies in enhancing public safety, ensuring equitable and consistent charging decisions, and fostering meaningful community oversight of local prosecutorial practices. We conclude by calling on decision-makers to allow local communities to assess these normative claims and chart the way forward for their own justice systems.*

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## INTRODUCTION

The American prosecutorial system is unique: we are the only country that elects local prosecutors, and the discretionary power bestowed upon those prosecutors is unmatched in the rest of the world.<sup>1</sup> And yet, for most of American history, prosecutorial elections existed mainly as a formality. Most elections were uncontested, candidates

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<sup>1</sup> See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 12 YALE L. J. 1528 (2012); see also Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQUENCY 568 (1984).

were subjected to remarkably little scrutiny, and voters had little insight into the policy distinctions between contenders.<sup>2</sup>

In recent years, however, that landscape has started to shift.<sup>3</sup> Over the last decade, a wave of district attorneys (“DAs”)<sup>4</sup> have been elected on platforms centered on the need to reform the criminal legal system. Although it is a pluralistic and diverse movement, many reform-minded prosecutors are linked together by common threads: they prioritize prosecuting the most serious cases while diverting or deflecting other conduct—which is often the manifestation of mental health or substance use challenges—away from the criminal legal system. They aim to understand systemic injustices, reduce racial bias, prioritize the use of taxpayer dollars to address the most serious crimes, make sentencing recommendations that consider the unique circumstances of each case and the individual’s capacity for rehabilitation, hold police accountable for misconduct, and rectify unjust convictions and excessive sentences. Today, nearly seventy reform-minded prosecutors are serving in elected offices across the country, cumulatively representing almost twenty percent of Americans.<sup>5</sup>

The unexpected success of the reform-minded prosecutor movement has drawn increasingly fierce pushback. The stiffest resistance has been directed towards policies that end the prosecution of certain offenses—such as simple drug possession, loitering, or sex work—unless exceptional circumstances warrant the filing of charges. Critics claim that prosecutors are obligated to enforce *all* laws and that reformers are shirking their responsibility, or even usurping the will of the legislature, by indicating that they will presumptively abstain from

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<sup>2</sup> See Carissa Byrne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31 (2023).

<sup>3</sup> See Rebecca Blair & Miriam Krinsky, *Progress and Pushback in the Prosecutorial Reform Movement*, in THE STATE OF CRIMINAL JUSTICE 61 (Elizabeth Kelley ed., 2023).

<sup>4</sup> The terms “district attorney,” “DA,” and “elected prosecutor” are used generally, as well as herein, to refer interchangeably to any chief local prosecutor, including State’s Attorneys, Prosecuting Attorneys, Commonwealth Attorneys, and Attorneys General with local jurisdiction. The labels used for these positions vary widely by jurisdiction.

<sup>5</sup> See Miriam Krinsky & Alyssa Kress, *Reform – Not Crime – Was the Winning Message in 2022*, THE CRIME REP. (Nov. 11, 2022), <https://thecrimereport.org/2022/11/11/2592761/>.

charging certain offenses. Critics have also taken aim at other reform policies—including those that end requests for cash bail, promote alternatives to incarceration, and support modifications of extreme sentences—by claiming that these policies embolden people to commit crimes without fear of punishment, leading to lawlessness and chaos.<sup>6</sup>

As the movement began to draw national attention in the late 2010s, opponents initially worked to defeat reform-minded prosecutors electorally.<sup>7</sup> Yet, with a couple of notable exceptions, communities have continued to embrace the prosecutorial reform movement, tapping reformers to replace traditional tough-on-crime prosecutors in contested races<sup>8</sup> and re-electing pro-reform incumbents,<sup>9</sup> often in veritable landslides.<sup>10</sup> As a result, in recent years the counter-reform offensive has opted to look beyond the ballot box, drawing on a multifaceted set of strategies to hinder or remove reform-minded prosecutors.

Since the beginning of 2021, lawmakers in fourteen states have introduced at least twenty-three bills, and passed at least six bills, seeking to limit the discretion of local prosecutors, give other officials the authority to override the decisions of local prosecutors, or create mechanisms for removing local prosecutors from office; several of these bills have contained provisions barring local prosecutors from declining to charge specific categories of offenses.<sup>11</sup> Reform-minded prosecutors have also faced efforts by governors, attorneys general, and judges to limit their authority or remove them from office.

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<sup>6</sup> See, e.g., The Heritage Foundation, *How Soros-Backed Prosecutors Are Making Cities More Dangerous*, YouTube (April 29, 2021), <https://www.youtube.com/watch?v=U2EyC0n1u1E>.

<sup>7</sup> See Blair & Krinsky, *supra* note 3.

<sup>8</sup> See Krinsky & Kress, *supra* note 5.

<sup>9</sup> See Miriam A. Krinsky, *How (Some) Prosecutors Changed the Face of Justice in 2021*, CRIME REP. (Dec. 7, 2021), <https://thecrimereport.org/2021/12/07/memo-to-biden-establish-a-task-force-on-21st-century-prosecution/>.

<sup>10</sup> See Sam McCann, *Reform Prosecutors Won Big in Midterms by Rejecting Scare Tactics*, VERA, (Nov. 23, 2022), <https://www.vera.org/news/reform-prosecutors-won-big-in-midterms-by-rejecting-scare-tactics>; see also Ryan Grim & Akela Lacy, *Progressive Prosecutor Movement Makes Major Gains in Democratic Primaries*, INTERCEPT (Aug. 6, 2020), <https://theintercept.com/2020/08/06/district-attorney-races-progressive-prosecutors/>.

<sup>11</sup> These numbers are derived from internal legislative tracking resources maintained by Fair and Just Prosecution and are current as of September 1, 2023.

One particularly prominent example surfaced in 2022, when the Pennsylvania House of Representatives returned articles of impeachment against Philadelphia District Attorney Larry Krasner, who had just been re-elected to a second term with nearly seventy percent of the vote.<sup>12</sup> The articles claimed that Krasner's reform policies were responsible for rising gun violence in Philadelphia over the prior two years, despite the fact that other Pennsylvania counties had seen similar or greater increases in homicides over the same period.<sup>13</sup> Another example arose in 2020, when Georgia's governor tried unsuccessfully to cancel a local district attorney election to prevent voters from choosing the pro-reform candidate, Deborah Gonzalez.<sup>14</sup>

The movement to limit the power of reform-minded prosecutors escalated significantly in August 2022, when Florida Governor Ron DeSantis suspended Andrew Warren, Tampa's twice-elected state attorney, from office, citing (among other things) two of Warren's presumptive non-prosecution policies and statements Warren had signed onto opposing the use of prosecutorial resources to criminalize the provision of abortion or gender-affirming healthcare.<sup>15</sup> DeSantis then appointed an interim state attorney staunchly opposed to the reform principles on which Warren had been elected. These actions effectively nullified the choice of Tampa voters, leaving them with no ability to

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<sup>12</sup> *Lawrence Krasner*, BALLOTPEDIA, [https://ballotpedia.org/Lawrence\\_Krasner](https://ballotpedia.org/Lawrence_Krasner) (last visited Aug. 3, 2023).

<sup>13</sup> *See DA Krasner Statement to PA GOP Lawmakers Determined to Impeach Him*, PHILA. DIST. ATT'Y'S OFF. (Oct. 21, 2022), <https://phillyda.org/news/da-krasner-statement-to-pa-gop-lawmakers-determined-to-impeach-him/>. A trial court has since ruled that the impeachment was unconstitutional, and that decision is pending appeal, as of November 2023. *See Commonwealth Court Rejects Unconstitutional & Illegal Impeachment Trial for 'Political Offense'*, PHILA. DIST. ATT'Y'S OFF. (Jan. 13, 2023), <https://phillyda.org/news/commonwealth-court-rejects-unconstitutional-illegal-impeachment-trial-for-political-offense/>. As of this writing, the Pennsylvania Senate's trial of the articles of impeachment has been indefinitely postponed. *See* Diany Wang, *Philadelphia DA Larry Krasner impeachment trial indefinitely halted*, DAILY PENNSYLVANIAN (Jan. 17, 2023), <https://www.thedp.com/article/2023/01/philadelphia-larry-krasner-trial-postponed>.

<sup>14</sup> *See* *Kemp v. Gonzalez*, 849 S.E.2d 667 (Ga. 2020).

<sup>15</sup> *See* 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>.

exercise control over who would lead their local justice system until the next election, which was more than two years away at the time of Warren’s removal.<sup>16</sup> Then, almost exactly a year later, DeSantis suspended Orlando’s state attorney, Monique Worrell, in an order that accused her of neglecting her duty by declining to prosecute certain cases, not pursuing enough charges subject to mandatory minimum sentences, failing to secure enough prison sentences, and not prosecuting enough juvenile cases.<sup>17</sup>

In this Article, we will critically examine the arguments undergirding efforts to curtail the discretion of reform-minded prosecutors. Much of our analysis will focus on challenges to the legitimacy of policies declining to prosecute certain categories of cases, as these claims have been central to the anti-reform backlash. But we will also engage with assertions made by policymakers and commentators who have more broadly taken aim at reformers’ efforts to reduce prison and jail populations and shrink the footprint of the criminal legal system.

In Part I, we address these attacks from a theoretical perspective. By placing these claims in historical and political context, we aim to demonstrate that the policies of today’s reform-minded prosecutors align with the conception of prosecutorial discretion that has been widely accepted within the American legal system for over a century.

In Part II, we shift to address criticism of the reform movement through a normative lens. Drawing on criminology research and studies of crime rates in jurisdictions with reform-minded prosecutors, we demonstrate the shortcomings of traditionally punitive approaches to prosecution and the potential for strategic reforms to bolster public safety. We then analyze the real world impacts of reform policies and recount the effectiveness of these approaches in fostering consistent and fair charging decisions while empowering communities to meaningfully engage with and impact local office policies.

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<sup>16</sup> See Sue Carlton, *Appointed by DeSantis, Suzy Lopez to Run for Hillsborough State Attorney*, TAMPA BAY TIMES (July 5, 2023), <https://www.tampabay.com/news/2023/07/05/appointed-by-desantis-lopez-now-running-hillsborough-state-attorney/>.

<sup>17</sup> Fla. Exec. Order. No. 23-160 (Aug. 9, 2023). At the time of this Article’s publication, both of these actions have been challenged in the courts. Warren v. DeSantis, 653 F. Supp. 3d 1118 (2023); Worrell v. DeSantis, No. SC23-1246 (Fla. argued Dec. 6, 2023).

We acknowledge that our policy arguments inevitably are based on normative judgments; indeed, subjective determinations are unavoidable at almost every step of the prosecutive process. Our modern criminal justice system, however, has been built on the premise that voters have the right to make such judgments by deciding who will run their prosecutor's office. Thus, we end by calling on decision-makers to allow communities to assess arguments both in favor and against reform and decide for themselves what vision of justice they embrace and who is best suited to carry out that vision within their local jurisdiction.

#### I. HISTORICAL AND LEGAL UNDERPINNINGS OF PROSECUTORIAL DISCRETION

In this Part, we draw on historical evidence and legal precedent to demonstrate that the broad exercise of prosecutorial discretion in deciding whether, when, and how to enforce certain laws is deeply engrained in the U.S. legal system. By tracing the evolution of the American prosecutor from an administrative functionary to one of the justice system's most powerful actors, we establish that many defining aspects of our prosecutorial system—including the practice, in almost every state, of choosing local prosecutors through elections—are predicated on the assumption that prosecutors must exercise subjective judgments throughout the prosecutive process.

Our discussion of the entrenched nature of prosecutorial discretion in our legal system does not imply, however, an endorsement of unfettered discretion. We do not contend that prosecutorial power should be shielded from examination. Instead, we delve into the historical roots of prosecutorial discretion for two reasons. First, we seek to rebut the argument that reformers are acting outside the traditional bounds of prosecutorial power, demonstrating that concerns about the expansion of discretion have been used as a thin pretense for attacks on reform. Second, by establishing that the modern legal system was built on the premise that prosecutors hold broad powers and that voters would democratically elect those who would wield such powers, we aim to show that efforts to undermine this premise selectively for reformers jeopardize the democratic foundations of the justice system.

As we explain further in Section D of this Part, these claims are incompatible only with efforts to selectively curtail the discretion of

prosecutors who support reform. None of our arguments, however, are at odds with calls for universally applied, systematic checks on prosecutorial power. We welcome critical examinations of prosecutorial decision-making and acknowledge that placing greater checks on discretion might normatively improve the justice system; we emphasize, though, that such checks must be applied universally, not selectively.

#### *A. A Brief History of Our Current Model of Prosecution*

Public prosecution in the United States has roots extending as far back as the seventeenth century. Initially, American colonists took with them the English tradition of prosecution, in which private victims or their families were responsible for apprehending and prosecuting assailants.<sup>18</sup> However, as the population grew and the colonies found the system of private prosecution increasingly insufficient to maintain public order, they began to shift some prosecutorial power to public officials, likely drawing on Dutch and French models of public prosecution.<sup>19</sup> After the Revolutionary War, the federal government created its own system of prosecution, and institutions of public prosecution became more ingrained at the state level.<sup>20</sup> However, these early public prosecutors were appointed, typically by the state's governor or legislature, and possessed little independence or discretionary power.<sup>21</sup>

The modern conception of the district attorney first began to take hold during the 1830s, amid a broader movement to combat patronage appointments by making more public offices subject to elections.<sup>22</sup> Mississippi led the way in 1932 by becoming the first state to provide

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<sup>18</sup> See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

<sup>19</sup> See *id.*; see also W. Scott Van Alstyne Jr., *The District Attorney—A Historical Puzzle*, 1952 WIS. L. REV. 125; see also John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

<sup>20</sup> See Yue Ma, *Exploring the Origins of Public Prosecution*, 18 INT'L CRIM. JUST. REV. 190 (2008).

<sup>21</sup> See Ellis, *supra* note 1.

<sup>22</sup> See *id.*



for the election of public prosecutors, and a majority of states had followed suit by the outbreak of the Civil War.<sup>23</sup> Two primary motivations drove this shift: the desire to grant local communities control over their prosecutors' offices and concern that governors were filling DA offices with political patrons.<sup>24</sup>

Not surprisingly, the transition from appointed to elected prosecutors coincided with a rise in their discretion. Early American prosecutors acted like clerks or administrative functionaries with little decision-making power, while grand juries and other authorities were responsible for selecting which cases to charge.<sup>25</sup> This approach wound up overwhelming many communities' justice systems with a barrage of trivial cases, sometimes making it impossible to even hold trials.<sup>26</sup> Thus, over time, district attorneys began to take on the role of deciding which cases to prosecute and which to deflect out of the system.<sup>27</sup>

While historical records concerning the transition from appointed to elected prosecutors are sparse, available evidence suggests that the shift was based, in part, on the recognition that the prosecutor's role was evolving beyond mere administrative tasks to encompass substantive decision-making power. As state constitutional conventions met in the decades before the Civil War to refine and revise governance documents,<sup>28</sup> delegates often debated the merits of electing district attorneys and discussed the need for prosecutors to be intimately familiar with the dynamics of hyperlocal communities when deciding whether, when, and how to prosecute.<sup>29</sup> Delegates also repeatedly decried the harms of allowing governors or attorneys general, who lived and worked far from many of their states' communities and were seen as out of touch with local interests, to control prosecutorial decisions across the state.<sup>30</sup> Recognizing that prosecutors do and must make normative judgments concerning the optimal administration of justice

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<sup>23</sup> *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See id.*

<sup>26</sup> *See* Steinberg, *supra* note 1.

<sup>27</sup> *See* Ellis, *supra* note 1.

<sup>28</sup> *See* John Dinan, *Explaining the Prevalence of State Constitutional Conventions in the Nineteenth and Twentieth Centuries*, 34 J. OF POL'Y HIST. 297 (2022).

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

and use of limited resources, all but three states eventually decided to empower voters to determine who would hold that role.<sup>31</sup>

### B. *The Fortification of Discretion*

By the turn of the twentieth century, the power of prosecutors to decide whether, when, and how to enforce specific laws had become commonly accepted as an intrinsic characteristic of the American legal system. As early as 1930, a survey of approximately 300 local prosecutors revealed that at least ninety percent regularly chose not to enforce certain laws and had never prosecuted many offenses included in their states' criminal codes.<sup>32</sup> Responding prosecutors most commonly cited aspects of speeding laws, Sunday closing laws, and adultery bans among the statutes that they were unwilling to enforce, but they mentioned a wide-range of other offenses as well, including laws criminalizing vagrancy and the dissemination of birth control information. In fact, foreshadowing contemporary clash-points over the use of prosecutorial discretion, about ten percent of respondents reported that they rarely or never enforced their states' abortion bans.

Against that backdrop, a spate of governmental crime commissions formed in the 1920s and 1930s released reports expressing both shock and concern over the astounding power concentrated in local prosecutors' offices.<sup>33</sup> As the National Commission on Law Observance and Enforcement observed in 1931, "when the number of prosecutions instituted each year has become enormous and beyond the possibilities of proper trial, the power of *nolle prosequi*, as a means of selecting those to be tried, makes the prosecutor the real arbiter of what laws shall be enforced and against whom[...]."<sup>34</sup>

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<sup>31</sup> See CARISSA BYRNE HESSICK, THE PROSECUTORS AND POLITICS PROJECT: NATIONAL STUDY OF PROSECUTOR ELECTIONS (University of North Carolina School of Law, 2020). Today, 45 states elect local prosecutors, while Rhode Island, Delaware, and the District of Columbia elect attorneys general with significant criminal jurisdiction. *Id.*

<sup>32</sup> Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POL. SCI. Q. 347 (1930).

<sup>33</sup> See Worrall, *supra* note 19.

<sup>34</sup> DEP'T OF JUST. NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON PROSECUTION, 19 (1931).

By the late twentieth century, the broad discretion of prosecutors to determine which cases to pursue, which charges to file, and what sentences to seek was so widely accepted as to be incorporated into guidelines of many of the legal profession's standard-bearing organizations. The American Bar Association's standards for prosecutors, first issued in 1971, accepted the premise that "[t]he public interest is best served and evenhanded justice best dispensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice."<sup>35</sup> One year later, the National District Attorneys Association issued guidelines recognizing that "the decision of whether to institute a criminal proceeding should be solely within the discretion of the district attorney" and emphasizing the need for case screening policies to ensure the fair and consistent application of discretion.<sup>36</sup>

Despite the well-settled and extraordinarily broad scope of prosecutorial discretion that has been evident to even the most casual legal observers for more than a century, the criminal legal system has seen no significant effort to limit the power of prosecutors until the last few years.

Throughout the twentieth century, the courts broadened and deepened the scope of prosecutors' discretion, consistently asserting that the people, rather than judges, were best positioned to address prosecutorial overreach.<sup>37</sup> In a series of rulings going back over a century, both state and federal courts reiterated that judges lack the

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<sup>35</sup> Leonard R. Mellon, Joan E. Jacoby & Marion A. Brewer, *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. OF CRIM. L. & CRIMINOLOGY 52, 54 (1981) (quoting ABA Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971)).

<sup>36</sup> ROBERT F. LEONARD, JOEL B. SAXE & JAMES GARBER, SCREENING OF CRIMINAL CASES PAGE NUMBER (1972).

<sup>37</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the criminal justice process, exceptionally clear proof is required before this Court will infer that the discretion has been abused."); *Milliken v. Stone*, 7 F.2d 397, 399 (S.D.N.Y. 1925) ("The remedy for inactivity of [the prosecutor] is with the executive and ultimately with the people.").

authority to compel prosecutors to pursue criminal charges,<sup>38</sup> or to dictate their approach to prosecution,<sup>39</sup> unless the prosecutor had engaged in severe misconduct or violated clear statutory mandates. The Supreme Court has consistently acknowledged that prosecutors are not just allowed, but *required*, to make normative judgments when deciding whether and how to prosecute.<sup>40</sup> Over time, the Court has construed this power so broadly as to allow prosecutors to punish defendants for refusing to accept plea offers by bringing new charges attached to drastically harsher sentences,<sup>41</sup> seek the death penalty in ways that

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<sup>38</sup> See, e.g., *Hassan v. Magis*, Ct. of New York, 191 N.Y.S.2d 238, 241 (N.Y. Sup. Ct.) (“The courts have time and again refused to interfere with prosecuting attorneys who in the exercise of discretion have determined not to institute prosecutions or determined that they would prosecute for one crime and not another.”); *Davis v. Mun. Ct.* 46 Cal. 3d 64, 77 (Cal. 1988) (“It is well established, of course, that a district attorney’s enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime.”); *Leone v. Fanelli*, 194 Misc. 826, 827 (N.Y. Sup. Ct. 1949) (“The general duty to prosecute all crimes or the special duty to prosecute a particular crime may not be required or supervised.”); *Brack v. Wells*, 184 Md. 86 (Md. 1944); *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U.S. 557 (1886); *People v. Adams*, 43 Cal. App. 3d 697 (Cal. Ct. App. 1974); *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965).

<sup>39</sup> See, e.g., *Howell v. Brown*, 85 F. Supp. 537, 540 (D. Neb. 1949) (finding that, when deciding whether to file charges, the prosecutor “must on occasion consider the public impact of criminal proceedings, or, again, balance the admonitory value of invariable and inflexible punishment against the greater impulse of ‘the quality of mercy.’”); *Wilson v. Cnty. of Marshall*, 257 Ill. App. 220, 225 (Ill. App. Ct. 1930) (noting that common law gives “the prosecuting attorney [...] absolute control of criminal prosecutions”); *Ackerman v. Houston*, 45 Ariz. 293 (Ariz. 1935) (noting the “quasi-judicial capacity” of county prosecutors); *United States v. Batchelder*, 442 U.S. 114 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Wayte v. United States*, 470 U.S. 598 (1985).

<sup>40</sup> See, e.g., *United States v. Lovasco*, 431 U.S. 783, 794 (1977) (“The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government’s case, in order to determine whether the prosecution would be in the public interest.”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (affirming that prosecutors represent “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

<sup>41</sup> *Bordenkircher*, 434 U.S. at 357.

produce racially disparate outcomes,<sup>42</sup> or even selectively enforce some laws.<sup>43</sup>

On the legislative front, efforts to check or override prosecutorial decisions were, until recently, notably absent. For more than a century, legislatures have continued to expand criminal codes, often including vaguely defined offenses, thereby necessitating reliance on prosecutorial discretion to determine which cases to pursue when.<sup>44</sup> And there has been near silence in the face of decades of prosecutorial decisions to levy increasingly harsh penalties, which have lengthened prison terms and dramatically swelled the prison population.

### C. *The Pragmatic Foundations of Discretion*

The legal system's recognition of prosecutorial discretion was, to some degree, a response to the practical impossibility of prosecuting every violation of the penal code. As early as the mid-nineteenth century, lawmakers recognized that the use of discretion to screen some cases out of the legal system was necessary to keep the courts functional as the population grew.<sup>45</sup> The challenge became even more pronounced over the twentieth century, as federal and state penal codes ballooned to criminalize an ever-increasing number of offenses.<sup>46</sup>

Thus, prosecutors have long made charging decisions based on considerations of the public safety value of using inherently limited resources to investigate or charge broad categories of cases.<sup>47</sup> As

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<sup>42</sup> *McCleskey*, 481 U.S. at 279.

<sup>43</sup> *Wayte*, 470 U.S. at 598.

<sup>44</sup> See John A. Lundquist, *Prosecutorial Discretion - A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485 (1972).

<sup>45</sup> See Steinberg, *supra* note 1.

<sup>46</sup> See, e.g., GIANCARLO CANAPARO, PATRICK MCLAUGHLIN, JONATHAN NELSON & LIYA PALAGASHVILI, COUNT THE CODE: QUANTIFYING FEDERALIZATION OF CRIMINAL STATUTES (2022); Maeve Walsh, *Ohio's Criminal Code Has Grown Nearly Fivefold since 1980. Some Want to Change That*, NBC4 (December 6, 2022), <https://www.nbc4i.com/news/local-news/ohios-criminal-code-has-grown-nearly-fivefold-since-1980-some-want-to-change-that/>.

<sup>47</sup> This is especially true in the federal system, where United States Attorneys and the Attorney General disseminate guidelines outlining which charges federal prosecutors should and should not pursue. See U.S. Dep't of Just., Just. Manual § 9-27 (2023).

societal attitudes evolve, many outmoded laws have gone decades without being enforced, including laws that criminalize the use of contraceptives,<sup>48</sup> consensual sex between same-sex adults,<sup>49</sup> and the cohabitation of unmarried adults.<sup>50</sup> Today, every state almost certainly has laws on the books that have rarely or never been enforced, ranging from antiquated morality laws like the adultery bans still active in several states,<sup>51</sup> South Carolina’s felony ban on the use of profanity in public,<sup>52</sup> or Michigan’s felony ban on seducing an unmarried woman,<sup>53</sup> to absurd provisions like Oklahoma’s prohibition on eavesdropping or Massachusetts’s mandate that all public performances of the Star Spangled Banner be “whole and separate,” “without embellishment.”<sup>54</sup>

In addition to determining which laws they will not spend scarce resources enforcing as a matter of policy, every elected prosecutor in the country also makes subjective decisions concerning when and how to enforce the criminal code. For example, most states criminalize public intoxication, yet a cursory look around any city’s downtown area on a Friday night will confirm that such offenses often go uncharged, even when committed in plain view of law enforcement.<sup>55</sup> Further, many laws are written so broadly that a single act might be accurately classified in wildly different ways. For example, a person who steals a pack of gum with a Swiss Army knife in their pocket could face charges of petit larceny, a misdemeanor usually punished with a fine, or armed burglary, a felony often subject to a years-long mandatory minimum prison sentence, depending on the judgment call of the charging

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<sup>48</sup> See *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>49</sup> See DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS* (2012).

<sup>50</sup> See *N.D. Legislation Targets Anti-Cohabitation Law*, NBC NEWS (Feb. 27, 2007), <https://www.nbcnews.com/id/wbna17360273>.

<sup>51</sup> See Julia Naftulin & Gabby Landsverk, *Cheating on Your Partner in Oklahoma Could Land You in Jail for Five Years. In These 6 Other US States, Infidelity Could Also Get You in Legal Trouble.*, INSIDER, (Sept. 9, 2019), <https://www.insider.com/states-where-cheating-illegal-illinois-north-carolina-hawaii-2019-9>.

<sup>52</sup> S.C. CODE ANN. § 16-17-530 (2012).

<sup>53</sup> MICH. COMP. LAWS § 750.532 (1931).

<sup>54</sup> OKLA. STAT. tit. 21, § 1202 (2022); MASS. GEN. LAWS ch. 264, § 9 (2023).

<sup>55</sup> See *Public Intoxication Laws*, JUSTIA, <https://www.justia.com/criminal/drunk-driving-dui-dwi/alcohol-related-crimes/public-intoxication/> (last reviewed October 2023).

prosecutor. Throughout the prosecutorial process, the subjective decisions of prosecutors are among the most significant factors in determining case outcomes.

*D. Distinguishing Selective and Universal Challenges to Discretion*

In this Part, we have endeavored to show that modern-day prosecutorial reform policies are aligned with the longstanding, entrenched conception of prosecutorial discretion within the American legal system. We engaged in this discussion in order to rebut one of the central claims underlying recent attacks on reform-minded prosecutors: that reform policies diverge from historical and legal precedent in ways that constitute a new and unprecedented expansion of prosecutorial power.

This historical and political context is not, however, intended to suggest that prosecutorial discretion should be unfettered. It is important to acknowledge that prosecutors have for decades overwhelmingly wielded their discretion in ways that have made the legal system less fair, less equitable, and excessively punitive. Over the last seventy years, prosecutors have used their discretion to almost entirely replace jury trials with back-room plea bargaining, which has driven the explosion of sentence lengths, enabled innocent people to be coerced into pleading guilty, and shielded many of the system's most consequential functions from public scrutiny.<sup>56</sup> Prosecutors have also used their discretion to expand the scope of behavior that is criminalized, dramatically increase sentence lengths, and deepen racial disparities throughout the system.<sup>57</sup>

Proponents of criminal justice reform have long been amongst the loudest voices calling for checks on prosecutorial power. Reformers have fought to strengthen the ethical rules governing prosecutors and the disciplinary processes for those who break these rules; require that offices provide case data to the public and researchers; remove prosecutors' authority to make decisions in areas outside of the core

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<sup>56</sup> See, e.g., Miriam A. Krinsky, *Bring Back the Jury Trial*, THE CRIME REP. (June 15, 2023), <https://thecrimereport.org/2023/06/15/bring-back-the-jury-trial/>.

<sup>57</sup> See DAVIS, *supra* note 18.

prosecutorial function, such as forensics, corrections, and clemency; and create oversight bodies charged with monitoring and informing the public about how particular offices are approaching their cases.<sup>58</sup> Each of these ideas is worthy of serious consideration and none of our arguments should be construed to be incompatible with these or other proposals for limiting prosecutorial overreach. We merely argue that limitations must apply universally, not selectively.

While we welcome robust discourse around the bounds of prosecutorial power, we reject the premise that recent attacks on reform-minded prosecutors are grounded in sincere concerns about the breadth of prosecutorial discretion. By refusing to challenge the application of discretion for any purpose other than the advancement of reform, the instigators of anti-reform attacks have made clear that they are only trying to prevent discretion from being used to curb the punitive status quo. These efforts threaten to move us towards a world in which communities have control over their local justice systems, unless and until they elect leaders who support reform. By undermining this principle selectively when communities opt for reform, they compromise the justification for all other applications of discretion.

It is undeniably true that many prosecutors abuse their discretionary power, often in ways that undermine the goals of the criminal justice reform movement. There are many valid reasons—which go far beyond the scope of this Article—to suggest that placing greater checks on prosecutorial power would normatively improve the operation of the criminal legal system, and none of our arguments are incompatible with calls for universal, systematic checks on prosecutorial discretion. We object only to those who leverage legitimate concerns about prosecutorial power as a Trojan horse to attack reform.

## II. NORMATIVE CONSIDERATIONS UNDERGIRDING PROSECUTORIAL REFORM

Thus far, we have aimed to demonstrate that reform-minded prosecutorial policies rest on well-settled historical and legal foundations, thereby rebutting claims that today’s reform-minded prosecutors are using their discretion illegitimately. At the heart of the

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<sup>58</sup> *See id.* at 179–94; *see also* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 143–64 (2019).



anti-reform backlash, however, is a more basic criticism: that reforms are normatively bad for communities. Efforts to restrict or remove reform-minded prosecutors are largely predicated on the notion that reforms are so dangerous as to be indefensible, obligating state-level leaders to swoop in and protect communities that have chosen to put themselves in harm's way.<sup>59</sup>

Thus, this Part will analyze the normative judgments underlying reform-minded approaches to prosecution and aim to demonstrate why communities have so consistently and emphatically embraced reform policies. We identify three primary elements of the value proposition offered by reformers: the potential for reforms to improve public safety, promote more consistent and equitable charging decisions, and enable more meaningful democratic oversight of traditionally secretive prosecutorial decisions. We aim not just to rebut claims that reform-minded prosecutors are so blatantly dangerous as to justify the negation of local election results, but also to illustrate the potential of reform-minded prosecution to remediate many of the criminal legal system's historic failures and develop innovative strategies for fostering safer, healthier, and more just communities.

We acknowledge throughout this Part that our policy arguments may invite valid disagreement—indeed, we welcome robust discourse

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<sup>59</sup> See, e.g., *PA House Republicans Introduce Articles of Impeachment Against Philadelphia District Attorney Larry Krasner*, KERRY BENNINGHOFF (Oct. 26, 2022), <https://www.kerrybenninghoff.com/News/31463/Latest-News/PA-House-Republicans-Introduce-Articles-of-Impeachment-Against-Philadelphia-District-Attorney-Larry-Krasner-> (“We must do something to free the people of Philadelphia from the crime and violence crisis that has destroyed lives and property and made Philadelphians prisoners of fear”); *Governor Ron DeSantis Suspends State Attorney Monique Worrell for Neglect of Duty and Incompetence*, RON DESANTIS (Aug. 9, 2023), <https://www.flgov.com/2023/08/09/governor-ron-desantis-suspends-state-attorney-monique-worrell-for-neglect-of-duty-and-incompetence/> (“The people of Central Florida deserve to have a State Attorney who will seek justice in accordance with the law instead of allowing violent criminals to roam the streets and find new victims”); *St. Louis and Missouri politicians react to Kim Gardner’s decision to step down*, ST. LOUIS POST-DISPATCH (May 5, 2023), [https://www.stltoday.com/news/local/crime-courts/st-louis-and-missouri-politicians-react-to-kim-gardner-s-decision-to-step-down/article\\_28cfb210-eac0-11ed-970b-5bb8e9b36673.html](https://www.stltoday.com/news/local/crime-courts/st-louis-and-missouri-politicians-react-to-kim-gardner-s-decision-to-step-down/article_28cfb210-eac0-11ed-970b-5bb8e9b36673.html) (“State government will act when local government fails to secure the safety of our communities and protect Missourians, which has been evident in the City of St. Louis”).

concerning the most effective and just ways to address the needs of our communities. However, we maintain that local elections are the proper venues for these debates. Recognizing the inherently local impacts of criminal justice policies, we argue that top-down efforts to overrule the electoral decisions of local communities based on policy disagreements endanger the democratic foundations upon which our prosecutorial system rests.

### *A. The Role of Reforms in Bolstering Public Safety*

Attacks on reform-minded prosecutors thus far have largely been predicated on the claim that reforms lead to increased crime.<sup>60</sup> This critique is most commonly levied at categorical declination policies but is also applied to policies that minimize pre-trial detention, limit the use of charges that trigger severe mandatory sanctions, expand diversion and deflection programs, and shorten carceral sentences.<sup>61</sup> These attacks reached a fever pitch during the COVID-19 pandemic, as rates of violent crime rose in many communities across the country.<sup>62</sup> Yet, these claims are clearly at odds with available data.

Crime rose across the country in 2020 and 2021, in jurisdictions that both did and did not adopt reform policies. A 2022 analysis found that homicide rates have risen less rapidly in communities served by reform-minded prosecutors than in those served by traditional, tough-on-crime prosecutors.<sup>63</sup> Similarly, a 2021 study of 35 jurisdictions with reform-minded prosecutors examined the impacts of various reforms—such as reducing cash bail, declining to prosecute certain low-level offenses,

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<sup>60</sup> See Eric Tegethoff, *Behind the Right's War on Prosecutors*, APPEAL (Aug. 3, 2023), <https://theappeal.org/conservatives-progressive-prosecutors-reform/>.

<sup>61</sup> See, e.g., *id.*

<sup>62</sup> See *How COVID-19 Changed Crime in the U.S.*, NORTHEASTERN UNIV. (Jan. 27, 2023), <https://publicaffairs.northeastern.edu/articles/us-crime-rate-during-pandemic/>.

<sup>63</sup> TODD FOGLESONG, RON LEVI, RICK ROSENFELD, HEATHER SCHOENFELD, JENNIFER WOOD, DON STEMEN & ANDRES RENGIFO, *VIOLENT CRIME AND PUBLIC PROSECUTION: A REVIEW OF RECENT DATA ON HOMICIDE, ROBBERY, AND PROGRESSIVE PROSECUTION IN THE UNITED STATES* (2022).

and diverting cases—and found that these policies had no statistically significant effects on local crime rates.<sup>64</sup>

Claims that reforms drive violent crime increases are not just belied by recent crime data, but also run counter to decades of criminology research. Robust evidence has demonstrated that pursuing harsher sentences does not effectively deter crime.<sup>65</sup> On the other hand, filing criminal charges—even ones that do not lead to convictions—sets off a cascade of consequences that can profoundly damage individuals’ financial stability, employment prospects, and housing access, increasing their likelihood of returning to the justice system.<sup>66</sup> Carceral sentences have especially devastating effects on individuals’ physical well-being, mental health, family relationships, and community ties, which, according to research, likely increase their odds of committing another crime after release.<sup>67</sup> Researchers have also repeatedly found that longer sentences produce no statistically significant reductions in post-release recidivism rates when compared to shorter sentences.<sup>68</sup>

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<sup>64</sup> Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Prosecutorial Reform and Local Crime Rates* (L. & Econ. Ctr. at George Mason Univ. Scalia L. Sch., Rsch. Paper Series No. 22—011, 2022).

<sup>65</sup> See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 230–33 (2013).

<sup>66</sup> See Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, 138 QUAR. J. OF ECON. 1453 (2023); see also Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests without Convictions*, 20 U. PA. J. L. & SOC. CHANGE 81 (2017); Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment>; U.S. SENT’G COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW (2016).

<sup>67</sup> See Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Working Paper, 2015); see also Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011).

<sup>68</sup> See G. Matthew Snodgrass, Arjan A. J. Blokland, Amelia Haviland, Paul Nieuwbeerta & Daniel S. Nagin, *Does the Time Cause the Crime? An Examination of the Relationship Between Time Served and Reoffending in the Netherlands*, 49 CRIMINOLOGY 1149, 1175 (2011); see also Thomas A. Loughran, Edward P. Mulvey, Carol A. Schubert, Jeffrey Fagan, Alex R. Piquero & Sandra H. Losoya, *Estimating a Dose-Response Relationship Between Length of Stay and Future*

And, high incarceration rates create ripple effects that impact entire communities, leading to a range of harms.<sup>69</sup>

A clear-eyed glance around the globe leads to the inescapable conclusion that the United States' embrace of mass incarceration is not necessary to maintain public safety. The United States is home to about four percent of the world's population but almost twenty percent of its prisoners and about forty percent of people serving life sentences.<sup>70</sup> Yet, even as the richest country in the world, we endure homicide rates over seven times higher than other high-income countries.<sup>71</sup>

The failures of the U.S.'s punitive approach to criminal justice policy reflect a serious flaw in the way we conceptualize, and seek to mitigate, public safety risks. In some criminal cases, a response from the legal system is necessary to keep communities safe. But, in many cases, prosecution has the opposite effect, funneling individuals who pose no threat to public safety into a system that destabilizes their lives, rendering them more vulnerable to drivers of crime than they were before they made contact with the system. Prosecutorial policies that draw people into the system without considering these trade-offs are, despite their tough-on-crime veneer, unjustifiably dangerous. To safeguard their communities, prosecutors cannot fall back on the simplistic assumption that more punishment leads to less crime, despite mountains of evidence to the contrary; they must acknowledge the risks created by system involvement and use their prosecutive power only when the risks of inaction are greater.

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*Recidivism in Serious Juvenile Offenders*, 47 CRIMINOLOGY 699 (2009); U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL VIOLENT OFFENDERS (2019).

<sup>69</sup> See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 (2008); see also Ashley Hickson, Ritika Purbey, Lorraine Dean, Joseph J. Gallo, Roland J. Thorpe, Keshia Pollack Porter & Aruna Chandran, *A Consequence of Mass Incarceration: County-level Association Between Jail Incarceration Rates and Poor Mental Health Days*, 10 HEALTH JUST. I (2022).

<sup>70</sup> HELEN FAIR & ROY WALMSLEY, WORLD PRISON BRIEF, INST. FOR CRIME & JUST. POL'Y RSCH., WORLD PRISON POPULATION LIST (13th ed., 2021); see also Lila Kazemian, *Long Sentences: An International Perspective*, COUNCIL ON CRIM. JUST. (2022), <https://counciloncj.foleon.com/tfls/long-sentences-by-the-numbers/an-international-perspective>.

<sup>71</sup> Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries, 2015*, 123 PREV. MED. 20, 22 (2019).

Further, by reallocating resources away from the enforcement of low-level offenses, reforms free up resources to focus on the most serious crimes. In the wake of the pandemic, the percentage of murders nationwide that led to an arrest plunged to an all-time low of just under fifty percent, and clearance rates for other serious violent and property crimes are even lower.<sup>72</sup> Low clearance rates endanger the community not just by allowing those who commit serious crimes to evade accountability, but also by hampering community trust in law enforcement, feeding into a vicious cycle that makes it more difficult for police to secure the community cooperation needed to solve future crimes.<sup>73</sup> Available evidence and common sense both suggest that investing more resources in the investigation of serious crimes is necessary to solve more of those crimes.<sup>74</sup> By publicly disclosing their charging priorities, reformers signal to law enforcement that they should spend less time policing minor infractions and more time investigating and solving serious crimes.

Many communities also have seen immense case backlogs pile up since the pandemic closed courthouses across the country.<sup>75</sup> These backlogs can lead to lengthy delays, potentially infringing upon defendants' right to a speedy trial, subjecting innocent individuals to prolonged periods of pre-trial detention, and delaying closure for victims. Deflecting cases whose prosecution would serve no public safety benefit out of the system is a crucial step towards alleviating these

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<sup>72</sup> See Derek Thompson, *Six Reasons the Murder Clearance Rate Is at an All-Time Low*, ATLANTIC (July 7, 2022), <https://www.theatlantic.com/newsletters/archive/2022/07/police-murder-clearance-rate/661500/>.

<sup>73</sup> See Anthony A. Braga, *Improving Police Clearance Rates of Shootings: A Review of the Evidence*, MANHATTAN INST. (June 20, 2021), <https://manhattan.institute/article/improving-police-clearance-rates-of-shootings-a-review-of-the-evidence>.

<sup>74</sup> See Heather Prince, Cynthia Lum & Christopher S. Koper, *Effective Police Investigative Practices: An Evidence-Assessment of the Research*, 44 POLICING: AN INT'L J. 683 (2021).

<sup>75</sup> See Griff Witte & Mark Berman, *Long after the courts shut down for covid, the pain of delayed justice lingers*, WASH. POST (December 19, 2021, 6:00 AM), [https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7\\_story.html](https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html).

backlogs and ensuring that justice is served efficiently and fairly for all stakeholders.

### *B. The Value of Office-wide Declination Policies*

Opponents of reform often contend that prosecutors are overstepping their bounds not by declining to prosecute individual cases but by implementing office-wide declination policies that establish a presumption against charging certain offenses, like sex work, loitering, or cannabis possession. Critics,<sup>76</sup> as well as some courts,<sup>77</sup> contend that these policies go beyond the ordinary exercise of discretion to improperly nullify the legislature's judgments.

Although case-by-case decisions are often necessary, there are two primary reasons that policies of presumptively declining to prosecute certain offenses are, in many instances, preferable and necessary.

The first reason is that giving individualized consideration to every crime that is committed in a given jurisdiction is, in practical terms, impossible. As we demonstrated in Part I, the exercise of subjective judgment in deciding which parts of the criminal code to enforce is, for better or worse, a foundational and longstanding element of criminal prosecution. With the sheer volume of statutory violations that occur every day in every jurisdiction, giving each violation of the law due consideration would require a massive expansion of prosecutorial resources. The suggestion that every illegality can or should be individually evaluated for prosecution is as absurd as the notion that everyone who drives fifty-six miles per hour in a fifty-five zone should be stopped and individually evaluated for a speeding ticket.

The second reason is that ad hoc, individual case decisions leave far more room for bias than categorical policies, often leading to the

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<sup>76</sup> See, e.g., Paul H. Robinson & Joshua Crawford, *Progressive Prosecutors and the Inconvenient Democratic Will*, NEWSWEEK (May 5, 2023, 6:00 AM), <https://www.newsweek.com/progressive-prosecutors-inconvenient-democratic-will-opinion-1798165>; CHARLES STIMSON & ZACK SMITH, "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS (2020); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431 (2023).

<sup>77</sup> See *Ayala v. Scott*, 224 So. 3d 755 (Fla. 2017); *Johnson v. Pataki*, 691 N.E.2d 1002, 1007 (N.Y. 1997).

inconsistent application of the law and contributing to the egregious racial disparities seen at every step of the criminal prosecution process.<sup>78</sup> In larger offices with dozens or even hundreds of line prosecutors, office-wide guidance is especially essential to avoiding uneven, arbitrary results in which the happenstance of the assigned prosecutor drives the disposition. Categorical policies that establish a presumption against charging certain offenses, where appropriate, can be invaluable in ensuring the consistent and equitable administration of justice across the office, while also promoting the efficient use of limited resources.

The appropriateness of clear, office-wide declination policies depends on the reasoning behind a prosecutor's decision not to charge. When the elected prosecutor determines that the community's interest in pursuing a particular charge may vary depending on the facts of each case, the screening of individualized cases is, of course, fitting. But when the prosecutor determines that the community's best interests are not served by spending government resources to prosecute a certain category of cases (like, for example, consensual extramarital affairs), it would be wasteful to allocate staff time towards evaluating each such case. Courts have repeatedly held that prosecutors hold broad power to decide which criteria to apply when determining whether to file charges.<sup>79</sup> If the justification for declining to charge applies equally to every violation of a given statute, a categorical declination policy is by far the most efficient and fair way to apply the elected prosecutor's judgment.

Reform proponents and opponents alike implicitly accept this argument when it is applied to particularly archaic or absurd laws; no one seriously claims that prosecutors are infringing on the powers of the legislature when they decline to individually consider for prosecution accusations of using profanity or working on a Sunday. Anti-reformers, however, seem to draw an invisible line in the sand, conceding through their silence that some laws may be left wholly unenforced while

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<sup>78</sup> See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998).

<sup>79</sup> See, e.g., *Hassan v. Magis*, Ct. of City of New York, 20 Misc. 2d 509, 191 N.Y.S.2d 238 (Sup. Ct. 1959) (“The courts have time and again refused to interfere with prosecuting attorneys who in the exercise of discretion have determined not to institute prosecutions or determined that they would prosecute for one crime and not another.”).

arguing that others must be considered on a case-by-case basis. The determination of where to draw that line, however, is inherently subjective and informed by the community's evolving standards and values. That logic is why Americans continue to choose our local prosecutors through elections: when subjective decisions are necessary, local communities are empowered to decide who will make those decisions on their behalf.

*C. The Importance of Transparent Policies to Empower Meaningful Democratic Oversight*

While the use of categorial charging policies isn't exclusive to the reform movement, reform-minded prosecutors have diverged from tradition in one notable way: they have often chosen to articulate these policies publicly. This transparency, rather than the nature of their decision-making, is what commonly triggers their opposition.

Until recently, prosecutorial discretion was almost exclusively exercised behind closed doors, with little oversight or transparency.<sup>80</sup> A prosecutor might have privately committed to never prosecuting some offenses and to only prosecuting other offenses in specific circumstances, but by never publicly disclosing this decision, she could avoid having to explain her thinking to her constituents. Voters were then left to assess the performance of their district attorneys without any insight into the unwritten policies that were governing the office's decisions. Candidates and incumbents could dodge questions about their prosecutorial philosophies by claiming that they would simply review each case individually, and voters were left to guess how their elected prosecutor might choose to spend their finite tax dollars as competing demands arose.

Recently, reform-minded prosecutors have started to buck that trend, issuing public statements explaining how they plan to allocate their offices' limited resources and opening up their offices, policies, and data for public scrutiny.<sup>81</sup> This openness encourages engagement

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<sup>80</sup> See Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICKINSON L. REV. 589 (2018).

<sup>81</sup> For instance, prosecutors' offices have published policy memos, *see, e.g.*, Memorandum from Manhattan District Attorney Alvin L. Bragg, Jr. (Jan. 3, 2022),



and informed choices, empowering the public to actively participate in shaping the priorities and direction of their criminal legal system.

History has shown us how encroachments on prosecutorial independence chill this kind of transparency. When New York reinstated capital punishment in 1995, for example, Bronx District Attorney Robert Johnson took a firm stance, categorically declaring that he would never seek the death penalty.<sup>82</sup> His candor drew a swift rebuke from New York Governor George Pataki, who reassigned a capital murder case from Johnson's office to the state's pro-death penalty attorney general the following year.<sup>83</sup>

Just across the Harlem River, Manhattan District Attorney Robert Morgenthau took a different tact. Although he avowedly shared Johnson's personal opposition to the death penalty, Morgenthau refused to state categorically that he would never seek a death sentence, maintaining that his office would assess each case on an individual basis.<sup>84</sup> For all practical purposes, Morgenthau's approach was the same as Johnson's: he never once sought the death penalty during his thirty-four years as district attorney, even when confronted with particularly tragic, high-profile, or politically charged cases.<sup>85</sup> Yet, by never

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<https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf>; released live data dashboards, *see e.g.*, *County Attorney Public Data*, RAMSET CNTY. ATT'Y'S OFF., <https://www.ramseycounty.us/your-government/leadership/county-attorneys-office/county-attorney-public-data>; and given data to independent researchers for policy evaluations, *see, e.g.*, Chad D. Cotti & M. Ryan Haley, *Estimating the effectiveness of a misdemeanor drug diversion program using propensity score matching and survival analyses*, 51 SOC. SCI. J. 638 (2019).

<sup>82</sup> *See* Adam Nossiter, *Furor Over Death Penalty Ensnarers Bronx Prosecutor*, N.Y. TIMES (Dec. 22, 1995), <https://www.nytimes.com/1995/12/22/nyregion/furor-over-death-penalty-ensnarers-bronx-prosecutor.html>.

<sup>83</sup> *See* Johnson v. Pataki, 691 N.E.2d 1002, 1007 (N.Y. 1997); *see also*, James Dao, *Vacco Seeks Death Penalty in Police Officer's Shooting*, N.Y. TIMES (July 10, 1996), <https://www.nytimes.com/1996/07/10/nyregion/vacco-seeks-death-penalty-in-police-officer-s-shooting.html>.

<sup>84</sup> *See* Jan Hoffman, *Morgenthau Will Consider Death Penalty*, N.Y. TIMES (June 14, 1996), <https://www.nytimes.com/1996/06/14/nyregion/a-trail-of-violence-the-prosecution-morgenthau-will-consider-death-penalty.html>.

<sup>85</sup> *See, e.g.*, Susan Saulny, *Morgenthau Rules Out Death Penalty in Triple-Murder Case*, N.Y. TIMES (Nov. 16, 2002), <https://www.nytimes.com/2002/11/16/nyregion/morgenthau-rules-out-death-penalty->

formalizing this approach into a transparent policy, he side-stepped gubernatorial interference and retained control over his office’s death-eligible cases.

The question at the heart of anti-reform criticism is not whether categorical charging and sentencing policies will exist—they have long been an intrinsic part of prosecutorial decision-making and we have no practical way to change that without dramatically restructuring our legal system—but rather whether these policies should be made in the open or behind closed doors. A ban on presumptive, categorical declination policies could, in practice, amount only to a ban on the transparent disclosure of those policies, driving prosecutorial decision-making back into the shadows.

#### *D. The Electorate’s Role in Making Normative Policy Judgments Regarding Their Choice of Prosecutor*

In a country with more criminal laws than it could ever enforce, there will inevitably be points on which reasonable individuals can disagree. For 150 years, the legal system has evolved based on the assumption that voters would make the final call.<sup>86</sup> For most of that time, though, democratic checks on prosecutorial power existed mostly in theory. Prosecutors were rarely contested in elections and rarely asked to describe the policies that governed their offices.<sup>87</sup> Still, the courts allowed prosecutors to amass more and more discretionary power, working from the premise that voters *could* intervene when their local prosecutors went too far or diverged from community values.

Then, over the last decade, voters in jurisdictions across the country began to use their electoral power to oust incumbents in favor of

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in-triple-murder-case.html; John Sullivan, *Morgenthau Rejects The Death Penalty In Killing of Officer*, N.Y. TIMES (Oct. 8, 1997), <https://www.nytimes.com/1997/10/08/nyregion/morgenthau-rejects-the-death-penalty-in-killing-of-officer.html>.

<sup>86</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (“Because discretion is essential to the criminal justice process, exceptionally clear proof is required before this Court will infer that the discretion has been abused.”); *Milliken v. Stone*, 7 F.2d 397 (S.D.N.Y. 1925) (“The remedy for inactivity of [the prosecutor] is with the executive and ultimately with the people.”).

<sup>87</sup> See Hessick, Treul & Love, *supra* note 2.

reformers who promised to shrink the footprint of the criminal legal system.<sup>88</sup> Only then did institutions of power start to launch large-scale challenges to the scope of prosecutorial discretion. This response seeks to constrain the capacity of communities to influence their local prosecutors' office in only one direction, keeping their democratic powers intact when they choose punitive candidates but muzzling them when they choose reformers.

It is true, of course, that efforts to stifle prosecutorial reforms have largely been led by state officials who are themselves democratically elected, often using mechanisms created through democratic processes. We do not contend that states cannot, or should not, create mechanisms by which state-level leaders can lawfully check the power of local officials. We make a narrower argument: when state-level officials work to prevent locally elected officials from carrying out the policy agendas on which they were elected, solely because they disagree with the normative judgments underlying those policies, they undermine the foundations of democracy.

As discussed in Part I, local prosecutorial elections arose in significant part because policymakers recognized that the criminal legal system would continue to require normative judgments, and they believed that state-level officials were ill-equipped to make those judgments on behalf of the distinct, varied communities across their states. The recent spate of attacks on local prosecutors serves to justify their concerns. Many of these attacks have taken place in majority-white states,<sup>89</sup> led or enabled by state legislatures that are both ideologically<sup>90</sup> and demographically<sup>91</sup> unrepresentative of the communities they serve, targeting prosecutors elected by diverse cities whose residents have disproportionately borne the brunt of mass incarceration.<sup>92</sup> Regardless

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<sup>88</sup> See Blair & Krinsky, *supra* note 3.

<sup>89</sup> See Rebecca S. Goldstein, *Toplash: Progressive Prosecutors Under Attack From Above*, 61 AM. CRIM. L. REV. (forthcoming 2024).

<sup>90</sup> See Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 154 (2012).

<sup>91</sup> See *State Legislator Demographics*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 1, 2020), <https://www.ncsl.org/about-state-legislatures/state-legislator-demographics>.

<sup>92</sup> For instance, look at the efforts by Missouri state officials to oust City of St. Louis Circuit Attorney Kimberly Gardner. See Jim Salter, *Kim Gardner steps down as St.*

of the legal mechanisms at play, there is no doubt that democratic principles are weakened when the communities most impacted by criminal justice policies are afforded the least agency in determining who will run their local justice systems.

For democratic safeguards to work, voters cannot be permitted to choose their local prosecutor only when their state-level leaders approve of their decision. Our modern prosecutorial system is based on the proposition that voters are best positioned to decide who should lead their local justice system; when subjective questions arise, voters have the right to answer.

## CONCLUSION

In forty-seven states and the District of Columbia, voters are charged with choosing their prosecutors and, thus, with defining the qualities that they want to see from their DA's office. For decades, voters were almost exclusively presented with and elected candidates who embraced punitive approaches, and yet, their wisdom was rarely questioned within the seats of power. That approach, though, brought us the world's largest prison system and untold numbers of wrongful convictions while leaving us with far higher violent crime rates than our peer nations.<sup>93</sup>

After decades down this road, when presented with an alternative vision, many communities began embracing change and voting for reformers. Opponents spent millions of dollars trying to defeat these reformers at the ballot box, but communities overwhelmingly chose to re-elect their pro-reform incumbents.<sup>94</sup> Then, suddenly, state-level

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*Louis prosecutor 2 weeks sooner than planned*, AP NEWS (May 16, 2023, 5:35 PM), <https://apnews.com/article/kim-gardner-resignation-st-louis-missouri-42d0302e1b25f07c18d82a3254087b74>; Joey Schneider, *Gov. Parson: Kim Gardner 'not doing what she needs to be doing'*, FOX2NOW (Feb. 23, 2023, 11:52 AM), <https://fox2now.com/news/janae-edmondson/gov-parson-kim-gardner-not-doing-what-she-needs-to-be-doing/>.

<sup>93</sup> See Blair & Krinsky, *supra* note 3.

<sup>94</sup> See, e.g., Scott Bland, *Progressive Prosecutors Beat Back Primary Challengers in Virginia*, NBC NEWS (June 21, 2023, 8:03 AM), <https://nbcnews.com/politics/elections/progressive-prosecutors-beat-back-primary-challengers-virginia-rcna90334>; Melissa Segura, *Progressive Prosecutors Won In Midterm Elections Across The US In Spite Of Tough-On-Crime Rhetoric From*

officials who never so much as raised an eyebrow at prosecutors who used their discretion to convict innocent people or pursue draconian prison sentences stepped in and declared that prosecutorial discretion had gone too far.

These efforts to override prosecutorial discretion seem to be predicated on the assumption that crime-impacted communities cannot be trusted to define their own vision of justice. But the people who live and work in communities impacted by crime understand the dynamics of their local justice systems far better than officials in their state capitals. They listened for decades as distant policymakers told them that seismic investments in police and prisons were the only way to keep them safe. They watched as mass incarceration devastated entire communities, brought about unfathomable human suffering, consumed trillions of dollars each year, and failed to make them safer. When they say they want something different, it's their leaders' job to listen.

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*Republicans*, BUZZFEED NEWS (November 10, 2022, 6:14 PM),  
<https://www.buzzfeednews.com/article/melissasegura/criminal-justice-reform-midterms>.