PROSECUTORIAL REFORM AND THE MYTH OF INDIVIDUALIZED ENFORCEMENT

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ABSTRACT

The American prosecutor's legitimacy faces unprecedented challenges. A new wave of reformist prosecutors has risen to power promising to transform the criminal justice system from within, sparking fierce backlash from defenders of the prosecutorial status quo. Central to this conflict is a debate over the nature of prosecutorial discretion, influenced by a set of claims and assumptions that this Article terms the myth of individualized enforcement. This myth posits that prosecutors base discretionary decisions on case-specific facts and equitable circumstances rather than generalizable criteria or categorical nonenforcement practices, such as the policies some reformist prosecutors have adopted that disfavor prosecuting marijuana possession or abortion offenses or seeking the death penalty.

This Article is the first to identify and critically examine the myth of individualized enforcement. It draws on a review of historical evidence and research on contemporary prosecutorial practices to show that prosecutors have long engaged in categorical nonenforcement in relation to vice laws, property offenses, and even certain areas of violent crime enforcement. By situating reformist prosecutors' policies within this broader context, the Article exposes how the myth of individualized enforcement has been weaponized to delegitimize reform efforts while shielding conventional prosecutors from scrutiny.

The Article also excavates the deeper distinctions between reformist and conventional approaches to categorical nonenforcement that the myth of individualized enforcement serves to hide from view. Reformist prosecutors tend to adopt centralized, formal, and transparent nonenforcement policies that aim to redistribute the benefits of prosecutorial leniency to historically marginalized groups. Conventional prosecutors, in contrast, have often

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dispensed categorical leniency in an informal, covert manner and in contexts that tend to reproduce existing hierarchies of race, class, and gender. By surfacing these divergences, the Article aims to recenter academic and political discourse about prosecutorial reform around comparing different substantive visions of discretionary justice and the institutional structures that will best align prosecutorial power with democratic values.

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INTRODUCTION

Writing nearly a century ago, as America's failed national experiment with alcohol prohibition was drawing to a close, political scientist Schuyler Wallace sent a survey to district attorneys (DAs) all across the country asking if they ever "made use of their discretion to the point of actually nullifying archaic or unpopular laws still on the statute books."[1] Almost all of the roughly 300 responding DAs acknowledged that "there were on the statute books many laws which they never enforced."[2] Sunday closing laws, prohibitions on adultery and fornication, and parts of the traffic code were all subject to "widespread" and "thoroughgoing" non-prosecution according to the survey data,[3] and a whole host of other laws—ranging from dry laws and anti-gambling measures to certain property crimes, bans on concealed

1. Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POL. SCI. Q. 347, 347–48 (1930). It is unclear whether the text just quoted represents the precise question or questions Wallace posed to the DAs or a distillation of the survey.

2. *Id.* at 348 & n.1 ("[A]t least ninety per cent . . . admitted that in their jurisdiction it was a common practice for them to use their discretion in the enforcement or non-enforcement of particular laws. And that there were on the statute books many laws which they never enforced.") (emphasis omitted).

3. *Id.* at 351; *see also id.* at 350, 352–54.

weapons, and civil rights laws—were likewise identified by many DAs as fertile terrain for nonenforcement.[4] The responses he received from these prosecutors led Wallace to conclude that "the practice of nullification . . . is a widespread and seemingly accepted process of government."[5]

The broad-ranging patterns of nonenforcement that Wallace catalogued in 1930 are striking, but they are hardly exceptional. It is common knowledge, corroborated by ample academic research, that the Volstead Act and other alcohol prohibition measures frequently went unenforced by prosecutors and police in "wet" locales where alcohol consumption was part of the community's way of life.[6] It should also surprise no one to hear that many statutes regulating consensual sexual activity were—and still are—often left on the shelves to collect dust[7] and that, in many different times and places, the same could be said of various laws proscribing white-collar crime,[8] lynching,[9] rape and domestic violence,[10] criminal acts by the police,[11] and other crimes.[12] Moreover, even when it comes to criminal prohibitions that prosecutors are amenable to enforcing with some regularity, patterns commonly emerge whereby the laws go systematically unenforced in certain situations while being enforced vigorously when the circumstances are different.[13] Whether or not one refers to these practices

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4. *Id.* at 357–58 (indicating that these and dozens of other crimes were "[a]mong those most frequently mentioned" by the responding DAs).

5. *Id.* at 348 (emphasis omitted).

6. *See, e.g.*, NAT'L COMM'N ON L. OBSERVANCE & ENF'T, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 70–78, 94–96, 106–10 (1931) [hereinafter WICKERSHAM REPORT]; Lawrence M. Friedman & Omar Vasquez Duque, *High and Dry in California: A Note on Enforcement of Prohibition*, 90 UMKC L. REV. 743, 748–50 (2022); *see also infra* notes 36–37 and accompanying text.

7. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 *passim* (2003); Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 96–97 (2022); *see also infra* notes 184–92 and accompanying text.

8. *See, e.g.*, EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 6–7, 54–60 (1983); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 *passim* (2001); *see also infra* notes Section II.B.

9. *See, e.g.*, SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY *passim* (2007); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 LAW & SOC'Y REV. 793, 809–11 (2005); *see also infra* notes 283–93 and accompanying text.

10. *See, e.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087 *passim* (1986); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1882, 1890 (1996); *see also infra* notes 310–15 and accompanying text.

11. *See, e.g.*, Vida B. Johnson, *Whom Do Prosecutors Protect?*, 104 B.U. L. REV. 289, 328–30 (2024); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 *passim* (2016); *see also infra* notes 294–99 and accompanying text.

12. *See infra* Part II.

13. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 *passim* (2004) (discussing "going rates" for plea offers that prevail in many courthouses); Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1577, 1583, 1593 (2012) [hereinafter Murray, *Color-Conscious Professional Ethic*] (arguing that implicit racial bias influences prosecutorial decisions);

as "nullification," as does Wallace,[14] or as "categorical nonenforcement," the term used in this Article,[15] there is a wealth of evidence indicating that prosecutors both enforce and refrain from enforcing many criminal statutes in a patterned and predictable fashion.

The so-called "myth of full enforcement," a dominant conception of the prosecutorial (and police) role for much of the twentieth century, was a seductive illusion.[16] It presented prosecutors as impartial, almost mechanical enforcers of the law, duty-bound to apply each statute to the fullest extent possible whenever they had at hand evidence establishing guilt.[17] This understanding of the prosecutor's function, however, has been steadily eroded by growing awareness of the vast discretionary powers prosecutors wield and the concomitant risks of abuse and selective enforcement.[18] A new myth has thus emerged to take its place: *the myth of individualized enforcement*. The myth of individualized enforcement, which this Article is the first to identify and to critically examine, posits that prosecutors exercise their discretion on a case-by-case basis, guided by the unique circumstances of each offense and free from the corrupting influence of broader ideological considerations and categorical policymaking. It seeks to reconcile the undeniable reality of prosecutorial discretion with the enduring ideal of neutral, apolitical law enforcement, thereby helping

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Megan S. Wright, Cindy L. Cain & Shima Baradaran Baughman, *Dimensions of Prosecutor Decisions: Revealing Hidden Factors with Correspondence Analysis*, 15 U.C. IRVINE L. REV. 271 (2024) (summarizing academic research on the salience of past criminal history in shaping discretionary decisions by prosecutors). Certain kinds of selective nonenforcement, though not all, qualify as "categorical nonenforcement" in the sense this Article uses that term. *See infra* pp. 1462–64.

14. Wallace, *supra* note 1, *passim*.

15. I have argued in prior work that it can be misleading to characterize categorical nonenforcement by prosecutors as "nullification" because doing so obscures how other actors such as police may continue using criminal laws to serve their own goals regardless of whether prosecutors are enforcing those laws. Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391 (2022) [hereinafter Murray, *Prosecutorial Nonenforcement*]. Other scholars see nullification as a helpful term for thinking through the normative difficulties that categorical nonenforcement presents. *E.g.*, W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) [hereinafter Murray, *Populist Prosecutorial Nullification*]; *cf.* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011) (employing the vocabulary of nullification but focusing more on the motivations animating prosecutorial decision making than on whether decisions have a categorical sweep); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012) (using the somewhat different nomenclature of "decriminalization" in describing a similar set of practices).

16. *See, e.g.*, Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 7–8 (1932) (discussing a then-widely shared "mystical ideal called Law Enforcement"); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 915, 930 (1962) (criticizing the "myth of full enforcement").

17. The myth of full enforcement is discussed *infra* notes 105–08 and accompanying text.

18. *See, e.g.*, John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3, 11–13 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008); Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62 *passim* (1976); *see also infra* notes 107–08 and accompanying text.

conventional prosecutors to preserve their legitimacy in the face of mounting criticism. At the same time, the myth serves to discredit a new wave of reformist prosecutors who are striving to transform the criminal justice system from within, casting the efforts of these reformers as politically motivated and antithetical to the impartial administration of justice.[19]

The past decade has witnessed a groundswell of support for reformist (often referred to as "progressive"[20]) prosecutors, who now represent around twenty percent of Americans.[21] The efforts of these reformers to disrupt business-as-usual have provoked stiff resistance,[22] with opponents rallying around the myth of individualized enforcement to slow the pace of change.[23] Voters have ousted several incumbent reformist prosecutors in part because of backlash against various categorical nonenforcement measures.[24] State legislatures in Texas and Georgia have recently passed laws that prohibit categorical nonenforcement,[25] and Pennsylvania's

19. On the precipitous ascent of reformist prosecutors over the past decade, see generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION ch. 5 (2019); Miriam Aroni Krinsky, Justin Murray & Maybell Romero, *Preface: New Directions in Prosecutorial Reform*, 60 AM. CRIM. L. REV. 1369 *passim* (2023). *See also infra* pp. 1453–54.

20. Though the term *progressive prosecutor* is in vogue, I find the term *reformist prosecutor* more accurate and helpful for a number of reasons, not least that DAs who happen to be Democrats—but who are not serious about criminal justice reform—can all too easily declare themselves progressive without taking meaningful steps to change how their offices approach crime and make themselves accountable to the public. Additionally, some committed reformers prefer not to describe their approach using terms that have a partisan or political valence. Framing discussions in terms of "progressive" prosecution needlessly excludes these reformers from the conversation. For further discussion, see Anna Roberts, *Criminal Terms*, 107 MINN. L. REV. 1495 *passim* (2023).

21. MIRIAM ARONI KRINSKY, CHANGE FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR, at xi (2022); *see* Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 *passim* (2021).

22. *See, e.g.*, I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795 *passim* (2022); Shaila Dewan, *The Lessons Liberal Prosecutors Are Drawing from San Francisco's Backlash*, N.Y. TIMES (June 15, 2022), https://www.nytimes.com/2022/06/13/us/justice-reform-boudin-recall-san-francisco.html [https://perma.cc/AF2G-KXDN].

23. *See generally* Brenner Fissell, *Categorical Declinations & Democracy*, 114 J. CRIM. L. & CRIMINOLOGY 745, 745 (2025) (identifying categorical nonenforcement policies as "[t]he most contentious action taken by reform prosecutors"); *see also infra* Section I.C.

24. *See, e.g.*, Max Blaisdell, *The Race to Replace Kim Foxx*, S. SIDE WKLY. (Mar. 6, 2024), https://southsideweekly.com/the-race-to-replace-kim-foxx [https://perma.cc/FPK8-C8TG] (discussing how the (successful) candidate to replace Chicago's reformist chief prosecutor campaigned against her policy preventing prosecution of low-dollar retail thefts as felonies); Joan Illuzzi-Orbon, Opinion, *Progressive Prosecutors & the Public They Serve*, N.Y. DAILY NEWS (June 7, 2022, 9:00 AM), https://www.nydailynews.com/opinion/ny-oped-chesa-boudin-recall-20220607-cosc24ttubbtvmne3ofwhxu2au-story.html [https://perma.cc/9C26-CDXE] (attacking San Francisco's reformist DA on the eve of his recall election largely because of his adoption of categorical nonenforcement policies).

25. 2023 Tex. Gen. Laws ch. 366 (codified at TEX. LOC. GOV'T CODE ANN. § 87.011(3)(B)–(C) (West 2024)) (deeming it "official misconduct" for a DA to "refus[e] to prosecute a class or type of criminal offense" or permit an assistant prosecutor to do so); 2023 Ga. Laws 718, 724 (codified as

legislature voted to impeach Philadelphia's prominent reformist DA (though the impeachment has stalled) based on allegations that included his issuance of nonenforcement policies.[26] Police officials in many places have vociferously opposed reformist prosecutors' nonenforcement policies, often continuing to make arrests even when it is perfectly clear that the arrests will lead nowhere.[27] Line prosecutors in some offices have more or less openly revolted against their reformist bosses, subverting their nonenforcement policies in their charging paperwork and in court.[28] The judiciary, too, has proven to be an obstacle, with judges thwarting non-prosecution policies relating to marijuana possession (in Virginia), Three Strikes enhancements (in California), and the death penalty (in Florida).[29] Right-wing pundits, politicians, and think tanks have waged a relentless campaign against "rogue" prosecutors who allegedly "contort the role of the prosecutor into a macabre creature that is a prosecutor in name only."[30] State governors have also deployed the myth of individualized enforcement as a cudgel against reformist prosecutors, as when Florida Governor Ron DeSantis removed Tampa's chief prosecutor Andrew Warren for allegedly (but not actually) adopting a policy against enforcing laws criminalizing abortion.[31] The myth has even found adherents within the legal academy, with Zach Price arguing that categorical nonenforcement violates the separation of powers under the laws of many states, Bruce Green and Rebecca Roiphe arguing that longstanding norms and traditions of the profession preclude categorical nonenforcement by prosecutors, and Paul

amended at GA. CODE ANN. § 15-18-32(i)(2)(E) (2024)) (creating a prosecutor oversight commission with the power to remove DAs for having a "stated policy, written or otherwise, which demonstrates that the district attorney . . . categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute").

26. *See* Brooke Schultz & Marc Levy, *Pa. Senate Indefinitely Delays Impeachment Trial for Philly DA Larry Krasner*, NBC10 PHILA. (Jan. 12, 2023, 11:47 AM), https://www.nbcphiladelphia.com/news/politics/senate-delays-philly-da-krasner-impeachment/3470344/ [https://perma.cc/5M2U-WSCA].

27. *See, e.g.*, KRINSKY, *supra* note 21, at 130–31, 135.

28. *See, e.g.*, Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403 *passim* (2023); Brian Melley, *Los Angeles DA Faces Resistance for Criminal Justice Reforms*, ASSOCIATED PRESS (Mar. 25, 2021, 3:29 PM), https://apnews.com/general-news-f14ee2c940125954ec3fdd98fd9fc67e [https://perma.cc/5QRY-YEGQ].

29. Murray, *Prosecutorial Nonenforcement*, *supra* note 15, *passim*; *see also* A. Shea Daley Burdette & Jacob Carruthers, Note, *Judicial Review of Prosecutorial Blanket Declination Policies*, 20 OHIO ST. J. CRIM. L. 179 *passim* (2022).

30. ZACK SMITH & CHARLES D. STIMSON, ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA'S COMMUNITIES 250 (2023); Tom Hogan, Opinion, *Cracking the Case of the 'Woke' Prosecutor*, N.Y. POST (Jan. 17, 2022, 7:41 PM), https://nypost.com/2022/01/17/cracking-the-case-of-the-woke-prosecutor-2/ [https://perma.cc/NH92-2KMQ].

31. *See* Fla. Exec. Order No. 22-176, at 2–4, 8 (Aug. 4, 2022) (asserting that Warren had adopted "blanket policies" of nonenforcement in which he would "exercise no discretion at all in entire categories of criminal cases"); Warren v. DeSantis, 90 F.4th 1115, 1121 (11th Cir. 2024) (noting that Warren's statements about abortion never became official policy), *vacated as moot*, 125 F.4th 1361 (11th Cir. 2025).

Robinson and Jeffrey Seaman arguing that reformist prosecutors' "de facto decriminalization" policies are fueling a crime spike.[32] In this contentious landscape, the myth of individualized enforcement has emerged as a potent weapon for those seeking to resist the rising reformist tide in American prosecution.

This Article makes three main contributions to the academic literatures on prosecutorial discretion, politics, and reform. The Article's first set of contributions, covered in Part I, is to give the myth of individualized enforcement a name, describe its core features, and trace the intellectual and political crosscurrents that propelled the myth's rise to prominence. These crosscurrents include (as Part I explains) the mounting political challenges confronting conventional prosecutors and the related ascendancy of reformist prosecutors, the unravelling of the full enforcement paradigm, and the debates surrounding President Obama's signature immigration initiatives (DAPA and DACA, to use their popular acronyms).[33] Part I also addresses the difficulty of precisely defining "categorical nonenforcement" (and other terms used interchangeably with it such as "blanket" nonenforcement[34]), which the myth's proponents frequently invoke but seldom define in any clear or consistent fashion. By sifting through various ways in which the term is described and applied by purveyors of the myth, Part I concludes that categorical nonenforcement (as it is conceived by many critics of reformist prosecutors) refers to prosecutorial policies or practices that predictably favor nonenforcement[35] across multiple cases

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32. Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651 *passim* (2023) [hereinafter Price, *Faithful Execution*]; Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431 *passim* (2023); Paul H. Robinson & Jeffrey Seaman, *Decriminalizing Condemnable Conduct: A Miscalculation of Societal Costs and Benefits*, 98 S. CAL. L. REV. 585 (2025).

33. *See infra* Section I.C. DAPA is shorthand for Deferred Action for Parents of Americans, and DACA refers to Deferred Action for Childhood Arrivals. Both programs were variously criticized, praised, and even challenged in court for allegedly replacing individualized decision making about whether to enforce the immigration laws with categorical nonenforcement—the very thing reformist prosecutors are now said to be doing in connection with state criminal codes. *Compare* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 *passim* (2015) (praising DAPA and DACA's categorical features for fostering presidential control and democratic accountability), *with* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–61 (2014) (criticizing DAPA and DACA on the ground that they "amount[] to a categorical, prospective suspension" of immigration laws). *See also infra* notes 109–12 and accompanying text.

34. *E.g.*, Ayala v. Scott, 224 So. 3d 755, 759 (Fla. 2017); Zachary Price, Opinion, *Can Prosecutors Refuse to Enforce the Law?*, WALL ST. J. (Apr. 28, 2022, 11:49 AM), https://www.wsj.com/articles/can-prosecutors-refuse-to-enforce-the-law-alvin-bragg-choose-crime-order-states-11651154718 [https://perma.cc/87JJ-33G2].

35. Another complication, explored in Part I, is that "categorical nonenforcement" and related terms are employed in such a way as to include policies or practices that entail lesser enforcement—such as life imprisonment instead of the death penalty, a misdemeanor charge instead of a felony, or diversion in lieu of traditional criminal prosecution—not merely the absence of any kind of enforcement whatsoever. *See infra* pp. 1464–66.

fitting within defined categories—by contrast with prosecutorial decision making that proceeds one case at a time, based on facts and circumstances peculiar to each case.

The Article's second contribution, detailed in Part II, is also its most significant: exposing the myth of individualized enforcement as a fallacy. Using the same definition of categorical nonenforcement employed by many of the myth's supporters as a benchmark, Part II examines the policies and practices of conventional prosecutors across a broad spectrum of different criminal offenses, ranging from vice crimes to property crimes and crimes of violence. Across all three domains, the Article reveals that conventional prosecutors make extensive use of categorical nonenforcement, even as they also utilize individualized criteria in many situations. To be sure, conventional prosecutors are a heterogeneous group, just as reformist prosecutors are: the precise kinds of categorical nonenforcement found in any given time and place—which might entail non-prosecution for bootleggers and adulterers in some jurisdictions, or lynchers and spousal abusers in another[36]—can differ drastically even between prosecutors whom this Article would lump together, admittedly imprecisely, as "conventional prosecutors."[37] Yet while the particulars of categorical nonenforcement vary (sometimes quite substantially) among conventional prosecutors, Part II debunks the notion that categorical nonenforcement is a novelty associated with the recent rise to power of reformist prosecutors and thus undermines a central tenet of the myth of individualized enforcement.

The Article's third contribution, and the focus of Part III, is to surface the real underlying differences between reformist and conventional prosecutors in how they approach categorical nonenforcement. Where reformist prosecutors tend to prefer a more formal and centralized approach, which gives the elected DA greater control over enforcement policy and outcomes, the nonenforcement patterns of conventional prosecutors are typically more informal and decentralized, devolving power to line prosecutors and middle management to effectively set policy for the office.

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36. *See infra* notes 180–83, 185 and accompanying text (nonenforcement for alcohol prohibition and adultery); *infra* notes 283–93 and accompanying text (nonenforcement for lynching); *infra* notes 310–15 and accompanying text (nonenforcement for domestic violence).

37. I largely follow the lead of the existing literature in dividing prosecutors into two groups: conventional (or "traditional") prosecutors and reformist (or "progressive") prosecutors. *See, e.g.*, Green & Roiphe, *supra* note 32, at 1432; Ryan C. Meldrum, Don Stemen & Besiki Luka Kutateladze, *Progressive and Traditional Orientations to Prosecution: An Empirical Assessment in Four Prosecutorial Offices*, 48 CRIM. JUST. & BEHAV. 354, 356 (2021). *But cf.* Green & Roiphe, *supra* note 32, at 1437 ("[I]t is important to acknowledge that both traditional and progressive prosecutors differ among themselves, and that this Article relies on broad generalizations."). For further discussion of this dichotomy, including an acknowledgment of its limitations, see *infra* notes 68–69, 86–89 and accompanying text.

Moreover, reformist prosecutors are generally more transparent about their nonenforcement policies and practices, whereas conventional prosecutors overwhelmingly prefer to conceal nonenforcement within the infamous "black box" of prosecutorial discretion.[38] Finally, reformist prosecutors commonly endeavor to leverage their nonenforcement authority to uplift disadvantaged groups and tackle the racial and socioeconomic disproportionalities that have persistently characterized conventional prosecution, whereas the primary beneficiaries of conventional prosecutors' nonenforcement decisions often wind up being those who occupy the upper echelons of the social hierarchy. By drawing attention to these differences, Part III exposes how the myth of individualized enforcement confers unearned legitimacy on conventional prosecutors, impoverishing public discourse and hindering much-needed efforts to reform the prosecution function.

I. THE MYTH OF INDIVIDUALIZED ENFORCEMENT IN CONTEXT

This Part of the Article introduces what I call the myth of individualized enforcement, a concept that has become increasingly central to debates about the role of prosecutors in the American criminal justice system. The main argument of this Part is that the myth serves to legitimize the vast discretionary powers of conventional prosecutors while delegitimizing reformist efforts to use that discretion in new ways. Section I.A begins by describing the various discretionary powers wielded by modern prosecutors, setting the stage for the ensuing discussion of how that discretion is conceptualized and contested. Section I.B then chronicles the rise of reformist prosecutors and the concomitant legitimacy crisis experienced by their more traditional counterparts. Section I.C situates the myth of individualized enforcement as a response to this crisis, portraying conventional prosecutors' supposedly case-by-case decision-making as apolitical and legitimate while casting reformist prosecutors' policies as dangerously categorical and ideological. Finally, Section I.D grapples with the critical but ill-defined concept of categorical nonenforcement, developing a working definition by examining how critics wield this concept against reformist prosecutors. This definition will serve as a valuable tool in Part II for demonstrating that conventional prosecutors routinely engage in the very practices the myth condemns, exposing the double standard at its core.

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38. *E.g.*, Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008); Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133 (2022).

A. The Discretionary Powers of the Modern American Prosecutor

The term *discretion* as used in this Article refers to the exercise of judgment in choosing between multiple courses of action that are each permitted by law.[39] Discretion has been pivotal to criminal law administration throughout this country's history.[40] Initially—during the post-revolutionary period and before it—the power to make major decisions regarding how the law should be enforced was entrusted not to public prosecutors but to judges along with private individuals acting in such varied capacities as constables, jurors, posses, vigilantes. Most relevant for purposes of our topic, crime victims were generally empowered to decide for themselves whether and in what way to seek redress in the criminal courts.[41] But over the course of the nineteenth century, for reasons that remain somewhat obscure and that few historians have carefully probed, public prosecutors (as well as professional police forces[42]) steadily wrested control over criminal law enforcement from crime victims, ushering in the modern system of prosecution.[43] Due to the decentralized character of American penal institutions, the transfer of enforcement authority from ordinary people to public officials did not happen in precisely the same way, nor at the same time, in every jurisdiction.[44] But by the mid- to late-

39. This is not the only plausible conception of what discretion means in legal discourse; for helpful discussions of various possibilities, see George P. Fletcher, *Some Unwise Reflections about Discretion*, 47 LAW & CONTEMP. PROBS. 269 (1984); and H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652 (2013) (posthumous).

40. *See, e.g.*, Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1954–56 (2019).

41. *See, e.g.*, Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–28 (2002). Government officials vested with certain prosecutorial powers have existed in America for centuries, but the earliest public prosecutors were bit players tasked mainly with ministerial functions such as managing court calendars and choreographing grand jury proceedings—not, at least in ordinary criminal matters, with formulating enforcement priorities or deciding which criminal complaints ought to be prosecuted. *See, e.g.*, Jack M. Kress, *Progress and Prosecution*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 100, 107 (1976); Mike McConville & Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800–1865*, 22 J.L. & SOC'Y 443, 453–55 (1995).

42. On the rise of police organizations in nineteenth century America, see, for example, THOMAS A. REPPETTO, AMERICAN POLICE: THE BLUE PARADE 1845–1945, A HISTORY (Enigma Books 2010) (1978). On the complex interplay between police decision making and prosecutorial discretion, see, for example, Jonathan Abel, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730 (2017); and Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

43. *See, e.g.*, Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L. J. 1528, 1530–33 (2012); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 569 (1984).

44. *Compare* Allen Steinberg, *"The Spirit of Litigation:" Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 20 J. SOC. HIST. 231 (1986) (concluding that Philadelphia's public prosecutors did not acquire substantial discretionary authority until the late nineteenth century

nineteenth century, public prosecutors in most jurisdictions had acquired substantial authority—whether through an explicit grant of authority by lawmakers or as a consequence of the disempowerment of grand juries—to determine when and how the criminal laws should be brought to bear against suspected violators.[45] Though the office of the public prosecutor continued to evolve and amass power in later periods, by this early stage the office had already assumed its essential modern characteristics in much of the country.[46]

The modern prosecutor possesses not one but many discretionary powers, each ultimately deriving from the prosecutor's control over the charging process.[47] Once alleged criminal activity is reported or referred to the prosecutor's office, the prosecutor has broad authority to either convert those allegations into formal charges, stop the case in its tracks, or pursue some other intervention such as diversion or restitution.[48] When opting to file charges, the prosecutor is typically empowered to institute a criminal prosecution—whether acting alone or through the grand jury, which, in its modern instantiation, is configured to do the prosecutor's bidding—as long as the charges are founded on legally sufficient evidence.[49] Because modern penal codes criminalize a stunning array of human behaviors (owing in part to the lobbying power of prosecutors themselves)[50] and because the evidentiary standard needed to bring charges is relatively undemanding

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and suggesting the same is likely true elsewhere), *with* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 266–67 (2013) (arguing that Philadelphia's public prosecutors were late bloomers and that public prosecutors in other jurisdictions acquired expansive enforcement discretion considerably earlier).

45. *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 29–30, 36–38 (1980); 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 1.6(d), Westlaw (4th ed. database updated November 2024).

46. Indeed, the normal pattern has been one of continually expanding prosecutorial power as criminal codes burgeoned, plea bargaining proliferated, and mandatory sentencing laws shifted much of the de facto control over sentencing from judges to prosecutors. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION ch. 7 (2019); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

47. *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 22–39, 43–48 (2007) [hereinafter DAVIS, ARBITRARY JUSTICE]; Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387 (2008).

48. *See, e.g.*, FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME *passim* (Frank J. Remington ed., 1969); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV 1521 (1981).

49. *See, e.g.*, Heman W. Chaplin, *Reform in Criminal Procedure*, 7 HARV. L. REV. 189, 190–92 (1893); Raymond Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403, 403–05 (1931).

50. *See, e.g.*, Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby* 80 WASH. & LEE L. REV. 143, 145–46 (2023); Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. 1965 (2023). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 171–72 (2019) (sounding a skeptical note regarding prosecutorial influence on the lawmaking process).

(probable cause is generally all that is needed), prosecutors have a large pool of potential targets from which to choose.[51] Conversely, prosecutors also have broad authority to refrain from enforcing criminal statutes even where charges could be supported by adequate evidence.[52] Research going back over a century establishes that many declination or dismissal decisions by prosecutors are premised not on a lack of proof but, rather, on such factors as empathy for a privileged or first-time offender, willingness to plead to lesser charges or cooperate with the police, payment of restitution to the victim, or the law in question being out of step with local norms.[53] Courts almost uniformly see themselves as ill-equipped to review prosecutors' decisions to decline or dismiss charges, and crime victims ordinarily lack standing to challenge them.[54] In short, as long as there is probable cause to suspect a person has committed an offense, the prosecutor ordinarily may choose to bring charges, intervene in some other fashion (such as by issuing a warning or referring the matter to civil regulators or demanding restitution), or take no action whatsoever.[55]

In the sizable subset of cases where a decision is made to pursue charges, the modern prosecutor is further tasked with deciding or at least being a key participant in a host of additional choices that can drastically impact what punishment the defendant is likely to receive. Will the defendant be prosecuted for the most serious provable charge or a lesser offense? Will there be many charges or few? Will the prosecutor seek to resolve the case through a plea deal or some form of diversion—or settle for nothing less than convictions for the crimes alleged in the charging instrument? If the target of the prosecution is a child, will the child be prosecuted like an adult in criminal court, or in the juvenile court system? Will the prosecutor pursue an enhanced form of punishment such as the death penalty or a Three Strikes sentence—or a sentence within the default range for the charged offense? Will the defendant be charged with an offense carrying a mandatory

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51. *See, e.g.*, Daniel C. Richman & William J. Stuntz, Essay, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005); William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 513, 551–52 (2016).

52. *See, e.g.*, 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 989 (1st ed. 1866); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717–21 (2006).

53. *See, e.g.*, MILLER, *supra* note 48, *passim*; RAYMOND MOLEY, POLITICS AND CRIMINAL PROSECUTION ch. 8 (1929); Wallace, *supra* note 1, *passim*. For a recent summary of the available data on prosecutorial declination rates, see Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937, 944–47 (2024).

54. *See, e.g.*, Linda R.S. v. Richard D., 410 U.S. 614, 618–19 (1973); ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 4–5, 54–58 (1981).

55. *See, e.g.*, Newman F. Baker & Earl H. De Long, *The Prosecuting Attorney: The Process of Prosecution*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 185, pt. 2, at 187, 195–96, 201 (1935); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1046, 1059–61 (1972).

minimum penalty, or with an offense that preserves judicial sentencing discretion? Will the prosecutor recommend a harsh or lenient sentence? Prosecutors play a major role in all these decisions, and then some. To be sure, prosecutors have a firmer grip when it comes to some of these decisions (like whether to pursue greater versus lesser charges) than for others (such as determining the sentence), and in any event, the distribution of authority between prosecutors and other decisionmakers in each domain varies considerably across jurisdictions. Even so, it is fair to say that the modern prosecutor has far-reaching influence not only in determining whether to institute a prosecution but also in shaping other important parts of the adjudicative process, including the sentence ultimately imposed by the judge.[56]

The expansive discretionary powers of modern prosecutors necessitate effective accountability mechanisms to ensure their powers are not misused. Yet no such effective mechanisms exist.[57] Jennifer Laurin notes that prosecutors might be held accountable through legal, bureaucratic, or political oversight (or some combination).[58] Of the three, legal accountability has proven the most feeble: courts routinely reject legal challenges to prosecutors' discretionary decisions over whether or not to enforce the law, incanting "almost magical formula—'within the prosecutor's discretion.'"[59] Civil actions related to prosecutorial charging are foreclosed by absolute immunity doctrines, and criminal prosecution is unthinkable in all but the rarest situations.[60] Bureaucratic accountability, which includes the informal constraints imposed by "courtroom workgroup" dynamics and feedback from other insiders such as judges, defense attorneys, and police, can exert a check on prosecutorial power in

56. There is an expansive literature covering the prosecutor's role and influence at each of these key decision points. For a snapshot, see, for example, various chapters from THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021).

57. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1021–28 (2006); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 976 (2009).

58. Jennifer E. Laurin, *Progressive Prosecutorial Accountability*, 50 FORDHAM URB. L.J. 1067, 1073 (2023).

59. George Fraser Cole, The Politics of Prosecution: The Decision to Prosecute 56 (May 24, 1968) (Ph.D. dissertation, University of Washington) (on file with the University of Arizona Law Library) (quoting Clarence Clyde Ferguson Jr., *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV. 507, 507 (1957)).

60. *See, e.g.*, Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509 (2011); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1358–60 (2021); *cf.* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1643 (2018) (noting that no prosecutor has ever been prosecuted for an intentional *Batson* violation even though some violations are within the fair sweep of a federal criminal statute). Relatedly, bar discipline authorities have traditionally been asleep at the switch when it comes to regulating prosecutorial ethics mishaps—though this is possibly beginning to change, ever so slightly. *See, e.g.*, Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 59–61 (2016).

certain circumstances.[61] However, the extent of these constraints varies widely, and prosecutors often end up having an outsized share of control within courtroom workgroups.[62] Political checks are intended as the principal means for holding prosecutors accountable, especially for locally elected prosecutors: in Darryl Brown's words, "[t]he law of prosecutorial charging discretion . . . is basically that politics governs discretion."[63] However, political accountability has been seriously hampered by a poverty of transparency in prosecutorial decision making and by the vacuousness of many elections featuring conventional prosecutorial candidates, which typically revolve around cherry-picked data, misleading information about conviction rates, and the occasional scandal or tabloid-worthy trial.[64]

The absence of effective oversight has enabled conventional prosecutors to pursue ill-advised policies and practices, contributing to a host of problems that pervade American criminal justice. A substantial body of research connects the unchecked power of prosecutors with the buildup of mass incarceration, with aggressive charging decisions and plea bargaining tactics resulting in longer sentences and fueling a historically unprecedented surge in prison populations.[65] The punitive orientation of conventional prosecution, moreover, has exacerbated racial and class disparities, perpetuated a futile war on drugs, and contributed to the destabilization of entire communities.[66] And yet, the tough on crime dimensions of

61. *See, e.g.*, JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (Univ. Press of Am. 1991) (1977); 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. CRIM. L. & CRIMINOLOGY 52, 55 (1981).

62. As one recent work says on this topic, "despite the tremendous amount of discretion spread throughout the criminal justice system, it is the prosecutor who is the focal point," since "[t]he inputs and outputs of the criminal justice process are largely governed by the prosecutor's decisions to decline to prosecute, accept and charge cases for prosecution, use other alternatives to prosecution, or dismiss cases." JOAN E. JACOBY & EDWARD C. RATLEDGE, THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM 31 (2016).

63. DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 205 (2016).

64. *See, e.g.*, Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1071–78 (2022); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

65. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM ch. 5 (2017); Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1123–28 (2021); *cf.* Mona Lynch, *Prosecutors as Punishers: A Case Study of Trump-Era Practices*, 25 PUNISHMENT & SOC'Y 1312 (2023) (presenting evidence that prosecutors can diminish the impact of decarceral laws if those laws fail to cabin prosecutors' discretion). *But see* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 835–39 (2018) (critically reviewing PFAFF, *supra*, and arguing that the contributions prosecutors made to mass incarceration were secondary to those of other government actors).

66. *See, e.g.*, Jawjeong Wu, *Racial/Ethnic Discrimination and Prosecution: A Meta-Analysis*, 43 CRIM. JUST. & BEHAV. 437, 437–40 (2016); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1273 (2004).

conventional prosecution only tell half the story. As this Article highlights, conventional prosecutors have also frequently engaged in troubling patterns of underenforcement, often turning a blind eye to the misdeeds of the wealthy, the well-connected, and the reputable while failing to prioritize offenses against disadvantaged groups and individuals.[67] In fairness, it is important to recognize that conventional prosecutors are not a monolithic group: many strive to uphold ethical standards and to achieve a measure of balance, whereas some pursue victory at any cost and actively perpetuate injustice, and others fill the spectrum of possibilities lying between these extremes.[68] Despite this heterogeneity, though, the overall pattern is that conventional prosecutors and the approaches they gravitate toward tend to create and reproduce entrenched social inequalities—in Samuel Walker's words, "to protect . . . the established segments of the community" against people who have been pushed to society's fringes.[69] It is only within the past decade or so that this familiar pattern has begun to reverse itself, due in part to the rise of reformist prosecutors as catalogued in the next section.

B. Prosecutorial Reform and the New Politics of Prosecution

The once-sacrosanct authority of conventional prosecutors has come under fire in recent years, as a growing number of voices have called attention to their role in perpetuating systemic injustices.[70] Concerned citizens, grassroots groups, and criminal justice reform organizations mobilized against prosecutors seen as emblematic of a regressive approach to criminal justice that has disproportionately burdened communities of color and failed to hold law enforcement responsible for violence and misconduct.[71] In Chicago, for example, this discontent crystallized around

67. *See infra* Part II, particularly the discussion of property crime enforcement in Section II.B.

68. For illuminating discussions of various kinds of diversity among prosecutors whom this Article would classify as "conventional," see, for example, Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 719–21 (2020); and Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018). *But cf.* Lauren M. Ouziel, *Prosecutors as Partisans*, 50 FORDHAM URB. L.J. 1093, 1096 (2023) (arguing that prior to the arrival of reformist prosecutors, the classical politics of prosecution were characterized by "relative political uniformity"); Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335 (1990) (similar).

69. SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 243 (2d ed. 1998) (referring not just to prosecutors but to the function of the criminal justice system writ large, across many different historical periods).

70. *See, e.g.*, Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019); Kim Taylor-Thompson & Anthony C. Thompson, *Introduction: Reckoning in the Moment*, *in* PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE 1, 4–6 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022).

71. *See, e.g.*, BAZELON, *supra* note 19, at 77–79; Note, *The Paradox of "Progressive Prosecution*,*"* 132 HARV. L. REV. 748, 754–55 (2018).

the case of Laquan McDonald, a seventeen-year-old Black boy shot sixteen times by a police officer in 2014. When State's Attorney Anita Alvarez waited a full year to bring charges against the officer, despite clear video documenting the murder, Black Lives Matter activists and other grassroots groups launched a concerted campaign to oust her from office, using the hashtag #ByeAnita to galvanize public resistance.[72] Meanwhile, across the Mason-Dixon line in Mississippi, DA Forrest Allgood—an incumbent securely ensconced in office for over twenty-five years—suddenly found himself mired in controversy in 2015 for his long record of aggressive prosecution, misconduct, and defense of questionable convictions. Allgood's unapologetic embrace of harsh prosecutorial policy and unfair tactics, combined with his refusal to acknowledge DNA evidence that exonerated a man he had prosecuted, made him a lightning rod for reformers seeking to challenge the excesses of the criminal justice system.[73] As figures like Alvarez and Allgood came to symbolize an untenable status quo, the credibility of the conventional approach to prosecution began to erode; the era of the unaccountable, untouchable prosecutor seemed to be drawing to a close.[74]

The intensifying criticism of conventional prosecutors has created space for a new cadre of reformist prosecutors to run for election and, in a surprising number of instances, to win office.[75] The seeds portending this shift were sown in 2013, when Brooklyn—which had not voted out an incumbent prosecutor in over a century—elected challenger Kenneth Thompson on a platform promising a fairer and more accountable approach

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72. *See* Mark Guarino, *Chicago's Prosecutor Loses Reelection Battle in the Shadow of the Laquan McDonald Video*, WASH. POST (Mar. 15, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/03/15/chicagos-prosecutor-faces-a-reelection-battle-in-the-shadow-of-the-laquan-mcdonald-video/ [https://perma.cc/5YJN-WPLH]; Stephanie Lulay, *'Bye Anita': How Chicago's Young Black Activists Fought For Alvarez's Loss*, DNAINFO (Mar. 16, 2016, 7:57 AM), https://www.dnainfo.com/chicago/20160316/river-north/bye-anita-activists-celebrate-anita-alvarez-ouster-with-song-hashtag [https://perma.cc/A2CY-LLXS].

73. *See* Radley Balko, Opinion, *Election Results: One of America's Worst Prosecutors Lost Last Night, But One of Its Worst Attorneys General Won*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/11/04/election-results-one-of-americas-worst-prosecutors-lost-last-night-but-one-of-its-worst-attorneys-general-won/ [https://perma.cc/M63W-XFSW]; Leon Neyfakh, *How to Run Against a Tough-on-Crime DA—and Win*, SLATE (Nov. 12, 2015, 12:25 PM), https://slate.com/news-and-politics/2015/11/district-attorneys-scott-colom-proves-you-can-run-against-a-tough-on-crime-da-and-win.html [https://perma.cc/G6BM-RXCR].

74. *See, e.g.*, Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 250, 251–53 (Máximo Langer & David Alan Sklansky eds., 2017); Editorial, *A Crisis of Confidence in Prosecutors*, N.Y. TIMES (Dec. 8, 2014), https://www.nytimes.com/2014/12/09/opinion/a-crisis-of-confidence-in-prosecutors.html [https://perma.cc/J4RX-7TBQ].

75. *See, e.g.*, Miriam Aroni Krinsky & Rebecca Blair, *Progress and Pushback in the Prosecutorial Reform Movement*, *in* THE STATE OF CRIMINAL JUSTICE 61 (Elizabeth Kelley ed., 2023); Carissa Byrne Hessick, Michael Morse & Nathan Pinnell, *Donating to the District Attorney*, 56 U.C. DAVIS L. REV. 1769, 1835 (2023).

to criminal justice.[76] The following year, Marilyn Mosby won election in Baltimore by combining traditional tough on crime themes with promises to prioritize criminal acts of violence by police and to strengthen community partnerships and diversion programs.[77] Then, in 2015 and 2016, Alvarez (Chicago) and Allgood (Mississippi's Sixteenth Judicial District) were ousted by reformers Kim Foxx and Scott Colom, respectively, and reformers also notched wins in parts of Florida, Louisiana, New Mexico, Ohio, and Texas.[78] These victories not only introduced a new, more balanced approach to prosecution but also brought much-needed diversity to a field long dominated by white men.[79]

What began as a handful of isolated upsets soon coalesced into an organized national effort that many observers plausibly see as a "movement."[80] By 2019, journalist Emily Bazelon estimated that "about 40 million Americans, more than 12 percent of the population, lived in a city or county with a D.A. who . . . could be considered a reformer."[81] Despite

76. *Compare* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 651 (2017) (suggesting Thompson's election was perhaps "the turning point" marking "a new era in prosecutorial elections"), *with* BAZELON, *supra* note 19, at 78–80 (dating the shift to 2015 while recognizing some "partial exceptions to harsh law-and-order prosecution" prior to that year). Even before 2013 there were early signs that the politics of prosecution were in flux, as a number of prosecutors, notably including Kamala Harris, were styling themselves as "smart on crime" prosecutors rather than fully embracing conventional paradigms. *E.g.*, KAMALA D. HARRIS & JOAN O'C. HAMILTON, SMART ON CRIME: A CAREER PROSECUTOR'S PLAN TO MAKE US SAFER (2009); Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. LEGAL ETHICS 905 (2012); *see also, e.g.*, Anthony V. Alfieri, *Community Prosecutors*, 90 CALIF. L. REV. 1465, 1496–1500 (2002) (chronicling the growing influence of community prosecution); Jon B. Gould, Rachel Bowman & Belén Lowrey-Kinberg, *A New Charge Afoot? Improving Prosecutors' Charging Practices*, *in* TRANSFORMING CRIMINAL JUSTICE 48, 49–50 (Jon B. Gould & Pamela R. Metzger eds., 2022) (discussing "evidence-based" and "data-driven" trends in prosecution).

77. *See* Editorial, *Baltimore City Endorsements*, BALT. SUN (June 3, 2019, 11:05 PM), https://www.baltimoresun.com/2014/06/16/baltimore-city-endorsements-editorial/ [https://perma.cc/G6RR-F7RP]; Luke Broadwater, *Mosby's Focus on Crime Helped Unseat Bernstein*, BALT. SUN (July 1, 2019, 9:09 AM), https://www.baltimoresun.com/2014/06/25/mosbys-focus-on-crime-helped-unseat-bernstein/ [https://perma.cc/N9KS-NQ63].

78. *See* Sklansky, *supra* note 76, at 656–67; Nick Tabor, *What If Prosecutors Wanted to Keep People* Out *of Prison?*, N.Y. MAG.: INTELLIGENCER (Mar. 27, 2018), https://nymag.com/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html [https://perma.cc/FTY2-SRC2].

79. *See, e.g.*, Paul Butler, *Sisters Gonna Work It Out: Black Women as Reformers and Radicals in the Criminal Legal System*, 121 MICH. L. REV. 1071, 1081, 1083–87 (2023) (book review); Anna Gunderson, *Descriptive Representation and Prosecutorial Discretion: Race, Sex, and Carceral Disparities*, 50 AM. POL. RSCH. 823, 832–33 (2022).

80. *E.g.*, Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187; David Alan Sklansky, *Foreword: The Future of the Progressive Prosecutor Movement*, 16 STAN. J.C.R. & C.L. i, iii–iv (2021). *But see* Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 130 (2022).

81. BAZELON, *supra* note 19, at 290. Compare that figure with John F. Pfaff, *The Poor Reform Prosecutor: So Far from the State Capital, So Close to the Suburbs*, 50 FORDHAM URB. L.J. 1013, 1022 (2023), estimating that reformist prosecutors represented around fifteen percent of Americans as of 2019.

setbacks in places like Los Angeles, Baltimore, Oakland, San Francisco, Orlando, and Tampa, where reformist prosecutors experienced reelection losses, recall votes, and gubernatorial interference, on the whole, their momentum has continued to build, with nearly one in five Americans now represented by a reformist prosecutor.[82] While reformist prosecutors have seen their greatest success in large urban centers, there are reformers leading small and midsize offices in both rural and suburban jurisdictions as well.[83] And even where reformers do not hold power, their efforts are impacting the broader political landscape: research has shown that incumbent prosecutors are more likely now than they were before to face an electoral challenger and to lose their bids for reelection, adding a measure of democratic accountability where little had previously existed.[84]

Pinpointing which qualities make a chief[85] prosecutor a reformer is no simple task, for the relevant benchmarks are ambiguous, contested, and rapidly changing.[86] Early attempts at defining the core features of the prosecutorial reform agenda, such as the influential Fair and Just Prosecution manifesto titled *21 Principles for the 21st Century Prosecutor*,[87] emphasized harnessing the power of prosecutorial discretion to achieve broader criminal justice reform objectives, such as shrinking America's jail and prison populations, reducing race and class inequalities, rectifying wrongful convictions, and invigorating the legal system's

82. *See, e.g.*, Dewan, *supra* note 22; Miriam Aroni Krinsky & Alyssa Kress, Op-Ed, *Reform—Not Crime—Was the Winning Message in 2022*, WITNESSLA (Nov. 14, 2022), https://witnessla.com/op-ed-reform-not-crime-was-the-winning-message-in-2022/ [https://perma.cc/38B7-SZAT]; Pfaff, *supra* note 81, at 1013.

83. *See* Krinsky et al., *supra* note 19, at 1375.

84. *See* Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 127, 130–33, 142–43 (2021).

85. It is important to bear in mind that line prosecutors, not just chief prosecutors, can be reformers. For further discussion, see, for example, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 118–20 (2009); Hannah Shaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90 U. CHI. L. REV. 1889, 1938–41, 1963–65 (2023); and Abbe Smith, *Progressive Prosecution or Zealous Public Defense? The Choice for Law Students Concerned About Our Flawed Criminal Legal System*, 60 AM. CRIM. L. REV. 1517, 1535–36 (2023).

86. *See generally* Levin, *supra* note 21 (analyzing four possible responses to this question). Empirical scholars have also begun devising various strategies for operationalizing the distinction between reformist or progressive prosecutors versus conventional or traditional ones. *See* Jennifer M. Balboni & Randall Grometstein, *Prosecutorial Reform from Within: District Attorney 'Disruptors' and Other Change Agents, 2016–2020*, 23 CONTEMP. JUST. REV. 261, 269–71, 281–83 (2020); Meldrum et al., *supra* note 37, at 356–57, 366–69; Ojmarrh Mitchell, Daniela Oramas Mora, Tracey L. Sticco & Lyndsay N. Boggess, *Are Progressive Chief Prosecutors Effective in Reducing Prison Use and Cumulative Racial/Ethnic Disadvantage? Evidence from Florida*, 21 CRIMINOLOGY & PUB. POL'Y 535, 538–39, 558–60 (2022).

87. FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [https://perma.cc/ST4E-RBWB].

responses to police violence and misconduct.[88] But as reformist prosecutors have moved from their initially precarious position within prosecutorial politics to a firmer footing, activists and scholars have articulated ever-more ambitious demands, asserting that, if reformers hope to be truly transformative agents of change, it is not enough simply to use discretionary power more benignly. Rather, according to this perspective, reformist prosecutors must seek actively to redistribute power—for instance by limiting plea bargaining in order to empower judges and juries, demanding equal resources for defense lawyers as a way of achieving adversarial balance, and enhancing transparency to strengthen outside oversight—so that other actors will be better-positioned to operate as a check against prosecutorial overreach.[89] Needless to say, some reformist prosecutors are more responsive to advocates' wish lists than others, and reformist prosecutors (like conventional prosecutors)[90] are a heterogeneous group.[91]

Of particular relevance to the myth of individualized enforcement and thus to this Article's core themes, openly announced nonenforcement policies have emerged as a key tool in the reformist prosecutor's kit.[92] Drawing inspiration from President Obama's DACA and DAPA initiatives, and motivated to intensify their efforts by the advent of the COVID-19 pandemic,[93] many reformist prosecutors have used nonenforcement initiatives of one kind or another to reduce unnecessary arrests and punishment and to reduce racial and class disparities.[94] Many such policies

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88. *See id.* at 3–7, 15–16, 19–20. In a similar vein, see, for example, Dan Satterberg, *2020 Vision and the Five Pillars of Criminal Justice Reform*, *in* PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE, *supra* note 70, at 55; and David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017).

89. *See, e.g.*, CMTY JUST. EXCH., COURTWATCH MA, FAMS. FOR JUST. AS HEALING, PROJECT NIA & SURVIVED AND PUNISHED NY, ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORG. 7–8, 11–12 (2019), https://www.communityjusticeexchange.org/en/abolitionist-principles [https://perma.cc/EF35-ST8Q]; Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1372–75 (2021) (book review); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 178–80, 202–03, 229–37 (2022).

90. *See supra* notes 68–69 and accompanying text.

91. *See, e.g.*, Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1986–89 (2022); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform*,*"* 128 YALE L.J.F. 848, 924–29 (2019).

92. *See, e.g.*, PRERNA JAGADEESH, ISA ALOMRAN, LEW BLANK & GUSTAVO SANCHEZ, DATA FOR PROGRESS: A NEW GENERATION OF PROSECUTORS IS LEADING THE CHARGE TO REIMAGINE PUBLIC SAFETY (2021); Murray, *Populist Prosecutorial Nullification*, *supra* note 15, at 193–97, 252–55.

93. *See, e.g.*, KRINSKY, *supra* note 21, at 191–92; Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 694–98 (2020).

94. *See, e.g.*, RACHEL ROLLINS, SUFFOLK CNTY. DIST. ATT'Y, THE RACHAEL ROLLINS POLICY MEMO 26 (2019) [hereinafter ROLLINS POLICY MEMO], https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5d44a5f79807850001acc3d9/1564780028241/The+Rachael+Rollins+Policy+Memo.pdf [https://perma.cc/8LSL-5TMV]; Angela J. Davis, *The Prosecution of Black Men*, *in*

are limited to marijuana possession or other low-level drug-related crimes,[95] but promises to never or rarely seek the death penalty are another common example.[96] Moreover, after the Supreme Court removed constitutional protection for abortion, nearly a hundred prosecutors signed a statement opposing prosecution of abortion-seekers.[97]

As the prosecutorial reform movement gained ground politically and set its sights higher, a relatively small but prominent group of reformist prosecutors have embraced more ambitious nonenforcement measures. For example, Suffolk County (Boston) DA candidate Rachael Rollins publicized a list of fifteen crimes for which the default would be non-prosecution or diversion—a list that included shoplifting, trespass, and all drug possession and possession with intent to distribute offenses[98]—and Los Angeles DA George Gascón circulated a day-one memorandum directing his office to stop enforcing any of California's sentence enhancement laws, including its infamous Three Strikes law.[99] At the same time, though, other, more centrist reformist prosecutors have always been wary of openly unveiling nonenforcement policies, and they have become still more cautious after witnessing the backlash such policies have provoked in other jurisdictions.[100] This backlash, and the myth of individualized enforcement that animates it, is the subject of the next section.

POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 178, 202–04 (Angela J. Davis ed., 2017).

95. *See, e.g.*, Letter from Greg D. Underwood, Commonwealth's Att'y, Off. of the Norfolk Commonwealth's Att'y, to Judges, City/State Leaders, and Criminal Justice/Public Safety Colleagues 2 (Jan. 3, 2019), https://www.virginiamercury.com/wp-content/uploads/2019/04/January-2019-Letter.pdf [https://perma.cc/G64B-LGZB]; PHILA. DIST. ATT'Y'S OFF., PHILADELPHIA DAO NEW POLICIES 1 (Feb. 15, 2018), https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/4VJS-JEKW].

96. *See, e.g.*, *On the Issues*, LARRY KRASNER FOR DIST. ATT'Y, https://krasnerforda.com/platform [https://perma.cc/M89K-9NB7]; Jordan Smith, *The Power to Kill: What Happens When a Reform Prosecutor Stands Up to the Death Penalty*, THE INTERCEPT (Dec. 3, 2019, 8:31 AM), https://theintercept.com/2019/12/03/death-penalty-reform-prosecutors/ [https://perma.cc/C7C6-SECF].

97. *See* FAIR & JUST PROSECUTION, JOINT STATEMENT FROM ELECTED PROSECUTORS (2022), https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf [https://perma.cc/7WLK-XZR7]. *See generally* Jonathan Mattise, *District Attorneys Refuse to Prosecute Some GOP-Led Laws*, ASSOCIATED PRESS (Oct. 19, 2021, 9:40 AM), https://apnews.com/article/crime-tampa-tennessee-nashville-787cae9774f5fa36797ce89bb25932a7 [https://perma.cc/YN95-FB35].

98. *See* ROLLINS POLICY MEMO, *supra* note 94, at D-1.

99. *See* GEORGE GASCÓN, L.A. CNTY. DIST. ATT'Y'S OFF., SPECIAL DIRECTIVE 20-08, at 1 (Dec. 7, 2020), https://da.lacounty.gov/sites/default/files/policies/special-directive-20-08.pdf [https://perma.cc/D3TS-7QFF].

100. *See, e.g.*, Julia Baker, *Q&A with DA Candidate Steve Mulroy*, DAILY MEMPHIAN (July 25, 2022, 4:00 AM), https://dailymemphian.com/article/29855/shelby-county-district-attorney-general-candidate-steve-mulroy-daily-memphian-q-and-a [https://perma.cc/A2W9-4A5V] (quoting successful Memphis DA candidate explaining that while abortion prosecutions would be a "very low priority," "[p]rosecutors should never say never, in large part because there's a Tennessee law that would allow

C. Retrenchment and the Myth of Individualized Enforcement

When the current wave of reformist prosecutors made their debut in local races and national headlines back in the mid-2010s, conventional prosecutors suddenly had to reckon with a new political environment in which the basic legitimacy of their approach was open to question.[101] In the past, conventional prosecutors had enjoyed a largely uncontested hold on power so long as they burnished their tough-on-crime credentials and kept their names out of the gossip columns.[102] Once reformist prosecutors began to upend the status quo, however, this simple formula could no longer assure political security. Faced with this new and uncertain terrain, conventional prosecutors scrambled to adapt, seeking out fresh rhetorical strategies to bolster their waning authority and discredit their ascendant rivals.[103] Prominent among these was the myth of individualized enforcement—a narrative that cast the particularistic, case-by-case decision-making supposedly used by traditional prosecutors as the epitome of neutral, apolitical justice, while painting reformers who embraced categorical policies as dangerous ideologues bent on subverting the rule of law. By exploiting the symbolic power of this myth, defenders of the prosecutorial establishment are now fighting to insulate conventional prosecutors from critique and maintain their grip on the levers of the justice system.[104]

For all its present-day currency, the myth of individualized enforcement has a surprisingly obscure intellectual pedigree. It appears to have roots in an earlier paradigm, now widely referred to as the "myth of full enforcement," which posited that police and prosecutors were duty-bound to enforce every law to the fullest extent possible, lest they usurp the role of the legislature and leaves their communities unprotected.[105] Though never

for the appointment of an independent prosecutor and basically stripping jurisdiction over that class of offenses away from the DA"); Max Marin, *Krasner's Softened Rhetoric on Death Penalty Worries Supporters*, CITY & STATE PA. (Jan. 18, 2018), https://www.cityandstatepa.com/policy/2018/01/krasners-softened-rhetoric-death-penalty-worries-supporters/364821/ [https://perma.cc/8KD9-LRM7] (documenting how Philadelphia's DA softened his absolute stance against the death penalty after a Florida prosecutor faced repercussions for her refusal to pursue death sentences).

101. *See supra* pp. 1450–53.

102. *See supra* note 64 and accompanying text.

103. For an overview of the various forms of backlash confronting reformist prosecutors, see generally Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1702–04; and Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, from Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467, 1484–93 (2023). *See also infra* pp. 1458–61.

104. *See infra* pp. 1458–61.

105. *E.g.*, THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 151–53 (1935) (referring to this myth by other names but describing its essential features clearly enough); Kadish, *supra* note 16, at 915, 930. Alongside this full enforcement myth there were some early signs, in case law and other sources, of a nascent form of what I am calling the myth of individualized enforcement, but, when seen against the backdrop of the vast reservoir of writing about prosecutorial discretion, these precursors to

an accurate reflection of enforcement practices on the ground, the full enforcement ideal proved remarkably resilient, shaping legislation and public debate throughout the progressive era and for decades after.[106]

The myth of full enforcement, however, eventually buckled under the weight of its own contradictions.[107] Scholars began to underscore the pervasive role of discretion in penal administration, arguing that the full enforcement model was not only futile but also self-defeating insofar as it detracted from realistic reforms geared toward channeling and restraining discretion.[108] The full enforcement paradigm ultimately receded, creating room for the myth of individualized enforcement to emerge as a more sustainable legitimating construct—one that accepted the inevitability of discretion while promising to constrain it within the bounds of case-by-case professional judgment. The newly ascendant myth of individualized enforcement first became politically salient on a national stage during the Obama administration, when the president's signature immigration initiatives, DACA and DAPA, came under fire for allegedly violating the president's constitutional duty to "take Care that the Laws be faithfully executed."[109] Defenders of the policies claimed that federal immigration agencies enjoy broad discretion over how to enforce the laws, much as

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today's myth are decidedly sparse. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 833 & n.4 (1985) (suggesting that the "presumption of unreviewability" for exercises of a federal administrative agency's prosecutorial discretion not to enforce might be overcome if the agency "consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities") (internal quotation marks omitted)); Johnson v. Pataki, 691 N.E.2d 1002, 1007 (N.Y. 1997) (disapproving a DA's anti-death penalty policy and reasoning that "the Legislature did not allow one or all 62 District Attorneys to functionally veto the statute by adopting a 'blanket policy,' thereby in effect refusing to exercise discretion"); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 7 (1964) ("Although the area of police and prosecutorial discretion not to invoke the criminal process is demonstrably broad, it is common ground that these officials have no general dispensing power.").

106. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 557–62 (1960); Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, *in* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY 1, 14–16 (Lloyd E. Ohlin & Frank J. Remington eds., 1993). For analysis of full enforcement statutes relating to police, see Gregory Howard Williams, *Police Rulemaking Revisited: Some New Thoughts on an Old Problem*, 47 LAW & CONTEMP. PROBS. 123, 133–37, 140–44 (1984). For an analysis of statutes addressing local prosecutors' enforcement obligations, many of which bear the imprint of the full enforcement model, see Price, *Faithful Execution*, *supra* note 32, at 673–79, 699–710.

107. *See, e.g.*, Allen, *supra* note 18, at 80–81, 108–12; Frank J. Remington & Victor G. Rosenblum, *The Criminal Law and the Legislative Process*, 1960 U. ILL. L.F. 481, 495–99.

108. *See, e.g.*, SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, at 6–12 (1993); Michael Tonry, *Foreword*, *in* DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY, *supra* note 106, at xiii, xiv.

109. U.S. CONST. art. II, § 3; *see, e.g.*, Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 798–803 (2013); Price, *Faithful Execution*, *supra* note 32, at 759–61.

criminal prosecutors do,[110] whereas that while "[p]rosecutorial discretion has a place in immigration law[,] [i]t has . . . historically involved case-by-case decisions, not the blanket relief that DACA" and DAPA allegedly afforded.[111] These debates, though arising in the distinct context of federal administrative law and policy, prefigured current controversies surrounding categorical nonenforcement by local prosecutors.[112]

The myth of individualized enforcement is founded on the belief that prosecutors have historically approached their discretionary enforcement decisions by weighing the distinctive factual and equitable considerations presented by each case, eschewing categorical policies that would dictate how to proceed in a broad class of cases. For one crisp articulation, a presidential commission report issued in the final days of the Trump administration drew a stark contrast between "standard prosecutorial discretion," which entails "assess[ing] whether to pursue charges after a case-by-case examination of the individual circumstances," and "non-enforcement policies" that "remove that discretion entirely by prescribing that certain laws will be categorically unenforced."[113] Governor Ron DeSantis voiced the same idea when he removed Tampa's elected prosecutor Andrew Warren from office in the middle of his term: while recognizing that prosecutors "have complete discretion in making the decision to prosecute a particular defendant," DeSantis asserted that discretion requires "'case-specific' and 'individualized' determinations" and thus that a "'blanket refusal' to enforce a criminal law is not an exercise

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110. *See, e.g.*, SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 105–07 (2015); Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 192–96 (2016). In harmony with the thesis this Article advances about prosecutorial discretion in the criminal law context, some defenders of DACA and DAPA argued that categorical nonenforcement of various kinds was commonplace in federal administrative law prior to the Obama administration. *See, e.g.*, WADHIA, *supra*, ch. 4; Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 544–48 (2017).

111. Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 177 (2014); *see also, e.g.*, Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63, 109–11 (2015).

112. *See* Price, *Faithful Execution*, *supra* note 32, at 673–74 (noting the connection between the DACA/DAPA debates and current controversies surrounding local prosecutorial discretion). Debates from around the same time relating to the Obama administration's policies deprioritizing certain aspects of marijuana enforcement likewise gave stakeholders a chance to rehearse arguments for and against categorical nonenforcement. *See generally* Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, *in* MARIJUANA FEDERALISM 123 (Jonathan H. Adler ed., 2020) (discussing the administration's evolving guidance in this area and discussing controversies surrounding the policies' legitimacy).

113. U.S. DEP'T OF JUST., PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: FINAL REPORT 6 (2020).

of prosecutorial discretion."[114] One can find similar expressions of this myth just about everywhere in the ongoing debates over prosecutorial enforcement authority: it features prominently in new state statutes that prohibit categorical nonenforcement,[115] in attacks on elected reformist prosecutors by police, judges, and line prosecutors,[116] in the Pennsylvania House's articles of impeachment against DA Larry Krasner,[117] and in the relentless torrent of alarmist commentary about reformist prosecutors disseminated by right-wing news organizations and think tanks.[118]

Legal scholarship has by and large bought into the myth of individualized enforcement as well—disagreeing not so much about the myth's core assumptions about how prosecutorial discretion traditionally operates as about what normative implications follow from those assumptions. Zach Price, perhaps the leading academic critic of DACA, DAPA, and other kinds of categorical nonenforcement in the administrative law field,[119] recently published an article about categorical nonenforcement by local prosecutors in which he argues that this practice—which "was once rare but has become increasingly common"—violates the legal duties of

114. Fla. Exec. Order No. 22-176, at 2 (Aug. 4, 2022) (quoting Ayala v. Scott, 224 So. 3d 755, 758–59 (Fla. 2017)). The case referenced by DeSantis offers yet another illustration: when former Governor Rick Scott transferred reformist prosecutor Aramis Ayala's first-degree murder caseload to a different, more conservative DA after Ayala announced she would never seek the death penalty, the Florida Supreme Court upheld the transfer, reasoning in part that "discretion demands an individualized determination" as opposed to a "blanket refusal to seek the death penalty." *Ayala*, 224 So. 3d at 759; *see also* Worrell v. DeSantis, 386 So. 3d 867, 871 (Fla. 2024) ("[A] suspension order does not infringe on a state attorney's lawful exercise of prosecutorial discretion where it alleges that such discretion is, in fact, not being exercised in individual cases but, rather, that generalized policies have resulted in categorical enforcement practices." (citing *Ayala*, 224 So. 3d at 759)).

115. *See* GA. CODE ANN. § 15-18-32(i)(2)(E) (2024) (creating a prosecutor oversight commission with the power to remove DAs for having a "stated policy, written or otherwise, which demonstrates that the district attorney . . . categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute"); TEX. LOC. GOV'T CODE ANN. § 87.011(3)(B)–(C) (West 2024) (deeming it "official misconduct" for a DA to "refus[e] to prosecute a class or type of criminal offense" or permit an assistant prosecutor to do so). A 2021 bill that became law in Iowa may potentially impose even broader restrictions on local prosecutors' discretion, prohibiting "adopt[ing] or enforc[ing] a policy or tak[ing] any other action . . . [that] prohibits or discourages the enforcement of state, local, or municipal laws." 2021 Iowa Acts 715, 724 (codified at IOWA CODE § 27B.2 (2025)). Related statutory reform efforts are underway in other states too. *See* Akela Lacy, *17 States Have Now Tried to Pass Bills That Strip Powers from Reform-Minded Prosecutors*, THE INTERCEPT (Mar. 3, 2023, 1:27 PM), https://theintercept.com/2023/03/03/reform-prosecutors-state-legislatures/ [https://perma.cc/35L4-P66U].

116. *See generally* Murray, *Prosecutorial Nonenforcement*, *supra* note 15, at 423–26.

117. *See* H.R. Res. 240, 2022 Gen. Assemb., Reg. Sess., at 48–49 (Pa. 2022) (enacted).

118. *See, e.g.*, *Tucker Carlson Tonight* (Fox News television broadcast Dec. 8, 2020); Charles "Cully" Stimson & Zach Smith, *Meet Rachael Rollins, the Rogue Prosecutor Whose Policies Are Wreaking Havoc in Boston*, HERITAGE FOUND. (Nov. 12, 2020), https://www.heritage.org/crime-and-justice/commentary/meet-rachael-rollins-the-rogue-prosecutor-whose-policies-are-wreaking [https://perma.cc/66T7-GEHV].

119. *See, e.g.*, Price, *Faithful Execution*, *supra* note 32, at 759–61; Zachary S. Price, *Federal Nonenforcement at a Crossroads*, 78 N.Y.U. ANN. SURV. AM. L. 205 *passim* (2023); Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235 *passim* (2016).

prosecutors as set forth in the codes of many states.[120] Prosecution scholars Bruce Green and Rebecca Roiphe have argued that "traditional prosecutors . . . pursue justice in individual cases by making case-by-case, fact-intensive decisions" and that this supposedly longstanding decision making procedure is pivotal for ensuring that prosecutorial discretion is exercised in an impartial and apolitical manner.[121] Likewise, prominent criminal law scholars Paul Robinson and Jeffrey Seaman recognize that "[l]ocal prosecutors obviously need to exercise discretion in individual cases" while asserting that reformist prosecutors' "de facto decriminalization" policies—this is Robinson and Seaman's preferred term for categorical nonenforcement—"usurp the criminalization authority of the legislature" and cause crime to rise.[122] Tellingly, even scholars who defend the legitimacy of categorical nonenforcement in whole or in part typically presuppose or repeat some version of the idea that categorical nonenforcement represents a departure from longstanding historical patterns—before proceeding to explain why such a departure may be justified in certain circumstances.[123]

Myths do not simply offer up factual or descriptive claims about the workings of social and political institutions; to borrow from anthropologist Bronislaw Malinowski, "the function of myth is not to explain but to vouch for, not to satisfy curiosity, but to give confidence in power."[124] And so it is with the myth of individualized enforcement. As the foregoing examples (along with countless others) demonstrate, the myth of individualized enforcement simultaneously props up conventional prosecutors and casts a cloud of illegitimacy over reformist prosecutors by suggesting that the former are engaged in a fundamentally neutral and nonpolitical process when exercising their discretion while the latter are pursuing political agendas and invading the legislature's domain.[125] Indeed, the myth of

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120. Price, *Faithful Execution*, *supra* note 32, at 694. Notably, many of the statutes Price relies on, *see id.* at 699–703, 722–73 (collecting statutes), are full enforcement statutes of the kind referenced earlier, see *supra* notes 105–06 and accompanying text, which have never been followed by prosecutors or enforced by courts as written. Price does not explain why these remnants of the full enforcement ideology support his call, not for full enforcement, but for *individualized* enforcement.

121. Green & Roiphe, *supra* note 32, at 1438.

122. Robinson & Seaman, *supra* note 32 (manuscript at 5).

123. *See* Fissell, *supra* note 23; Milan Markovic, *Charging Abortion*, 92 FORDHAM L. REV. 1519, 1541–43 (2024); Murray, *Prosecutorial Nonenforcement*, *supra* note 15, at 178–82, 231–33; Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 629–32 (2020); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 837–40, 847–49 (2020).

124. BRONISLAW MALINOWSKI, MAGIC, SCIENCE AND RELIGION AND OTHER ESSAYS 64–65 (Robert Redfield ed., 1948); *see also, e.g.*, W. BOYD LITTRELL, BUREAUCRATIC JUSTICE: POLICE, PROSECUTORS, AND PLEA BARGAINING 223 (1979) ("[T]he purpose of myth is to justify institutions at precisely those points where strain, conflict, and contradiction develop.").

125. *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 113, at 6–8; Green & Roiphe, *supra* note 32, at 1453–54, 1458–59, 1462–64.

individualized enforcement can no longer be seen (if it ever could be) merely as a targeted critique of a discrete type of misguided policy, namely, categorical nonenforcement policies—rather, the myth has made categorical nonenforcement policies into a symbol or synecdoche for much of what is considered wrongheaded and dangerous about prosecutorial reform. To embrace a categorical nonenforcement policy is to mark oneself as a "rogue," "woke," or "de-prosecution" prosecutor, with all the baggage that accompanies such labels.[126]

D. Categorical Nonenforcement: A Working Definition

Up to this point I have sketched the main outlines of the myth of individualized enforcement without defining or critically examining its foundational concepts. In doing so I have followed the lead of the myth's expositors, who, with one notable exception,[127] have avoided specifying in any clear fashion what they mean by the key terms "categorical" and "nonenforcement."[128] This oversight would perhaps not be worth belaboring if the meaning of the terms were self-explanatory or if nothing of consequence hinged on how one defines them. But in reality, both terms can (and in public discourse, do) bear a broad range of meanings.[129] And adherents of the myth of individualized enforcement are constantly shifting back and forth amongst these varied meanings (perhaps unwittingly, and certainly without saying so) to advance their argumentative needs—at times employing a narrow definition suggesting that categorical nonenforcement

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126. *E.g.*, JAKOB DUPUIS, CICERO INST., THE "SPECIAL PROSECUTOR" *passim* (2023); Hogan, *supra* note 30.

127. A recent article by Zach Price criticizing some reformist prosecutors' categorical nonenforcement policies for violating the laws of their states defines categorical nonenforcement as "indicating not only that a particular crime is a low priority for enforcement, but also that it categorically will not be prosecuted (or at least will not be prosecuted outside of exceptional circumstances)." Price, *Faithful Execution*, *supra* note 32, at 667. Price's definition aligns with the one offered here insofar as it recognizes that categorical nonenforcement practices can have exceptions, *see infra* pp. 1462–64, though our approaches diverge to the extent Price suggests that a nonenforcement practice must be formalized as a policy in order to qualify as categorical nonenforcement, *see infra* pp. 1466–67.

128. Another curious feature of the myth of individualized enforcement is its apparent lack of concern regarding the inverse of categorical nonenforcement: *categorical enforcement*. One scholar has noticed a similar asymmetry in the administrative law literature and called for greater attention to categorical enforcement or, to use his term, "crackdowns." Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 52–55 (2017).

129. *See infra* Section I.D. As noted earlier, *see supra* notes 109–11 and accompanying text, there is a parallel academic debate about categorical nonenforcement in the administrative law field; many participants in that debate have likewise highlighted the concept's ambiguity. *See, e.g.*, Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1863–64 (2016); Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1553–56 (2018). For one effort to distinguish between "five different types of presidential discretion," including categorical nonenforcement, and to highlight potential normative concerns each one presents, see Michael Kagan, *A Taxonomy of Discretion: Refining the Legality Debate About Obama's Executive Actions on Immigration*, 92 WASH. U. L. REV. 1083, 1085–88 (2015).

is a rare and radical departure from norms of impartial law enforcement while other times implying a broader (but more innocuous) definition expansive enough to cover many of the policies adopted by reformist prosecutors. This section examines the ambiguities that attend the concept of categorical nonenforcement with the aim of uncovering the working definition that many proponents of the myth of individualized enforcement are implicitly relying on when they attack the policies of reformist prosecutors. I will then use this same working definition in Part II to explore whether and to what extent conventional prosecutors, like their reformist counterparts, engage in categorical nonenforcement.

The "categorical" portion of the term categorical nonenforcement (and other modifiers such as "blanket"[130] nonenforcement that are used interchangeably with "categorical") is marked by a fundamental ambiguity. In its strongest form, "categorical" nonenforcement suggests a policy of absolute or unbending nonenforcement—a wholesale refusal to pursue punishment under a given statute, no matter the facts of the case. This is the version of "categorical" nonenforcement that gives the myth of individualized enforcement its rhetorical bite, conjuring images of prosecutors who have unilaterally decided to override the legislative will.[131] Yet while reformist prosecutors have at times embraced categorical nonenforcement of this sort—Aramis Ayala's policy against seeking death sentences comes to mind,[132] as does Sarah George's policy against prosecuting the possession or distribution of buprenorphine (a controlled substance but one that is used to treat opioid addiction)[133]—these examples are the exceptions and not the rule.[134]

Far more common are reformist nonenforcement policies that restrict enforcement of a criminal statute in some of the statute's applications while

130. *E.g.*, Ayala v. Scott, 224 So. 3d 755, 759 (Fla. 2017); Zachary Price, *Blanket Nonenforcement Policies Are Unconstitutional in California*, SCOCABLOG (Feb. 2., 2022), http://scocablog.com/616-2/ [https://perma.cc/7K8N-SHFS].

131. *See, e.g.*, SMITH & STIMSON, *supra* note 30, at 20–21 (2023); Peter Reinharz, Opinion, *Alvin Bragg's Threat to Democracy*, WALL ST. J. (Jan. 24, 2022, 6:25 PM), https://www.wsj.com/articles/alvin-bragg-threat-to-democracy-district-attorney-crime-new-york-hochul-constitution-leftist-11643062014 [https://perma.cc/2T5C-7SSS].

132. *See* Aramis Donell Ayala, *Prosecutorial Discretion and Death Penalty*, *in* CAN THEY DO THAT? UNDERSTANDING PROSECUTORIAL DISCRETION 185, 185–91, 194–97 (Melba V. Pearson ed., 2020).

133. *See* Mike Dougherty, *The Deeper Dig: Drawing the Line on Recovery Drugs*, VTDIGGER (Mar. 1, 2019, 7:03 PM), http://vtdigger.org/2019/03/01/deeper-dig-drawing-line-recovery-drugs/ [https://perma.cc/KW48-MKLY].

134. *See* Carissa Byrne Hessick & Meighan R. Parsh, The Nuances of Prosecutorial Nonenforcement (unpublished working paper) (on file with author) (noting that wholesale, mandatory prosecutorial nonenforcement policies are rare and offering a taxonomy of other, less far-reaching varieties of nonenforcement).

permitting enforcement in other situations.[135] For instance, some reformist prosecutors have adopted policies that decline to prosecute or divert theft cases if the amount stolen falls below a specified threshold (while allowing prosecution when the amount stolen is above the threshold),[136] or decline or divert low-level marijuana possession cases if the quantity is small enough (while allowing for traditional prosecution when a person possesses a larger amount),[137] or limit declination to first-time offenders.[138] Also common are policies that set a presumption against prosecution (or a presumption favoring diversion) for all or some applications of a law while providing that the presumption gives way when special circumstances are present that justify prosecution.[139] The much-discussed policy of Suffolk County (Boston) DA Rachael Rollins exemplifies this approach. Although Rollins's policy lists fifteen offenses that her office will ordinarily decline to prosecute or handle through diversion, it also grants line prosecutors the discretion to override this default upon obtaining supervisory approval.[140] A

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135. *See, e.g.*, ALVIN L. BRAGG, JR., N.Y. CNTY. DIST. ATT'Y'S OFF., POLICY AND PROCEDURE MEMORANDUM 1–2 (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/FR3W-5EAQ] (listing offenses that will not be prosecuted "unless as part of an accusatory instrument containing at least one felony count"); GEORGE GASCÓN, L.A. CNTY. DIST. ATT'Y'S OFF., SPECIAL DIRECTIVE 20-07, at 2 (Dec. 7, 2020), https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf [https://perma.cc/4B4R-6WGZ] ("The misdemeanor charges specified below shall be declined or dismissed before arraignment and without conditions unless 'exceptions' or 'factors for consideration' exist.").

136. *See, e.g.*, Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren't Happy*, TEX. TRIB. (May 21, 2019, 12:00 AM), https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/ [https://perma.cc/X9TC-YB77].

137. *See, e.g.*, Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), https://www.nytimes.com/2014/07/09/nyregion/Brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html [https://perma.cc/C7D9-ZD8W]; Tom Dart, *Houston's New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, THE GUARDIAN (Apr. 18, 2017, 7:00 AM), http://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas [https://perma.cc/QBF7-73MS].

138. *See, e.g.*, Press Release, Kings Cnty. Dist. Att'y, Brooklyn District Attorney Kenneth P. Thompson Announces New Policy for Prosecuting Low-Level Marijuana Possession Arrests (July 8, 2014), http://brooklynda.org/wp-content/uploads/2015/03/MarijuanaPolicy_7_8_2014.pdf [https://perma.cc/AF2K-BDSC]; GASCÓN, *supra* note 135, at 2–4.

139. *See, e.g.*, Bragg, *supra* note 135, at 1–2 (listing offenses the office generally will not prosecute but noting that, for some of the offenses, exceptions are allowed if approved by a supervisor); ELI SAVIT, WASHTENAW CNTY., OFF. OF THE PROSECUTING ATT'Y, POLICY DIRECTIVE 2021-08: POLICY REGARDING SEX WORK 2, 9 (2021), https://content.civicplus.com/api/assets/d351ddc5-9ef9-478a-8f55-b212bbc4b6da [https://perma.cc/6WEX-QHZP] (announcing that the office "will henceforth decline to bring charges related to consensual sex work *per se*" while allowing for deviations, albeit "only in exceptional circumstances"). It bears note that one scholar has provided a taxonomy in which "categorical nonenforcement" (which he considers legitimate) consists of "strong presumptions against charges" that do not entirely "rul[e] out charges in exceptional circumstances," whereas "[p]rosecutorial nullification" (which he generally deems illegitimate) encompasses more far-reaching nonenforcement policies that lack exceptions. Markovic, *supra* note 123, at 1542–43.

140. *See* ROLLINS POLICY MEMO, *supra* note 94, at C-1 to C-2.

study looking at the implementation of the policy found that the prosecution rate for covered offenses dropped by only about five percent on average, demonstrating that the policy's presumption of nonenforcement is just that—a presumption, which can be rebutted when staff prosecutors deem warranted.[141] Thus, a policy that has become the poster child for "categorical" nonenforcement in fact retains substantial room for case-specific decision making. We might call this intermediary form of "categorical" nonenforcement *patterned nonenforcement* to capture how such policies channel discretion without eliminating it entirely. Yet proponents of the myth of individualized enforcement typically elide this distinction, leveraging an implied conception of "categorical" nonenforcement as exceptionless in their jeremiads even as they denounce a spectrum of more flexible reformist policies for having an illegitimately "categorical" sweep.[142]

The uncertainty surrounding the term "categorical" is further complicated by a corresponding ambiguity in the meaning of "nonenforcement." Critics of reformist prosecutors often invoke the specter of total prosecutorial inaction—*nullification*, even—when they deploy this term, suggesting a blanket refusal to bring any enforcement resources at all to bear on an entire category of offenses.[143] While this interpretation aligns with the most intuitive understanding of "nonenforcement," it fails to capture the nuances of many policies pursued by reformist prosecutors. In practice, these so-called "categorical nonenforcement" policies often involve some degree of enforcement, albeit a more restrained mode of enforcement than the maximal response permitted by law. These policies might, for example, direct prosecutors to seek base sentences instead of sentences elevated by statutory sentencing enhancements,[144] lodge misdemeanor or summary charges in lieu of more serious charges,[145] file cases against children in family court instead of criminal court,[146] or pursue

141. FELIX OWUSU, PRESUMPTIVE DECLINATION AND DIVERSION IN SUFFOLK COUNTY, MA 9 (2022).

142. *See supra* notes 118–22, 131–42 and accompanying text.

143. *See supra* note and accompanying text.

144. *See* KRINSKY, *supra* note 21, at 16; GASCÓN, *supra* note 99, at 2.

145. *See, e.g.*, Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county [https://perma.cc/HNK3-UVX8]; Marfin, *supra* note 136.

146. *See, e.g.*, *Chesa Boudin Critic Replaces Him as San Francisco DA*, ASSOCIATED PRESS (July 8, 2022, 5:49 PM), https://apnews.com/article/elections-california-san-francisco-recall-government-and-politics-d12b7f4e8402497843b004d43c263048 [https://perma.cc/2ZPL-ARZB]; Marjorie Hernandez, *LA County District Attorney Accused of Retaliating Against Prosecutors*, N.Y. POST (Feb. 16, 2022, 9:25 PM), https://nypost.com/2022/02/16/la-county-da-george-gascon-criticized-over-juvenile-policy/ [https://perma.cc/F2DM-NR54].

diversion as opposed to traditional criminal enforcement.[147] Jeff Bellin helpfully refers to this assortment of practices as "prosecutorial leniency," defined as "any scenario where a prosecutor can select from alternatives and chooses a less severe option."[148] Although I agree with Bellin that prosecutorial leniency more accurately describes many policies categorized as "categorical nonenforcement," I will primarily use the well-established term "nonenforcement" to better situate my analysis within the prevailing discourse.

Synthesizing the implicit understandings that animate critiques of reformist prosecutors' categorical nonenforcement policies reveals a working definition of the concept that is both broader and more nuanced than the term might initially seem to suggest. On the "categorical" side of the ledger, the term encompasses not just exceptionless, across-the-board nonenforcement, but also patterned or predictable nonenforcement across defined classes of cases, even if those classes admit of some exceptions.[149] And on the "nonenforcement" side, the term extends beyond a complete refusal to bring enforcement resources to bear, embracing a wide spectrum of prosecutorial leniency practices that fall short of the most severe sanctions available.[150] Stitching these threads together, the implicit definition of "categorical nonenforcement" at work in the discourse surrounding reformist prosecutors encompasses *patterned or predictable prosecutorial leniency that applies in defined classes of cases*. To be clear, this is a constructed definition that draws upon the various ways in which most critics deploy the concept; it is not a verbatim restatement of any single critic's articulated definition.[151] (As noted earlier, explicit definitions are hard to come by in this discourse.[152]) But by reverse-engineering the concept from the ways in which it is used in existing debates, we can arrive at a clearer understanding of the core grievance leveled against reformist prosecutors—not that they are literally refusing to enforce the law, but that they are enforcing it less stringently than the law allows, in a manner that treats certain categories of offenses as lesser priorities. This understanding

147. *See, e.g.*, KRINSKY, *supra* note 21, at 152–53; Dart, *supra* note 137.

148. Jeffrey Bellin, *Principles of Prosecutor Lenience*, 102 TEX. L. REV. 1541, 1545 (2024); *see also* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1435 (2004) (defining "leniency" as "a value-free umbrella term under which an offender receives less punishment than is possible").

149. *See supra* pp. 1463–66.

150. *See supra* notes 143–48 and accompanying text.

151. Because "thinking is always categorical," it is possible to "infer the implicit criteria [underlying prosecutorial decisions] even though the subjects may be unaware of them" by "observing individual decisions over many cases." William H. Simon, *The Organization of Prosecutorial Discretion*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 74, at 175, 179 (opposing "any strong distinction between categorical and individualized decision-making" and arguing that an insistence on individualization "does not result in unmediated contextuality, but rather decisions governed by tacit and perhaps unconscious criteria over more explicit and reflective ones").

152. *See supra* notes 127–28 and accompanying text.

of categorical nonenforcement, in turn, provides a yardstick against which to assess whether conventional prosecutors, too, engage in such practices—the central question taken up in the Article's next Part.

One additional nuance of the working definition of categorical nonenforcement proposed here is that it encompasses not only formal, publicly proclaimed nonenforcement policies but also informal, even tacit, prosecutorial practices that generate predictable patterns of leniency across identifiable categories of cases. The choice to define categorical nonenforcement in this way is grounded in three primary considerations. First, as academic commentary and court decisions both recognize, deeply entrenched informal norms and practices can be just as consequential as formal rules or policies in shaping the on-the-ground realities of law enforcement.[153] In the words of one judicial opinion, "[d]eeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text."[154] Second, and relatedly, the major objections that critics lodge against categorical nonenforcement—that it flouts legislative supremacy, undermines the rule of law, and so forth[155]—would apply with comparable force (if they in fact have force) regardless of whether the nonenforcement manifests as a formal policy or a pervasive informal practice.[156] Finally, to the extent some may deem the distinction between formal policy and informal practices germane to the normative assessment of nonenforcement (as I do as well), controversial issues surrounding whether to proceed formally or informally are better addressed head-on rather than smuggled into the definition of categorical nonenforcement. As I will argue in Part III, the proclivity of reformist prosecutors to adopt more formal—and more transparent—nonenforcement policies than their conventional counterparts is undoubtedly a salient difference that merits reflection and debate, but it is not one that alters the categorical sweep of a nonenforcement practice.

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153. *See, e.g.*, Kay L. Levine, Elizabeth Griffiths, Joshua M. Hinkle & Volkan Topalli, *Law in Inaction: The Origins and Implications of Chronic Drug Law Underenforcement in One Southern County*, 114 J. CRIM. L. & CRIMINOLOGY 623 (2024); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 55–57 (2002).

154. Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362, 369 (1940); *see also, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970). Indeed, in some legal contexts, informal customs, patterns, or practices are even treated as tantamount to formal policies. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978) (holding that a municipal government cannot be held liable for constitutional violations under 42 U.S.C. § 1983 unless the violations resulted from "a government's policy *or custom*" (emphasis added)).

155. *See supra* pp. 1458–61.

156. *See* MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 132 (1973) (where "an established policy of nonenforcement" exists, "this situation is not materially different from the situation of a long-standing nonenforcement pattern, which after all is significant chiefly because it furnishes proof of the existence of a nonenforcement policy of some force").

II. CATEGORICAL NONENFORCEMENT BY CONVENTIONAL PROSECUTORS

Existing conversations about prosecutorial discretion in academic research, news sources, and politics generally take for granted a core assumption underpinning the myth of individualized enforcement: namely, that prosecutors have traditionally relied on case-specific factors, not categorical criteria, in discretionary decision making.[157] As discussed in Part I, conventional prosecutors and their allies constantly invoke this notion to defend the legitimacy of their approach and assail reformist prosecutors.[158] Many reformist prosecutors and their supporters, while defending categorical nonenforcement as a valid tool for reducing unwarranted criminalization, concede that it represents a break from traditional practice.[159] Seldom do participants in these debates question the underlying premise of the discussion,[160] and no scholar has sought to systematically challenge this assumption. This Part takes up that task, arguing that categorical nonenforcement, in both its absolute and selective forms, is a fundamental and longstanding feature of American prosecution.

Sections II.A, II.B, and II.C examine prosecutorial practices across a spectrum of offenses—vice crimes, property crimes, and violent crimes, respectively—uncovering pervasive patterns of categorical nonenforcement by conventional prosecutors. These sections reveal that prosecutors have long employed categorical criteria to guide their discretionary decisions, sometimes in the form of unbending, exceptionless policies or customs and other times as clear patterns of selective nonenforcement. Moreover, four trans-substantive patterns emerge across the three crime categories explored in this Part: (1) a stark difference in how enforcement officials respond to public versus private criminality, with the latter often subject to drastically diminished enforcement; (2) the influence of race, class, and other markers of privilege on enforcement decisions; (3) lenient treatment for defendants who plead guilty or otherwise waive their rights compared to those who contest the charges; and (4) the central role of suspects' prior criminal records in shaping prosecutorial decisions. Categorical approaches to discretion, whether manifested as formal policies or informal practices, exert an undeniable influence. By exposing these patterns and their trans-substantive character, this Part demonstrates that both absolute and selective

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157. *See supra* pp. 1458–60.

158. *See supra* notes 24–27.

159. *See, e.g.*, Fissell, *supra* note 23, at 757; Murray, *Prosecutorial Nonenforcement*, *supra* note 15, at 173, 175–78.

160. The most noteworthy counterexample is Rebecca Blair & Miriam Aroni Krinsky, *Why Attacks on Prosecutorial Discretion Are Attacks on Democracy*, 61 AM. CRIM. L. REV. ONLINE 1, 10–14 (2024), which presents some evidence that reformist prosecutors' categorical nonenforcement policies are consistent with the way prosecutors have exercised discretion historically.

forms of categorical nonenforcement are core, albeit often hidden, facets of prosecutorial discretion, not the wholly novel innovations of reformist prosecutors. This conclusion undermines a key assumption of the individualized enforcement paradigm and lays the groundwork for a more honest reckoning with the realities of prosecutorial decision making as discussed in Part III.

Before presenting the evidence that supports this conclusion, a methodological nuance needs to be addressed. Some of the sources canvassed in this Part document the wholesale or selective nonenforcement of various criminal laws without expressly ascribing responsibility for these patterns to prosecutors as opposed to police, and some sources even place greater emphasis on police decision making.[161] However, this does not undermine the Article's thesis for two main reasons. First, many of the sources relied on here, such as Schuyler Wallace's seminal article emphasized in the Introduction and in Section II.A, do directly implicate prosecutors in categorical nonenforcement practices.[162] Second, the boundaries between prosecution and policing are often blurred in practice, with police frequently acting in a prosecutorial capacity and prosecutors influencing enforcement priorities.[163] Police officers consider the equities of criminal justice intervention much as prosecutors do when making decisions about whom to arrest, which charges to include in their arrest paperwork, and what feedback to provide on plea offers,[164] while prosecutors help set proactive enforcement agendas through grand jury investigations, securing warrants, and pressuring police to alter their own practices and priorities.[165] Consequently, prosecutors and police share responsibility for determining which offenders are brought within the ambit

161. *See generally* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1245–46 (2020) (highlighting commonly occurring situations where criminal laws go unenforced and emphasizing that "none of these mercies come about because we give broad discretion to prosecutors" and that "[t]hese decisions are typically made by police").

162. *See supra* notes 1–5 and accompanying text; *infra* notes 173–78 and accompanying text.

163. Indeed, in a number of jurisdictions, arresting officers quite literally are the prosecutors in low-level misdemeanor cases. *See* Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1331–32 (1998); Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html [https://perma.cc/QUM4-6XK7].

164. *See, e.g.*, Abel, *supra* note 42, *passim*; Goldstein, *supra* note 106, at 564–73. W. Boyd Littrell helpfully conceptualizes the "charging decision" not as a unilateral prosecutorial function but as "a committee decision" jointly shaped by a variety of different actors, with police and prosecutors jointly "play[ing] the major part." LITTRELL, *supra* note 124, at 32–33. In a similar vein, Frank Miller notes that "[t]he decision to charge, unlike the decision to arrest, is not a unitary decision made . . . by a specified individual" and that "[i]n some instances, the effective decision is made when the police decide not to ask the prosecutor to charge." MILLER, *supra* note 48, at 11.

165. *See, e.g.*, Jack Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes*, 13 LAW & SOC'Y REV. 431, 441–44 (1979); Richman, *supra* note 42, *passim*.

of the criminal adjudicative process. Taken together, the evidence set forth in this Part demonstrates that categorical nonenforcement is a pervasive feature of the conventional prosecution function writ large, encompassing not only the actions of individual prosecutors but also the broader set of practices and norms that shape the exercise of prosecutorial discretion throughout the criminal justice system.

A. Nonenforcement for Vice Crimes

The administration of vice laws—that is, laws prohibiting conduct that lawmakers deem immoral or indulgent but that lacks a discrete victim[166]—presents unique opportunities for both wholesale and selective nonenforcement to flourish.[167] The moral sentiments that underlie these offenses are often deeply contested, varying across communities, social groups, and even amongst enforcement officials themselves.[168] Moreover, the absence of direct victims can dampen public pressure for a harsh law enforcement response, creating room for enforcement officials to adopt varied policy stances based on local norms, resource constraints, and competing enforcement priorities.[169] It is hardly surprising, then, that many of the categorical nonenforcement policies announced by reformist prosecutors—and assailed by purveyors of the myth of individualized enforcement—have involved vice crimes, particularly marijuana possession[170] and, in a trend that has gathered momentum since *Roe v. Wade*[171] was overruled, abortion prohibitions.[172] Yet amidst the intense scrutiny on these reformers, the historical patterns of nonenforcement practiced by conventional prosecutors have flown under the radar. This

166. For definitions of vice or morals crimes, see, for example, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 126 (1993); and Jerome H. Skolnick, *The Social Transformation of Vice*, 51 LAW & CONTEMP. PROBS. 9, 10 (1988).

167. *See, e.g.*, Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 471–73 (2002); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 456–57 (1967).

168. *See, e.g.*, Peter Reuter, *Police Regulation of Illegal Gambling: Frustrations of Symbolic Enforcement*, 474 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 37–38 (1984); Jeffrey A. Roth, *Prosecutor Perceptions of Crime Seriousness*, 69 J. CRIM. L. & CRIMINOLOGY 232, 240 (1978).

169. *See, e.g.*, PARRILLO, *supra* note 44, at 269–71, 274–79; Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 257–59 (2007).

170. *See supra* note 95 and accompanying text.

171. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

172. *See supra* note 97 and accompanying text. Abortion prohibitions admittedly resist any single or straightforward classification within criminal law's traditional taxonomic divides. While such laws share in many characteristics of vice or morals crimes insofar as they are often premised, at least in part, on moral beliefs about gender roles and the proper functions of sex, *see, e.g.*, KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD ch. 8 (1985), they also possess characteristics of crimes against the person to the extent they are animated by fetal protection considerations, *see, e.g.*, *Dobbs*, 597 U.S. at 225–32, 240, 250.

section aims to shine a light on that history, challenging the prevailing narrative that reformist prosecutors' nonenforcement policies for crimes such as marijuana possession and abortion represent a sharp break from established norms of prosecutorial decision making.

The Introduction to this Article opened with data from political scientist Schuyler Wallace's 1930 survey of American DAs, which found, to recap, that "at least ninety per cent" of the nearly three hundred DAs who answered the survey recognized there were "many laws which they never enforced."[173] Wallace concluded from these striking results that what he called "nullification"—a concept closely related to, though likely narrower than, "categorical nonenforcement"[174]—was "a widespread and seemingly accepted process of government."[175] Of special note for purposes of this section, the laws that prosecutors most frequently reported nullifying were vice offenses. Nonenforcement of Sunday closing laws, for example, was "[e]ven more widespread and . . . thoroughgoing" than nonenforcement of anti-speeding laws—which, in turn, over seventy percent of the responding DAs said they were not enforcing as written.[176] Adultery and fornication prohibitions likewise had fallen into desuetude in much of the country, rendered inert in what Wallace estimated to be "a great many jurisdictions, probably . . . the majority."[177] From alcohol prohibition to gambling, profanity to restrictions on cigarette sales, vice crimes of all stripes consistently surfaced in prosecutors' reports of laws they rarely or never enforced.[178] Wallace's survey thus provided an early and vivid demonstration of just how routinely conventional prosecutors engage in categorical nonenforcement when it comes to vice offenses.

Other research bears out Wallace's conclusions.[179] Perhaps the most familiar and well-documented illustration of widespread nonenforcement comes from the national experiment with alcohol prohibition. From 1920 to 1933, the Eighteenth Amendment and the Volstead Act banned the manufacture, sale, and transportation of intoxicating liquor nationwide, yet

173. Wallace, *supra* note 1, at 348 (emphasis omitted).

174. For more on the relation between "nullification" and "categorical nonenforcement," see *supra* note 15.

175. Wallace, *supra* note 1, at 348, 351–52 (emphasis omitted).

176. *Id.* at 351; *cf. id.* at 352 (acknowledging that "[t]here still remain many communities in which certain portions of the Blue Laws are enforced" but concluding that "[s]o widespread is the practice of nullifying the Blue Laws throughout the nation, that further comment thereon seems unnecessary").

177. *Id.* at 354.

178. *Id.* at 354–55.

179. *See, e.g.*, WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 84 (1998) ("Prosecutorial nullification is widely considered legitimate in circumstances where the application of a statute produces an especially harsh or anomalous result or where an entire statute, usually an old one, seems out of tune with contemporary sentiment—for example, the laws against fornication."); Brown, *supra* note 169, at 261 ("[M]ost obscure or superfluous statutes in criminal codes are effectively nullified by prosecutors . . . .").

in many "wet" jurisdictions, prosecutors and police made little effort to enforce these locally unpopular measures.[180] Indeed, it was not uncommon for local enforcement officials to shield alcohol distributors from the law upon payment of a satisfactory bribe.[181] In a few instances, enforcement officials faced removal from office or other repercussions for alleged dereliction of duty in administering alcohol prohibition (and in some instances, anti-gambling) laws.[182] But such consequences were the rare exception rather than the rule. Prohibition's eventual repeal underscored the ineffectiveness of enforcement efforts, which were undermined, in part, by widespread local opposition, resistance, and nonenforcement.[183]

Academic research and case law also lend support to Wallace's findings that numerous vice laws beyond those targeting alcohol fell into widespread disuse and neglect. Laws against fornication,[184] adultery,[185] nonmarital cohabitation,[186] sodomy (between consenting adults),[187] obscenity,[188] and, to a lesser extent, bigamy[189] long ago fell into "a very comprehensive

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180. *See, e.g.*, J.C. Burnham, *New Perspectives on the Prohibition "Experiment" of the 1920's*, 2 J. SOC. HIST. 51, 55–59 (1968); Walter E. Edge, *The Non-Effectiveness of the Volstead Act*, 109 ANNALS AM. ACAD. POL. & SOC. SCI. 67, 82 (1923). Similar patterns of localized nonenforcement afflicted earlier state-level experiments with alcohol prohibition. *See, e.g.*, MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 197–98 (2005); Ellis, *supra* note 43, at 1551–57, 1565. Although recent historical work on prohibition resists the misconception that the prohibition laws were wholly moribund, contemporary scholars nevertheless acknowledge that there were large "gaps in enforcement when it came to particular cities and social groups." LISA MCGIRR, THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE 68 (2015) (discussing regional variations as well as selective enforcement structured by race and class); *see also, e.g.*, Friedman & Duque, *supra* note 6, *passim*.

181. *See, e.g.*, FRIEDMAN, *supra* note 166, at 140; WICKERSHAM REPORT, *supra* note 6, at 78.

182. *See, e.g.*, State *ex rel.* Kinsella v. Eberhart, 133 N.W. 857, 860–61 (Minn. 1911); State *ex rel.* Coleman v. Trinkle, 78 P. 854, 857–58 (Kan. 1904).

183. For an account of the contingent political developments that culminated in prohibition's repeal, see DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION (1979). Regarding the relationship between repeal and shifting public impressions about the cost of enforcing prohibition, see Camilo García-Jimeno, *The Political Economy of Moral Conflict: An Empirical Study of Learning and Law Enforcement Under Prohibition*, 84 ECONOMETRICA 511 (2016).

184. *See, e.g.*, KADISH & KADISH, *supra* note 156, at 73–74; George F. Cole, *The Decision to Prosecute*, 4 LAW & SOC'Y REV. 331, 335 (1970).

185. *See, e.g.*, DEBORAH L. RHODE, ADULTERY: INFIDELITY AND THE LAW 61–67 (2016); Nelson, *supra* note 167, at 456–57.

186. *See, e.g.*, Fort v. Fort, 425 N.E.2d 754, 758 (Mass. App. Ct. 1981); Johnson, *supra* note 7, at 96–97.

187. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003); William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 664–65.

188. *See, e.g.*, U.S. DEP'T OF JUST., ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 366 (1986); George P. Wilson, Francis T. Cullen, Edward J. Latessa & John Steven Wills, *State Intervention and Victimless Crimes: A Study of Police Attitudes*, 13 J. POLICE SCI. & ADMIN. 22 (1985).

189. Bigamy was eventually stamped out (for the most part) in Utah during its path toward statehood due to federal intervention. But the reason federal leadership was needed to achieve this result was due to widespread local support for or tolerance of bigamy within the territory's Mormon

desuetude" in many jurisdictions.[190] Similarly, laws restricting access to contraception and abortion often went unenforced. For instance, in Connecticut, as of 1961, there was an "undeviating policy of nullification" of the state's anti-contraceptive laws "throughout all the long years that they have been on the statute books,"[191] while in Chicago, a study found that between 1867 and 1940 prosecutors almost never brought charges against abortionists unless a woman died as a result of the procedure.[192] Sunday closing laws were frequently violated but seldom enforced in much of the country.[193] Gambling laws, too, were often rendered dead letters by police and prosecutors in certain jurisdictions.[194] To be sure, each of these vice offenses has at times been targeted for aggressive enforcement campaigns, particularly during periods of heightened religious fervor and moralistic reform programs. "Every city," writes historian Lawrence Friedman, "had its own special history of crackdowns, campaigns, and arrests—and payoffs, immunities, and shoulder-shrugging toleration."[195] But this in no way detracts from the fact that in other times and places, nonenforcement policies or practices carried the day. These examples, encompassing a broad spectrum of vice offenses and historical eras, illustrate that the phenomenon Wallace identified was not confined to a single crime category or time period but instead represents a deeply ingrained and enduring characteristic of American penal administration.

While the most extreme forms of categorical nonenforcement—which Wallace and others have termed "nullification," but I prefer to call absolute

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population, including among police and prosecutors. *See* STEPHEN CRESSWELL, MORMONS AND COWBOYS, MOONSHINERS AND KLANSMEN: FEDERAL LAW ENFORCEMENT IN THE SOUTH AND WEST, 1870–1893 (1991). For discussion of more recent prosecutorial nonenforcement in relation to bigamy, see Shayna M. Sigman, *Everything Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 141–42, 177–84 (2006).

190. *Fort*, 425 N.E.2d at 758 (making this point in the context of discussing fornication, adultery, and "lewd and lascivious cohabitation").

191. Poe v. Ullman, 367 U.S. 497, 502 (1961) (plurality opinion). *See generally* Melissa Murray, Essay, Griswold*'s Criminal Law*, 47 CONN. L. REV. 1045, 1056–60 (2015).

192. Leslie J. Reagan, *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867–1940*, 77 J. AM. HIST. 1240, 1250 n.17 (1991). *See generally* Markovic, *supra* note 123, at 1550.

193. *See, e.g.*, A.H. LEWIS, A CRITICAL HISTORY OF SUNDAY LEGISLATION FROM 321 TO 1888 A.D., at 209 (New York, D. Appleton & Co. 1888); Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 J. CHURCH & STATE 13, 15–16 (1994).

194. *See, e.g.*, FLOYD J. FOWLER, JR., THOMAS W. MANGIONE & FREDERICK E. PATTER, GAMBLING LAW ENFORCEMENT IN MAJOR AMERICAN CITIES 30, 143 (1978) (documenting low levels of police enforcement for social gambling and evidence that, though prosecutors in many cities generally moved forward with the gambling cases presented by police, prosecutors in three of the cities studied generally did not prosecute broad subsets of police gambling arrests).

195. FRIEDMAN, *supra* note 166, at 140. *See generally* Sohoni, *supra* note 128, at 48–55 (underscoring that a law receiving loose enforcement in one political context may become a major enforcement priority in another).

or near-absolute nonenforcement as a less value-laden alternative[196]—are commonplace in the vice context, they are not the entire picture. Equally important are more calibrated and selective—but still patterned and predictable and, thus, *categorical*—forms of nonenforcement. These selective nonenforcement practices are not simply the product of individual prosecutors exercising professional judgment in a case-by-case fashion, as the myth of individualized enforcement would suggest. Rather, they often reflect systematic patterns of nonenforcement that are broadly consistent across different prosecutors within a given jurisdiction, across jurisdictions, across different kinds of vice crimes, and even, as later sections of the Article will show, for other types of crime outside the domain of vice.

Perhaps the most entrenched and persistent pattern of selectivity driving vice enforcement—a pattern Friedman calls "the Victorian Compromise"—is a tendency to tolerate private indulgence while cracking down on vice that spills into public view.[197] The animating idea behind the Victorian Compromise is that vice can never be fully suppressed—it can only be hidden, so as not to tempt or disturb the sensibilities of others, or contained, so that it cannot spread.[198] The history of prostitution enforcement vividly illustrates this dynamic. Indoor sex work, whether in brothels, massage parlors, or via escort services, has often been tolerated, or at least treated more leniently than street prostitution.[199] In some times and places, indoor sex work was even formally or informally zoned into red light districts where it was allowed to occur with minimal interference as long as it remained geographically contained.[200] By contrast, the sex trade in public spaces, epitomized by the "street walker," has historically been the primary

196. For discussion of my thoughts on this terminology, see *supra* note 15.

197. FRIEDMAN, *supra* note 166, at 127, 130; *see also, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 169–70 (2011). Lawmakers bear some responsibility for this pattern, as they sometimes create crime definitions that solely cover public displays of vice, such as the unevenly enforced crime of *public* intoxication. Most vice crimes, however, do not work that way: ordinarily, crime definitions sweep broadly enough to encompass public and private vice equally, leaving it to police and prosecutors to decide which violations to pursue.

In a similar vein, enforcement officials will often limit their interventions to commercialized vice, giving a free pass to recreational indulgences even when they, too, are prohibited by statutory law. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4, 84–86 (1969); KADISH & KADISH, *supra* note 156, at 73.

198. *See, e.g.*, FRIEDMAN, *supra* note 166, at 127, 130–31; Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201–06 (1996).

199. *See, e.g.*, Mark H. Haller, *Historical Roots of Police Behavior: Chicago, 1890–1925*, 10 LAW & SOC'Y REV. 303, 316 (1976); William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1813–14, 1829–30 (1998).

200. *See, e.g.*, MARA L. KEIRE, FOR BUSINESS AND PLEASURE: RED-LIGHT DISTRICTS AND THE REGULATION OF VICE IN THE UNITED STATES, 1890–1933 (2010); Neil Larry Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870–1910*, 19 J. SOC. HIST. 665 (1986).

target of enforcement.[201] Similarly, adultery laws were almost never enforced against those who kept their trysts discreet[202] (and as we have seen, in some jurisdictions they simply were not enforced at all[203]). And drug enforcement follows a comparable script, with crackdowns focused on open-air drug markets in economically and racially disadvantaged urban areas while drug activity in suburban homes and college dorms goes comparatively unpoliced and unhindered by prosecutors.[204]

Race, class, and other identity markers are also crucial determinants of how vice laws are enforced and not enforced.[205] Across a range of historical and contemporary contexts, vice enforcement has disproportionately targeted vice offenses involving racial and ethnic minorities, the poor, women, LGBTQ individuals, and people with disabilities.[206] The enforcement of alcohol prohibition—with parallels in drug enforcement today[207]—focused on lower-class, immigrant communities and the saloons and moonshiners that served them, while taking a more hands-off approach toward middle- and upper-class drinking establishments.[208] Prostitution enforcement has consistently focused on women and gender minorities, especially those who are racially and economically marginalized, while their patrons, typically men, tend to draw little attention from police and prosecutors.[209] Paradoxically, however, membership in a disfavored group can also lead to neglectful underenforcement, where authorities decline to intervene out of a perception that immoral conduct is so widespread in certain communities as to fall outside the regulatory capabilities of the criminal law. Historically, some prosecutors have openly acknowledged declining to enforce adultery and bigamy laws against Black defendants in

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201. *See, e.g.*, THOMAS C. MACKEY, PURSUING JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND NEW YORK CITY'S COMMITTEE OF FOURTEEN, 1920–1930, at 56 (2005); SIDNEY L. HARRING, POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865–1915, at 191–96 (1983).

202. *See, e.g.*, FRIEDMAN, *supra* note 166, at 130; Deborah L. Rhode, *Adultery: An Agenda for Legal Reform*, 11 STAN. J.C.R. & C.L. 179, 184 (2015).

203. *See supra* notes 177, 185 and accompanying text.

204. *See, e.g.*, Stuntz, *supra* note 199, at 1798, 1819–24; Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 40, 52–58.

205. *See, e.g.*, KEIRE, *supra* note 200, ch. 3. William Stringfellow, *Unresolved Issues in the Allocation of Justice: An Existential View*, *in* THE POLITICS OF LOCAL JUSTICE 231, 232–34 (James R. Klonoski & Robert I. Mendelsohn eds., 1970).

206. *See, e.g.*, David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 133–36 (1994); Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1658–63 (2021).

207. *See, e.g.*, Mona Lynch, *Prosecutorial Discretion, Drug Case Selection, and Inequality in Federal Court*, 35 JUST. Q. 1309, 1333–34 (2018); Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1081–84, 1091–95 (2017).

208. *See, e.g.*, William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874–80 (2000).

209. *See, e.g.*, MACKEY, *supra* note 201, at 56; Marie Bailey-Kloch, Corey Shdaimah & Philip Osteen, *Finding the Right Fit: Disparities Between Cisgender and Transgender Women Arrested for Prostitution in Baltimore*, 5 J. FORENSIC SOC. WORK 82, 83–84 (2015).

situations where they would have pursued charges against white offenders, citing stereotypes about uncontrollable Black lust or cultural pathology.[210] In some instances, enforcement officials have gone even further, actively steering vice into marginalized neighborhoods in order to insulate more privileged spaces from its harms.[211] These seemingly opposed enforcement strategies—harsh crackdowns on the one hand, lackadaisical underenforcement and racialized containment on the other—both reflect group-based decision making and stereotypes rather than the particularistic assessment of evidence contemplated by the myth of individualized enforcement.[212]

Prosecutors handling vice offenses also exhibit a strong tendency to bestow leniency upon the class of defendants who waive their rights and acquiesce in some reduced form of accountability, whether that be a guilty plea or some form of diversion—and conversely, to penalize defendants who exercise their trial rights.[213] Indeed, some of the earliest documented examples of plea bargaining in America involve vice crimes, with prosecutors in mid-nineteenth century Massachusetts frequently using the practice to dispose of cases involving unlicensed liquor sales.[214] This tendency intersects with another pervasive pattern in the enforcement of vice (and other) crimes: treating offenders with a clean criminal record more favorably than those with a checkered past.[215] The "going rates" for plea bargains in many jurisdictions are stratified based on criminal history, with first-time offenders typically receiving more lenient deals.[216] Likewise,

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210. *See* DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 110, 122–24 (1966); Wallace, *supra* note 1, at 353.

211. *See, e.g.*, Stephen Robertson, Shane White, Stephen Garton & Graham White, *Disorderly Houses: Residences, Privacy, and the Surveillance of Sexuality in 1920s Harlem*, 21 J. HIST. SEXUALITY 443, 452–59 (2012); I. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576 *passim* (2023).

212. *See, e.g.*, Natapoff, *supra* note 52, at 1745–48; Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1150–61 (2018) (book review).

213. *See, e.g.*, Maureen Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 LAW & SOC'Y REV. 473, 489–96 (1971); John F. Padgett, *The Emergent Organization of Plea Bargaining*, 90 AM. J. SOCIO. 753, 754–56, 785–89 (1985).

214. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 868–79 (2000). For other studies examining early- to mid-nineteenth century plea practices relating to vice offenses in Massachusetts, see THEODORE FERDINAND, BOSTON'S LOWER CRIMINAL COURTS, 1814–1850 *passim* (1992); and MARY E. VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS AND THE MAKING OF POLITICAL AUTHORITY *passim* (2007).

215. *See, e.g.*, Oshea Johnson, Marisa Omori & Nick Petersen, *Racial-Ethnic Disparities in Police and Prosecutorial Drug Charging: Analyzing Organizational Overlap in Charging Patterns at Arrest, Filing, and Conviction*, 60 J. RSCH. CRIME & DELINQ. 255, 266, 285–86 (2023); Mileski, *supra* note 213, at 503–05.

216. *See, e.g.*, NEWMAN, *supra* note 210, at 115–18; Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1948–50 (2006). *But see* Brian Forst & Kathleen B. Brosi, *A Theoretical and*

many diversion programs—for DUI offenders, for people addicted to drugs, and for others—categorically exclude defendants with prior convictions, creating a bifurcated system of treatment.[217] Importantly, these two patterns—plea-driven leniency and criminal history-based sorting—are mutually reinforcing. The threat of harsh repeat offender sentences is routinely wielded by prosecutors *not* to ensure severe punishment for recidivists, but as leverage to extract guilty pleas.[218] Prosecutors frequently employ their charging discretion to shelve recidivist enhancements in exchange for a plea on terms they deem acceptable, reserving the full weight of these provisions for the unfortunate few who turn down the prosecutor's plea offer and insist on having a trial.[219] The intersection of these enforcement patterns further underscores the extent to which prosecutorial discretion in the vice realm is often guided by generalized, group-based distinctions and not merely by granular, individualized factors.

B. Nonenforcement for Property Crimes

In the domain of property crimes—a category used here in a loose sense that includes the closely related crimes of fraud and theft of services—reformist prosecutors have announced fewer categorical nonenforcement policies than for vice crimes. But there are some noteworthy counterexamples. Cook County State's Attorney Kim Foxx faced criticism from police, retailers, and political opponents over her policy of not charging thefts under $1,000 as felonies, with some accusing her of

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Empirical Analysis of the Prosecutor, 6 J. LEGAL STUD. 177, 188–89 (1977) (finding that a defendant's prior criminal record had no statistically significant effect on prosecutorial decision making for cases included in the study). For a snapshot of the expansive literature on locally customary "going rates" for pleas, see, for example, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 187–89 (1979); and Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1139–41 (2011).

217. *See generally* Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 340–42 (2021) (noting that many prosecution-led diversion initiatives exclude people with prior convictions and criticizing such exclusions). Though early prosecutorial diversion initiatives tended to exclude anyone with prior convictions, some contemporary programs steer clear of such categorical exclusions—especially when it comes to prior nonviolent misdemeanor convictions. *See* Kalani C. Johnson, Robert C. Davis, Melissa Labriola, Michael Rempel & Warren A. Reich, *An Overview of Prosecutor-Led Diversion Programs: A New Incarnation of an Old Idea*, 41 JUST. SYS. J. 63, 71–72 (2020).

218. *See, e.g.*, MONA LYNCH, HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT 120–23 (2016); Rodney L. Engen, *Have Sentencing Reforms Displaced Discretion over Sentencing from Judges to Prosecutors?*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 18, at 73, 76–77.

219. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978); Jeffery T. Ulmer, Megan C. Kurlychek & John H. Kramer, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RSCH. CRIME & DELINQ. 427, 446–51 (2007).

abdicating her prosecutorial role.[220] Manhattan District Attorney Cy Vance's policy against criminally prosecuting most acts of subway fare evasion drew fire for inviting nonpayment and exacerbating the metro agency's financial woes.[221] And Dallas County DA John Creuzot's policy against prosecuting shoplifting under $750 was attacked by the Texas governor for supposedly "stok[ing] crime" and communicating that "[i]f someone is hungry they can just steal some food," in effect authorizing "wealth redistribution by theft."[222] The feverish intensity of some of the critiques might lead one to believe that reformist prosecutors were blazing an entirely new trail—treading into uncharted waters where no conventional prosecutor had dared to venture.

In reality, many conventional prosecutors' offices have long engaged in practices comparable to those that have sparked outcry when adopted by reformist prosecutors. The King County (Seattle) DA's Office, for example, instituted a policy decades ago of prosecuting most first-offense thefts of $250–$500 as misdemeanors rather than felonies, mirroring the controversial theft policy more recently championed by Foxx.[223] Far from being seen as radical, that office's policy was part of a suite of internal enforcement guidelines that formed the basis for statewide prosecutorial guidelines.[224] Across the country, systematic leniency initiatives are and long have been commonplace for low-level property offenses like shoplifting and passing bad checks, prioritizing payment of restitution for such crimes over retributive punishment.[225] Furthermore, at least three of the four[226] overarching patterns of selective nonenforcement that shape vice

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220. *See* Max Blaisdell, *The Race to Replace Kim Foxx*, S. SIDE WKLY. (Mar. 6, 2024), https://southsideweekly.com/the-race-to-replace-kim-foxx/ [https://perma.cc/4634-L7E8]; Elyssa Cherney, *Chicago Police Union President Renews Criticism of Kim Foxx Says She 'Needs to Step Down' if She Can't Do Her Job*, CHI. TRIB. (May 23, 2019, 7:02 AM), https://www.chicagotribune.com/2019/04/30/chicago-police-union-president-renews-criticism-of-kim-foxx-says-she-needs-to-step-down-if-she-cant-do-her-job/ [https://perma.cc/Q63S-68YP]; Stacey Baca, *Shoplifting Concerns Rise, Retailers Target Cook County State's Attorney Kim Foxx*, ABC7 CHI. (Dec. 20, 2019), https://abc7chicago.com/shoplifting-kim-foxx-chicago-crime-news/5769897/ [https://perma.cc/SD7H-82B7].

221. *See* Brendan Cheney, *Manhattan DA Will No Longer Prosecute Turnstile Jumping*, POLITICO (Feb. 1, 2018, 1:55 PM), https://www.politico.com/states/new-york/city-hall/story/2018/02/01/manhattan-da-will-no-longer-prosecute-turnstile-jumping-229568 [https://perma.cc/DCH2-KDBJ].

222. Greg Abbott (@GregAbbott_TX), X (Apr. 14, 2019, 10:42 PM), https://x.com/gregabbott_tx/status/1117634208405557248 [https://perma.cc/JAN8-RCRK].

223. David Boerner, *Prosecution in Washington State*, 41 CRIME & JUST. 167, 186 (2012).

224. *See id.* at 186–87.

225. *See, e.g.*, MILLER, *supra* note 48, at 271–73; Donald M. McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 463, 470–71 (1968).

226. The fourth pattern from the previous section—harsher treatment of (vice) offenses taking place in public than those occurring in private spaces—is not well-documented in the property crime context and does not appear to have any systematic influence. The pattern will, however, resurface when violent crimes are discussed in Section II.C, *infra* note 271 (discussing the pattern in a general way). *See also infra* notes 310–15 and accompanying text (discussing the specific pattern of systematic

crime prosecutions also structure the enforcement of property crimes: distributing leniency based on race and class categories;[227] breaks for those who plead guilty or otherwise waive their rights as compared with those who contest the prosecution's case;[228] and favorable treatment of first-time offenders compared with suspected recidivists.[229]

For conventional prosecutors, though, the most glaring and longstanding nonenforcement pattern pertains to the white-collar branch of the property crime universe.[230] In his foundational 1940 address introducing the concept of white-collar crime, sociologist Edwin Sutherland challenged traditional understandings of the "crime problem" that posited a tight link between poverty and criminality, drawing attention to the prevalence and gravity of crimes committed by people of higher social status.[231] Sutherland argued that even though the economic and social harms occasioned by white-collar crimes eclipse those associated with the property crimes of the poor, white-collar crimes almost invariably "result in no official action at all" because enforcement officials tend not to perceive white-collar offenders as "real criminals."[232] The opposite pattern prevails for non-white collar property crimes such as larceny, theft of services, and forgery, which are prosecuted

underenforcement with respect to domestic violence and sexual assault crimes, which overwhelmingly occur in private spaces).

227. *See, e.g.*, Michael Braun, Jeremy Rosenthal & Kyle Therrian, *Police Discretion and Racial Disparity in Organized Retail Theft Arrests: Evidence from Texas*, 15 J. EMPIRICAL LEGAL STUD. 916 (2018); Julilly Kohler-Hausmann, *"The Crime of Survival": Fraud Prosecutions, Community Surveillance, and the Original "Welfare Queen,"* 41 J. SOC. HIST. 329, 329–30, 332 (2007).

228. *See, e.g.*, NEWMAN, *supra* note 210, at 129–30, 163–64; Baker & De Long, *supra* note 55, at 185, 187, 196–96, 201.

229. *See, e.g.*, MICHAEL L. BENSON & FRANCIS T. CULLEN, COMBATING CORPORATE CRIME: LOCAL PROSECUTORS AT WORK 110–11, 188–94 (1998); Kenneth Adams & Charles R. Cutshall, *Refusing to Prosecute Minor Offenses: The Relative Influence of Legal and Extralegal Factors*, 4 JUST. Q. 595, 605 (1987).

230. *See, e.g.*, JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020); SUTHERLAND, *supra* note 8, at 6–7, 54–60. Though scholars continue to debate how best to define white-collar crime, I follow the approach of researchers who think of white-collar crime as a status-neutral umbrella concept that encompasses corporate or organizational crime, on one hand, and occupational crime, on the other. *See, e.g.*, MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 187–88 (2d ed. 1986). *Compare id.*, *with* John Braithwaite, *White Collar Crime*, 11 ANN. REV. SOCIO. 1, 19 (1985) (noting that one possible drawback of this approach is that treating all occupational crime as white-collar crime "brings in many 'blue collar' occupational crimes").

Moreover, there is a small body of research showing that enforcers' lenient treatment of white-collar offenses and offenders can apply to crimes against the person and not just property and regulatory crimes. *See, e.g.*, Barry Goetz, *Organization as Class Bias in Local Law Enforcement: Arson-for-Profit as a "Nonissue,"* 31 LAW & SOC'Y REV. 557 (1997); Cedric Michel, *Violent Street Crime Versus Harmful White-Collar Crime: A Comparison of Perceived Seriousness and Punitiveness*, 24 CRITICAL CRIMINOLOGY 127 (2016).

231. Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIO. REV. 1, 4–5, 8 (1940).

232. *Id.* at 8. On the enormous yet underappreciated harms associated with white-collar crime, see, for example, JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME ch. 4 (2020); and Richard Delgado, Essay, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 526–27 (1994).

at high rates and constitute a large share of a typical criminal court's workload.[233] As discussed further below, this bifurcated enforcement pattern stems from a complex interplay of factors,[234] but its net effect is to reinforce societal assumptions about what counts as true crime and which groups comprise the "criminal classes" so feared by the public.[235]

Researchers have identified several explanations for conventional prosecutors' persistent inertia when it comes to white-collar crime. One key factor is the perception that many white-collar offenses, though technically criminal, are fundamentally civil or regulatory problems best addressed through non-criminal interventions such as civil fines, deferred prosecution agreements, and the like.[236] For instance, criminal charges are exceedingly rare—whereas civil enforcement is at least somewhat more robust—when it comes to securities violations by investment firms,[237] insurance fraud by physicians,[238] fraudulent lending by banks,[239] wage theft,[240] and crimes committed by corporate entities.[241] In contrast, for shoplifting, passing bad checks, fare evasion, and other property crimes associated with lower-class offenders, policing and prosecution are often seen as the natural response[242] (though as discussed above, this is not always the case even among conventional police and prosecutors, many of whom prefer alternatives such

233. *See, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 630–31 (2014); Darrell Steffensmeier, Casey T. Harris & Noah Painter-Davis, *Gender and Arrests for Larceny, Fraud, Forgery, and Embezzlement: Conventional or Occupational Property Crime Offenders?*, 43 J. CRIM. JUST. 205, 208–12 (2015). *See generally* Brown, *supra* note 8, at 1298 ("Criminal law is a comparatively minor tool for addressing white-collar wrongdoing. For street wrongdoing, in contrast, criminal law remains the dominant instrument.").

234. *See infra* notes 236–53 and accompanying text.

235. *See* Brown, *supra* note 8, at 1334–38, 1359–60; Sutherland, *supra* note 231, at 8–10.

236. *See, e.g.*, Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 *passim* (2007); Susan P. Shapiro, *The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders*, 19 LAW & SOC'Y REV. 179, 190, 205–08 (1985).

237. *See* Shapiro, *supra* note 236, at 190, 193–94.

238. *See, e.g.*, Henry N. Pontell, Paul D. Jesilow & Gilbert Geis, *Policing Physicians: Practitioner Fraud and Abuse in a Government Medical Program*, 30 SOC. PROBS. 117, 122–24 (1982); Robert Tillman & Henry N. Pontell, *Is Justice "Collar-Blind"?: Punishing Medicaid Provider Fraud*, 30 CRIMINOLOGY 547, 553 & n.5 (1992).

239. *See, e.g.*, JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); Henry N. Pontell, William K. Black & Gilbert Geis, *Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions After the 2008 Financial Meltdown*, 61 CRIME L. & SOC. CHANGE 1, 10–11 (2014).

240. *See, e.g.*, Stephen Lee, *Policing Wage Theft in the Day Labor Market*, 4 U.C. IRVINE L. REV. 655, 668–71 (2014); Terri Gerstein, *Stealing from Workers Is a Crime. Why Don't More Prosecutors See It That Way?*, THE NATION (May 24, 2018), https://www.thenation.com/article/archive/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/ [https://perma.cc/Y639-4H3F].

241. *See, e.g.*, Joan Neff Gurney, *Factors Influencing the Decision to Prosecute Economic Crime*, 23 CRIMINOLOGY 609, 620 (1985). *See generally* Miriam H. Baer, *Forecasting the How and Why of Corporate Crime's Demise*, 47 J. CORP. L. 887, 893 (2022) (contrasting federal law's broad legal definition of corporate liability with the far narrower "shadow law of corporate criminal liability" arising from federal prosecutors' internal policies).

242. *See supra* note 233 and accompanying text.

as restitution for these offenses[243]). These patterns reinforce social understandings that link criminality to poverty while portraying the misdeeds of the powerful as mere regulatory problems to be managed by specialized government agencies.[244]

Special investigative challenges and resource constraints also contribute to the minimal level of enforcement activity for white-collar crime among conventional prosecutors.[245] Such crimes tend to be secretive, occurring via computers or within executive suites, office cubicles, and other occupational spaces located outside the gaze of most forms of traditional police surveillance, making detection and evidence-collection unusually challenging.[246] White-collar defendants are more likely to hire aggressive and skillful legal teams, setting the stage for robust motions practice, pretrial investigation, and adversarial contestation.[247] And the crimes themselves may be difficult to understand and prove without special expertise in relevant business or accounting practices—expertise few local prosecutors or police departments possess.[248] This is a major reason why federal agencies and state attorneys general have traditionally played larger roles in

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243. *See supra* note 225 and accompanying text.

244. *See supra* note 235 and accompanying text.

245. *See, e.g.*, BENSON & CULLEN, *supra* note 229, at 160–71; Darryl K. Brown, *The Distribution of Fraud Enforcement*, 28 CARDOZO L. REV. 1593, 1596–97 (2007).

246. *See, e.g.*, Michael L. Benson, William J. Maakestad, Francis T. Cullen & Gilbert Geis, *District Attorneys and Corporate Crime: Surveying the Prosecutorial Gatekeepers*, 26 CRIMINOLOGY 505, 507 (1988); Robert Tillman, Kitty Calavita & Henry Pontell, *Criminalizing White-Collar Misconduct: Determinants of Prosecution in Savings and Loan Fraud Cases*, 26 CRIME L. & SOC. CHANGE 53, 56 (1997). It may well be that something akin to the Victorian compromise (discussed above in connection with vice crime enforcement, see *supra* notes 197–98 and accompanying text) also helps account for underenforcement vis-à-vis white-collar crimes that are perpetrated: enforcement officials perhaps deprioritize these crimes because they are not thought to threaten public order or moral sensibilities due to their secretive character.

247. *See, e.g.*, KENNETH MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK ch. 11 (1985); Joe McGrath & Deirdre Healy, *Theorizing the Drop in White-Collar Crime Prosecutions: An Ecological Model*, 23 PUNISHMENT & SOC'Y 164, 183 (2021). *But cf.* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (highlighting the inquisitorial dimensions of white-collar practice).

248. *See, e.g.*, Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1305 (2008); Gurney, *supra* note 241, at 612–13, 621–24. Relatedly, it is often said that adducing proof of criminal intent presents special hurdles in white collar cases. *See, e.g.*, Benson et al., *supra* note 246, at 507, 511–13; Pontell et al., *supra* note 238, at 123. There is surely some truth in this, at least for certain types of white-collar crime. Even so, it bears note that criminal intent is *ascribed* through sociocultural norms as much as it is *proven* through evidence. In the context addressed here, the relevant norms tend to afford a presumption of good faith to high-status white-collar suspects that is frequently withheld from otherwise comparable lower-status suspects such as, say, welfare recipients accused of fraud. *Compare* Pontell et al., *supra* note 238, *passim* (discussing near-impossibility of establishing criminal intent in fraudulent billing cases against physicians and attributing the challenge in part to other physicians' disinclination to ascribe bad faith to colleagues), *with* Spencer Headworth, *Broke People, Broken Rules: Explaining Welfare Fraud Investigators' Attributions*, 23 PUNISHMENT & SOC'Y 24, 27 (2021) (finding that "fraud workers' attributions of purposeful, malicious behavior to clients invoke invidious stereotypes about the undeserving poor, suggesting that many fraud perpetrators are not truly struggling and that fraud results more from greed than from need").

white-collar enforcement, both civil and criminal, whereas local prosecutors have mostly taken a backseat or absented themselves from the enforcement picture entirely.[249]

But these investigative obstacles could be overcome to a substantial degree if adequate resources were committed to the cause, and resource allocation decisions are ultimately policy decisions that reveal where an agency's true priorities lie. For over half a century, scholars and practitioners alike have understood that successful white-collar crime enforcement depends on a "control network approach" characterized by specialized in-house units and deep partnerships between prosecutors and civil regulatory agencies.[250] Yet only a small fraction of local DAs' offices have cultivated such structures in any systematic way.[251] Even where dedicated white collar units do exist, they still tend to suffer from deficient resources and underdeveloped interagency partnerships and must compete for staff with other crime types deemed higher priorities, notably narcotics enforcement.[252] While resource limitations play a significant role in explaining diminished white-collar enforcement, these constraints largely stem from prosecutors' decisions to prioritize other crime categories and underinvest in the tools necessary for effective white-collar enforcement.[253]

Regressive patterns are evident not only when comparing white-collar to non-white-collar enforcement, but also within the white-collar enforcement realm itself. Corporations, despite the immense harms they often cause, are rarely prosecuted and can frequently resolve the few cases brought against them through alternatives to prosecution such as deferred prosecution agreements.[254] By comparison, individual white-collar offenders, particularly those from marginalized backgrounds, face a much higher

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249. Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 177, 179–85 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Jed S. Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions*, *in* CORRIGIBLE CORPORATIONS AND UNRULY LAW 173, 180–81 (Brent Fisse & Peter A. French eds., 1985). Local prosecutors began to ramp up their enforcement activity against corporate crime beginning around the mid-1970s, but their efforts remain marginal. *See* BENSON & CULLEN, *supra* note 229, at 62–72 (finding small levels of enforcement by local prosecutors vis-à-vis corporate crime in a national sample and suggesting that "had this survey been conducted at any time prior to the mid-1970s, we would have observed virtually no local corporate crime prosecutions").

250. *E.g.*, BENSON & CULLEN, *supra* note 229, at 19–20; Herbert Edelhertz & Charles H. Rogovin, *Implementing a National Strategy*, *in* A NATIONAL STRATEGY FOR CONTAINING WHITE-COLLAR CRIME 103 (Herbert Edelhertz & Charles H. Rogovin eds., 1980).

251. *See* BENSON & CULLEN, *supra* note 229, at 71–78, 224–26; Michael L. Benson, Francis T. Cullen & William J. Maakestad, *Local Prosecutors and Corporate Crime*, 36 CRIME & DELINQ. 356, 366–71 (1990).

252. *See* Gurney, *supra* note 241, at 618–21.

253. *See* Tillman et al., *supra* note 246, at 72.

254. *See, e.g.*, Todd Haugh & Mason McCartney, *DPA Discounts*, 61 AM. CRIM. L. REV. 35 (2024); Megan Jean Parker & Mary Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime*, 30 J. FIN. CRIME 940, 950–53 (2023).

likelihood of prosecution.[255] This disparity is further exacerbated by the fact that extremely wealthy corporations—those deemed too big to fail—are especially insulated from prosecution.[256] Related research has found, moreover, that cases with corporate victims are more likely to result in prosecution and conviction than cases with individual victims, further highlighting how the criminal justice system prioritizes the interests of powerful corporate actors over those of ordinary citizens.[257] Moreover, among individual white-collar offenders, there are glaring racial and class disparities.[258] A nationwide study of federal white-collar cases from 1994–2019 found that Black men and women were prosecuted at three times the rate of other racial groups, often for offenses involving smaller monetary losses.[259] The growing percentage of white collar prosecutions involving non-white defendants, driven partly by the "democratization" of white-collar employment and (by extension) of opportunities to commit white collar crime, has only amplified these inequalities.[260] Each of these patterns reflects the penal system's broader tendency to focus on low-level, easily prosecuted offenses committed by those with the least ability to resist the power of the state. The white-collar enforcement landscape thus reveals a system that is deferential to corporate interests, quick to prosecute low-level individual offenders, and structured by all-too-familiar racial and class biases.

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255. *See, e.g.*, Kenneth A. Ayers, Jr. & James Frank, *Deciding to Prosecute White-Collar Crime: A National Survey of State Attorneys General*, 4 JUST. Q. 425, 429–33 (1987); John Hagan, *The Corporate Advantage: A Study of the Involvement of Corporate and Individual Victims in a Criminal Justice System*, 60 SOC. FORCES 993, 1003–14 (1982).

256. *E.g.*, BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Luis Baez, *Prosecutorial Discretion Advised: Analyzing the Proper Role of "Economic Consequences" as a Factor in Federal Prosecutorial Decisions Not to Seek Criminal Charges*, 12 DARTMOUTH L.J. 1, 18–22 (2014).

257. *See* Gurney, *supra* note 241, at 619–23; Hagan, *supra* note 255, at 1015–16.

258. *See, e.g.*, Benjamin Levin & Kate Levine, Essay, *Redistributing Justice*, 124 COLUM. L. REV. 1531 (2024).

259. Stephanie Holmes Didwania, *Regressive White-Collar Crime*, 97 S. CAL. L. REV. 299, 333 (2024). Other research likewise finds that white-collar enforcement tends to concentrate on small-time, low-status white-collar offenders rather than the more serious crimes of high-status offenders. *See, e.g.*, Gurney, *supra* note 241, at 614–18. And although some studies find that higher-status offenders fare no better (and perhaps worse) than lower-status offenders at the sentencing stage, *see, e.g.*, Stanton Wheeler, David Weisburd & Nancy Bode, *Sentencing the White-Collar Offender: Rhetoric and Reality*, 47 AM. SOCIO. REV. 641, 650–52 (1982), this may well be a function of investigators and prosecutors screening out the less serious offenses committed by higher-status offenders (but not lower-status offenders) and placing them on a civil enforcement track, *see* Shapiro, *supra* note 236, *passim*.

260. Michael L. Benson, Ben Feldmeyer, Shaun L. Gabbidon & Hei Lam Chio, *Race, Ethnicity, and Social Change: The Democratization of Middle-Class Crime*, 59 CRIMINOLOGY 10 (2021).

C. Nonenforcement for Violent Crimes

Legal scholars often suggest that prosecutorial discretion is at its nadir when it comes to crimes of violence.[261] The heightened public fear and moral condemnation that violent offenses engender, coupled with the perceived imperative to incapacitate dangerous individuals, make "a small but important part of state criminal codes . . . politically mandatory" for prosecutors to pursue.[262] Although the very concept of "violent crime" is less stable than is commonly assumed,[263] the basic point remains that prosecutors face immense pressure to vigorously enforce many laws that address violence. This expectation holds true for reformist prosecutors as well: even as they have openly adopted far-reaching declination policies for certain low-level offenses, often justifying such policies as a means of redirecting scarce resources toward addressing violent crime,[264] reformers have mostly eschewed transparent categorical nonenforcement in the violent crime context.[265] The few exceptions, such as DA Aramis Ayala's policy against seeking the death penalty[266] or DA George Gascón's policy against pursuing statutory sentence enhancements,[267] have been met with fierce resistance despite being confined to the sentencing phase of the adjudicative process. Florida's governor reassigned Ayala's death-eligible cases to a different prosecutor (and his action was upheld by the state's supreme court),[268] while key portions of Gascón's enhancement policy remain tied up in court.[269] The vehemence of this backlash, fueled at every turn by the myth of individualized enforcement,[270] underscores the

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261. *See, e.g.*, Brown, *supra* note 169, at 256; Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 617–18 (2011).

262. Richman & Stuntz, *supra* note 51, at 600.

263. Indeed, David Sklansky calls the term a "conceptual gerrymander" due to how it has been continuously redefined to suit the needs of various political agendas. DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 236 (2021).

264. *See, e.g.*, GASCÓN, *supra* note 135, at 2; ROLLINS POLICY MEMO, *supra* note 94, at 25, 27.

265. *Cf.* Fissell, *supra* note 23, at 752 (noting that most of reformist prosecutors' nonenforcement policies are for "nonviolent, 'victimless' crimes" and arguing that any comparable policy for "serious violent crime [would be] illegitimate"). The few policies that instruct line prosecutors to generally not prosecute criminal threats (policies allowing for certain exceptions) perhaps represent an exception to this pattern. *See* GASCÓN, *supra* note 135, at 3; ROLLINS POLICY MEMO, *supra* note 94, at C-7. By contrast, I do not see resisting arrest (another common target of reformist prosecutors' non-prosecution policies) as a violent crime, for the reasons offered by Fissell, *supra* note 23, at 754 n.45.

266. *See supra* note 132 and accompanying text.

267. *See supra* note 99 and accompanying text.

268. *See supra* note 114 and accompanying text.

269. *See infra* note 270.

270. *See, e.g.*, Ayala v. Scott, 224 So. 3d 755, 758 (Fla. 2017) ("[B]y effectively banning the death penalty in the Ninth Circuit—as opposed to making case-specific determinations as to whether the facts of each death-penalty eligible case justify seeking the death penalty—Ayala has exercised no discretion

perceived incompatibility of prosecutorial discretion with society's demand for uncompromising punishment of violent offenders.

Yet despite the dominant understanding that prosecutorial discretion is incompatible with society's interests in enforcing laws proscribing violent crime, the historical record and contemporary practices in conventional prosecutors' offices reveal a long and disquieting tradition of patterned selective nonenforcement for serious violent offenses. Many of the same core trends documented earlier in connection with vice and property crimes—the tendency of prosecutors to deprioritize criminality occurring in private spaces and relationships (a tendency more prominent in the vice context than for property crimes), the crimes of those who plead guilty or accept alternative forms of accountability, and first-time offenders—resurface in the context of violent crimes as well.[271] But the point I intend to underscore most here is that the enforcement of violent crimes is pervasively structured by race, gender, and class perceptions of which lives truly matter.[272] Historically and still in our day, robust enforcement of violent crime laws has been primarily reserved for offenses that claim privileged lives, while a diminished level of enforcement is more likely to result when the victims are socially marginalized.[273] The perceived worth and credibility of the victim—as refracted through the lenses of white supremacy, patriarchy, and class hierarchy—can dictate the intensity of the

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at all."); Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief at 2–4, Ass'n of Deputy Dist. Att'ys v. Gascón, No. 20STCP04250 (Cal. Super. Ct. L.A. Cnty. Feb. 8, 2021), https://www.laadda.com/wp-content/uploads/2020/12/2020.12.29-Writ-Petition.pdf [https://perma.cc/FK9J-VXAZ] (arguing that Gascón's prohibition on alleging prior strikes and certain other aspects of his policy amounted to "[l]egislating by fiat" and that the policy had "all but repealed California's sentencing enhancement laws"), *aff'd in part, rev'd in part*, 295 Cal. Rptr. 3d 1 (Ct. App. 2022), *petition for review granted*, 515 P.3d 657 (Cal. 2022).

271. For discussion of these themes in the context of vice and property crimes, see *supra* notes 197–204, 213–19, 226–29 and accompanying text. On the deprioritization of enforcement vis-à-vis private violence, see, for example, MILLER, *supra* note 48, at 266–71; and VERA INST. OF JUST., FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY'S COURTS 19–20 (1977); *see also infra* notes 310–15 and accompanying text (discussing enforcement patterns for sexual and domestic violence). On the centrality of guilty pleas and alternative dispositions in violent crime enforcement, see, for example, Fisher, *supra* note 214, *passim*; and Grace Y. Li, Felony Problem-Solving Court (unpublished working paper) (on file with author) (highlighting a new diversion initiative in the Manhattan DA's Office that is open to participation by people charged with violent felonies). On the importance of prior criminal history in the context of violent crime enforcement, see, for example, David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 684–89, 698–700 (1983); and Janell Schmidt & Ellen Hochstedler Steury, *Prosecutorial Discretion in Filing Charges in Domestic Violence Cases*, 27 CRIMINOLOGY 487, 499–500, 505–08 (1989).

272. *See, e.g.*, Ilene Nagel Bernstein, William R. Kelly & Patricia A. Doyle, *Societal Reaction to Deviants: The Case of Criminal Defendants*, 42 AM. SOCIO. REV. 743, 751 (1977); Tuerkheimer, *supra* note 212, at 1150–61.

273. *See, e.g.*, Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 797–99 (2020); Randall L. Kennedy, McCleskey v. Kemp*: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1424–29, 1431–34 (1988).

state's response as much as the severity of the offense itself.[274] From the lynching of thousands of Black Americans during the Redemption Era[275] to the killing of civilians by police officers,[276] the death penalty,[277] and the selective failure to prosecute sexual violence and domestic violence,[278] the patterned underenforcement of serious violent crime laws has been a defining feature of the American legal landscape when the victims are people not fully included in the social compact.

Moreover, the unequal treatment of violent crimes based on the identity of the victim is compounded by stark disparities based on the status of the perpetrator.[279] Marginalized groups stereotyped as inherently violent or "savage"—at various points including Native Americans, enslaved and freed Black people, or immigrant groups not yet assimilated into the dominant white racial identity—have often faced brutal retribution from law enforcement and vigilantes for even minor acts of violence, especially when the victims were white.[280] Conversely, when perpetrators of violence occupied a more privileged social position, their actions were frequently excused or treated with leniency—chalked up to youthful indiscretion, romantic passion, or righteous masculine honor rather than inherent dangerousness, criminality, or cultural pathology.[281] Adding further complexity, when both perpetrator and victim came from marginalized groups—as in the case of intra-racial homicide within Black communities, for instance—penal intervention was often seen as unwarranted since the lives impacted were devalued across the board.[282] Far from being a zone of uniformly vigorous enforcement, then, the prosecution of violent crime has always been a site where the state's selective appraisal of the value of human lives has been starkly displayed—with devastating and often deadly consequences for marginalized communities.

274. *See, e.g.*, Michal Buchhandler-Raphael, *Underprosecution Too*, 56 U. RICH. L. REV. 409 *passim* (2022); Regina Branton, Kimi King & Justin Walsh, *Criminal Justice in Indian Country: Examining Declination Rates of Tribal Cases*, 103 SOC. SCI. Q. 69 (2022).

275. *See infra* notes 238–93 and accompanying text.

276. *See infra* notes 294–99 and accompanying text.

277. *See infra* notes 300–09 and accompanying text.

278. *See infra* notes 310–15 and accompanying text.

279. *See, e.g.*, BRIAN D. BEHNKEN, BORDERS OF VIOLENCE AND JUSTICE: MEXICANS, MEXICAN AMERICANS, AND LAW ENFORCEMENT IN THE SOUTHWEST, 1835–1935 *passim* (2022); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 *passim* (1985).

280. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 30–32 (rev. ed. 2012); LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY chs. 1–2 (1998).

281. *See, e.g.*, MILLER, *supra* note 48, at 208–09; Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77, 97–108 (2014).

282. *See, e.g.*, RANDALL KENNEDY, RACE, CRIME, AND THE LAW 19–20, 69–75 (1997).

Nowhere are these dynamics of patterned nonenforcement based on the identity of both victim and perpetrator more apparent than in the history of lynching in post-Civil War America.[283] Between the end of Reconstruction in 1877 and 1950, over 4,000 "racial terror lynchings" have been documented in which Black victims were murdered, and often tortured, because of actual or suspected crimes or for simply breaching the community's norms of racial etiquette.[284] Many more lynchings went unrecorded; others still targeted Native American, Mexican- or Chinese-origin, or other non-Black victims;[285] and numerous additional episodes of both mass and small-scale interracial violence took place that do not qualify conceptually as lynchings.[286] Those responsible for these horrific acts of violence were rarely held accountable by prosecutors and police.[287] Nor could lynching and other forms of racialized violence have become so prevalent were it not for official forbearance: as Sherrilyn Ifill writes, "lynching, genocide, and other forms of systematic racial or ethnic violence cannot flourish without the active participation and support of a community's institutions and institutional actors," since "[t]he individual actor is emboldened because he believes that his communities' institutions . . . will ultimately support or condone his actions.[288] Although federal prosecutors, acting in concert with the armed forces, made some significant efforts during the peak of Reconstruction to stem the pervasive racialized violence that marked this period,[289] the political tide quickly turned against federal intervention and enforcement responsibility was

283. *See, e.g.*, IFILL, *supra* note 9, *passim*; Garland, *supra* note 9, at 815–19.

284. EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 29–39, 44 (3d ed. 2017). For alternative estimates that include non-Black victims, see, for example, STEWART E. TOLNAY & E.M. BECK, A FESTIVAL OF VIOLENCE: AN ANALYSIS OF SOUTHERN LYNCHINGS, 1882–1930, at 29–31 (1995); and Charles Seguin & David Rigby, *National Crimes: A New National Data Set of Lynchings in the United States, 1883 to 1941*, 5 SOCIUS, 2019, at 2.

285. *See, e.g.*, WILLIAM D. CARRIGAN & CLIVE WEBB, FORGOTTEN DEAD: MOB VIOLENCE AGAINST MEXICANS IN THE UNITED STATES, 1848–1928 (2013); MICHAEL J. PFEIFER, ROUGH JUSTICE: LYNCHING AND AMERICAN SOCIETY, 1874–1947, at 85–93 (2004); SCOTT ZESCH, THE CHINATOWN WAR: CHINESE LOS ANGELES AND THE MASSACRE OF 1871 (2012).

286. *See, e.g.*, Sean A. Hill II, *The Right to Violence*, 2024 UTAH L. REV. 609.

287. *See, e.g.*, MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 79, 113 (2011); PHILIP DRAY, AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHING OF BLACK AMERICA 30–31, 146–48 (Mod. Libr. 2003) (2002). Indeed, lynchings often resulted from the negligent—and sometimes deliberate—failure of local law enforcement to protect Black prisoners against white mobs. *See, e.g.*, W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH: GEORGIA AND VIRGINIA, 1880–1930, at 180 (1993); IFILL, *supra* note 9, *passim*.

288. IFILL, *supra* note 9, at 155.

289. *See, e.g.*, Stephen Cresswell, *Enforcing the Enforcement Acts: The Department of Justice in Northern Mississippi, 1870–1890*, 53 J.S. HIST. 421 (1987); James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 401–05 (2014).

returned to local criminal justice systems that had neither the capacity nor the desire to punish lynchers.[290]

The very notion of "conventional" prosecution is, of course, historically contingent. The routinized nonenforcement of laws against lynching may seem utterly nonconventional from the vantage point of the twenty-first century, when lynching is widely recognized as among the most horrific of crimes—a unique emblem of the post-slavery racial regime. But for much of the Jim Crow era, the public torture and execution of Black Americans by white mobs for suspected racial transgressions was not an aberration but the norm in many communities: "conventional" in any plausible sense of the term.[291] Far from provoking uniform condemnation, lynchings were openly publicized and celebrated by large swaths of white society and commemorated through macabre rituals like the distribution of victims' body parts as souvenirs.[292] In this context, the failure of the justice system to bring lynch mobs to heel represented a near-complete abdication of its responsibility to protect Black victims from racial terrorism.[293]

The racialized under-protection and overenforcement that characterized the lynching era remain entrenched in contemporary American policing.[294] Today, Black Americans are nearly three times more likely than whites to be killed by police and are also disproportionately subjected to non-lethal

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290. *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 530–31 (Perennial Classics 2002) (1988); James Forman, Jr., Essay, *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 914–20 (2004).

291. *See, e.g.*, Jesse Carr, *The Lawlessness of Law: Lynching and Anti-Lynching in the Contemporary USA*, 6 SETTLER COLONIAL STUD. 153 (2016); James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 276–81 (1998).

292. *See, e.g.*, ASHRAF H.A. RUSHDY, AMERICAN LYNCHING 130–32 (2012); AMY LOUISE WOOD, LYNCHING AND SPECTACLE: WITNESSING RACIAL VIOLENCE IN AMERICA, 1890–1940 chs. 1–3 (2009).

293. *See, e.g.*, Carr, *supra* note 291; Christopher Waldrep, *National Policing, Lynching, and Constitutional Change*, 74 J.S. HIST. 589 (2008).

294. *See, e.g.*, Courtney M. Echols, *Anti-Blackness is the American Way: Assessing the Relationship Between Chattel Slavery, Lynchings, & Police Violence During the Civil Rights Movement*, 14 RACE & JUST. 217 (2024); Christopher J. Lyons, Noah Painter-Davis & Drew C. Medaris, *The Lynching Era and Contemporary Lethal Police Shootings in the South*, 14 RACE & JUST. 265, 268–70 (2024). Additional illustrations of racialized (and classed and gendered) underenforcement that cannot be explored above the line due to space constraints include underenforcement with respect to violence taking place in jails and prisons, *see, e.g.*, Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 23–29, 67–69 (2010); David R. Eichenthal & James B. Jacobs, *Enforcing the Criminal Law in State Prisons*, 8 JUST. Q. 283, 288–92 (1991), and police and prosecutorial inertia when it comes to hate crime laws, *see, e.g.*, Ryan D. King, Steven F. Messner & Robert D. Baller, *Contemporary Hate Crimes, Law Enforcement, and the Legacy of Racial Violence*, 74 AM. SOCIO. REV. 291, 309–11 (2009); Beverly McPhail & Valerie Jenness, *To Charge or Not to Charge?—That Is the Question: The Pursuit of Strategic Advantage in Prosecutorial Decision-Making Surrounding Hate Crime*, 4 J. HATE STUD. 89, 100–02, 113–16 (2005).

violence, racial profiling, and other forms of misconduct.[295] Yet despite this pervasive abuse, legal accountability remains rare.[296] Between 2005 and 2015, police nationally killed around 1,000 civilians annually, but each year, an average of only 4.4 officers faced prosecution for these deaths.[297] This impunity is perpetuated by the close institutional ties between police and prosecutors. Reliant on law enforcement for investigating crimes and making cases, prosecutors face powerful pressures to maintain positive relationships with police—pressures that disincentivize holding officers accountable even for egregious misconduct.[298] Even the most flagrant acts of racist police violence have rarely triggered charges, as prosecutors exercise their vast discretion in ways that shield officers from consequence—a reflection of the persistent devaluation of Black lives by actors tasked with enforcing the law.[299] The same prosecutorial discretion that once allowed lynch mobs to terrorize Black communities without fearing repercussions now operates to secure virtual immunity for police officers who brutalize and kill Black people.

The unequal application of the death penalty offers another stark modern manifestation of the racial disparities that have long plagued the enforcement of laws against violent crime in America.[300] The groundbreaking Baldus study, which examined over 2000 murder cases in Georgia in the 1970s,[301] found that the odds of receiving a death sentence were 4.3 times higher for defendants who killed white victims than for those who killed Black victims, after controlling for numerous other pertinent variables.[302] This finding is consistent with a large body of research showing

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295. *See, e.g.*, Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCIS. 16793, 16794 (2019); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 658 & nn.127–28 (2021).

296. *See, e.g.*, Johnson, *supra* note 11, at 333–36.

297. Franklin E. Zimring, *Police Killings as a Problem of Governance*, 687 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 116 (2020).

298. *See, e.g.*, Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 771–75 (2016); Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 913–15, 920–25 (2020).

299. *See, e.g.*, Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 570–77 (1994); Stephen Rushin, *Law Enforcement Agent Defendants and Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 56, at 497, 497–504.

300. *See, e.g.*, SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA ch. 8 (2d ed. 2000); David Rigby & Charles Seguin, *Capital Punishment and the Legacies of Slavery and Lynching in the United States*, 694 ANNALS AM. ACAD. POL. & SOC. SCI. 205, 212–15 (2021).

301. Baldus et al., *supra* note 271.

302. *See* DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 319–20 tbl.52, row 30 (1990). Although many have echoed the Supreme Court's characterization of the study as finding (in one of the study's main models) that "defendants

that the race of the victim is among the strongest predictors of whether prosecutors will seek and obtain a death sentence.[303] In addition to race-of-victim disparities, Black defendants are disproportionately likely to face capital charges and receive death sentences compared to similarly situated white defendants.[304] In *McCleskey v. Kemp*,[305] the Supreme Court had an opportunity to disrupt these patterns, as the defendant presented the Baldus study as evidence that Georgia's death penalty system was infected by racial bias and thus that it violated the Constitution.[306] But the Court refused to intervene,[307] effectively blessing the continued operation of a capital punishment regime that places a higher value on white lives.[308] As Justice Brennan noted in dissent, the Court's unwillingness to act reflected a "fear of too much justice"—a concern that acknowledging the pervasive influence of race in the death penalty context would call into question the fairness of the criminal justice system as a whole.[309]

The selective underenforcement of laws against sexual and domestic violence offers another striking illustration of unequal protection.[310] Despite decades of reforms to substantive criminal law and enforcement procedures,[311] police and prosecutors continue to treat these crimes as less

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charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks," McCleskey v. Kemp, 481 U.S. 279 (1987), this characterization is not entirely accurate as it conflates the concepts of probability and odds ratios. For discussion of this conflation as it relates to the interpretation of Baldus's findings, see Arnold Barnett, *How Numbers Can Trick You*, TECH. REV., Oct. 1994.

303. *See, e.g.*, John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. EMPIRICAL LEGAL STUD. 637 (2014); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984).

304. *See, e.g.*, Baldus et al., *supra* note 271, at 698–705, 709–12; William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1086–89 (1983).

305. 481 U.S. 279.

306. *See id.* at 286–90.

307. *See id.* at 291.

308. *McCleskey* is a widely (and justly) reviled decision. For a snapshot of the criticisms offered by scholars and advocates, see, for example, Symposium, *"A Fear of Too Much Justice"?: Equal Protection and the Social Sciences Thirty Years After* McCleskey v. Kemp, 112 NW. U. L. REV. 1259 (2018); and Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509 (1994).

309. *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

310. *See, e.g.*, Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 855, 895–902 (2018); Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2139–41 (1996).

311. As to the inefficacy of reforms to the law of rape and sexual assault in transforming enforcement practices, see, for example, Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 558–60, 573–74 (1993); and Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 567–76 (1980). As for domestic violence reforms, even with the adoption in many jurisdictions of so-called mandatory

serious than other violent crimes, routinely disregarding or discrediting victims.[312] This baseline of neglect for crimes that disproportionately impact women is then compounded by intersecting forms of marginalization. In sexual assault cases, victims who are white, middle-class, and gender-conforming are more likely to see their claims prosecuted than those who are marginalized by race, class, or gender identity.[313] Domestic violence victims face similar hurdles, with those who deviate from the paradigm of the ideal victim encountering heightened skepticism and inaction.[314] Women of color and LGBTQ individuals, for example, often face disbelief or hostility when reporting abuse, their experiences filtered through biases rooted in white supremacy, economic inequality, and heteronormativity.[315] Such selective underenforcement lays bare the role of prosecutorial discretion in maintaining systems of gendered and racialized

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arrest and no-drop prosecution policies, police and prosecutors continue to enjoy abundant discretion that can be utilized to circumvent progressive rule changes. *See generally* Town of Castle Rock v. Gonzales, 545 U.S. 748, 760–61 (2005) (concluding that Colorado's mandatory arrest law had not "truly made enforcement of restraining orders *mandatory*" in light of "[t]he deep-rooted nature of law-enforcement discretion"); Robert C. Davis, Chris S. O'Sullivan, Donald J. Farole, Jr. & Michael Rempel, *A Comparison of Two Prosecution Policies in Cases of Intimate Partner Violence: Mandatory Case Filings Versus Following the Victim's Lead*, 7 CRIMINOLOGY & PUB. POL'Y 633, 637–38 (2008) (discussing various types of no-drop policies and noting that "[i]ronically, many jurisdictions that have a 'no-drop' policy once a case is filed are actually *more* likely to decline to prosecute cases at the screening phase").

312. *See, e.g.*, Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 142–44, 173–77 (2000); Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 970–71 (2004). Male victims of sexual violence are taken even less seriously, since rape and sexual assault are socially understood as crimes perpetrated by men and suffered by women. *See* Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 *passim* (2011).

313. *See, e.g.*, AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 541–43, 550–52 (1997). Another key determinant of (non)enforcement is whether the perpetrator is a stranger to the victim or an acquaintance. Enforcement officials are far more likely to take action in paradigmatic stranger-rape situations than in counter-stereotypical assaults involving people who know each other. *See, e.g.*, David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1251–52 (1997); Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1059–62 (2017).

314. *See, e.g.*, Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255 *passim* (2010); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1452–57 (2012).

315. *See, e.g.*, Leigh Goodmark, *Transgender People, Intimate Partner Abuse, and the Legal System*, 48 HARV. C.R.-C.L. L. REV. 51 (2013); Danielle M. Romain & Tina L. Freiburger, *Prosecutorial Discretion for Domestic Violence Cases: An Examination of the Effects of Offender Race, Ethnicity, Gender, and Age*, 26 CRIM. JUST. STUD. 289, 302 (2013). For one particularly extreme example, involving a chief prosecutor who openly announced that he would not enforce domestic violence laws to protect people in same-sex relationships, see Deanna Paul, *This 'Good Christian' Prosecutor is Overlooking Domestic Violence Charges for Same-Sex Couples*, WASH. POST (June 5, 2019), https://www.washingtonpost.com/nation/2019/06/05/this-good-christian-prosecutor-is-overlooking-domestic-violence-charges-same-sex-couples/ [https://perma.cc/DGQ9-KXMY].

subordination—a reality that leaves all victims of violence against women under-protected, and those facing multiple vectors of marginalization profoundly so.

In tandem, these failures of enforcement—the near-impunity granted to police who use deadly force, the racially selective application of the death penalty, the anemic response to sexual and domestic violence inflicted on marginalized victims, and the broader devaluation of Black lives and of crimes against women—perpetuate systems of racial and gender subordination with deep roots in the histories of slavery, lynching, and patriarchal violence.[316] They reveal patterns of toleration for violence that are all too conventional within the American penal system. Viewed against this backdrop, the myth of individualized enforcement championed by opponents of prosecutorial reform is exposed as fundamentally misleading. The track record of conventional prosecutors, both past and present, reveals the pervasiveness of categorical nonenforcement even in the domain of violent crime—the very place where one might expect the myth to have its greatest purchase.

Confronting the shortcomings of the individualized enforcement myth is essential not only for developing a descriptively accurate understanding of historical and contemporary prosecutorial practices, which this Part has aimed to achieve, but also for reshaping current debates about prosecutorial reform. That is the topic to which the Article now turns in its third and final Part.

III. BREAKING THE SPELL OF THE MYTH OF INDIVIDUALIZED ENFORCEMENT

By excavating the pervasive use of categorical nonenforcement by conventional prosecutors, Part II poses a formidable challenge to the myth of individualized enforcement that dominates debates about prosecutorial reform. In particular, the data presented in Part II undermines a key assumption underlying many critiques of categorical nonenforcement—namely, the assumption that categorical nonenforcement subverts longstanding norms of prosecutorial discretion.[317] If anything, the fact that conventional prosecutors have long engaged in categorical nonenforcement with minimal pushback from legislatures suggests a degree of implicit acquiescence, undercutting separation of powers-related attacks on

316. *See, e.g.*, Estrich, *supra* note 10, at 1109–11, 1125–27; Rigby & Seguin, *supra* note 300.

317. For a summary of these critiques, see *supra* pp. 1458–61.

reformist prosecutors' nonenforcement policies.[318] At the very least, if categorical nonenforcement is as troubling as critics contend, then conventional prosecutors would seem to be just as culpable as their reformist counterparts. Debunking the myth of individualized enforcement thus helps to reorient the debate over prosecutorial reform by exposing the double standards and inconsistencies in how nonenforcement is scrutinized and criticized.

But the implications of this Article's analysis go beyond simply exposing the selective deployment of the individualized enforcement myth as a rhetorical weapon against reformist prosecutors. By surfacing the real differences between reformist and conventional prosecutors' approaches to nonenforcement, this Part aims to develop a richer normative account of prosecutorial discretion. Section III.A examines reformist prosecutors' propensity for adopting planned and centralized nonenforcement policies (as opposed to conventional prosecutors' more informal and decentralized practices) and evaluates the consequences of this change for prosecutorial accountability, consistency, and other values. Section III.B considers the heightened transparency often associated with reformist prosecutors' nonenforcement initiatives, investigating how increased visibility can bolster democratic oversight while potentially undermining deterrence and provoking political backlash. Lastly, Section III.C explores the contrasting distributional ramifications of reformist and conventional approaches, illustrating how reformist policies often target offenses disproportionately enforced against marginalized communities, while conventional practices frequently favor the powerful and privileged. In highlighting these distinctions, the Article does not aim to conclusively vindicate reformist prosecutors' policy choices. The goal, rather, is to shift the conversation away from a misguided focus on categorical nonenforcement as such and toward the substantive and procedural differences between competing models of prosecutorial discretion.

A. Planned and Centralized Versus Informal and Decentralized Nonenforcement

One key difference between reformist and conventional prosecutors' approaches to nonenforcement lies in the degree of planning and centralization in the policymaking process. Reformist prosecutors are far

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318. For political economy analyses suggesting that legislatures have strong incentives to configure substantive criminal law in ways that expand or at least acquiesce in prosecutorial discretion and few incentives to impose constraints on it, see, for example, Stuntz, *supra* note 46, at 547–57; and Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION, *supra* note 56, at 327, 329–32.

more likely than their conventional counterparts to adopt explicit written policies, formulated by the chief prosecutor and disseminated to line prosecutors, that categorically direct or constrain charging and plea bargaining decisions for specified classes of offenses.[319] These policies aim to structure and coordinate the exercise of prosecutorial discretion to advance the chief prosecutor's substantive priorities, such as reducing incarceration or ameliorating racial disparities.[320] Conventional prosecutors, in contrast, rarely promulgate detailed enforcement or nonenforcement policies.[321] While federal prosecutors and large local prosecutors' offices in major urban centers are somewhat more likely to have formal policies,[322] the vast majority of prosecutors' offices provide scant official guidance to line prosecutors on how to exercise their discretion.[323] A variety of factors may contribute to this aversion to written policies,[324] but whatever the motivation, the upshot is that the categorical nonenforcement patterns of conventional prosecutors documented in Part II arise primarily from unwritten customs, informal norms, and habits of disposition, rather than clear-cut directives from leadership. This does not make conventional prosecutors' nonenforcement practices any less "categorical" in the sense of predictably channeling enforcement away from certain classes of cases.[325] But it does carry a distinct set of implications for accountability, consistency, and bureaucratic rationality that warrant further examination.[326]

The embrace of planned, centralized nonenforcement policies by reformist prosecutors has much to recommend it. Indeed, a broad scholarly consensus holds that prosecutors should make greater use than they currently do of formal written guidance constraining discretion, even as they debate the optimal form such guidelines should take.[327] One key advantage

319. For examples of such policies, see *supra* notes 95–99, 132–33, 135–40, 144–47 and accompanying text.

320. *See supra* note 94 and accompanying text.

321. *See* Brandon L. Garrett et al., *Open Prosecution*, 75 STAN. L. REV. 1365, 1380–81 (2023).

322. *See* Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 227–45 (2003).

323. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 912 (2009); Gould et al., *supra* note 76, at 60–61.

324. Some of the concerns that formal guidelines present are discussed *infra* notes 338–39 and accompanying text.

325. For discussion of how this Article defines categorical nonenforcement, see *supra* Section I.D.

326. *See generally* Hessick & Parsh, *supra* note 134 (exploring major normative tradeoffs among various types of prosecutorial nonenforcement).

327. *See, e.g.*, Bibas, *supra* note 57, at 1003–07; Vorenberg, *supra* note 48, at 1562–65. The Model Penal Code on sentencing that was recently published by the American Law Institute embraces scholars' longstanding call for prosecutorial guidelines in the context of diversion. *See* MODEL PENAL CODE: SENTENCING § 6.03(14)–(15) (AM. L. INST. 2023) (urging prosecutors' offices to "adopt and

of this approach is that it promotes consistency and equal treatment across cases. When individual line prosecutors exercise discretion based solely on their own intuitions, similarly situated defendants may receive disparate outcomes due to each prosecutor's idiosyncratic preferences and biases.[328] Formal policies can help ensure that prosecutorial decision making is guided by consistent principles rather than the potentially conflicting judgments of individual prosecutors.[329]

Leveraging the chief prosecutor's policymaking authority to create enforcement guidelines for the office can yield additional benefits in terms of democratic accountability and institutional perspective. As the elected official charged with setting the office's enforcement priorities (in jurisdictions that have elected prosecutors), the chief prosecutor has a degree of democratic legitimacy that line prosecutors lack. The chief prosecutor is also best positioned to take a big-picture view of the office's overall practices and outcomes, enabling more holistic and informed decision making than is possible for line prosecutors focused on a narrower set of cases and concerns—including, perhaps, undue deference to the decisions made by police officers with whom they routinely interact.[330] Moreover, by elevating decisions to a higher level of seniority, formal policies may help mitigate "Young Prosecutor Syndrome," a phenomenon documented in some jurisdictions whereby inexperienced prosecutors armed with substantial discretion tend toward overzealousness.[331] Senior

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make publicly available written standards for [their] use of deferred-prosecution agreements"). Some of the major debates in this area concern whether prosecutorial guidelines should be clear or open-ended, publicly available or kept secret, and legally enforceable or unenforceable. *Compare* Vorenberg, *supra* note 48 (arguing for relatively specific, published, and enforceable guidelines), *with* William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1363–72 (1993) (arguing that guidelines should generally be flexible, internal, and unenforceable).

328. *See, e.g.*, DAVIS, ARBITRARY JUSTICE, *supra* note 47, at 4–7, 16–17; Shima Baradaran Baughman & Jensen Lillquist, *Fixing Disparate Prosecution*, 108 MINN. L. REV. 1955 (2024).

329. *See, e.g.*, Bellin, *supra* note 148; Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 956 (2000).

330. Regarding the tendency of many line prosecutors to defer unduly to police judgments, see, for example, JEFFREY BELLIN, MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER ch. 11 (2023).

331. *See* Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1068 (2014) ("This early collection of beliefs and attitudes about the importance of every case, the constant quest for trials, and the aggressive posturing with defense attorneys is a condition that we label 'Young Prosecutors' Syndrome.'"). *But see* Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) (questioning the Young Prosecutors' Syndrome hypothesis by pointing to the cynicism that sometimes afflicts more experienced prosecutors). Another recent study of prosecutorial decision making similarly finds evidence that younger prosecutors are harsher than experienced prosecutors, albeit only for some of the decision points included in the study. *See* Wright et al., *supra* note 13 (finding evidence of Young Prosecutors' Syndrome with respect to willingness to use

prosecutors with a more seasoned perspective may be better situated to balance the complex demands of the prosecutorial role and provide tempering guidance to junior prosecutors.[332]

In addition to these commonly cited advantages, formal or written policies can yield further benefits that are often overlooked. For one, the very process of formulating clear rules requires prosecutors to grapple directly with the full range of costs and benefits that flow from their discretionary choices—including so-called collateral consequences such as deportation and loss of public benefits, which many prosecutors too readily discount[333]—counteracting the tendency toward reflexive prosecution that can arise from a case-processing mindset.[334] By preemptively screening out weaker or lower priority cases, formal nonenforcement policies also conserve resources that can then be channeled into deeper individualized consideration in more complex or higher stakes matters. Proponents of the myth of individualized enforcement overlook how resource-intensive individualized review can be.[335] Somewhat paradoxically, then, taking a categorical approach to some segments of an office's caseload can free up bandwidth for more intensive individualized consideration in other, higher priority cases.[336] Additionally, categorical nonenforcement policies can relieve defendants of burdensome process costs in cases that would

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deferred prosecution and support suspended sentences but not with respect to whether a felony is charged in the first instance).

332. *See supra* note 331 and accompanying text.

333. Regarding the tendency of conventional prosecutors to be insufficiently sensitive to the immigration-related ramifications of their discretionary decisions, see, for example, Ingrid V. Eagly, *Prosecuting Immigrants in a Democracy*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 74, at 227, 233–39; and Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016).

334. Regarding the need for centralized prosecutorial policy to ensure that the costs of prosecution are considered more systematically, see, for example, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 331–33 (2004); and Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. L.J. 841 (2024).

335. Political scientist Michael Lipsky's pioneering work on rank-and-file public servants identifies scarce resources and excessive caseloads as some of the key constraints that prevent street-level bureaucrats from actualizing the ideal conception of their jobs. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE ch. 3 (1980). When, by contrast, caseloads are manageable and resources more plentiful, deeper individualized review and higher quality service provision becomes feasible. *See id.* at 28 ("If a legal services office encouraged its staff to take only four or five cases at a time in order to maximize the quality of preparation of each case, the lawyers would behave differently than if they worked in an office with much higher demands.").

336. Just as categorical policies can enhance the caliber of individualized review by conserving scarce resources, decision making in individual cases can over time inform the development of office policy—if, that is, an office collects data on how line prosecutors are exercising discretion and is structured in a way that facilitates institutional learning from line prosecutors' experiences. *See* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 294 (1980) ("[E]ven if the policy-formulation process has not progressed to the stage of articulated factors, they may emerge from the process of reason giving; thus, reasons evolve into factors, and factors evolve into rules.").

eventually have been declined or dismissed regardless, minimizing the unnecessary imposition of pretrial incarceration, court appearances, and stigma.[337]

While there are strong arguments in favor of the more planned and centralized variety of categorical nonenforcement favored by reformist prosecutors, this approach is not without drawbacks. One is that bright-line rules, however judiciously crafted, will often be overinclusive when applied to the nuances of actual cases, forcing prosecutors' hands in situations where the equities call for a different result. Formal policies necessarily sacrifice some degree of flexibility to tailor decisions to morally relevant case-specific details.[338] A related concern is that top-down policies may fail to leverage the distinctive kinds of expertise that line prosecutors cultivate through their day-to-day handling of cases. By virtue of their intimate familiarity with how different offense types play out in the trenches, it may well be that line prosecutors sometimes develop a heightened ability to distinguish between defendants who are genuinely deserving of leniency—based on their individual circumstances, attitudes, and prospects for rehabilitation—and those who are apt to quickly reoffend if afforded the opportunity. To be sure, some of these concerns can be addressed by soliciting input from line prosecutors in the development of office policies and authorizing deviations from presumptive rules in exceptional situations.[339] But the tension between centralized and decentralized decision making—like the closely connected tension between individualization and uniformity—is to some degree ineradicable.

Ultimately, though, the choice between formal and informal approaches to prosecutorial discretion is best conceived not as a binary either/or proposition but as a continuum.[340] And at present, there are strong reasons to believe that the prevailing equilibrium in most prosecutors' offices bends

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337. Regarding the need for early prosecutorial screening to alleviate process costs, see, for example, Adam M. Gershowitz, *Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833; and Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment [https://perma.cc/8PQL-HM9U]. The classic work highlighting the importance of process costs in criminal adjudication is FEELEY, *supra* note 216.

338. *See generally* Ohlin, *supra* note 106, at 4 ("Always evident is a tension between the individualization of decision making and the desire for uniformity and predictability.").

339. Regarding the need for collaboration across different layers of the office hierarchy in formulating prosecutorial policy, see Laurie L. Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors*, 60 AM. CRIM. L. REV. 1495, 1513–15 (2023); and Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 582–86 (2020).

340. *See* Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169, 193 (2020) ("[W]hile consistency ought to be a guiding principle, it ought not to transform itself into rigidity. Justice is at its peak when laws and procedures reflect a balance of generality and specificity.").

too far toward the informal, decentralized end of this spectrum.[341] By obscuring the distinction between centralized, planned policies and informal, diffuse practices, the individualized enforcement myth diverts attention from the institutional design choices that are needed to harness the potential benefits of prosecutorial discretion while minimizing the associated risks of abuse. Recognizing that a key difference between reformist and conventional prosecutors lies in the formality and centralization of policymaking—not merely the categorical nature of the policies themselves—can help reframe the conversation. This reframing shifts the focus toward identifying the structural arrangements and institutional design features best suited to align prosecutorial power with the core goals of consistency, transparency, and accountability, while still preserving needed flexibility.

B. Transparent Versus Secretive Nonenforcement

Another salient distinction is that reformist prosecutors' categorical nonenforcement practices tend to exhibit a much higher degree of transparency than those of their conventional counterparts.[342] As is true for many of the examples discussed in Parts I and II, reformist prosecutors often go to great lengths to publicize their nonenforcement policies, using press releases, official websites, campaign literature, and public speeches to broadcast their intentions.[343] This transparency enables outside observers, whether supportive or critical of the prosecutorial reform project, to readily identify and assess these policies without the need for extensive guesswork or investigation. Conventional prosecutors, by contrast, are more apt to shield their categorical nonenforcement practices from public view.[344] While certain conventional prosecutors' offices, especially in larger jurisdictions, do make some of their policies available to the public,[345] these offices remain the exception rather than the rule. More commonly, even when conventional prosecutors have formal policies governing discretionary decisions, those policies are not affirmatively disclosed or

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341. *See supra* pp. 1493–96.

342. Regarding the centrality of transparency to the current prosecutorial reform project, see generally FAIR & JUST PROSECUTION, *supra* note 87, at 14–15.

343. *See, e.g.*, policies discussed *supra* notes 95–99, 132–33, 135–40, 144–47 and accompanying text.

344. *See, e.g.*, PROSECUTORS & POL. PROJECT, UNIV. OF N.C. SCH. OF L. & DRUG ENF'T & POL'Y CTR., OHIO STATE UNIV. MORITZ COLL. OF L., ENFORCING MARIJUANA PROHIBITIONS: PROSECUTORIAL POLICY IN FOUR STATES 5 (2023); Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463, 471–76.

345. *See* John F. Pfaff, *Prosecutorial Guidelines*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 101, 107–10 (Erik Luna ed., 2017).

publicized. They instead function as a kind of "secret law," known to and followed by actors within the office but opaque to the public at large.[346]

Transparency in the adoption and implementation of categorical nonenforcement policies is not an incidental feature of the reformist prosecutor movement, but a core pillar of its commitment to democratizing prosecutorial discretion.[347] This commitment is grounded in the recognition that transparency is indispensable for meaningful accountability, which is primarily achieved in the American system through electoral oversight of prosecutors.[348] As a rich body of scholarship contends, prosecutor elections cannot serve their intended accountability function if voters lack access to information about how prosecutors are exercising their vast discretionary powers.[349] Policies cloaked in secrecy, even if categorical in nature, shortchange voters' ability to assess their elected prosecutors' performance and priorities; conversely, making those policies transparent equips voters with meaningful information they can bring with them to the ballot box. Transparency also fortifies other mechanisms of institutional accountability, empowering actors such as legislatures, judges, and bar associations to more effectively monitor and check prosecutorial decision making—hence why there is so much pushback against reformist prosecutors' nonenforcement policies.[350] Far from eroding the rule of law, then, prosecutorial transparency is better understood as a crucial support for a healthy separation of powers, ensuring that the exercise of prosecutorial authority occurs within the rubric of democratic constraints and oversight rather than in an insular black box.[351]

Beyond bolstering accountability, the transparency of reformist prosecutors' nonenforcement policies generates a host of other systemic benefits. For one, it opens channels for fruitful collaboration between prosecutors' offices and other agencies. Transparent nonenforcement policies provide a clear framework for prosecutors to coordinate with police leadership to calibrate arrest practices and develop diversion infrastructure,

346. Luna, *supra* note 15, at 787–801. For discussion of the concept of secret law, see generally Christopher Kutz, *Secret Law and the Value of Publicity*, 22 RATIO JURIS 197 (2009); Jonathan Manes, *Secret Law*, 106 GEO. L.J. 803 (2018).

347. *See supra* note 342.

348. *See, e.g.*, Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 102–04, 110–12 (2011); Miller & Wright, *supra* note 38, at 185–87.

349. *See, e.g.*, Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071 (2017); Yu-Hsien Sung, *How U.S. Voters Elect Prosecutors: Evidence from a Conjoint Experiment*, 76 POL. RSCH. Q. 1309, 1319–21 (2022).

350. For discussion of this pushback, see *supra* Section I.C.

351. *See, e.g.*, Murray, *Populist Prosecutorial Nullification*, *supra* note 15, at 226–27, 229–33; Sawyer, *supra* note 123, at 629–32.

amplifying the reach and impact of the policies.[352] Transparency also fosters internal consistency and regularity in policy implementation, as line prosecutors operate under the shadow of public scrutiny and deviations from announced protocols are more readily detectable.[353] This enhanced consistency, in turn, promotes a more equitable distribution of the benefits of prosecutorial lenience. In the absence of transparent guidelines, well-connected defense attorneys may be able to intuit unstated office policies and exploit them to their clients' advantage, while less savvy defendants are left to the vagaries of prosecutorial whim.[354] Finally, transparency catalyzes the cross-pollination of effective reforms, as successes and challenges are held up for evaluation by researchers and policymakers. The transparent policies of trailblazing prosecutors like Larry Krasner in Philadelphia and Rachael Rollins in Boston, for instance, have become templates that other offices look to in developing their own innovations—accelerating the diffusion of data-driven approaches to prosecutorial problem-solving.[355]

While the benefits of transparency in this context are substantial, not everyone agrees that prosecutorial enforcement guidelines should be broadly disseminated. Indeed, many critiques of reformist prosecutors' categorical nonenforcement policies make frequent mention of the fact that the policies were openly announced and not just their categorical sweep.[356]

352. Although police agencies often oppose prosecutorial nonenforcement policies and opt to continue making arrests irrespective of whether prosecutors are willing to file charges, *see, e.g.*, Nicholas Goldrosen, *Null Effects of a Progressive Prosecution Policy on Marijuana Enforcement*, 23 J. CRIMINOLOGY CRIM. JUST. L. & SOC'Y 23 (2022), police pushback is not inevitable. Sometimes, arrests can be reduced in tandem with a reduction in charges if prosecutors succeed in coordinating their efforts with police agencies. *See* Saba Rouhani, Catherine Tomko, Bradley E. Silberzahn, Noelle P. Weicker & Susan G. Sherman, *Racial Disparities in Drug Arrest Before and After De Facto Decriminalization in Baltimore*, 65 AM. J. PREVENTIVE MED. 560, 564–65 (2023).

353. Since line prosecutors in many offices may diverge ideologically from a reformist chief prosecutor, the need for monitoring to ensure compliance with office policy should not be underestimated. *See, e.g.*, Godsoe & Romero, *supra* note 28, *passim*; Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era*, 109 CORNELL L. REV. 1067 (2024). For ways to improve compliance with internal prosecutorial guidelines in the federal system, see Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice*,*"* 13 CORNELL J.L. & PUB. POL'Y 167 (2004).

354. *See, e.g.*, Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn about the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1095–1101 (1993); Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653, 664–70 (2019).

355. *See, e.g.*, KRINSKY, *supra* note 21, at 20, 136; *cf.* Price, *Faithful Execution*, *supra* note 32, at 737 (noting, but with disapproval, that experiments with categorical nonenforcement are being modeled in other jurisdictions).

356. *See, e.g.*, Price, *Faithful Execution*, *supra* note 32, at 666–68 (offering a "spectrum of potential approaches to prosecutorial enforcement" in which "categorical nonenforcement" and "[a]nnounced priorities" embody a greater commitment to "[e]xecutive primacy"—and a greater potential threat to legislative primacy—than merely "[i]nternal priorities"); Green & Roiphe, *supra* note 32, at 1443 ("It may be that some traditional prosecutors have also been flatly unwilling to implement certain laws as a matter of policy, but if so, they have generally kept their policies to themselves, recognizing that they invite opposition if they turn a consistent internal practice into an announced policy.").

Although the nature of their objection to transparency is typically left unspoken in current public debates about prosecutorial discretion (after all, who wants to openly side with secrecy?), the main concern of critics seems to be that transparency around nonenforcement could undermine deterrence by signaling to prospective offenders that they will not face punishment.[357] If a prosecutor's office openly declares that it will not charge certain low-level drug offenses, for instance, this might embolden more people to commit those offenses, secure in the knowledge that they will not be prosecuted. This concern resonates with the academic theory of "acoustic separation," which posits that maintaining a distinction between the rules governing officials' conduct and the rules as publicly perceived can yield socially beneficial outcomes.[358] More precisely, the idea is that "conduct rules" transmitted to the public should be pitched expansively in order to maximize compliance with the law, while "decision rules" for officials can be designed to advance other social policies.[359] Applying that theory to the nonenforcement policies this Article addresses, one could argue that prosecutors ought to keep up the appearance that they are willing to enforce every law so as to ensure people do not commit crimes even if, behind closed doors, prosecutors privately develop decision rules against enforcing outmoded or socially harmful laws in some or all situations.

Another potential downside of transparency is that openness could—indeed, it demonstrably *does*—invite political backlash and legal challenges.[360] Highly publicized nonenforcement policies have become a lightning rod for conservative countermobilization and fueled claims that these prosecutors are abdicating their duties.[361] In some cases, this pushback has led prosecutors to scale back or even abandon their policies, as occurred when Florida's governor reassigned prosecutor Aramis Ayala's first-degree murder cases in response to her announcement that she would not pursue death sentences.[362] To avoid such outcomes, some might argue that

357. *See, e.g.*, U.S. DEP'T OF JUST., *supra* note 113, at 6 (criticizing categorical nonenforcement policies for, among other things, "caus[ing] violent crime rates to go up, especially in minority communities" (quoting from a written statement of the U.S. Attorney for the Eastern District of California)); Robinson & Seaman, *supra* note 32 (arguing that openly announcing a categorical nonenforcement policy will cause crime to rise).

358. Meir Dan-Cohen, *Decisions Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV 625, 630–34 (1984).

359. *Id.* at 626–28.

360. *See* Green & Roiphe, *supra* note 32, at 1440 ("It is to their credit that progressive prosecutors are more transparent than traditional prosecutors, but their openness provides more to criticize and invites better-informed criticism.").

361. *See supra* Section I.C.

362. *See supra* note 114 and accompanying text.

prosecutors are better off adopting nonenforcement policies quietly, without drawing undesired scrutiny through public pronouncements.[363]

Although these arguments for secrecy are not entirely unfounded, they ultimately collide with the overriding significance of transparency in guaranteeing democratic legitimacy and accountability in the exercise of prosecutorial discretion. Rule-of-law principles suggest that the criteria shaping the conduct of government officials be accessible to the public whenever feasible, so that citizens can understand how the coercive power of the state is being deployed.[364] Concealing prosecutorial policies, even if well-intentioned, deprives voters of the information they need to make informed choices about whether their prosecutors' actions align with community values, and it eliminates a crucial avenue for public oversight and debate about what sorts of conduct should be prioritized or deprioritized for enforcement.[365] Whatever marginal benefits acoustic separation may bring from a narrow deterrence perspective are far outweighed in most circumstances by transparency's essential role as a support for democratic accountability and against unchecked discretion.[366]

The choice between transparency and opacity in prosecutorial decision making involves complex tradeoffs that may vary depending on the specific circumstances. In unusual situations where potential offenders could readily exploit knowledge of enforcement priorities, for instance, secrecy might be justified on deterrence grounds. Concerns about political backlash also cannot be dismissed entirely, although the force of this consideration will depend on the particular policies and political climate in question. Crucially, however, framing the debate in terms of categorical versus case-by-case decision making obscures the real stakes. As Part II demonstrates, categorical nonenforcement is already widespread, with or without

363. Indeed, those who are most sympathetic to reformers' substantive objectives are most apt to find this concern meritorious. That being said, just as conservative critics of categorical nonenforcement do not often come right out and proclaim that what they oppose is transparency, liberal supporters of reform are not eager to advocate for secrecy in writing. Though I can attest, based on private conversations, that they—*we*—are carefully weighing the tactical dangers transparency presents.

364. *See generally* LON L. FULLER, THE MORALITY OF LAW 35, 39 (rev. ed. 1969). In Lon Fuller's classic parable about Rex and his failed attempts at law reform, one way in which Rex tried to create law but failed in doing so involved writing out a general code of rules but keeping "the contents of the code . . . an official state secret." *Id.* at 35. This was "deeply resented by his subjects," since "[t]hey declared it was very unpleasant to have one's case decided by rules when there was no way of knowing what those rules were." *Id.* The moral of the story, for Fuller, is that this and other failures on the part of Rex were so fundamentally incompatible with the very concept of law and the rule of law that the failures did "not simply result in a bad system of law; [they] result[ed] in something that is not properly called a legal system at all." *Id.* at 39; *see also id.* at 51 ("The laws should . . . be given adequate publication so that they may be subject to public criticism . . . .").

365. *See supra* p. 64.

366. *Cf.* Miller & Wright, *supra* note 38, at 191 ("The framework we suggest treats transparency as a matter of degree, and views any move toward greater transparency as a presumptive virtue, while recognizing that some movements toward transparency have costs too high to pay.").

transparency. Openly announcing such policies, as many reformist prosecutors have done, promises to significantly enhance the criminal justice system's democratic legitimacy and accountability. Any marginal costs to deterrence or political stability must be weighed against the overriding importance of transparency for enabling meaningful public oversight and input.

C. Redistributing the Benefits and Burdens of Nonenforcement

A third distinction between the categorical nonenforcement policies and practices of reformist and conventional prosecutors concerns how they distribute the burdens and benefits of nonenforcement across different segments of society. In broad strokes, reformist prosecutors often concentrate their nonenforcement policies on offenses disproportionately enforced against socially marginalized groups, such as drug possession, quality-of-life crimes, and nonviolent property offenses.[367] Conventional prosecutors, by contrast, have frequently employed their discretion to immunize conduct associated with social privilege, such as white-collar crime, police violence, and—in times past—lynching.[368] Of course, this distinction is not airtight, and there is ample room for disagreement about how to characterize the distributive impacts of specific nonenforcement practices. The widespread nonenforcement of adultery and sodomy prohibitions by some conventional prosecutors in the past, for instance, bears notable similarities to the more lenient approach to vice crimes adopted by many reformist prosecutors today.[369] On the whole, however, a pronounced distributional asymmetry emerges from the nonenforcement track records of the two groups.

When we revisit Part II's panorama of conventional prosecutors' nonenforcement practices through a distributive lens, the through-line is unmistakable. From the lax enforcement of drug offenses in suburban communities and college campuses,[370] to the impunity often enjoyed by perpetrators of sexual assault,[371] to the free pass routinely extended to police officers who commit criminal acts of violence,[372] nonenforcement has repeatedly operated to preserve rather than unsettle status quo alignments of power and privilege. Even the most egregious, racially-targeted forms of violence, such as white supremacist lynchings, frequently escaped criminal

367. *See supra* notes 95, 98, 172, 220–22 and accompanying text.
368. *See supra* Section II.B; notes 283–99 and accompanying text.
369. *See supra* p. 38.
370. *See supra* note 204 and accompanying text.
371. *See supra* notes 310–15 and accompanying text.
372. *See supra* notes 294–99 and accompanying text.

sanction due to prosecutorial inaction or complicity.[373] Though not uniform across all jurisdictions and offenses, the overall pattern is clear: conventional prosecutors tend to dispense leniency in ways that disproportionately benefit the already-privileged.

The regressive distributional impact of conventional prosecutors' nonenforcement practices extends beyond their choice of what offenses to consistently ignore; it is also, as Part II suggests, a function of how they selectively wield discretion in the offenses they do prosecute. Race and class are powerful predictors of whether a suspect will benefit from leniency in connection with commonly prosecuted offenses, with white offenders of means routinely enjoying a forbearance that is denied to racial minorities and the poor.[374] These disparities are compounded by conventional prosecutors' penchant for using past convictions as a proxy for blameworthiness or risk of future offending,[375] an approach that overlooks how criminal history is itself determined by racially skewed policing.[376] Moreover, the prosecutorial tendency to deprioritize private violence[377] disproportionately deprives women—especially those also marginalized by race and class—of the criminal law's protection.[378] And in the plea negotiation process, conventional prosecutors' reliance on overcharging and the looming specter of severe trial penalties as bargaining tactics disproportionately strong-arms disadvantaged defendants—those least capable of mounting a vigorous defense—into relinquishing their rights, thus propelling a system that imprisons poor people and racial minorities at a historically unprecedented rate.[379] In all these ways, the patterns of selective nonenforcement that are typical of conventional prosecutors tend to entrench racial, socioeconomic, and gender inequality.

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373. *See supra* notes 283–93 and accompanying text.

374. *See supra* Section II.B; notes 205–12, 272–82 and accompanying text. *See generally* Besiki L. Kutateladze, Nancy R. Andiloro, Brian D. Johnson & Cassia C. Spohn, *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014) (finding racial disparities at multiple stages, though not every stage, of the prosecutorial process, and underscoring the need to assess bias as a cumulative phenomenon across the entire process); Wu, *supra* note 66 (providing a meta-analysis of empirical studies of racial bias in prosecution).

375. *See supra* notes 197–204, 271 and accompanying text.

376. *See, e.g.*, Murray, *Color-Conscious Professional Ethic*, *supra* note 13, at 1577–80; Shaffer, *supra* note 85, *passim*.

377. *See supra* notes 215–19, 229, 271 and accompanying text.

378. For the classic feminist critique of American law's inattentiveness to private violence and power arrangements, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

379. *See, e.g.*, Rhys Hester, *Sentencing Disparity and Mass Incarceration*, *in* A SYSTEM OF PLEAS: SOCIAL SCIENCE'S CONTRIBUTIONS TO THE REAL LEGAL SYSTEM 153 (Vanessa A. Edkins & Allison D. Redlich eds., 2019); Justin Murray, *The Procedural Architecture of Mass Incarceration*, *in* MASS INCARCERATION IN THE 21ST CENTURY: REALITIES AND REFLECTIONS 17, 20–21 (Addrain Conyers, Vanessa Lynn & Margaret E. Leigey eds., 2024).

Reformist prosecutors, in contrast, have consciously sought to redistribute nonenforcement's dividends downward. A defining strategy has been the nonprosecution or presumptive diversion of low-level drug, property, and quality-of-life offenses that have historically been enforced in racially and economically skewed ways.[380] Milwaukee prosecutor John Chisholm pioneered this approach with his office's nonprosecution of drug paraphernalia cases, a policy expressly motivated by data revealing stark racial disparities in paraphernalia arrests.[381] Other reformers have followed suit with declination policies aimed at offenses strongly associated with poverty, such as shoplifting, trespassing, and driving on a suspended license,[382] or correlated with substance addiction and mental health conditions.[383] The goal animating these policies is alleviating the burden of criminalization on marginalized communities.

Opponents of reform object that pulling back enforcement of drug and public order offenses will harm the very communities reformers aim to help.[384] Their argument rests on two key premises: first, that these offenses, even if disproportionately policed and prosecuted in poor and minority neighborhoods, also impose significant costs on those neighborhoods in the form of disorder and diminished quality of life; and second, that criminal enforcement is an effective tool for reducing such harms. In this view, the solution to unequal enforcement is not less enforcement, but more—more policing and prosecution to ensure that the benefits of public safety are available to all.[385]

This critique is not easily dismissed, as empirical research concerning the impact of reformist prosecutors' nonenforcement policies on crime is still underdeveloped and emerging (though what research does exist generally supports the policies).[386] But even though its premises are

380. *See, e.g.*, SAVIT, *supra* note 139, at 5; Recent Election, *State Election Law — Recall Process — San Francisco District Attorney Chesa Boudin Recalled*, 136 HARV. L. REV. 1740, 1741 (2023).

381. *See* Toobin, *supra* note 337.

382. *See, e.g.*, GASCÓN, *supra* note 135, at 2–3; ROLLINS POLICY MEMO, *supra* note 94, at App'x C.

383. *See* ROLLINS POLICY MEMO, *supra* note 94, app. C.

384. *See, e.g.*, Robinson & Seaman, *supra* note 32; Nellie Bowles, *How San Francisco Became a Failed City*, THE ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/how-san-francisco-became-failed-city/661199/ [https://perma.cc/G9E4-EDV2].

385. *See generally* KENNEDY, *supra* note 282, at 19 ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws."); Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. & EQUAL. 85 (2022) (making the case for hiring half a million more police officers across America while also striving to reduce incarceration rates).

386. One study found that, across thirty-five jurisdictions with elected reformist prosecutors, the policies these prosecutors introduced had no statistically significant effect on crime rates. *See* 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. 21-011, 2021). Other studies have

questionable, the law-and-order argument for greater enforcement at least has the virtue of foregrounding the inescapably allocative nature of prosecutorial discretion. It highlights how enforcement decisions, even when motivated by individual-level considerations, shape the distribution of criminal law's burdens and benefits across communities. And in doing so, it invites reflection on the first-order normative question that must guide any theory of prosecutorial justice: when and for whom is criminal law an institution of societal protection versus an instrument of domination?

In addition to reducing enforcement in some domains, reformist prosecutors have also invested in intensified enforcement in areas where conventional prosecutors have been faulted as overly lenient.[387] Police violence is a focal point for many such efforts, with a number of reform-minded prosecutors creating dedicated police integrity units or aggressively pursuing charges in high-profile cases of police misconduct.[388] White-collar crime and employer abuses have been another priority, as illustrated by Manhattan DA Alvin Bragg's recently formed Worker Protection Unit which has the mission of investigating and prosecuting wage theft and crimes that produce unsafe working conditions.[389] This two-pronged strategy—nonenforcement for certain offenses, stepped-up enforcement for others—reflects a concerted effort to reorient the penal system away from the criminalization of marginality and toward accountability for the powerful.

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found that certain declination and diversion policies adopted by reformers may even reduce future criminal offending by the people impacted by them, perhaps by lessening the criminogenic effects of criminal stigma and incarceration. *See* Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, 138 Q.J. ECON. 1453, 1487–89 (2023); Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 88 REV. ECON. STUD. 883, 914–15 (2021). The leading study on the other side of the issue is Thomas P. Hogan, *De-Prosecution and Death: A Synthetic Control Analysis of the Impact of De-Prosecution on Homicides*, 21 CRIMINOLOGY & PUB. POL'Y 489 (2022), which concluded that prosecutorial nonenforcement in Philadelphia from 2015–2019 was responsible for an estimated 74.79 homicides per year in the city. *Id.* at 489–90. Hogan's study has been widely criticized by other researchers. *See* Akela Lacy, *Larry Krasner Impeachment Committee Relies on Widely Panned Journal Study*, THE INTERCEPT (Oct. 24, 2022, 8:02 PM), https://theintercept.com/2022/10/24/larry-krasner-impeachment-debunked-study/ [https://perma.cc/HSV2-CTS9].

387. *See generally* Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 3–5 (2018) (noting that reformist prosecutors simultaneously aspire to reduce enforcement in certain areas while enhancing it in other domains, particularly police violence).

388. *See, e.g.*, All Things Considered, *Prosecutor in Freddie Gray Case Offers Lessons for Minneapolis*, NPR (May 31, 2020, 5:06 PM), https://www.npr.org/2020/05/31/866426142/prosecutor-in-freddie-gray-case-offers-lessons-for-minneapolis [https://perma.cc/KY76-Z8MH]; Mensah M. Dean, *Philly DA Larry Krasner Is Charging Cops with Murder. It Could Cost Him a Job.*, THE TRACE (Oct. 21, 2022), https://www.thetrace.org/2022/10/philadelphia-da-larry-krasner-impeach/ [https://perma.cc/TDY6-PYKU].

389. *See Manhattan DA Unveils New Unit to Combat Wage Theft, Protect NYC Workers*, NBC NEW YORK (Feb. 16, 2023, 10:54 PM), https://www.nbcnewyork.com/news/local/manhattan-da-unveils-new-unit-to-combat-wage-theft-protect-nyc-workers/4108194/ [https://perma.cc/839N-UJ2V].

For some commentators, it is reformist prosecutors' embrace of increased prosecution for certain offenses—not their commitment to decarceration in other areas—that presents the most troubling questions about the reform agenda.[390] In a probing critique, Ben Levin and Kate Levine argue that the imagined redistributive potential of criminal law is belied by the realities of the carceral system. They point to evidence that even ostensibly progressive criminal statutes, like hate crime enhancements, often end up disproportionately targeting marginalized defendants rather than the powerful actors advocates imagine.[391] Moreover, Levin and Levine warn that any punitive policies, even those motivated by egalitarian aims, risk legitimizing and expanding the reach of the carceral state, with potential spillover effects that could make less powerful defendants more likely to face harsher treatment.[392] But beyond questioning progressive criminalization's redistributive bona fides, they argue any turn to criminal law is misguided because incarceration is inherently brutalizing and dehumanizing. In their view, criminal law's individualistic focus inevitably obscures structural inequities and creates a permanent, excluded underclass.[393] These arguments pose a formidable challenge to the logic underpinning progressive efforts to repurpose prosecutorial power, suggesting the iniquities of the carceral system are not merely a matter of distributive injustice, but are baked into its very core.[394]

Levin and Levine's critique, while skeptical of criminal law's progressive potential, resonates with the efforts of reformist prosecutors in one crucial respect: both recognize the inherently distributional character of enforcement decisions. By spotlighting how discretion shapes the burdens and benefits of the carceral system, reformist prosecutors have made manifest what long went unspoken—that prosecutorial choices are inescapably political, with profound consequences for who is punished and who is spared. In a world of scarce enforcement resources and structurally unequal policing, every case-level nonenforcement choice implies a relative prioritization; every iteration of discretion, a reallocation of the system's burdens.[395] Addressing these distributional consequences candidly and

390. *See, e.g.*, Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199 *passim* (2020); Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1010–17, 1023–24 (2021).

391. Levin & Levine, *supra* note 258.

392. *Id.* at 1581–84.

393. *Id.* at 1584–94.

394. *See id.*

395. *See generally* George C. Christie, *An Essay on Discretion*, 1986 DUKE L.J. 747, 747 ("Discretion involves power relationships and the ways that people work out these relationships in an ongoing political system."); James R. Klonoski & Robert I. Mendelsohn, *The Allocation of Justice: A Political Approach*, 14 J. PUB. L. 323, 323 (1965) ("[P]olitical considerations broadly conceived explain

forthrightly is crucial to constructing a justice system attuned to marginalized communities, even if Levin and Levine are correct in believing that genuine equity ultimately necessitates transcending the bounds of criminal law entirely. By clearing away the myth of individualized enforcement, we can begin the hard but necessary work of deliberating over what a more just distribution of state violence would entail, and whether the carceral system is equipped to deliver it. That conversation will be contentious, but it is where a reckoning with criminal law's future must begin.

CONCLUSION

The myth of individualized enforcement has obscured the pervasive role of categorical judgment in prosecutorial decision-making. This Article illustrates that prosecutors frequently make broad decisions to forgo enforcement or lower penalties for whole categories of offenses.[396] Yet the myth of individualized enforcement has deflected attention from this reality, insisting on a false dichotomy between case-by-case decisions and categorical policymaking. By unearthing the pervasive use of categorical nonenforcement by conventional prosecutors, this Article disputes the individualized enforcement paradigm's underlying assumptions and paves the way for a more forthright assessment of prosecutorial discretion's operation.

Recognizing the pervasiveness of categorical nonenforcement, however, is only the first step, for prosecutors differ dramatically in how they wield this discretion.[397] Reformist prosecutors often embrace nonenforcement policies transparently and methodically, employing their discretion to address the criminalization of poverty, race, and addiction. Conversely, conventional prosecutors frequently operate by stealth, employing nonenforcement informally in a way that aggravates the systemic racial and class inequities that permeate our criminal justice system. These divergent approaches have profound implications for the transparency and accountability of the prosecutorial role and for the system's outputs. By confronting these realities directly, this Article seeks to shift the discourse surrounding prosecutorial reform from abstract arguments about the validity of categorical decision making to substantive discussions about the appropriate extent and objectives of nonenforcement.

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to a large extent who gets—and in what amounts and how—the 'good' (justice) that is produced by the legal system.").

396. *See supra* Part II.

397. *See supra* Part III.