THE NUANCES OF PROSECUTORIAL NONENFORCEMENT

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ABSTRACT

The academic literature on prosecutors is divided: Some commentors believe that prosecutors should more aggressively use their ability to decline to bring charges, decreasing the overall number of criminal cases and helping to address the problem of mass incarceration. Others believe that broad prosecutorial nonenforcement poses significant risks to our constitutional order and public safety. While the visibility of this debate has increased—spilling over from the pages of law reviews into political campaigns and headlines—the terms of this debate are at times unclear. Prosecutorial nonenforcement is a multifaceted phenomenon, and discussions about its costs and benefits can obscure necessary tradeoffs between important values and principles.

This Article brings much-needed nuance to the debate surrounding prosecutorial nonenforcement. It provides a three-tiered taxonomy of nonenforcement decisions: the method of nonenforcement, the justification for nonenforcement, and the identity of nonenforcement decision makers. It also explains how different features of

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nonenforcement implicate conflicting values, such as individualization and consistency. By providing this taxonomy and highlighting these tradeoffs, the Article seeks to improve the terms of the debate surrounding prosecutorial nonenforcement. In so doing, it demonstrates that although abstract discussions about nonenforcement can be valuable, they are no substitute for an assessment of the substance of those decisions.

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INTRODUCTION

In the past decade, a growing body of legal scholarship has sought to address the nonenforcement of laws, including nonenforcement by prosecutors.[1] While prosecutorial *discretion* has long been a topic of importance for criminal law and criminal procedure scholarship,[2]

1. *See generally* 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 (2013) (arguing that the legal and historical context surrounding the Take Care Clause authorizes only individualized nonenforcement decisions in particular cases); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431 (2023) [hereinafter Green & Roiphe, *Fiduciary Theory*] (arguing that progressive prosecutors' broad use of nonenforcement abdicates their fiduciary role); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011) (defining prosecutorial nullification and contextualizing it in the conversation of discretion in the criminal justice system); 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 (2016) (comparing executive nonenforcement of marijuana and immigration laws and evaluating the appropriateness of each); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019) (exploring the historical roots of the Take Care Clause and how that understanding limits nonenforcement); Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391 (2022) [hereinafter Murray, *Prosecutorial Nonenforcement*] (critiquing the characterization of prosecutorial nonenforcement as usurpation and describing the phenomenon of residual criminalization); Justin Murray, *Prosecutorial Reform and the Myth of Individualized Enforcement*, 102 WASH. U. L. REV. 1435 (2025) [hereinafter Murray, *Prosecutorial Reform*] (identifying and critiquing the myth of individualized prosecutorial nonenforcement and comparing nonenforcement by traditional and reform prosecutors); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) [hereinafter Murray, *Nullification*] (arguing that democratic theory can legitimize prosecutorial nullification); Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 TEX. L. REV. 937 (2024) (arguing that misdemeanor declination serves as a check on police power and increases equity, efficiency, and accountability); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) [hereinafter Price, *Enforcement Discretion*] (arguing that the constitutional authority for executive nonenforcement discretion is limited and defeasible); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651 (2023) [hereinafter Price, *Faithful Execution*] (examining the variations in the degree to which state laws authorize prosecutorial nonenforcement); Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477 (2020) (examining how prosecutors communicate nonenforcement decisions).

2. *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) [hereinafter DAVIS, ARBITRARY JUSTICE] (describing and critiquing prosecutorial power); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) (advancing proposals for reforming discretionary decisions in the justice system and laying the groundwork for further empirical and philosophical study); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61

prosecutorial *nonenforcement* has more recently gained prominence as prosecutorial nonenforcement decisions have taken center stage in a national debate between so-called progressive prosecutors and those who favor traditional law enforcement policies.[3] Local prosecutors have won office promising to, among other things, stop enforcing various low-level crimes, such as minor shoplifting and possession of marijuana. Lawmakers in at least a dozen states have responded by proposing—and sometimes passing—legislation designed to limit prosecutors' discretion to decline enforcement.[4] Some

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STAN. L. REV. 869 (2009) (using the institutional design literature from administrative law to explore how federal prosecutors' offices could be altered to curb abuses of power through separation-of-functions requirements and greater attention to supervision); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998) (examining prosecutorial discretion's role in causing racial inequality in the justice system); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980) (presenting the results of a study of prosecutorial discretion); Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940) (reprinting the remarks of a landmark 1940 speech on prosecutorial ethics and the dangers of abuse); Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691 (2006) (presenting qualitative data about the effect of defendant-victim intimacy on prosecutorial understanding and handling of statutory rape cases); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017) (discussing the boundaries of the President's prosecutorial discretion authority); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365 (1987) (offering a systematic examination of the way constitutional principles are utilized to constrain prosecutorial activities); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (arguing that prosecutorial discretion is unjustifiably broad and proposing a more principled and accountable system of prosecutorial discretion); Ann Woolhandler, Jonathan Remy Nash & Michael G. Collins, *Bad Faith Prosecution*, 109 VA. L. REV. 835 (2023) (examining the legal standards for doctrines of unconstitutional prosecutorial motivation).

3. The term "progressive prosecutor" is hard to define, with many policies falling under its umbrella. Nonetheless, at least two consistent themes underlie many of the movement's goals: publicly announcing policies that reject the traditional focus on conviction rates, and prioritizing reducing mass incarceration and increasing fairness in the criminal justice system. *See, e.g.*, Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1424, 1427 (2021); Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 125-26 (2021); FAIR & JUST PROSECUTION, BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 3 (2018).

4. *See* JORGE COMACHO, NICHOLAS GOLDROSEN, RICK SU & MARISSA ROY, PREEMPTING PROGRESS: STATES TAKE AIM AT PROSECUTORS 3 (2023); *see also* Akela Lacy, *17 States Have Now Tried to Pass Bills that Strip Powers from Reform-Minded Prosecutors*, INTERCEPT (Mar. 3, 2023, at 13:27 ET), https://theintercept.com/2023/03/03/reform-prosecutors-state-legistatures/ [https://perma.cc/A3UM-L2FR] (describing legislative backlash against local

state officials have sought to remove local prosecutors based on nonenforcement policies or specific decisions not to prosecute, alleging that failures to prosecute represent a neglect of duty or a usurpation of legislative power.[5]

Because progressive prosecutors are the most visible example of prosecutorial nonenforcement, the debate over nonenforcement has taken on a partisan cast.[6] But progressive prosecutors are hardly the only example of prosecutorial nonenforcement. There is ample evidence of prosecutors refusing to enforce hate crime laws.[7] And there is historical evidence that other laws—including laws against domestic violence, white-collar crimes, and environmental offenses—have long gone underenforced.[8] More recently, Attorney General Pam Bondi has deprioritized enforcement of traditional white-collar offenses such as bribery, money laundering, and tax avoidance, and President Donald Trump has signed executive orders promising not to prosecute companies who service TikTok despite a federal law banning the app.[9] As these examples show, although the discussion surrounding nonenforcement has taken on a partisan

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progressive prosecutors).

5. *See* J. David Goodman, *With an Array of Tactics, Conservatives Seek to Oust Progressive Prosecutors*, N.Y. TIMES (Aug. 12, 2023), https://www.nytimes.com/2023/08/12/us/conservatives-progressive-district-attorneys.html [https://perma.cc/L5QU-57G5]; *see also* Meighan R. Parsh, Comment, *Dueling Discretion: The Imperfect Mechanisms for Removing Elected Prosecutors*, 102 N.C. L. REV. 573 (2024) (discussing efforts to remove local prosecutors and the mechanisms for doing so).

6. *See, e.g.*, ZACK SMITH & CHARLES D. STIMSON, ROGUE PROSECUTORS: HOW RADICAL SOROS LAWYERS ARE DESTROYING AMERICA'S COMMUNITIES (2023); *see also* Carissa Byrne Hessick & Rick Su, *The (Local) Prosecutor*, 2023 WIS. L. REV. 1669, 1700-02 ("Much of the backlash against reform prosecutors can be explained as partisan conflict.").

7. *See, e.g.*, Michael E. Miller & Steven Rich, *Hate Crime Reports Have Soared in D.C. Prosecutions Have Plummeted.*, WASH. POST (Aug. 21, 2019), https://www.washingtonpost.com/graphics/2019/local/dc-hate-prosecutions-drop/ [https://perma.cc/8G3J-5WS4] (reporting that the number of hate crime prosecutions had dropped to nearly zero at the same time that the number of people arrested for hate crimes increased significantly); *see also* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 880-906 (2014) (presenting qualitative evidence of nonenforcement of hate crimes).

8. *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1722-44 (2006).

9. Jeffrey Goldfarb, *Ignoring US White-Collar Crime Will Run Up Big Tab*, REUTERS (Mar. 27, 2025, at 07:00 UTC), https://www.reuters.com/breakingviews/ignoring-us-white-collar-crime-will-run-up-big-tab-2025-03-26/ [https://perma.cc/EP5J-LQ38]; Bobby Allen, *Trump Extends TikTok's Sell-By Date Again*, NPR (Apr. 4, 2025, at 14:07 ET), https://www.npr.org/2025/04/04/nx-s1-5347418/trump-tiktok-second-ban-delay [https://perma.cc/8MUJ-LC88].

cast, it is not only a progressive tool—it has a long history and it has often been used to frustrate, rather than to further, progressive aims.

Those who criticize nonenforcement often rely on constitutional principles and historical practice. These nonenforcement minimalists conceptualize prosecutors as executive officials who have a duty to "faithfully execute" the laws passed by the legislature. To the extent that they recognize the need for some level of nonenforcement, they insist upon a narrow and modest approach: Decisions not to prosecute must be done on a case-by-case basis, rather than through policies adopted by the head prosecutor.[10]

In contrast, those who favor broader nonenforcement efforts stress the lengthy history of nonenforcement practices, and they highlight the potential of nonenforcement decisions to make the criminal justice system more responsive to local community norms. For these nonenforcement maximalists, well-crafted nonenforcement policies have the ability to soften the effect of overly harsh laws and are thus better at both reversing the trend of mass incarceration and protecting the underrepresented communities that have borne the brunt of traditional enforcement.[11]

The debate over prosecutorial nonenforcement is not limited to the pages of law reviews. Legislatures, local prosecutors, and other public officials have disagreed about the power of prosecutors to make enforcement decisions—sometimes to great fanfare. For example, decisions to indict President Donald Trump on charges associated with falsifying business records and improperly retaining classified documents drew intense criticism on the ground that individuals who have engaged in similar behavior have not faced criminal charges.[12] Prosecutorial decisions over enforcement also played a significant role in the 2016 election. When then-FBI Director James Comey announced that criminal charges would not be brought against presidential candidate Hillary Clinton for mishandling classified documents, his statement was met with

10. *See infra* Part I.C.1.

11. *See infra* Part I.C.2.

12. Alan Feuer, *Prosecutors Reject Claims of Unfairness in Trump Classified Documents Case*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/politics/prosecutors-trump-classified-documents.html [https://perma.cc/Z5N8-7SUT].

outrage.[13] Although Clinton's actions appeared to fall within the statute criminalizing the mishandling of classified information, Comey explained that her conduct did not satisfy the enforcement criteria that the Department of Justice (DOJ) has long used to determine whether to pursue prosecutions in such cases.[14]

More frequently, the public debate revolves around empirical claims about whether progressive prosecutors' nonenforcement policies promote or hinder public safety,[15] whether local communities should have control over local law enforcement decisions,[16] and how values such as transparency, consistency, and justice should inform prosecutorial nonenforcement decisions.[17] But it also

13. Corky Siemaszko, *FBI Chief James Comey Grilled About Decision Not to Charge Hillary Clinton*, NBC NEWS (July 7, 2016), https://www.nbcnews.com/news/us-news/fbi-chief-james-comey-grilled-about-decision-not-charge-hillary-n605206 [https://perma.cc/Y6BN-VCSP].

14. Press Release, James B. Comey, Dir., Fed. Bureau Investigations, Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016), https://www.fbi.gov/news/press-releases/statement-by-fbi-director-james-b-comey-on-the-investigation-of-secretary-hillary-clinton2019s-use-of-a-personal-e-mail-system [https://perma.cc/PLQ2-DDD4].

15. *See, e.g.*, Lauren-Brooke Eisen, Jinmook Kang, Ames Grawert & Brianna Seid, *Myths and Realities: Prosecutors and Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (Oct. 23, 2024), https://www.brennancenter.org/our-work/research-reports/myths-and-realities-prosecutors-and-criminal-justice-reform [https://perma.cc/WJ2C-XCQ2]; Charles D. Stimson, Zack Smith & Kevin D. Dayaratna, *The Blue City Murder Problem*, HERITAGE FOUND. (Nov. 4, 2022), [hereinafter Stimson et al., *Blue City Murder Problem*] https://www.heritage.org/sites/default/files/2022-11/LM315.pdf [https://perma.cc/TY67-6WBD].

16. *See, e.g.*, Matt Dixon, *Ron DeSantis Suspends Second Elected Prosecutor as His 2024 Campaign Struggles*, NBC NEWS (Aug. 10, 2023, at 02:37 ET), https://www.nbcnews.com/politics/2024-election/ron-desantis-suspends-second-elected-prosecutor-monique-worrell-rcna98968 [https://perma.cc/7C6R-HFUA] (quoting Monique Worrell's critique of her removal, saying, "I am your duly elected state attorney," and that "the country [is] 'in danger of losing our democracy'"); Brendan Farrington & Freida Frisaro, *Florida Gov. DeSantis Suspends Another Democratic Prosecutor as He Seeks GOP Presidential Nomination*, AP NEWS (Aug. 10, 2023, at 11:03 ET), https://apnews.com/article/desantis-suspends-florida-prosecutor-monique-worrell-45d2f5955b87fb5c0e817d9da9133393 [https://perma.cc/X2R3-9KWE] (statement of Anna Eskamani, Florida House Representative) ("Her removal is a complete slap in the face to Orange and Osceola County residents and another example of Governor DeSantis eroding our local control and democracy.").

17. *See, e.g.*, Nick Minock, *Fairfax County Commonwealth's Attorney Descano's Transparency Efforts Gets Mixed Reviews*, WJLA (Aug. 13, 2024, at 18:52 ET), https://wjla.com/news/local/fairfax-county-crime-commonwealths-attorney-steve-descano-transparency-data-police-department-prosecution-court-records-community-pat-herrity-cse-fcpd-website-governor-glenn-youngkin [https://perma.cc/V2RR-KSZ8]; *see also* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1208 (2020) (describing the use of "justice" in describing prosecutors' work and the issues associated with it); FAIR & JUST PROSECUTION ET AL., *supra*

includes arguments about constitutional issues and the nature of prosecutorial duties that feature prominently in academic writing on the subject.[18]

While there are clear *sides* to the nonenforcement debate—with some expressing hostility to nonenforcement and others embracing it—the *terms* of that debate are sometimes less clear. The complicated nature of prosecutorial nonenforcement means that even the most sophisticated academic accounts can be confusing, and that confusion can obscure the true nature of the disagreement between nonenforcement minimalists and nonenforcement maximalists. Part of the descriptive confusion stems from the fact that certain terms have been used to mean different things. But much of the descriptive confusion stems from the fact that nonenforcement is not only complicated, but also multifaceted. There are three major features of nonenforcement—features which are not always clearly disaggregated in the academic debate.

The first, and most heavily discussed, feature of nonenforcement is the method through which nonenforcement occurs.[19] Much of the discussion focuses on nonenforcement decisions that are either "individualized" or made pursuant to "categorical" policies. But there are several common nonenforcement methods that fall in between those two extremes, including the setting of enforcement priorities, presumptions against nonenforcement, and various types of mandatory nonenforcement policies. In other words, *how* nonenforcement occurs takes different forms in different places, at different times.

The second feature of nonenforcement is the reason to forgo prosecution.[20] The nonenforcement debate sometimes contrasts nonenforcement decisions that are grounded in policy considerations from those that are based on concerns about evidence and resources. But there are other reasons for nonenforcement that do not fit neatly into these categories. What is more, the reasons for

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note 3 (providing strategies for progressive prosecutors to increase fairness in the criminal justice system); Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020) (arguing that prosecutors should prioritize consistency of process to further reform goals).

18. *See* Hessick & Su, *supra* note 6, at 1683-97 (collecting sources).

19. *See infra* Part II.A.

20. *See infra* Part II.B.

nonenforcement often bleed into one another, making clear distinctions difficult, if not impossible. As a result, *why* nonenforcement occurs can be difficult to disentangle.

The third feature of nonenforcement is the person making the nonenforcement decision.[21] The current literature sometimes contrasts individualized decisions made by line prosecutors with office-wide policies adopted by the head (often elected) prosecutor. The role of supervising attorneys within prosecutor offices can be overlooked when that contrast is drawn, as is the central role that those supervisors play in setting informal policies, applying presumptions, and otherwise reviewing individualized decisions. What is more, the relative roles of line prosecutors, supervisory prosecutors, and head prosecutors depend on the size of the office and the way in which the office is organized. Thus, *who* makes nonenforcement decisions and the implications of the decision maker's identity can differ greatly from office to office.

As these three features illustrate, the reality of nonenforcement is far from binary. There is a broad spectrum of nonenforcement decisions, most of which lie between the extremes of individualized, case-by-case decisions and categorical policies that permit no discretion. The distinction between so-called policy-based decisions not to enforce and decisions based on evidence or resources does not stand up to scrutiny. And the identity of who is making nonenforcement decisions—line prosecutors, supervisors, or head prosecutors—has important implications for the quality of and accountability for those decisions.

Like the descriptive account of prosecutorial nonenforcement, the prescriptive account of nonenforcement could be improved. Nonenforcement maximalists largely focus on the benefits of nonenforcement, particularly as it allows prosecutors to reduce the footprint of the criminal justice system while promoting consistency and transparency.[22] In contrast, nonenforcement minimalists often focus on the specific costs of nonenforcement such as the lack of individualized decision-making and potential public safety risks.[23] But when the arguments in favor and against nonenforcement are

21. *See infra* Part II.C.
22. *See infra* notes 92-108 and accompanying text.
23. *See infra* notes 69-91 and accompanying text.

recast in more general terms, the debate over nonenforcement can be reframed, not simply as a question of whether the practice is good or bad, but instead as a question of competing values and tradeoffs. Allowing line prosecutors the discretion to make their own decisions about nonenforcement, for example, prioritizes individualization over consistency, while mandatory nonenforcement policies prioritize consistency over individualization.

While this Article does not ultimately take a side in the ongoing debate between nonenforcement minimalists and maximalists, it makes two key contributions. First, it provides a taxonomy of prosecutorial nonenforcement, which recognizes the three major features of the phenomenon—the method, the reason, and the decision maker. Second, it reframes the prescriptive discussion of prosecutorial nonenforcement so that, rather than discussing the costs and benefits of nonenforcement in isolation, they are instead presented as tradeoffs between important values.

Understanding the different features of prosecutorial nonenforcement and recognizing the debate surrounding it as a question of tradeoffs does not settle the dispute between the minimalists and the maximalists. To the contrary, our contribution suggests that the more one understands about prosecutorial nonenforcement, the more one might conclude that there is no necessarily correct answer about the desirability of the practice. Reasonable people can—and do—disagree about which values to maximize or minimize when those values are in tension with one another.

Nonetheless, given how salient the debate has become in American criminal justice politics, we believe explaining the complex descriptive reality of prosecutorial nonenforcement and understanding normative arguments about the practice as tradeoffs will improve the terms of that debate. If nothing else, it will ensure that descriptions of nonenforcement are more accurate and that arguments about nonenforcement are not framed in black and white terms. The lack of descriptive accuracy in the current debate has led commentors to offer a stylized understanding of what prosecutorial nonenforcement *is*—an understanding that has stymied the normative debate about when and how nonenforcement ought to occur. By offering a more nuanced descriptive account of prosecutorial

nonenforcement, our Article reveals that nonenforcement practices are more complex than the academic debate suggests. Once they account for that descriptive complexity, the maximalists and minimalists may discover that their normative debate is less pronounced than it currently appears.

We believe that our descriptive and prescriptive contributions can improve the quality of the debate over nonenforcement. Indeed, in developing a multifaceted descriptive account of prosecutorial nonenforcement and reframing the normative debate as a question of tradeoffs, we were able to refine and better articulate our own views about the practice. While we do not offer a detailed policy proposal, we do offer two major conclusions—about balance and skepticism.

First, as a general matter, we conclude that attempting to strike a balance between the competing values we identify as nonenforcement tradeoffs is preferable to maximizing one value at the expense of the other. This general conclusion leads us to the more specific conclusion that setting enforcement priorities and adopting presumptions against enforcement are preferable to ad hoc decision-making and mandatory nonenforcement policies.

Second, we conclude that there are reasons to be skeptical of many premises that underlie the debates between nonenforcement minimalists and nonenforcement maximalists. In particular, there is reason for skepticism that a clear line can be drawn between nonenforcement decisions based on so-called policy concerns and nonenforcement based on other reasons. There are also reasons to be skeptical of claims by minimalists that such announcements will lead to more lawbreaking, as well as claims by maximalists that such announcements result in more democratic accountability for prosecutors. Perhaps most importantly, there are reasons to be skeptical that an abstract balancing of the tradeoffs implicated by different nonenforcement decisions can satisfactorily resolve the debate surrounding nonenforcement. While much of that debate is framed in abstract terms, the substantive decisions themselves undoubtedly influence the supporters and detractors of nonenforcement.

The Article proceeds in three parts. Part I begins by defining the terms "prosecutorial nonenforcement" and "nonenforcement policy."

It then turns to the academic literature on prosecutorial nonenforcement. After noting and explaining the consensus surrounding the inevitability of nonenforcement, it provides an overview of the arguments that have been raised in favor of and against prosecutorial nonenforcement policies. These arguments can be roughly grouped into themes that nonenforcement minimalists and maximalists draw on to both criticize and support nonenforcement. Themes such as public safety, democratic participation, transparency, consistency, justice, the separation of powers, and prosecutors' duty to enforce the law are used to highlight the perceived benefits and drawbacks of prosecutorial nonenforcement.

Part II provides a taxonomy of prosecutorial nonenforcement. It identifies three major elements of nonenforcement: the method of nonenforcement, the justification for nonenforcement, and the identity of nonenforcement decision makers. Part III moves from the descriptive to the prescriptive. It identifies several tradeoffs—individualization versus consistency, neutrality versus justice, knowledge versus accountability, and public safety versus transparency—and explains how the different features of nonenforcement identified in Part II maximize, minimize, or strike a balance between these competing values. In identifying these tradeoffs, we also indicate where balance is possible and ought to be pursued, as well as where skepticism is warranted.

Prosecutorial nonenforcement is hardly new; it has existed since the early days of the Republic.[24] But the public awareness of nonenforcement decisions and the intensity of the debate over the practice may be unprecedented. In providing a taxonomy of nonenforcement policies and identifying the major tradeoffs associated with those policies, we hope to improve that debate.

I. NONENFORCEMENT: DEFINITIONS AND DEBATES

This Part defines the terms "prosecutorial discretion," "prosecutorial nonenforcement," and "nonenforcement policies" as they are used in this Article. This Part then provides an overview of the academic debate surrounding nonenforcement, beginning with the

24. *See, e.g.*, Markowitz, *supra* note 2, at 497-98; Murray, *Prosecutorial Reform*, *supra* note 1, at 1467-91.

academic consensus that some amount of nonenforcement is inevitable, and then documenting how common themes are used to argue both against and in favor of prosecutorial nonenforcement.

A. Defining Nonenforcement

Several of the terms that we use in this Article could be interpreted to mean different things. To avoid confusion, this Section provides definitions of those terms.

Throughout this Article we refer to "prosecutorial discretion" when describing the authority of a prosecutor to make a nonenforcement decision. The meaning of the word "discretion" is quite broad. It essentially means the power to choose.[25] Thus, "prosecutorial discretion" generally refers to prosecutors' ability to freely choose how to handle a case according to their own judgment. Prosecutors exercise discretion at many different stages of the criminal justice process, not only deciding whether to charge a defendant, but also which charges to select, whether to seek bail, how to negotiate a plea deal, and so on.[26] In fact, head prosecutors can exercise discretion before cases even reach their office when they decide which policies to implement to guide the decision-making of line prosecutors.[27]

Prosecutorial discretion may be explicit, in that there are no prescribed outcomes in a given case.[28] Prosecutors may also have de facto discretion, which results from a lack of oversight in their decision-making process.[29] Both types of discretion are relevant to discussing nonenforcement decisions. An office that places few

25. *See* F. Andrew Hessick & Carissa Byrne Hessick, *Facts, Policy, and Discretion*, 59 U.C. DAVIS L. REV. (forthcoming 2026) (on file with authors) (manuscript at 7-10) [hereinafter Hessick & Hessick, *Facts, Policy, and Discretion*] (defining the term discretion and explaining how it is used in the law).

26. *See* Parsh, *supra* note 5, at 589; *see also* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019) (describing prosecutors' charging power); Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 994-96 (2019) (describing how broadly written criminal laws have given prosecutors plea bargaining leverage and power to determine the scope of criminal laws).

27. *See infra* Part II.A; *see also* Parsh, *supra* note 5, at 589-90 (discussing prosecutors' use of broad nonenforcement policies).

28. *See* Carissa Byrne Hessick & F. Andrew Hessick, *Procedural Rights at Sentencing*, 90 NOTRE DAME L. REV. 187, 196 (2014).

29. *See id.* at 197-98.

substantive constraints on a line prosecutor's decision, for example, may nonetheless constrain their decisions by subjecting those decisions to review by supervising attorneys.[30] In such an office, line prosecutors have explicit discretion, but not de facto discretion. Alternatively, an office could articulate a number of substantive criteria that a line prosecutor must consider in determining whether to file charges, but not subject those decisions to review by a supervisor. In such an office, line prosecutors would have little explicit discretion, but significant de facto discretion.

Although both types of discretion are important to understanding prosecutorial nonenforcement, the term "prosecutorial discretion" is used more often to refer to explicit discretion. In particular, Part II.A discusses the various methods of nonenforcement in terms of how much discretion each method gives to the line prosecutor. In that discussion, the term "discretion" means explicit discretion, not de facto discretion.

This Article frequently uses the term "prosecutorial nonenforcement" to refer to the decision by a prosecutor to decline to file charges against an individual or to dismiss an existing prosecution despite the existence of probable cause. For simplicity's sake, we also use the less specific term "nonenforcement" to refer to this prosecutorial decision. There are, of course, other actors in the criminal justice system who possess the discretion not to enforce the law. For example, police may choose not to arrest an individual despite possessing probable cause that the person has committed a crime.[31] And jurors may refuse to convict a defendant even when they are convinced of that person's guilt beyond a reasonable doubt. These decisions could also be referred to as "nonenforcement." But those decisions are not the subject of this Article.

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30. *See infra* Part II.C.2.

31. It is also worth noting that prosecutors do not always make the initial charging decision. In some jurisdictions, the police have the power to file a complaint to initiate prosecution. *See* Carissa Byrne Hessick, Jeffrey Bellin, Elana Fogel, Anjelica Hendricks, Erin Blondel & John Flynn, *Plea Bargains: Efficient or Unjust*, 107 JUDICATURE, no. 1, 2023, at 50, 55-57. Some jurisdictions go even further and give police the power to prosecute misdemeanor offenses all the way through to a conviction. Alexandra Natapoff, *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/6H9M-2LPF]. When the police file the initial charges, prosecutors have no choice but to dismiss, rather than decline, prosecution. *See infra* notes 32-33 and accompanying text.

Our term "nonenforcement" lumps together two distinct decisions—declinations and dismissals.[32] A declination is the decision not to bring charges in the first instance, whereas a dismissal is the decision to discontinue an ongoing prosecution after charges have been filed. While there are some legal differences between declinations and dismissals,[33] we do not distinguish between them because those differences are not relevant to the taxonomy or the tradeoffs that are the focus of this Article.

This Article also uses the term "nonenforcement policy." As used in this Article, a nonenforcement policy is the articulation of guidance—whether in the form of rules or standards—within a prosecutor's office that is intended to shape how the nonenforcement power will be exercised in individual cases. Nonenforcement policies can be written or unwritten, formal or informal.[34]

We note that these definitions do not necessarily settle which types of prosecutorial decisions qualify as nonenforcement and which do not. For example, reasonable people could disagree as to whether nonenforcement includes an agreement between the prosecution and the defense to avoid criminal charges if the defendant agrees to complete a diversion program.[35] On the one

32. When dismissing charges that have already been filed, a prosecutor may discontinue a prosecution by filing a writ of *nolle prosequi* or a motion to dismiss. In some jurisdictions there is an important difference between the various legal mechanisms: The *nolle prosequi* preserves the option to bring the charge again so long as it is made before jeopardy attaches, whereas the motion to dismiss can be made with prejudice, precluding future prosecution. *See* JOAN E. JACOBY & EDWARD C. RATLEDGE, THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM 4 (2016). *Compare* VA. CODE ANN. § 19.2-265.6 (2022) (allowing a motion to dismiss with prejudice), *with* Cantrell v. Commonwealth, 373 S.E.2d 328, 333 (Va. Ct. App. 1988) (stating that a *nolle prosequi* does not preclude future prosecution if entered before jeopardy attaches). The effect—and label—of the various formal legal mechanisms whereby prosecutors decline to continue prosecution varies greatly across jurisdictions.

33. For example, dismissals may require leave of the court, whereas declinations are deemed to be wholly within the discretion of the prosecutor and thus insulated from judicial review. *Compare* FED. R. CRIM. P. 48(a), *with* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 23-24 (1981).

34. We recognize that there can sometimes be disagreement or confusion about the content of informal or unwritten policies. *See* Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2188-97 (2022). Nonetheless, such policies often shape nonenforcement decisions, and we thus include them in our analysis.

35. *Compare* UNIV. OF N.C. SCH. OF L. PROSECUTORS & POL. PROJECT & THE OHIO STATE UNIV. MORITZ COLL. OF L. DRUG ENF'T & POL'Y CTR., ENFORCING MARIJUANA PROHIBITIONS: PROSECUTORIAL POLICY IN FOUR STATES 9-10 (2023) [hereinafter ENFORCING MARIJUANA

hand, by diverting rather than dismissing a case, the prosecutor is pursuing consequences against the defendant for her breach of the law. On the other hand, the consequences of diversion are not in the form of criminal charges or a criminal conviction (assuming successful completion of the diversion program). Decisions to pursue only civil enforcement measures raise a similar issue, especially when officials combine civil remedies and criminal punishment in a single case.[36]

Importantly, our definition is meant to exclude the dismissal of charges that occurs as a result of a charge bargain plea agreement.[37] If a defendant agrees to plead guilty to one or more criminal charges in exchange for the dismissal of other charges, we do not believe that those dismissals qualify as nonenforcement decisions. That is not to say that charge bargains and other plea agreements are never controversial or that they cannot be the subject of policies in prosecutor offices. But those dismissals occur only because the defendant is pleading guilty to other charges, thus the direct result of the dismissal is actually a conviction. What is more, given the ubiquity of guilty pleas and plea bargains, we do not think that such dismissals fall within the academic and popular debate about nonenforcement.

PROHIBITIONS] (characterizing diversion as "less than full or ordinary enforcement" of law), *with* THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, *Prosecuting Cannabis: Approaches from States Without Legalization*, at 37:25 (YouTube, May 22, 2023), https://www.youtube. com/watch?v=hOSDitn0Xhs [https://perma.cc/V83N-YSRR] (statement of Prof. Lauren Ouziel) (stating that diversion is not underenforcement, but instead a different mode of enforcement).

36. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325-28 (1991). In those situations, the decision to drop criminal charges bears a greater resemblance to a charge bargain than a dismissal. *See infra* note 37 and accompanying text. However, the distinction may be even hazier than with diversion programs due to the more overtly punitive nature of civil remedies such as restitution and forfeiture. *See* Cheh, *supra*, at 1332-35, 1338-42.

37. In a charge bargain, prosecutors incentivize the defendant to plead guilty by agreeing to drop certain charges or allow a plea to less serious charges in return for a guilty plea. *See* Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 687 (2010) (defining charge bargaining).

B. The Inevitability of Nonenforcement

Although prosecutorial nonenforcement is the source of significant debate in the legal academy, the practice has a long history. What is more, even nonenforcement's biggest academic critics recognize that some amount of prosecutorial nonenforcement is inevitable.

Prosecutorial nonenforcement's history predates the public spotlight on it today. Although early American law and practice encouraged full enforcement, it was routine for federal prosecutors to decline enforcement in individual cases, including when they had concerns about justice and equity.[38] Nonenforcement was also historically recognized as a routine part of the prosecutor's role at the state level, and as local prosecutors' power grew, so too did their discretion.[39]

State courts frequently recognized local prosecutors' nonenforcement discretion, with one court going so far as to say that a prosecutor "may commence public prosecutions ... and he may discontinue them when, in his judgment, the ends of justice are satisfied."[40] And both state and federal courts resisted efforts to restrict prosecutors' power or to force them to bring charges.[41]

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38. Price, *Enforcement Discretion*, *supra* note 1, at 718, 723-28.

39. In the earliest days of American history, private citizens could prosecute criminal offenses, but this practice was limited and did not last long. John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, *in* THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3, 5-6 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008); JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 10 (1980). The more significant shift for the purposes of nonenforcement discretion was from appointed local prosecutors to elected local prosecutors, which took place during the Jacksonian era of democratization. JACOBY, *supra* note 39, at 22, 25-26; Worrall, *supra* note 39, at 5-6. *See generally* Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012) (describing how, when, and why local prosecutors shifted from appointed to elected officials).

40. People v. Wabash, St. Louis & Pac. Ry. Co., 12 Ill. App. 263, 265 (1882); *see also* JACOBY & RATLEDGE, *supra* note 32, at 2-30 (describing prosecutorial charging discretion and courts' general acceptance of prosecutorial nonenforcement decisions as unreviewable discretionary decisions); Worrall, *supra* note 39, at 8-9 (describing the development of prosecutorial power and judicial recognition that many discretionary decisions are unreviewable).

41. *See, e.g.*, Davis v. Mun. Ct., 757 P.2d 11, 18 (Cal. 1988) ("It is well established, of course, that a district attorney's enforcement authority includes the discretion either to prosecute or to decline to prosecute an individual when there is probable cause to believe he has committed a crime."); Milliken v. Stone, 7 F.2d 397, 399 (S.D.N.Y. 1925) ("The remedy for inactivity of [the prosecutor] is with the executive and ultimately with the people."); Worrall,

Decisions not to enforce the law were not simply the result of case-by-case decision-making.[42] A study published in 1930 found that 90 percent of prosecutors regularly exercised nonenforcement discretion and many reported that there were laws they had never enforced.[43]

Nonenforcement is also a matter of modern necessity. The scope of both federal and state criminal law has expanded dramatically in the last century and a half.[44] As the scope increased, so did the demand for prosecutorial resources, making full enforcement impossible. Modern criminal codes give local prosecutors a lengthy menu of options in pursuing criminal punishment, and those codes are so broad that prosecutors simply cannot enforce every law as written. Because they do not have the resources to pursue every possible case of every possible crime, modern prosecutors must, as a matter of necessity, engage in some amount of discretionary nonenforcement. In other words, whatever the "law on the books" may be, the "law on the street" is different, and local law enforcement and local prosecutors determine what the law on the streets will be.[45]

For their part, modern courts have recognized executive nonenforcement discretion, and they generally deem those discretionary decisions to be insulated from judicial review.[46] The combination of

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supra note 39, at 9; Rebecca Blair & Miriam Aroni Krinsky, *Why Attacks on Prosecutorial Discretion Are Attacks on Democracy*, AM. CRIM. L. REV. ONLINE 11-13 (2024) (collecting sources).

42. Murray, *Prosecutorial Reform*, *supra* note 1, at 1467-91.

43. Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POL. SCI. Q. 347, 349 (1930); *see also* Blair & Krinsky, *supra* note 41, at 10 (discussing the findings of the study).

44. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 359-61 (2019).

45. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 511, 519, 535-37, 571, 577-78 (2001).

46. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he decision whether or not to prosecute ... generally rests entirely in [the prosecutor's] discretion." (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978))); *see also* Heckler v. Chaney, 470 U.S. 821, 831-32 (1985) (articulating the reasons not to review an agency decision not to institute an enforcement action including that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch"). *But see, e.g.*, United States v. Ammidown, 497 F.2d 615, 620 (D.C. Cir. 1973) ("[T]he court does not have primary responsibility, but rather the role of guarding against abuse of prosecutorial discretion. The rule contemplates exposure of the reasons for dismissal 'in order

broad criminal codes and no real limits on prosecutorial discretion have led many to argue that the current structure of criminal law amounts to a "de facto delegation" in which Congress enacts laws expecting that the executive will moderate their effect by exercising broad nonenforcement discretion.[47]

Although prosecutorial nonenforcement has a long history, for much of that history, nonenforcement has taken place in relative obscurity. The public is usually not in a position to observe when or why decisions were made.[48] This is, in part, due to the nature of nonenforcement decisions. For example, a declination decision takes place entirely within the walls of the prosecutor's office;[49] as a result there is often no record of the charges that prosecutors contemplated, but never brought. And even when a dismissal of pending charges creates a record in open court, the public is unlikely to be aware of such actions except in high-profile cases generating media coverage.[50]

But in recent years, high-profile nonenforcement decisions have brought new awareness to the practice. The Obama Administration's decision not to pursue certain immigration offenders induced a series of academic critiques of nonenforcement decisions,[51] as well as litigation on the matter.[52] James Comey's public statements

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to prevent abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors,' and in pursuance of this purpose 'to gain the Court's favorable discretion, it should be satisfied that the reasons advanced for the proposed dismissal are substantial.'" (citing United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 486 (S.D.N.Y. 1964))).

47. *See* Price, *Enforcement Discretion*, *supra* note 1, at 745-46; Price, *Faithful Execution*, *supra* note 1, at 664; *see also* Delahunty & Yoo, *supra* note 1, at 851-53 (describing de facto delegation in the immigration law context); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463, 510-11, 513 (2009) (describing how the structure of immigration law has allowed the President to exert considerable discretion without explicit authorization from Congress); Stuntz, *supra* note 45, at 509, 546-57 (describing the relationship between prosecutors and legislators and how that relationship expands prosecutorial power).

48. *See* Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1084-1107 (2022).

49. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 133 (2008).

50. *Cf.* Roth, *supra* note 1, at 482-84 (discussing some high-profile prosecutorial declination statements).

51. *See, e.g.*, Price, *Enforcement Discretion*, *supra* note 1; Delahunty & Yoo, *supra* note 1. *But see* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015) (defending the decision).

52. *See, e.g.*, Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

about the decision to decline criminal charges against Hillary Clinton in the run-up to the 2016 presidential election took the nonenforcement debate out of obscure law review pages, placing the issue on the front page of national newspapers.[53]

Nonenforcement has also taken center stage in discussions about criminal justice reform in the states. Beginning in the mid-2010s, a wave of candidates began to run for the office of local prosecutor on an anti-mass-incarceration platform—many of whom won and assumed office.[54] Once in office, these progressive prosecutors were far more transparent about many previously opaque decisions, including their nonenforcement policies.[55] They also published data on how their offices operate, and they generally embraced transparent decision-making.[56] These efforts to reform the office of prosecutor—making it less punitive—garnered media attention and, eventually, political backlash. Reform-oriented prosecutors have faced removal from office, supersession efforts, judicial resistance, and electoral challenges because of their charging policies.[57]

In the public debate over nonenforcement, nonacademics will sometimes suggest that prosecutors lack the power of nonenforcement—that they must enforce the law as written.[58] But in the legal and academic debate, even the fiercest skeptics of nonenforcement

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53. *See* Siemaszko, *supra* note 13.

54. Carissa Byrne Hessick, Michael Morse & Nathan Pinnell, *Donating to the District Attorney*, 56 U.C. DAVIS L. REV. 1769, 1835-44 (2023).

55. Murray, *Prosecutorial Reform*, *supra* note 1, at 1497-1502.

56. *See, e.g.*, Blair & Krinsky, *supra* note 41; Carissa Byrne Hessick, *Pitfalls of Progressive Prosecution*, 50 FORDHAM URB. L.J. 973 (2023); Brandon L. Garrett, William E. Crozier, Kevin Dahaghi, Elizabeth J. Gifford, Catherine Grodensky, Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, 75 STAN. L. REV. 1365 (2023).

57. *See* Parsh, *supra* note 5, at 574-77; Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 565-66 (2020); Murray, *Prosecutorial Nonenforcement*, *supra* note 1, at 405-06; Salvador Rizzo & Olivia Diaz, *In Va., Democratic Challengers Take on Party's Incumbent Prosecutors*, WASH. POST (Feb. 13, 2023), https://www.washingtonpost.com/dc-md-va/2023/02/13/northern-virginia-progressive-prosecutors-challengers/ [https://perma.cc/J4N5-2CLV].

58. *See, e.g.*, Fla. Exec. Order No. 22-176 (Aug. 4, 2022) (suspending Andrew Warren); Fla. Exec. Order No. 23-160 (Aug. 9, 2023) (suspending Monique Worrell); Jeff Amy, *Georgia Prosecutors Are Suing to Strike Down a New State Law that Undermines Their Authority*, AP NEWS (Aug. 2, 2023, at 13:32 ET), https://apnews.com/article/georgia-prosecutors-lawsuit-commission-0f9593225ac0a5caf4de8d457907ae71 [https://perma.cc/8PMT-C5F2] (statement of Chris Carr, Georgia Attorney General) ("Unfortunately, some DAs have embraced the progressive movement across the nation of refusing to enforce the law. That is a dereliction of duty.").

acknowledge that prosecutors are not capable of pursuing criminal charges in every single situation in which probable cause exists.[59] Thus, the academic and legal consensus is that (a) prosecutors possess the power to refrain from prosecuting cases for which they have probable cause and (b) some amount of nonenforcement is necessary as a practical matter.[60]

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59. At the most extreme, Delahunty and Yoo argue that the Take Care Clause requires that the Executive fully "enforce *all* constitutionally valid acts of Congress in *all* situations and cases." Delahunty & Yoo, *supra* note 1, at 784. Delahunty and Yoo state that they "give no specific consideration to executive nonenforcement decisions in the criminal area," but their arguments nonetheless speak to the proper exercise of the executive's law enforcement power. *Id.* at 787. And although they acknowledge that full enforcement is not realistic, they maintain that a "deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty." *Id.* at 784-85. Delahunty and Yoo recognize that there are necessary exceptions to their argument, *id.* at 856, but they maintain a belief that broad, policy-based considerations should have no place in nonenforcement decisions. *Id.* at 794, 799.

Others take a less extreme position. They acknowledge that some nonenforcement is necessary, but they argue against decisions to "effectively 'suspend' laws through an assertion of categorical prosecutorial discretion." Kent et al., *supra* note 1, at 2186-87; *see also* Price, *Enforcement Discretion*, *supra* note 1, at 675 ("Executive officials should presume ... they hold discretion to decline enforcement in particular cases, but ... that they lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions."). Instead of categorical nonenforcement policies, they prefer that executive officials decide not to prosecute on an individualized, case-by-case basis. Because they prefer that nonenforcement decisions be made individually, some also argue that these decisions ought to be made by line prosecutors on an ad hoc basis, rather than pursuant to a policy articulated by office leadership. *See* Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1432-34, 1458, 1464-65 ("Serving as a fiduciary means allowing prosecutors in the office to make individualized decisions. If the elected prosecutor must delegate decision making to subordinates, subordinates' discretion should be guided, not circumscribed."). Finally, some argue for limitations on the reasons for nonenforcement. Zachary Price, for example, argues that when nonenforcement is inevitable, the executive should set priorities that comply with statutory policy rather than make policy-based exceptions to the law. Price, *Enforcement Discretion*, *supra* note 1, at 748-49.

60. *See, e.g.*, A. Shea Daley Burdette & Jacob Carruthers, Note, *Judicial Review of Prosecutorial Blanket Declination Policies*, 20 OHIO ST. J. CRIM. L. 179, 184 (2023) ("[T]he explosion of criminal statutes makes it impossible to sanction every technical violation."); Price, *Enforcement Discretion*, *supra* note 1, at 746 ("Congress, to be sure, has made enforcement discretion inevitable by enacting overly broad prohibitions and by failing to appropriate adequate resources for full enforcement."); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 609 (2020) ("[P]rosecutors inevitably make policy decisions not just about the limits of available resources but also about which laws they should enforce with those limited resources."); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 829 (2020) ("The decision of an individual prosecutor to decline charges in a single case is unremarkable.").

C. The Debate over Nonenforcement

It is against this backdrop consensus of the inevitability of nonenforcement that the academic debate over nonenforcement occurs. Within that debate, much of the writing on this topic can be classified as falling into one of two camps—the nonenforcement minimalists and the nonenforcement maximalists.[61] The nonenforcement minimalists prefer to make nonenforcement decisions a matter for line prosecutors who, though largely left to their own devices about when to decline to prosecute, are presumed to act mostly based on evidentiary concerns or possibly resource constraints. Nonenforcement maximalists, on the other hand, see a larger role for chief prosecutors, who can increase nonenforcement through office-wide policies, including policies that lead to routine nonenforcement in cases involving less serious crimes.

These nonenforcement minimalists and nonenforcement maximalists offer various justifications for their positions. Some of those justifications sound in principle, such as arguments about the appropriate allocation of constitutional powers and the facilitation of democracy and local control.[62] Other arguments focus on consequences—what has been or will be the effect of broad prosecutorial nonenforcement.[63]

To be clear, the terms "minimalists" and "maximalists" represent a simplification of a complex literature; they may obscure real differences of opinion. Kerrel Murray, for example, offers a justification of prosecutorial nonenforcement that sounds in democratic theory; he does not defend the practice on the grounds that it will reduce mass incarceration.[64] Nonetheless, we use these categories and labels because they offer a useful shorthand for mapping a broad debate—namely the debate over whether prosecutorial

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61. We are not the first to highlight this debate. *See* Wright, *supra* note 60, at 825-26 ("[P]rosecutors' announcements about their declination plans have prompted controversy about ... when those declinations should be deemed legitimate or illegitimate. One approach to this question—one might call it the 'leniency option'—validates prosecutorial leniency in almost every form.... Another school of thought—one might call it the 'individuals-only option'—draws a line between case-by-case declinations (which are seen as acceptable) and categorical decisions to decline charges (which are not).").

62. *See infra* notes 69-79, 94-102 and accompanying text.

63. *See infra* notes 83-91 and accompanying text.

64. *See* Murray, *Nullification*, *supra* note 1, at 179-80.

nonenforcement ought to be limited or whether it ought to be embraced.

1. Nonenforcement Minimalists

Nonenforcement minimalists are those scholars, commentators, and public officials who take a narrow view of the appropriate role of prosecutorial nonenforcement.[65] Many minimalists recognize—as discussed above—that some amount of nonenforcement is inevitable.[66] But they believe that nonenforcement should be limited, and that it ought to occur on a case-by-case basis.[67] In their view, broadly applicable nonenforcement policies are beyond the legitimate scope of prosecutorial discretion.

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65. *See, e.g.*, Burdette & Carruthers, *supra* note 60; Delahunty & Yoo, *supra* note 1; John E. Foster, Note, *Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511 (2019); Green & Roiphe, *Fiduciary Theory*, *supra* note 1; John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1997); Kent et al., *supra* note 1; Price, *Faithful Execution*, *supra* note 1; Price, *Enforcement Discretion*, *supra* note 1; Stimson et al., *Blue City Murder Problem*, *supra* note 15; *see also* Fla. Exec. Order No. 22-176 (Aug. 4, 2022) (suspending Hillsborough County State Attorney Andrew Warren from office based on his nonenforcement policies); William P. Barr, Att'y Gen., U.S. Dep't of Just., Address at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference (Aug. 12, 2019), https://www.justice.gov/opa/speech/attomey-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th [https://perma.cc/ZVY8-JNGU] (critiquing progressive prosecutors' nonenforcement policies as causing increasing crime rates); Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association Is Throwing a Fit over Prosecutorial Discretion*, SLATE (Jan. 4, 2019, at 12:55 ET) [hereinafter Hessick & Hessick, *National Police Association*], https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html [https://perma.cc/MNY4-V9AV] (describing an ethics complaint filed by National Police Association against Rachael Rollins based on her nonenforcement policies); 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, at 00:00 CT), https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/ [https://perma.cc/ZDL8-UVMN] (describing backlash against Dallas County District Attorney John Creuzot in response to his nonenforcement policies). To clarify, some, but not all, of the authors cited here are minimalists themselves—others simply describe or document anti-nonenforcement arguments made by minimalists.

66. *See supra* Part I.B.

67. *See, e.g.*, Wright, *supra* note 60, at 835-36 ("Some critics of declination policies ... conclude that prosecutors should restrict themselves to declinations for individual cases and should avoid general and prospective policies.").

Minimalist arguments fall into two broad categories: (a) arguments based on principles[68] and (b) arguments about consequences. Turning to the arguments about principles first, there are three major arguments. First, some nonenforcement minimalists argue that prosecutorial nonenforcement threatens the proper separation of powers by usurping the role of the legislature as the lawmaker.[69] Minimalists argue that prosecutors usurp the role of the legislature when they use nonenforcement policies, rather than pure case-by-case evaluations, to decide which cases to prosecute.[70] Central to this constitutional argument is the idea that broad nonenforcement policies have the effect of rewriting the law.[71] As Zachary Price puts

68. Generally, these minimalist arguments rely on federal constitutional principles, and some extend beyond criminal prosecution to agency action as well. *See, e.g.*, Delahunty & Yoo, *supra* note 1, at 792-96, 796-835; Kent et al., *supra* note 1, at 2178-91. It is far from obvious that these federal constitutional principles ought to apply to state prosecutorial nonenforcement because not all states have adopted the federal approach to the separation of powers. *See, e.g.*, F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 65-75 (2014) (detailing how state and federal notions of judicial power differ). Indeed, some states classify prosecutors as members of the judicial branch—a difference that would presumably affect any constitutional analysis about their appropriate role. *See* Hessick & Su, *supra* note 6, at 1685-88. For an analysis of the differences between state and federal law on issues of nonenforcement, see Price, *Faithful Execution*, *supra* note 1, at 694-736 (surveying state laws).

69. The doctrine of separation of powers is a fundamental constitutional principle that has a role in many areas of law. In criminal law, scholars conceptualize the separation of powers as a way to protect individual liberty. Carissa Byrne Hessick, Response, *Separation of Powers Versus Checks and Balances in the Criminal Justice System: A Response to Professor Epps*, 74 VAND. L. REV. EN BANC 159, 159-60 (2021). This is accomplished by requiring agreement by each branch of government before a person can be criminally punished for their conduct. Under the separation of powers, the legislature must criminalize specific conduct, the executive enforces the law against a specific person, and the judiciary decides whether the person's conduct falls within the scope of the law. *Id.* at 159. A prosecutor's role in this framework is in the second step—enforcing the law against a specific person. But critics argue that broad nonenforcement policies reach into the first step by deciding whether to criminalize certain conduct in the first place. *E.g.*, Price, *Enforcement Discretion*, *supra* note 1, at 705.

70. Burdette & Carruthers, *supra* note 60, at 188; Price, *Enforcement Discretion*, *supra* note 1, at 748-49. Case-by-case nonenforcement is widely viewed as an acceptable method for prosecutors to fulfill their obligation to seek justice. *See, e.g.*, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (A.B.A. 2017).

71. Logan Sawyer frames the general argument, saying that when prosecutors make "generally applicable prospective rules, they arguably change the law and thus encroach on the authority of the legislature." Sawyer, *supra* note 60, at 618. Sawyer appears to accept that a formalist account of the separation of powers does not permit prosecutors to adopt nonenforcement policies. *Id.* at 621-22. He is, however, a nonenforcement maximalist. In his article on the topic, he encourages courts to take a functional, rather than a formal, approach to the separation of powers and deem nonenforcement policies to be constitutional. *Id.* at 627-32.

it, when prosecutors adopt rules about how they will exercise their nonenforcement discretion, they have usurped the role of the legislature by "curtail[ing] the statute" that the legislature enacted and "replacing it with a narrower prohibition" than intended.[72] He argues that the encroachment on legislative power is exacerbated when prosecutors publicly announce their nonenforcement policies—as has become increasingly common in the progressive prosecution movement—because it magnifies the overreach by "effectively supplanting the legislature's primary role in establishing conduct rules" for the public.[73] These arguments lead Price to conclude that, although the constitutional structure contemplates executive enforcement discretion, discretionary decisions not to prosecute must be made on a case-by-case basis.[74]

A second constitutional argument against prosecutorial nonenforcement is that prosecutors have an affirmative duty to enforce the laws.[75] Sometimes the affirmative duty argument is framed as a constitutional argument that prosecutors have a duty to faithfully execute the criminal laws.[76] This faithful execution argument is rooted in the U.S. Constitution's Take Care Clause, as well as in similar state constitutional and statutory provisions.[77] This critique

72. Price, *Enforcement Discretion*, *supra* note 1, at 705.

73. Price, *Faithful Execution*, *supra* note 1, at 671. For a similar argument, see Burdette & Carruthers, *supra* note 60, at 193.

74. Price, *Enforcement Discretion*, *supra* note 1, at 716, 749. Price does acknowledge that full enforcement is not practical, but he argues that when nonenforcement is inevitable, the executive should set priorities that comply with statutory policy rather than make policy-based exceptions to the law. *Id.* at 748-49.

75. There is also a nonconstitutional version of the affirmative duty argument—namely that broad nonenforcement represents a neglect of duty. Florida Governor Ron DeSantis made this argument when removing two elected prosecutors from office. *See* Fla. Exec. Order No. 22-176 (Aug. 4, 2022); Fla. Exec. Order No. 23-160 (Aug. 9, 2023); *see also* Parsh, *supra* note 5, at 577-89 (categorizing the mechanisms for removing elected prosecutors from office, including stated reasons for removal). In that framing, prosecutors are free to make case-by-case decisions not to prosecute, but broad policies against prosecution are deemed an abdication of discretion, rather than an exercise of discretion. *See* Ayala v. Scott, 224 So. 3d 755, 758-59 (Fla. 2017). *But see* Hessick & Hessick, *Fact, Policy, and Discretion*, *supra* note 25 (arguing that discretion necessarily requires the application of general principles, and thus policies and categorial rules do not represent an abdication of discretion).

76. Article II of the Constitution requires that the President "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. The President's oath of office also implies a duty of faithful execution: "I will faithfully execute the Office of President." U.S. CONST. art. II, § 1.

77. A version of the Take Care Clause is contained in the constitutions of all fifty states, extending the duty of faithful execution to state executives as well. Mila Sohoni, *Crackdowns*,

of nonenforcement deems categorical and prospective nonenforcement policies unconstitutional, particularly when driven by policy-based considerations.[78] Robert Delahunty and John Yoo, for example, argue that the legal and historical context surrounding the Take Care Clause authorizes only individualized nonenforcement decisions in particular cases, and their analysis traces the clause's origins from English law through the Constitutional Convention.[79]

Bruce Green and Rebecca Roiphe have offered a novel, non-constitutional version of the affirmative duty argument, grounded in the theory of fiduciary duties. They argue that prosecutors have a duty to carry out the "public's abstract interest in justice" by using their professional expertise to make decisions based on the facts of individual cases.[80] Categorical nonenforcement policies violate this duty, so the argument goes, because they eliminate the exercise of professional judgment.[81] Green and Roiphe also invoke democratic norms to support their theory, claiming that elected prosecutors' nonenforcement polices violate the fiduciary duty because they are based only on the views of their supporters and fail to account for the preferences of their entire electorate.[82]

In addition to their arguments about principles, nonenforcement minimalists often base their criticism on concerns about the effects of prosecutorial nonenforcement on public safety. Most often, these arguments are about whether nonenforcement policies will increase

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103 VA. L. REV. 31, 89 n.269 (2017). Zachary Price relies on these constitutional provisions, statutes, court opinions, and other sources to determine the extent to which positive law in the states allows or constrains local prosecutorial nonenforcement policy. Price, *Faithful Execution*, *supra* note 1.

78. Those who make this argument interpret the Take Care Clause as a command that the President ensure that the laws in effect are enforced. *See* Price, *Enforcement Discretion*, *supra* note 1, at 689. Although there is some uncertainty as to the full breadth of "the Laws," they argue that, at the very least, it includes laws enacted by Congress. Kent et al., *supra* note 1, at 2136-37; Price, *Enforcement Discretion*, *supra* note 1, at 688. This is seen as a structural feature of the Constitution in which the executive is subordinate to the legislature when it comes to lawmaking, and thus when the legislature has already acted, the executive cannot make the law. *See* Price, *Enforcement Discretion*, *supra* note 1, at 689.

79. *See generally* Delahunty & Yoo, *supra* note 1 (arguing that the legal and historical context surrounding the Take Care Clause authorizes only individualized nonenforcement decisions in particular cases).

80. Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1451.

81. *Id.* at 1454 (claiming that Alvin Bragg "foreswore the exercise of judgment" with his Day One Policy Memo).

82. *Id.* at 1448.

or decrease crime. Sometimes the arguments are empirical; those who make them point to changes in crime rates and claim that those changes are attributable to nonenforcement policies. Such arguments are quite common outside of the academic literature.[83] For example, a series of publications from fellows at the Heritage Foundation claims that recent crime increases are attributable to progressive prosecutors who adopted nonenforcement policies.[84] And public safety concerns appear to have played a large role in the successful recall campaign against former San Francisco District Attorney Chesa Boudin, in which his opponents pointed to rising retail theft and high-profile instances of violent crime as evidence of his policies' failures.[85]

But not all public safety arguments are empirical arguments about what nonenforcement has caused. Sometimes they are predictive claims about what is likely to happen if nonenforcement policies are adopted or announced. For some minimalists, the adoption of broad nonenforcement policies will inevitably lead to lawlessness.[86] But others specifically criticize the public announcement of nonenforcement policies because such announcements may "encourage or authorize illegal conduct by providing prospective assurances that those who engage in it will face no repercussions."[87]

This prospective authorization critique is not just about the broad nature of the policies; it also focuses on prosecutors publicly announcing their nonenforcement policies, as opposed to quietly following internal guidelines as has traditionally been the norm.[88] Although evidence suggests that prosecutors have a long history of

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83. *E.g.*, Barr, *supra* note 65 (arguing that progressive prosecutors are "refusing to enforce the law" which is "dangerous to public safety").

84. *See, e.g.*, SMITH & STIMSON, *supra* note 6; Stimson et al., *Blue City Murder Problem*, *supra* note 15; CHARLES STIMSON & ZACH SMITH, HERITAGE FOUND., "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 2 (Oct. 29, 2020) [hereinafter STIMSON & SMITH, "PROGRESSIVE" PROSECUTORS], https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore [https://perma.cc/77R9-QGYV].

85. *See, e.g.*, Benjamin Wallace-Wells, *Why San Francisco Fired Chesa Boudin*, NEW YORKER (June 8, 2022), https://www.newyorker.com/news/the-political-scene/why-san-francisco-fired-chesa-boudin [https://perma.cc/LS89-F9JJ].

86. STIMSON & SMITH, "PROGRESSIVE" PROSECUTORS, *supra* note 84, at 2 ("Violent crime increases in cities where ... [progressive] prosecutors have been elected.").

87. Price, *Faithful Execution*, *supra* note 1, at 667.

88. Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1440.

broadly not enforcing certain laws,[89] the announcement of such decisions appears to be a relatively recent—and limited— phenomenon.[90] Minimalists criticize this new transparency, arguing that it weakens the deterrence effect of the criminal justice system and threatens the rule of law.[91]

2. Nonenforcement Maximalists

Nonenforcement maximalists are those who take an expansive view of the appropriate role of prosecutorial nonenforcement.[92] Like the minimalists, nonenforcement maximalists make both principled and consequentialist arguments. But their underlying contention is that prosecutors should be free to use their nonenforcement powers more broadly, and not simply in case-by-case determinations.[93]

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89. *See* Murray, *Prosecutorial Reform*, *supra* note 1, at 1467-91; Wallace, *supra* note 43, at 348.

90. See ENFORCING MARIJUANA PROHIBITIONS, *supra* note 35, at 3, 5, 9, 13 (reporting that more than half of surveyed prosecutor offices had adopted policies of less than full enforcement in possession of marijuana cases, and only 19 percent of offices had publicly announced their office policy on enforcement).

91. Price, *Faithful Execution*, *supra* note 1, at 670 ("[M]ore categorical, transparent, and determinate nonenforcement presents an increasing challenge to the rule of law, if by the rule of law one means the governance of society by conduct rules established through either legislation or an express delegation of lawmaking power."); STIMSON & SMITH, "PROGRESSIVE" PROSECUTORS, *supra* note 84, at 23 (quoting a news article for the idea that announcing the intention not to prosecute certain crimes is an "invitation" for would-be criminals to move to a particular jurisdiction); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 854 (2020) (arguing that transparency can threaten prosecutorial independence and jeopardize the integrity of investigations).

92. *See, e.g.*, Blair & Krinsky, *supra* note 41, at 6; Murray, *Nullification*, *supra* note 1, at 181; Sawyer, *supra* note 60, at 608-09; Olwyn Conway, *Beyond Binary Thinking: Addressing the Biases That Threaten the Progressive Prosecution Movement*, 19 OHIO ST. J. CRIM. L. 1, 2 (2021); Angela J. Davis, *Can a Good Person Be a Good Prosecutor?*, 87 FORDHAM L. REV. ONLINE 8, 12 (2018) [hereinafter Davis, *Good Prosecutor*]; Rebecca S. Goldstein, *Toplash: Progressive Prosecutors Under Attack From Above*, 61 AM. CRIM. L. REV. 1157, 1187-89 (2024); Kay L. Levine, Joshua C. Hinkle & Elizabeth Griffiths, *Making Deflection the New Diversion for Drug Offenders*, 19 OHIO ST. J. CRIM. L. 75, 80-82 (2021); Markowitz, *supra* note 2, at 493-94; Cody McGraw, Comment, *Prosecuting with Compassion, Defending with Power: Progressive Prosecutors and the Case for Rehabilitative Justice*, 9 PENN ST. J.L. & INT'L AFFS. 261, 264 (2021); Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23, 26 (2021).

93. Some scholars who we have identified as maximalists do not directly advocate for nonenforcement or explicitly take a side in the ongoing debate. Identifying these individuals as maximalists requires an inferential step based on their arguments. For example, many arguments advocating for reducing incarceration rates encourage prosecutors to use their

The primary maximalist argument grounded in principle is one of democratic and local control.[94] Kerrel Murray traces the legitimacy of broad prosecutorial nonenforcement discretion to the democratic endorsement of a prosecutor's policy platform through elections.[95] By this account, prosecutors can "draw on an electorally granted signal of popular will for the special authorization needed to take the drastic step of categorically nullifying" an offense so long as they "specifically target[] those offenses for nullification pre-election."[96] He analogizes nonenforcement to jury nullification, which similarly allows local communities to directly express their preferences in the criminal justice system.[97] Murray's account of nonenforcement legitimacy requires prosecutors to be explicit and specific about which laws they will not enforce.[98] According to Murray, that transparency both gives the eventual policy its legitimacy, and allows voters to hold prosecutors accountable if they do not follow through.[99]

Murray is not alone in discussing transparency as an important guarantor of democratic control over prosecutorial nonenforcement.[100] Other maximalists likewise argue that the electorate

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discretion to seek alternatives to incarceration or seek lower sentences and thus align with maximalist arguments in favor of broadly exercising nonenforcement powers. *See* R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 983 (2014); Angela Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1064-65 (2016) [hereinafter Davis, *Ethical Duty*]; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 196-202, 205-32 (2017). Others write in favor of the progressive prosecution movement without specifically discussing nonenforcement. *See, e.g.*, David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS. L. REV. ONLINE 25, 27 (2017).

94. *See, e.g.*, Sawyer, *supra* note 60, at 632 (discussing local prosecution jurisdictions as potential "laboratories of democracy"); Goldstein, *supra* note 92, at 1161-62, 1187-89 (framing state-level attacks on progressive prosecutors as ideological battles between Republican state-level officials and Democratic urban voters and their elected officials); Blair & Krinsky, *supra* note 41, at 24-28.

95. Murray, *Nullification*, *supra* note 1, at 179-81.

96. *Id.* at 249-50 (discussing the death penalty).

97. *Id.* at 217.

98. *Id.* at 235.

99. *Id.* at 229-33.

100. Jessica Roth, for example, has argued that when prosecutors increase the transparency of their nonenforcement decisions, both victims and the public can better understand the reasoning of these important decisions. Roth, *supra* note 1, at 484-85. And Sawyer—in response to minimalists' separation of powers concerns about broad prosecutorial discretion—argues that greater transparency about prosecutors' policies helps the legislative

cannot express their preferences if they do not know a prosecutor's policies.[101] Logan Sawyer, for example, goes a step further, arguing that transparency has the added benefit of sparking broader conversations about the merits of criminal justice reform efforts that are not limited to a prosecutor's local jurisdiction.[102] Such conversations allow greater democratic engagement and input across the country.

In addition to the benefits of democratic responsiveness, maximalists also argue that expanded prosecutorial nonenforcement can lead to greater consistency, as well as to justice. Maximalists argue that case-by-case nonenforcement—especially nonenforcement that is not guided by more general policies—can lead to arbitrary and potentially discriminatory decisions.[103] The adoption of nonenforcement policies, so the argument goes, standardizes decision-making and reduces the potential influence of inappropriate extralegal factors (such as race or socioeconomic status) by dictating boundaries within which decisions can be made.[104]

Principled arguments, however, are less prominent among maximalists than are consequentialist arguments. Indeed, the most prominent argument in favor of broad nonenforcement is that it will result in a reduction in the number of people who are brought into the criminal justice system.[105] Maximalists repeatedly tout the

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and judicial branches act as checks on prosecutorial power. Sawyer, *supra* note 60, at 629-32.

101. *E.g.*, Fairfax, Jr., *supra* note 1, at 1268-69 (noting that nonenforcement decisions often lack democratic accountability because of "the failure of the electoral process to highlight prosecutorial policies for voter consideration" and because of a low level of transparency); *see also* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 768 (1996) (arguing that prosecutors be required to adopt guidelines about how they will use their finite resources because, inter alia, "the electorate will better be able to review the prosecutor's effectiveness and compare the prosecutor's strategy to the strategy of any political challenger").

102. Sawyer, *supra* note 60, at 632 (discussing local prosecution jurisdictions as potential "laboratories of democracy").

103. DAVIS, ARBITRARY JUSTICE, *supra* note 2, at 17.

104. *Cf.* MIRIAM ARONI KRINSKY, CHANGE FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR 15-16 (2022) (describing Chesa Boudin's decision to adopt a "policy declining to prosecute contraband criminal cases stemming from pretextual traffic stops" on the theory that those stops are made on an arbitrary and discriminatory basis). Indeed, others have noted that prosecutorial nonenforcement is an important check on the police. *E.g.*, Natapoff, *supra* note 1, at 966-68.

105. *See* Zeidman, *supra* note 92, at 30; Davis, *Good Prosecutor*, *supra* note 92, at 8-10 (discussing the need to "implement[ ] a new model of prosecution that focuses on alternatives to incarceration and second chances").

ability of broad prosecutorial nonenforcement policies to give prosecutors the flexibility to seek a different vision of justice for their communities. For example, Arlington, Virginia, Commonwealth's Attorney Parisa Dehghani-Tafti described the importance of using her power to create a system in which "[n]ot every social ill [is] criminalized, and not everything that's criminalized has to be punished."[106] Other maximalists point to prosecutors as major, yet often overlooked, drivers of mass incarceration,[107] and they argue that broad nonenforcement can be used to help remedy that problem. In this context, maximalists argue that prosecutors should exercise their discretion to pursue "justice" by choosing not to enforce charges carrying mandatory minimum sentences and expanding the use of diversion and dismissals.[108]

While the argument that broad nonenforcement allows prosecutors to better achieve just outcomes is most often framed as the ability to reduce punitiveness generally, sometimes it is framed in more specific terms. For example, sometimes it is framed in terms of allowing prosecutors to ameliorate the disproportionate racial effects of tough-on-crime policies.[109]

Nonenforcement maximalists also frequently discuss the effects of nonenforcement on public safety. Sometimes maximalists simply push back against minimalists' public safety arguments, noting that crime also rose—sometimes at a higher rate—in jurisdictions where prosecutors had not adopted nonenforcement policies,[110] or pointing

106. KRINSKY, *supra* note 104, at 57.

107. *See, e.g.*, PFAFF, *supra* note 93 (arguing that prosecutors are overlooked contributors to mass incarceration and proposing reforms to reduce incarceration rates).

108. *See, e.g.*, Davis, *Ethical Duty*, *supra* note 93; Cassidy, *supra* note 93. As we noted above, whether diversion is a form of nonenforcement is a matter of some disagreement. *See supra* note 35 and accompanying text.

109. Davis, *Good Prosecutor*, *supra* note 92, at 8-9, 11-12 (discussing racial disparity and the need for racial equity as an important basis for the exercise of prosecutorial discretion); Zeidman, *supra* note 92, at 30 ("[T]he interests of justice and racial equality dictate that prosecutors should decline to prosecute any arrest that falls under the rubric of 'Broken Windows,' 'quality of life,' or 'zero tolerance' policing.").

110. *Cf.* German Lopez, *Crime is Nonpartisan,* N.Y. TIMES (Aug. 31, 2023), https://www.nytimes.com/2023/08/31/briefing/crime.html [https://perma.cc/GVR3-HR38] (discussing crime rates in Republican-led cities as compared to Democrat-led cities and the political debate surrounding those rates).

to studies that found no relationship between prosecutors who adopt nonenforcement policies and rising crime rates.[111]

Other maximalists also make an affirmative public safety argument—namely that nonenforcement policies can actually reduce crime. This affirmative public safety argument takes a few different forms. Sometimes it takes an empirical form, invoking a recent study which suggests that keeping minor offenders out of the criminal justice system decreases future offending by those individuals.[112] Other times the argument is predictive, claiming that purposeful nonenforcement of minor crimes will allow prosecutors to successfully prosecute more serious crimes.[113] In other words, nonenforcement maximalists argue that nonenforcement policies have the potential to decrease crime.

II. A TAXONOMY OF NONENFORCEMENT DECISIONS

As noted above, there is an academic consensus that some prosecutorial nonenforcement is inevitable, but how that nonenforcement ought to occur has not generated a similar consensus. Some argue for a minimalist view of nonenforcement, which occurs only on a case-by-case basis and is justified only by a limited number of reasons. Others advocate for a maximalist view, in which the adoption of nonenforcement policies is constrained only by notions of fairness and justice. These competing visions of nonenforcement differ on key variables—including how nonenforcement decisions are made, why the decisions are made, and who makes the decisions.

The key distinctions between methods of nonenforcement, reasons for nonenforcement, and nonenforcement decision makers are

111. One example of such a study is Todd Foglesong, Ron Levi, Rick Rosenfeld, Heather Shoenfeld, Jennifer Wood, Don Stemen & Andres Rengifo, *Public Prosecution and Violent Crime: A Review of Recent Data on Homicide and Progressive Prosecution in the United States*, GLOB. JUST. LAB (Oct. 29, 2022), https://munkschool.utoronto.ca/research/violent-crime-and-public-prosecution [https://perma.cc/DZE9-HC4E].

112. That study is Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, 138 Q.J. ECON. 1453 (2023). For arguments consistent with the study's findings, see Rachel S. Rollins, *Holding Prosecutor Offices Accountable: The Suffolk County District Attorney's Office's Approach to Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 564, 566 (2021); Blair & Krinsky, *supra* note 41, at 19.

113. Blair & Krinsky, *supra* note 41, at 21.

sometimes obscured by different features of the nonenforcement debate, in part because of ambiguous terminology. For example, Justin Murray has observed that scholars ascribe both narrow and broad meanings to the term "categorical nonenforcement," and that the term "categorical" is itself "marked by a fundamental ambiguity."[114] As a result, the debate over whether "categorical" nonenforcement policies are constitutional or desirable can be confusing.

Similarly, in the debate over the appropriate reasons for nonenforcement, the term "policy reasons" suffers from a lack of precision. Some have argued that nonenforcement decisions may be based on evidentiary concerns and resource constraints but ought not be based on "policy" reasons.[115] What, precisely, qualifies as a policy reason remains murky. Indeed, evidentiary concerns and resource constraints may often include considerations that could credibly be categorized as "policy."

Finally, much of the existing scholarship focuses either on the role of the head prosecutor in deciding which nonenforcement methods to employ or the role that the line prosecutor plays (or should play) in making case-by-case decisions.[116] These actors operationalize both the nonenforcement methods and reasons behind those decisions. Yet, there is a third nonenforcement decision maker—the supervisory prosecutor—who plays a unique role that contributes to both the creation and implementation of nonenforcement policies alongside the head prosecutor and the line prosecutor.[117]

To help improve the debate over prosecutorial nonenforcement in the academic literature, this Section offers a multifaceted framework through which to better understand the nuances of prosecutorial nonenforcement. It specifically avoids using some

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114. *See* Murray, *Prosecutorial Reform*, *supra* note 1, at 1461-62.

115. *See, e.g.*, Price, *Enforcement Discretion*, *supra* note 1, at 754.

116. *See, e.g.*, KRINSKY, *supra* note 104; Green & Roiphe, *Fiduciary Theory*, *supra* note 1; Zeidman, *supra* note 92.

117. Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1138 (2012) ("A supervisor leads each group and develops group-specific policies to supplement the office-wide policies. Team supervisors create a middle level of management for the office, although in smaller offices the Elected might personally supervise each of the specialty units.").

common terms because they are contested, and thus their usefulness is limited by this lack of clarity. Instead, this Section disaggregates three elements of prosecutorial nonenforcement to bring greater clarity and nuance to the academic understanding of this area. First, it will describe the different methods through which nonenforcement decisions are made. Next, it will identify the various reasons that motivate nonenforcement decisions. Finally, this Section identifies the decision makers who are involved in a nonenforcement decision and act as the filter through which the other elements are implemented.

A. Nonenforcement Methods

This Subsection examines the methods through which nonenforcement decisions are made, organized by the amount of discretion that individual prosecutors have when making those decisions. A prosecutor has the most discretion when nonenforcement decisions are left entirely in her hands and can be made on an ad hoc basis. A prosecutor has the least amount of discretion when nonenforcement decisions are governed by mandatory policies. In between these two extremes are enforcement priorities and presumptions against enforcement.

To a certain extent, the nonenforcement methods described here can be thought of in terms of rules versus standards. Mandatory nonenforcement policies are like rules that leave prosecutors with the least amount of discretion because their decision is primarily a factual one: Either the case is a type that falls within the scope of the nonenforcement policy, or it is not. In contrast, enforcement priorities and presumptions against enforcement resemble standards; they require prosecutors to exercise their judgment by examining the facts of a case to determine whether and how to apply the nonenforcement policy.[118]

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118. Ad hoc decision-making is arguably neither a rule nor a standard because it does not provide any criteria for decision makers. In practice, however, ad hoc decision-making is probably best thought of as the application of very broad standards because there are broad principles that *all* prosecutors likely consider—even in the absence of criteria—when deciding whether to pursue a case, such as the strength of the evidence and the seriousness of the crime. *Cf.* Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIF. L. REV. 447, 450 n.13 (2016) (arguing that "implicit standards" guided judicial discretion in

The categories in this Subsection do not match up neatly with some of the language that is often used to describe nonenforcement decisions. Most notably, we do not use the terms "enforcement criteria" or "categorical policies" to distinguish between different approaches to nonenforcement because both terms can be imprecise—enforcement criteria can be mandatory or presumptive, and the term "categorical" has been used in ways that are inconsistent with the linguistic meaning of that word. By creating categories that focus on the effect that different approaches have on a prosecutor's discretion, we hope to bring more clarity to this topic.

1. Ad Hoc Decision-Making

At the most extreme end of individualized nonenforcement decision-making is ad hoc discretion. Ad hoc decision-making allows individual prosecutors to decide whether to pursue a case without formal or informal policies to guide their discretion.[119] The lack of policies or guidelines beyond the terms of the statute itself means that nonenforcement decisions always require case-by-case decision-making. To be clear, ad hoc decision-making does not mean that prosecutors make decisions based on mere whim.[120] Prosecutors use their professional judgment, informed by personal standards, institutional norms, and legal rules, to determine whether to decline prosecution in a particular case.[121] But while these considerations inform how prosecutors exercise their discretion, ad hoc decision-making allows individual prosecutors to make decisions as they see fit, without the constraint of nonenforcement policies.

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pre-guideline sentencing even though "no formal standards governed judicial sentencing practice" because "judges nonetheless regularly acknowledged a small set of theoretical purposes—retribution, deterrence, and rehabilitation—as establishing the framework within which sentencing decision making was expected to occur").

119. *See* John A. Lundquist, Comment, *Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485, 501 (1971).

120. *See* United States v. Redondo-Lemos, 955 F.2d 1296, 1299 (9th Cir. 1992) ("Given the significance of the prosecutor's charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.").

121. *Cf.* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 846-47 (2004) (noting the "norms of conduct that affect how prosecutors exercise their powers" as well as the informal mechanisms that set boundaries).

One example of ad hoc decision-making can be found in Angela Davis's description of a hypothetical prosecutor faced with multiple pending burglary charges.[122] She explains how the prosecutor might consider things like the victim's interest, the strength of the evidence, and the defendant's prior criminal record in deciding whether to prosecute or dismiss a case.[123] As Davis's hypothetical shows, in a system of ad hoc decisions, a prosecutor considers each case individually and uses her own judgment to prioritize cases. Nonetheless, a prosecutor may take the same approach to these decisions as other prosecutors. That is because, even without formal or informal enforcement policies in place, many prosecutors will tend to consider similar factors in deciding whether to pursue a case.[124]

Of course, the fact that nonenforcement decisions are made on an ad hoc basis does not necessarily mean that the prosecutor has unlimited authority regarding whether to pursue prosecution. For example, an ad hoc nonprosecution decision might be subject to review by a supervising attorney, who can overrule the decision not to prosecute.[125] This office structure constrains line prosecutor discretion because, even if a chief prosecutor does not constrain line prosecutors' discretion through ex ante policies, the line prosecutors are still subordinate to the supervisor, and the supervisor is empowered to overrule the line prosecutors' decisions ex post. Indeed, even those prosecutors who are given a lot of discretion recognize that the head prosecutor is accountable for the office's work.[126] As one line prosecutor explained in an interview: "You've

122. DAVIS, ARBITRARY JUSTICE, *supra* note 2, at 35-38.

123. Davis gives the hypothetical in order to illustrate that, even when employing these routine considerations, a prosecutor's decision may be affected by subconscious bias about race and class. *Id.* For example, in Davis's Case A versus Case B example, she notes that the prosecutor may have subconsciously felt more comfortable meeting with the college professor victim in Case B (the charges that he decides to pursue), as opposed to the victim in Case A (the charges that he decides to dismiss) who lives in a rundown apartment with no phone. *Id.*

124. *Id.* at 34-38.

125. *See infra* Part II.C.2.

126. In other words, while ad hoc decision-making gives line prosecutors significant explicit discretion, they may have little *de facto* discretion if their decisions are subject to strict supervisory review. *See supra* Part I.A.

got to remember [that] you work for the guy whose name's on the door, at the end of the day ... we're soldiers in this army."[127]

2. Enforcement Priorities

Enforcement priorities are policies that place a thumb on the scale in favor of prosecuting—or not prosecuting—certain offenses. In the nonenforcement context, prosecutors typically frame these policies in terms of assigning low priority to certain offenses. Assigning low priority to some offenses allows the office to focus more resources and attention on high priority offenses.

Although they have not captured much attention in the nonenforcement debate, enforcement priorities appear to be quite common.[128] The DOJ's Justice Manual, for example, indicates that the Attorney General "may establish national investigative and prosecutorial priorities," which are "designed to focus federal law enforcement efforts."[129] In addition to these national priorities, "individual United States Attorneys are required to establish their own priorities (in consultation with law enforcement authorities), within the national priorities, in order to concentrate their resources on problems of particular local or regional significance."[130]

While enforcement priorities provide some guidance, in the absence of particularized guidelines for how to act on these priorities, prosecutors retain discretion over how to satisfy these policies. For example, if an office has adopted a policy of prioritizing gun

127. Levine & Wright, *supra* note 117, at 1155-56 (internal quotations omitted).

128. While *enforcement* priorities appear to be common, *nonenforcement* priorities appear to be less common. That may be because prosecutors can deprioritize enforcement through means other than adopting policies that explicitly communicate which crimes should receive less priority. For example, reassigning prosecutors who were tasked with enforcing certain laws to other positions will result in fewer prosecutions under those laws. *See, e.g.*, Memorandum from Pam Bondi, Att'y Gen., to Dep't of Just. Emps., General Policy Regarding Charging, Plea Negotiations, and Sentencing 4 (Feb. 5, 2025) [hereinafter Bondi Memo], https://www.justice.gov/ag/media/1388541/dl?inline [https://perma.cc/3LUY-3Y48] (disbanding the DOJ's Foreign Influence Task Force and adopting a partial mandatory nonenforcement policy for the Foreign Agents Registration Act). As will shifting resources from certain types of enforcement to other types of enforcement. *See id.* (directing the ATF to "shift resources from its Alcohol and Tobacco Enforcement Programs to focus on matters relating to ... other priorities.").

129. U.S. Dep't of Just., Just. Manual § 9-27.230 (2018).

130. *Id.*

crimes, an individual prosecutor might interpret that priority as supporting a policy of offering favorable plea deals to each person suspected of committing a gun crime in order to ensure that all defendants are convicted. Another prosecutor might instead refuse to offer favorable plea deals to avoid defendants receiving less than the maximum punishment, even if that approach leads some defendants to insist on a trial and results in a few acquittals.

Of course, when it comes to nonenforcement, such differences may be less pronounced because assigning a low priority to certain types of cases is a signal to prosecutors that they should spend less time and effort prosecuting those cases. There may still be some differences in individual decisions—one prosecutor may elect to dismiss all low priority cases, while another may offer diversion or very generous plea deals.[131] In both situations the result is fewer cases ending in convictions and full punishment. Nonetheless, these potential differences illustrate how much discretion line prosecutors retain in an office that sets enforcement priorities. Priorities alone do not create the same type of decision criteria and preferred or required outcomes that are the hallmarks of presumptions against enforcement and mandatory nonenforcement policies.[132] Instead, enforcement priorities merely tell the prosecutors within an office where to focus their time and resources, leaving significant discretion to line prosecutors (and perhaps their supervisors)[133] to decide how to go about pursuing those priorities.[134]

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131. *Cf.* BRUCE FREDERICK & DON STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING—TECHNICAL REPORT, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 89-90 (2012) [hereinafter FREDERICK & STEMEN, FINAL REPORT], https://www.ojp.gov/ pdffiles1/nij/grants/240334.pdf [https://perma.cc/4GE9-D8YG] (reporting that resource constraints led one office to offer plea deals with very favorable terms and another office to decline and defer more cases).

132. *See infra* Parts II.A.3, II.A.4.

133. Supervisors may exercise discretion depending on how closely they review line prosecutors' decisions. *See infra* Part II.C.2.

134. In this regard, our description of enforcement priorities differs from what Zach Price refers to as "internal priorities." As we do, Price identifies "internal priorities" as one of several "potential approaches to prosecutorial enforcement." Price, *Faithful Execution*, *supra* note 1, at 666-68. But Price's "internal priorities" category includes not only informing line prosecutors "that certain offenses ... are low priorities for use of enforcement resources, while others ... are high priorities," but also the establishment of "internal guidelines about how recurrent types of cases should generally be treated." *Id.* at 667. We distinguish between the articulation of priorities and the creation of guidance and we also distinguish between different types of guidance. *Compare infra* Part II.A.3 (discussing various types of

3. Presumptions Against Enforcement

A presumption against enforcement operates as a default rule that can be overcome if a condition is met. The default is nonenforcement—an offense will not be prosecuted unless the facts of a specific case warrant enforcement.[135] Presumptive nonenforcement policies restrict discretion to prosecute to a greater degree than the mechanisms discussed above. But presumptions against enforcement still preserve case-by-case decision-making because prosecutors must evaluate the facts and circumstances of each case to assess whether the condition is met and the presumption has been overcome before deciding whether to prosecute an offense.

The default aspect of presumptive nonenforcement policies can be formulated in different ways. A policy could identify *particular crimes* that are presumptively not going to be enforced. For example, Philadelphia District Attorney Larry Krasner has a policy of declining any charges for marijuana possession, regardless of weight, in the absence of "extraordinary circumstances."[136] This is

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presumptions), *with infra* Part II.A.4 (discussing different types of mandatory policies). Unlike Price, we do not distinguish between policies that are communicated only within an office and those that are publicly announced. *See* Price, *Faithful Execution*, *supra* note 1, at 667. We do, however, address the public announcement of policies in our discussion of the tradeoff between transparency and public safety in Part III.D.

135. Importantly, offices can also adopt presumptions in favor of enforcement—that is, policies under which the default is prosecution, and the line prosecutor can overcome that default only by negating the presumption. One example of such a policy is the Obama Administration's Deferred Action for Childhood Arrivals (DACA) program. Under this immigration policy, certain individuals unlawfully residing in the United States could be eligible to have their removal proceedings deferred for renewable two-year periods and access work authorization. Kamin, *supra* note 1, at 192-93. The Department of Homeland Security articulated five criteria that made individuals eligible for deferred action, and it instructed line prosecutors that they could seek to defer proceedings in cases where those criteria were present. Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 5, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/U2L3-YUUM] (referring to the program as an exercise of individualized prosecutorial discretion within the authority of the executive branch).

136. Memorandum from Larry Krasner, Phila. Dist. Att'y, to Assistant Dist. Att'ys (Feb. 15, 2018) [hereinafter Krasner Memo], https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/L48K-64RE].

an example of a policy triggered by the particular crime. Alternatively, a policy could identify *certain factual circumstances* under which a presumption against enforcement attaches. An example of such a policy is former Hillsborough County State Attorney Andrew Warren's policy for charges arising from bicycle and pedestrian stops. Under Warren's policy, prosecutors were instructed that conduct that originated with "an initial encounter with law enforcement solely for a bicycle or pedestrian violation" should ordinarily not lead to charges.[137] However, the policy provided that "charges could be filed, with a supervisor's approval, if, 'based on the facts and circumstances of the case,' the 'public safety needs of the community' outweighed the presumption."[138] Both Warren's policy and Krasner's policy created presumptions, because they explicitly allowed for enforcement under at least some circumstances. The difference was the trigger for the default rule—namely, whether it applied to all charges for a particular crime (marijuana possession) or only to charges that implicated certain factual circumstances (any charges that originated solely from a bicycle or pedestrian violation).

Whether the nonenforcement default is triggered by the offense or is triggered by particular factual circumstances is not the only variation across presumptive nonenforcement policies. Presumptions against enforcement also have different types of conditions—that is to say, they have different formulations of how the presumption can be overcome. The Krasner and Warren policies described above set qualitative standards as the conditions necessary to overcome the presumption against enforcement. These qualitative standards—that is, whether "extraordinary circumstances" exist[139] or whether the "public safety needs of the community" overcome the presumption[140]—do not set bright lines for enforcement. Instead, they require the line prosecutor to make a professional judgment about what circumstances are "extraordinary" and what "public safety" requires. These standards leave quite a lot of discretion for

137. Warren v. DeSantis, 653 F. Supp. 3d 1118, 1127 (N.D. Fla. 2023), *vacated and remanded*, No. 23-10459, 2024 WL 105340 (11th Cir. Jan. 10, 2024), *vacated and superseded*, 90 F.4th 1115 (11th Cir. 2024), *and vacated and remanded*, 125 F.4th 1361 (11th Cir. 2025).

138. *Id.*

139. Krasner Memo, *supra* note 136.

140. *Warren*, 653 F. Supp. 3d at 1127.

prosecutors because they are written in general terms that require prosecutors to do more than simply assess the facts of a case; they must also exercise their own judgment to determine whether the qualitative standard has been satisfied.

Qualitative standards are not the only way to formulate presumptions against enforcement. The condition or conditions that may overcome a presumption can be written with far more specificity. Indeed, Andrew Warren adopted a second presumptive nonenforcement policy that gave much more specific guidance to prosecutors regarding how to overcome the presumption. The second Warren policy was adopted to deal with a backlog of cases in the wake of the coronavirus.[141] The policy set a presumption of nonenforcement for fifteen low-level offenses.[142] But rather than simply stating that the nonenforcement presumption could be overcome based on "extraordinary circumstances" or when "public safety needs of the community outweighed the presumption," this policy gave several specific examples of what factual circumstances could overcome the presumption—such as "pending felony charges, a violation of probation, or that the charge was part of a course of conduct that included other offenses."[143] Because the list of circumstances that could overcome the presumption was not exhaustive, it still gave line prosecutors the ability to exercise discretion on a case-by-case basis.[144] But the list itself gave more guidance than the general, qualitative standards in the first Warren policy and the Krasner policy discussed above.

To some extent, the list of circumstances in the second Warren policy appear to operate as enforcement criteria. Enforcement criteria are the facts or factors used to determine whether specific conduct will be prosecuted.[145] Enforcement criteria can be fact-

141. *Id.* at 1128.

142. *Id.*

143. *Id.* at 1127-28.

144. If prosecutors were not afforded such discretion—that is, if the list of conditions that could authorize enforcement were exhaustive, leaving no room for the line prosecutor to identify additional conditions—then the policy would not be a presumption against enforcement. Instead, it would be a mandatory policy. *Infra* Part II.A.4.

145. The concept of enforcement criteria is not limited to criminal law enforcement. Many administrative agencies use enforcement criteria to help guide their discretion regarding civil enforcement actions. *See, e.g.*, Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 240-42 (2004) (discussing enforcement criteria at the Securities and Exchange Commission);

specific, such as a minimum amount of drugs necessary to trigger enforcement of narcotics laws or a minimum dollar threshold for property crimes. For example, when Cook County District Attorney Kim Foxx took office, she adopted a policy of prosecuting retail theft of property worth less than $1,000 as a misdemeanor, even though state law set the threshold for felony charges at $300.[146] By imposing a higher dollar amount for felony charges than what the statute demanded, Foxx created an enforcement criterion.

While presumptions against enforcement can incorporate enforcement criteria, the two concepts are not interchangeable. Enforcement criteria can operate as the basis for a presumption against enforcement, and they can also serve as the basis for a mandatory nonenforcement policy (discussed below). What matters is the stated effect of an enforcement criterion. As explained more fully below, if enforcement is not permitted unless the enforcement criteria are met, then the policy at issue is a mandatory nonenforcement policy.[147] But if the criteria merely create a default of nonenforcement—a default that can be overcome by an additional showing—then the policy at issue is a presumption against enforcement. To return to the Foxx example, the policy explicitly allowed line prosecutors to bring felony charges against defendants who stole property worth less than $1,000 if the prosecutor believed it necessary under the circumstances of the case.[148] In other words, the higher dollar amount functioned only as a presumption against enforcement because prosecutors had the discretion to bring charges by identifying other, nonspecified facts that overcame the presumption.

Although presumptions against enforcement constrain the discretion of individual prosecutors, these policies still require

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Carol T. Crawford, *Unfairness and Deception Policy at the FTC: Clarifying the Commission's Role and Rules*, 54 ANTITRUST L.J. 303, 304-08 (1985) (discussing enforcement criteria for deception cases at the Federal Trade Commission).

146. Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB. (May 23, 2019, at 03:50 CT), https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html [https://perma.cc/4S3P-6MHU]. Notably, the policy did not apply to defendants who had a history of ten or more prior felony convictions. *See id.* In other words, the enforcement criterion of the dollar amount was further qualified by an enforcement criterion about the defendant's criminal history.

147. Specifically, it is a partial mandatory nonenforcement policy. *See infra* Part II.A.4.a.

148. Schmadeke, *supra* note 146.

prosecutors to exercise case-by-case discretion. Specifically, prosecutors must make individualized determinations about whether the presumption has been overcome. Interestingly, Florida Governor Ron DeSantis cited Warren's bicycle and pedestrian stop policy (among other decisions) to justify suspending Warren from office. DeSantis alleged that the policy did "not require 'case-specific' and 'individualized' determinations as to whether the facts warrant[ed] prosecution but instead [was] based on categorical exclusions of otherwise criminal conduct."[149] But a federal judge disagreed, finding that "this was not a blanket nonprosecution policy."[150] The judge noted that Warren's office filed charges in a case in which the presumption was rebutted, demonstrating that individualized discretion was alive and well under a presumption against enforcement policy.[151]

Of course, just because a line prosecutor believes the presumption is overcome, that does not necessarily mean she will be permitted to file charges. Some presumptions against enforcement require supervisor approval to bring charges.[152] In such offices, the supervisor will review the line prosecutor's proffered explanation for why charges are appropriate and make an independent determination of whether the presumption has, indeed, been overcome.[153] In other words, the fact that line prosecutors retain some discretion to bring charges under presumptions against enforcement does not mean they have the last word on the matter.

4. Mandatory Nonenforcement Policies

The most controversial nonenforcement method is the mandatory nonenforcement policy. These policies afford prosecutors the least

149. Fla. Exec. Order No. 22-176, at 4 (Aug. 4, 2022).

150. Warren v. DeSantis, 653 F. Supp. 3d 1118, 1128 (N.D. Fla. 2023), *vacated and remanded*, No. 23-10459, 2024 WL 105340 (11th Cir. Jan. 10, 2024), *vacated and superseded*, 90 F.4th 1115 (11th Cir. 2024), *and vacated and remanded*, 125 F.4th 1361 (11th Cir. 2024).

151. *Id.*

152. The nonenforcement presumptions adopted by Larry Krasner in marijuana cases and Andrew Warren in bicycle and pedestrian stops are examples. *See supra* notes 136-38 and accompanying text.

153. *Cf.* Levine & Wright, *supra* note 117, at 1137 (noting that, in offices with mid-level supervisors, line prosecutors "are subject to at least one level of review for decisions of any consequence").

amount of discretion—in some cases, no discretion at all. To better understand how these policies restrict prosecutorial discretion, it may be best to divide mandatory nonenforcement policies into two categories—partial mandatory policies and complete mandatory policies.

a. Partial Nonenforcement

As noted in the previous Section, some nonenforcement policies require certain facts to be present or certain factors to be met in order for criminal charges to be filed. When such facts or factors are necessary to bring charges, and do not merely create a rebuttable presumption,[154] then the policy is one of mandatory nonenforcement.

Mandatory nonenforcement policies can be written in qualitative terms that require prosecutors to exercise their professional judgement. For example, the DOJ has a mandatory nonenforcement policy for federal prosecutions "based on substantially the same act(s) or transactions involved in a prior state or federal proceeding."[155] This policy, which is included in the publicly available *Justice Manual*, "precludes the initiation or continuation of a federal prosecution, ... unless three substantive prerequisites are satisfied."[156] The three prerequisites are (1) the matter involves "a substantial federal interest"; (2) "the prior prosecution must have left that interest demonstrably unvindicated"; and (3) "the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact."[157] The policy is clearly mandatory because prosecution is "preclude[d]" unless the three criteria are met. At the same time, the criteria are written in such terms that give the prosecutor significant discretion. Deciding whether a case involves "a substantial federal interest," for example, requires more than just a review of a case's facts; it also requires a prosecutor to consider what makes a federal interest "substantial," and whether any of the interests in a particular case

154. *See supra* Part II.A.3.
155. U.S. Dep't of Just., Just. Manual § 9-2.031 (2018).
156. *Id.*
157. *Id.*

meet that threshold. Because different prosecutors could have different opinions on those matters, they could come to different conclusions in similar cases.

But not all partial nonenforcement policies require similar exercises of professional judgment. That is because, like presumptions against enforcement,[158] mandatory nonenforcement policies can be written in fact-specific terms. For example, when bigamy was a felony in the state of Utah, one prosecutor adopted a formal office policy "not to prosecute the practice of bigamy unless the bigamy occurs in the conjunction with another crime or a person under the age of 18 was a party to the bigamous marriage or relationship."[159] Unless one of the two enforcement criteria was present—the presence of another crime or a spouse under the age of eighteen—the office would not enforce the law. Unlike the DOJ's policy above, this policy left very little room for the exercise of professional judgment in evaluating cases. If a prosecutor reviewed the facts of the case and determined that neither enforcement criterion was present, then she was not authorized to bring charges.[160] The facts of a case determined the outcome.

We do not wish to overstate the amount of discretion that partial mandatory nonenforcement policies afford to individual prosecutors. For one thing, any determination about whether an enforcement criterion has been met is likely to be reviewed by a supervising attorney, who is unlikely to simply defer to the line prosecutor.[161] For another, to the extent that enforcement criteria involve straightforward factual questions—such as whether one of the spouses in a bigamous marriage is under the age of eighteen—the prosecutor's case-by-case determination is essentially ministerial in nature.

158. *See supra* Part II.A.3.

159. Brown v. Buhman, 947 F. Supp. 2d 1170, 1179-80 (D. Utah 2013), *vacated*, 822 F.3d 1151 (10th Cir. 2016).

160. That is not to say a fact-specific partial mandatory nonenforcement policy will always leave no room for discretion. It depends on how straightforward the factual determination is. For example, a recent partial mandatory nonenforcement policy adopted by the Trump DOJ says prosecutions "under the Foreign Agents Registration Act and 18 U.S.C. § 951 shall be limited to instances of alleged conduct similar to more traditional espionage by foreign government actors." *See* Bondi Memo, *supra* note 128, at 4. That policy allows prosecutions only under certain factual circumstances, but the factual circumstances are not clearly delineated and will require some judgment to apply.

161. *See* Levine & Wright, *supra* note 117, at 1137.

Nonetheless, even when a mandatory nonenforcement policy turns on such straightforward factual decisions, it still requires a prosecutor to make an individualized assessment to determine whether an exception applies. This is distinct from the assessment required in the last type of nonenforcement policies—complete mandatory nonenforcement policies—because those policies have no exceptions that allow for enforcement.

b. Complete Nonenforcement

The nonenforcement method that allows the least individualized discretion is a complete mandatory nonenforcement policy. Under such policies, prosecutors will not enforce any violation of a particular offense. To the extent that any case-by-case assessment is involved under such policies, it is merely to ensure that no charges are brought for a crime that falls within the scope of the policy. If a crime does fall within the scope, the prosecutor will decline enforcement. There is no further evaluation of the facts and no consideration of whether the circumstances justify prosecution.

To understand how mandatory nonenforcement policies differ from other nonenforcement policies, an example may be helpful. Imagine an individual arrested for participating in a bar fight and found with marijuana in her pocket. If an office had a presumptive marijuana nonenforcement policy, the fact that the individual possessed marijuana during the commission of a violent offense might justify overcoming the presumption and prosecuting the drug offense due to public safety concerns. If an office had a partial mandatory nonenforcement policy, the possession of drugs during the commission of a violent crime could be one in a list of articulated enforcement criteria that allowed the filing of charges for the drug offense. But if an office had a complete mandatory nonenforcement policy, no drug charges could be brought. The individual could still face charges arising from the fight, such as charges for assault, but there is no fact or circumstance that would authorize drug charges.

In the debate surrounding nonenforcement decisions, mandatory nonenforcement policies are sometimes referred to as "categorical" nonenforcement policies. But we do not adopt the term "categorical," because it is also sometimes used to refer to nonenforcement policies

that are presumptions against enforcement or partial mandatory enforcement policies.[162] As we explain in Part III, there are different tradeoffs associated with complete mandatory nonenforcement policies as compared to other nonenforcement methods. Consequently, we prefer to avoid the term "categorical" in an effort to avoid any confusion about the type of policy at issue.

When defined to mean policies that do not allow certain charges, regardless of the circumstances, complete mandatory nonenforcement policies appear to be rare. One prosecutor in Georgia indicated that he had adopted a complete mandatory nonenforcement policy for the crime of adultery[163]—which as of 2024 is still criminalized in more than a dozen states.[164] The prosecutor's office in Washtenaw County, Michigan, announced that it would categorically decline to prosecute "charges that are based solely on the consensual exchange, between adults, of sex for money."[165] That policy does not prohibit prosecutors from filing other charges arising from consensual sex work,[166] but the consensual sex act alone may not be

162. For example, Zachary Price refers to nonenforcement policies adopted in Brooklyn, Philadelphia, and Manhattan as examples of categorical nonenforcement, Price, *Faithful Execution*, *supra* note 1, at 675-77, even though all of those policies had exceptions allowing for prosecution. *See* Murray, *Prosecutorial Reform*, *supra* note 1, at 1461 n.127, 1465 (noting Price's inclusion of "practices [that] can have exceptions" in the term "categorical nonenforcement policies" and also adopting a definition of the term that "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"). Similarly, Burdette and Carruthers refer to a nonenforcement policy adopted by the Washtenaw County (Michigan) Prosecuting Attorney's Office as a "blanket nonenforcement" policy, Burdette & Carruthers, *supra* note 60, at 179, even though the policy explicitly permits deviations from the policy based on "exceptional circumstances, and where public safety requires that deviation," WASHTENAW CNTY. OFF. OF THE PROSECUTING ATT'Y, POLICY DIRECTIVE 2021-05: POLICY REGARDING CANNABIS & MARIJUANA 9 (2021), https://www.washtenaw.org/DocumentCenter/View/19154/Cannabis-and-Marijuana-Policy [https://perma.cc/KZT2-3WCH]. Under our taxonomy, these policies would be classified as presumptions against enforcement, not mandatory nonenforcement policies.

163. *See* Amy, *supra* note 58.

164. Katherine Fung, *Map Shows 16 States Where It's Illegal to Cheat on Your Wife*, NEWSWEEK (Apr. 5, 2024, at 14:10 ET), https://www.newsweek.com/map-shows-16-states-where-its-illegal-cheat-your-wife-1887307 [https://perma.cc/3QL9-WT3L].

165. WASHTENAW CNTY. OFF. OF THE PROSECUTING ATT'Y, POLICY DIRECTIVE 2021-08: POLICY REGARDING SEX WORK 5 (Jan. 14, 2021), https://www.washtenaw.org/DocumentCenter/View/19157/Sex-Work-Policy [https://perma.cc/RH3Y-GMTN]; *see also* Price, *Faithful Execution*, *supra* note 1, at 676 (documenting the Washtenaw County policy).

166. The policy clarifies that "[if] a person engages in indecent exposure (e.g., has sex in a public place), the Prosecutor's Office may, consistent with this Policy, file charges of

prosecuted under the policy. And in St. Louis County, Missouri, the Prosecuting Attorney's Office had a policy declining to prosecute any possession of 100 grams or less of marijuana,[167] which translated into a complete nonenforcement policy for two misdemeanor possession crimes involving amounts less than 100 grams.[168] There certainly may be additional examples of complete mandatory nonenforcement policies that we have not discovered, but our research on nonenforcement policies leads us to suspect that such policies are infrequently adopted.

We do acknowledge that, in recent years, there have been multiple, high-profile examples of complete mandatory policies related to sentencing. For example, several local prosecutors have publicly announced their refusal to seek the death penalty in any case.[169] And the former district attorney in Los Angeles adopted a complete mandatory policy prohibiting line prosecutors from seeking certain sentencing enhancements.[170] But whether to seek the death

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indecent exposure," but charges for the sex act itself are not permitted. WASHTENAW CNTY. OFF. OF THE PROSECUTING ATT'Y, *supra* note 165, at 6.

167. Memorandum from Wesley Bell, St. Louis Cnty. Prosecuting Att'y (Jan. 2, 2019) [hereinafter Bell Memo], https://www.stlamerican.com/wp-content/uploads/2019/01/8dd4b8a8d987a60746bb2b3c879d597e.pdf [https://perma.cc/7Z4A-UYWD].

168. Possession of up to ten grams was a Class D misdemeanor, MO. REV. STAT. § 579.015(4) (2016), and possession of more than ten grams and less than thirty-five grams was a Class A misdemeanor, MO. REV. STAT. § 579.015(3) (2016). Both of these crimes fell within the 100 grams limit, and they were thus subject to a complete mandatory nonenforcement policy. In contrast, possession of between thirty-five grams and thirty kilograms was a Class D felony, MO. REV. STAT. § 579.015(2), so for that crime, Bell's policy operated as a partial mandatory nonenforcement policy. See Bell Memo, *supra* note 167. Missouri legalized possession of marijuana three years after Bell implemented his nonenforcement policy. MO. CONST. art. 14, § 2.

169. *See* Ayala v. Scott, 224 So. 3d 755, 756-57 (Fla. 2017); KRINSKY, *supra* note 104, at 36; Brighton McConnell, *Local D.A. Shares Timeline, Decision to Not Seek Death Penalty in UNC Murder Case*, CHAPELBORO.COM (Sep. 1, 2023), https://chapelboro.com/news/crime/local-d-a-shares-timeline-decision-to-not-seek-death-penalty-in-unc-murder-case [https://perma.cc/FFR7-HGRY].

170. Los Angeles District Attorney George Gascón required prosecutors to categorically not enforce sentence enhancements in any case. Memorandum from George Gascón, L.A. Dist. Att'y, to All Deputy Dist. Att'ys 1-2 (Dec. 7, 2020) [hereinafter Gascón Memo], https://da.lacounty.gov/sites/default/files/pdf/special-directive-20-08.pdf [https://perma.cc/AQC5-MMSU]; *see also* Laurie L. Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors*, 60 AM. CRIM. L. REV. 1495, 1506 (2023) (describing Gascón's policies regarding the use of sentence enhancements). Gascón faced immediate backlash from the union representing the prosecutors in his office, who filed a lawsuit seeking an injunction to prevent the sentencing directive from taking effect. *See* Cynthia Godsoe & Maybell Romero,

penalty or other sentencing enhancements is distinct from the question of nonenforcement—the former is about limiting the penalty to which a defendant is exposed if convicted, while the latter is about forgoing a conviction altogether.[171] Nonetheless, when prosecutors universally decline to impose a legally authorized punishment that is within their discretion to seek, many of the same concepts and arguments are implicated as those that appear in the discussion of prosecutorial nonenforcement. Thus, these policies related to sentencing may create the impression that complete mandatory nonenforcement policies are more common than our research suggests.

B. Nonenforcement Justifications

There are many reasons why a prosecutor might decline to pursue a prosecution. This Subsection seeks to divide those reasons into separate categories, namely evidentiary concerns, nonevidentiary case-specific circumstances, resource constraints, and public policy considerations. Similar distinctions between the justifications for nonenforcement often appear in the debate over nonenforcement.[172] But on closer inspection, those distinctions may be more apparent than real.

1. Evidentiary Reasons

Nonenforcement based on evidentiary concerns occurs when a prosecutor has probable cause to support a prosecution but elects not to pursue the case because she believes she does not have enough evidence to prove the charges beyond a reasonable doubt. As a constitutional matter, prosecutors need only probable cause to

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Prosecutorial Mutiny, 60 AM. CRIM. L. REV. 1403, 1407-09 (2023). The California Court of Appeals ruled for the prosecutors' union in 2022, although an appeal is pending before the California Supreme Court as of this writing. Ass'n of Deputy Dist. Att'ys for L.A. Cnty. v. Gascon, 295 Cal. Rptr. 3d 1, 45 (Cal. Ct. App. 2022); Ass'n of Deputy Dist. Att'ys for L.A. Cnty. v. Gascon, 515 P.3d 657, 657 (Cal. 2022).

171. Indeed, Gascón's policy clarified that his intention was not to decline enforcement of the underlying offenses but rather to limit the penalty for those offenses to "the current statutory ranges for [the] criminal offenses alone." Gascón Memo, *supra* note 170, at 1.

172. *See infra* Part III.B.

believe that a defendant has committed a crime in order to bring criminal charges.[173] Probable cause is, however, insufficient to secure a conviction. A conviction must be based on a finding of proof beyond a reasonable doubt.[174]

Out of concern that a jury will not convict if the case proceeds to trial, prosecutors will often decline to pursue cases where probable cause, but not proof beyond a reasonable doubt, exists. Social science research confirms that nonenforcement based on evidentiary concerns is common.[175] And historical records indicate that prosecutors have long declined to pursue cases based on evidentiary concerns. For example, most early federal dismissals involved "abandoning unprovable cases ... and avoiding acquittals."[176]

Perhaps because of their ubiquity and their historical pedigree, evidentiary concerns are among the least controversial reasons for deciding not to prosecute a case. While prosecutors *may* proceed with a case based only upon probable cause, there is no expectation that a prosecutor *must* pursue a case if she believes that a conviction is unlikely. Requiring prosecutors to pursue losing cases serves no purpose and imposes significant costs on the courts, the defendants, and the prosecutors' offices.

Nonenforcement based on evidentiary concerns often involves ad hoc decision-making. Determining whether there is sufficient evidence to proceed with a case depends on the prosecutor's evaluation of the factual circumstances of the case, the relevant law, and the likely behavior of judges or juries in the jurisdiction.

But evidentiary concerns can also be formalized in nonenforcement policies. For example, the American Bar Association's *Standards for the Prosecution Function* indicate that prosecutors should bring criminal charges only when they believe that they have

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173. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

174. *In re* Winship, 397 U.S. 358 (1970).

175. BRUCE FREDERICK & DAN STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION-MAKING, SUMMARY REPORT TO THE NATIONAL INSTITUTE OF JUSTICE (2012) [hereinafter FREDERICK & STEMEN, SUMMARY REPORT], https://vera.org/downloads/publications/anatomy-of-discretion-summary-report.pdf [https://perma.cc/UMW4-V44Q].

176. Price, *Enforcement Discretion*, *supra* note 1, at 726.

proof beyond a reasonable doubt of the defendant's guilt.[177] Given that the American Bar Association's standards are understood to be prosecutorial best practices, it is likely that many prosecutor offices have adopted this threshold as either a presumption against enforcement or a mandatory nonenforcement policy.

The proof beyond a reasonable doubt standard is not the only example of a nonenforcement policy based on evidentiary concerns. For example, a 2022 study of marijuana enforcement practices in four states found that several prosecutors' offices had adopted nonprosecution policies for adult possession of marijuana because of the difficulty in distinguishing between marijuana (which was illegal) and various forms of hemp (which were not illegal).[178]

Offices could also adopt evidentiary policies that are based on constitutional concerns. For example, some prosecutors' offices maintain *Brady* lists that name "law enforcement officers with histories of misconduct that could impact the officers' credibility in criminal cases."[179] These lists were ostensibly developed to ensure the disclosure of favorable evidence to the defense,[180] but they could also form the basis of nonenforcement policies. Because those officers' past conduct can result in embarrassing cross examinations at trial, a prosecutor's office might adopt a presumption against pursuing a case that depends primarily on testimony from an officer that appears on the office's *Brady* list.[181]

2. Nonevidentiary Circumstances

There are a variety of other, nonevidentiary circumstances that lead to nonenforcement. Previous accounts of prosecutorial

177. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3 (A.B.A. 2016) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, [and] that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.").

178. *See* ENFORCING MARIJUANA PROHIBITIONS, *supra* note 35, at 38 tbl. B14.

179. Rachel Moran, Brady *Lists*, 107 MINN. L. REV. 657, 658 (2022).

180. *See id.* at 658-59.

181. *E.g.*, Ben Conarck, *State Attorney's Office Keeping Tabs on Problematic Cops in Jacksonville, Across First Coast*, FLA. TIMES-UNION (July 13, 2017, at 09:57 ET), https://www.jacksonville.com/news/public-safety/florida/2017-07-13/state-attorney-s-office-keeping-tabs-problematic-cops [https://perma.cc/PDH5-LRQZ] (describing the Jacksonville State Attorney's Office's *Brady* list and dismissal of forty-one cases involving discredited officers).

discretion have identified a series of case-specific circumstances—such as the wishes of the victim, the defendant's criminal history, the seriousness of the offense, the public interest, and the availability of alternative methods of accountability—that appear to affect prosecutors' decisions whether to pursue a case.[182]

These circumstances can form the basis for ad hoc nonprosecution decisions. For example, a line prosecutor who knows that a defendant charged with a minor offense does not have a criminal history may decline to prosecute that individual because the person is unlikely to reoffend.[183]

The circumstances can also form the basis of office nonprosecution policies. For example, some offices appear to have adopted a presumption against bringing certain charges unless a defendant has multiple prior convictions.[184] Criminal history appears to be a particularly important nonevidentiary circumstance in drug cases. For example, former Baltimore State's Attorney Marilyn Mosby enacted a policy requiring that all first-time felony drug distribution offenders be referred to a diversion program that involved rehabilitative programing and the possibility of expungement after two years, rather than prosecution.[185] The 2022 survey of prosecutors' offices discussed above found a number of offices that had adopted diversion policies for first time offenders.[186]

Whether nonevidentiary circumstances are seen as a sufficient justification for nonenforcement decisions depends, in part, on the circumstance at issue. There is widespread agreement, for example, that the race of the defendant ought to play no role in

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182. *See, e.g.*, Fairfax, Jr., *supra* note 1, at 1258-62; *see also* DAVIS, ARBITRARY JUSTICE, *supra* note 2, at 35-39 (describing nonevidentiary circumstances that prosecutors consider when deciding whether to pursue a case).

183. JACOBY & RATLEDGE, *supra* note 32, at 12-13; *see also* FREDERICK & STEMEN, SUMMARY REPORT, *supra* note 175, at 11 (reporting that prosecutors who participated in a focus group "suggested that some defendants with serious criminal histories might be prosecuted despite relatively weak evidence, while cases involving defendants with negligible criminal histories might be rejected despite strong evidence" but that a quantitative analysis of this factor "produced mixed results").

184. *See* JACOBY & RATLEDGE, *supra* note 32, at 12-13.

185. OFF. OF THE STATE'S ATT'Y FOR BALTIMORE CITY, REFORMING A BROKEN SYSTEM: RETHINKING THE ROLE OF MARIJUANA PROSECUTIONS IN BALTIMORE CITY 12-13 (2019) [hereinafter BALTIMORE CITY REPORT], https://www.stattorney.org/images/MARIJUANA_WHITE_PAPER_FINAL.pdf [https://perma.cc/TB3M-FESL].

186. ENFORCING MARIJUANA PROHIBITIONS, *supra* note 35, at 37 tbl. B12.

nonenforcement decisions. Indeed, making prosecutorial decisions on the basis of race is unconstitutional.[187] But nonenforcement policies that have been adopted in order to ameliorate racial disparities have been more controversial. For example, when former State's Attorney Andrew Warren enacted a presumption against enforcing charges arising from pedestrian stops because of the disproportionate racial impact of such stops, that policy was cited as one reason for Governor DeSantis's decision to remove Warren from office.[188]

Other nonevidentiary circumstances are seen as less controversial. In particular, criminal history and the seriousness of the offense appear to be not only common, but also well-accepted reasons for making nonenforcement decisions. Nonenforcement based on desuetude and the concept of "zombie laws" similarly seems to draw less criticism.[189]

3. Resource Constraints

As noted above, the conventional wisdom is that the government does not have sufficient resources to pursue every violation of the law, and thus prosecutors must decide how to use their limited resources when enforcing the law.[190] Because of this consensus surrounding limited resources, basing nonenforcement decisions on resource constraints is relatively well accepted. Even those scholars who critique broad nonenforcement policies recognize resource

187. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("[T]he decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962))); Reiss, *supra* note 2, at 1372 (identifying race as an "impermissible bas[i]s for prosecutorial selectivity").

188. *See* Fla. Exec. Order No. 22-176 (Aug. 4, 2022); Warren v. DeSantis, 90 F.4th 1115, 1120 (11th Cir. 2024), *vacated and remanded*, 125 F.4th 1361 (11th Cir. 2025).

189. Desuetude typically involves crimes which have not been invalidated or repealed but have fallen out of favor over time due to changes in moral beliefs, technology, or general disuse. Joel S. Johnson, *Dealing with Dead Crimes*, 111 GEO. L.J. 95, 96-97 (2022) (describing the term "dead crimes"); John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 565-66, 569-71 (2014) (describing the term "desuetude" and its history). "Zombie laws" are laws that have been invalidated but remain on the statute books because legislators do not repeal them. Howard M. Wasserman, *Zombie Laws*, 25 LEWIS & CLARK L. REV. 1047, 1050-51 (2022).

190. *See supra* Part I.B.

constraints as a legitimate reason to decline to prosecute a case—or even a broad category of cases.[191]

Nonenforcement based on resource constraints sometimes occurs on an ad hoc basis. For example, prosecutors interviewed by the Vera Institute described the effect of resource constraints on their decision-making, stating that the "lack of resources often resulted in prosecutors having to dispose of cases in ways they would not otherwise have to if adequate resources were available."[192] A prosecutor who has more cases than she can handle may elect to charge fewer new cases, or she may dismiss some of her existing cases. In those situations, the line prosecutor is making resource-based nonenforcement decisions, but the resource at issue is her own time and attention.

When it comes to the resource constraints of the entire office, line prosecutors may not be in the best position to make resource-based decisions. Supervisory prosecutors and head prosecutors likely have a better understanding of the office's full caseload and available resources; they can direct those resources toward particular cases by setting enforcement priorities. Those priorities give guidance to the individual line prosecutors as they decide which cases to pursue. To the extent that more specific guidance is needed, offices ensure that resources are directed toward some cases rather than others by adopting presumptions against enforcement or mandatory non-enforcement policies. An office that wants to ensure only the most serious theft cases receive sufficient resources, for example, may adopt a nonenforcement policy that discourages or prevents prosecution of cases involving thefts below a certain dollar amount.[193] And an office that wants to conserve resources for serious drug cases can adopt nonenforcement policies for minor drug possession cases.[194]

To be clear, offices can deal with office-wide resource constraints without resorting to priorities, presumptions, or mandatory policies.

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191. *E.g.*, Burdette & Carruthers, *supra* note 60, at 184-85; Price, *Enforcement Discretion, supra* note 1, at 758.

192. FREDERICK & STEMEN, FINAL REPORT, *supra* note 131, at 88.

193. *See supra* note 146 and accompanying text.

194. *See* ENFORCING MARIJUANA PROHIBITIONS, *supra* note 35, at 38 tbl. B14 (noting that eight offices reported not having sufficient resources to prosecute all marijuana possession cases).

A 2012 study of prosecutorial discretion reported that, in one office, resource constraints led the drug unit to conduct roundtables in which "all cases are evaluated together and *the unit* decides which cases the entire unit will dispose of."[195] At these roundtables, a case-by-case evaluation occurred, during which "prosecutors compare[d] the merits of one case to the merits of other cases" at the roundtable "to decide what [would] be dismissed or have a new plea offer made."[196] In other words, the roundtables allowed ad hoc nonenforcement decisions to be made by the entire unit, rather than by individual prosecutors.

4. Policy Considerations

The three justifications discussed above—evidentiary reasons, other nonevidentiary circumstances, and resource constraints—are relatively uncontroversial reasons to decline to pursue a prosecution. In contrast, so-called policy considerations have drawn significant criticism as a basis for prosecutorial nonenforcement. Recent federal nonenforcement of immigration violations, which was prompted by congressional inaction, led to academic criticism that the executive was encroaching on the policy prerogative of Congress.[197] High-profile examples of local prosecutors' nonenforcement policies led conservative commentators to accuse these Democratic prosecutors of "blatant usurpation of the constitutional role of state legislatures" when they adopted broadly applicable nonenforcement policies.[198] While these criticisms suggest that policy-based nonenforcement oversteps the executive's discretion regarding evidentiary and resource-based concerns, the line between permissible nonenforcement reasons and impermissible reasons may be more apparent than real. That is because it can be difficult to distinguish between policy considerations and other justifications for nonenforcement.

195. *See* FREDERICK & STEMEN, FINAL REPORT, *supra* note 131, at 91.

196. *Id.* (emphasis omitted).

197. *See, e.g.*, Price, *Enforcement Discretion, supra* note 1, at 748-49 (arguing that the role of the executive is to set priorities within the boundaries of statutorily enacted policies, not set their own policies); Delahunty & Yoo, *supra* note 1, 792-96.

198. STIMSON & SMITH, "PROGRESSIVE" PROSECUTORS, *supra* note 84, at 11.

To be clear, there are some easy cases where reasonable people would agree that the basis for nonenforcement was based only on policy. When former Nueces County District Attorney Mark Gonzalez explained his decision to divert all marijuana possession charges, for example, he said "people shouldn't have convictions for marijuana, especially with the inequities usually associated with it."[199] This justification clearly sounds in policy because it espouses the idea that marijuana possession is not the sort of activity that ought to result in a criminal conviction—that is to say, it should not be a crime. In addition to questioning the wisdom of criminalizing this activity, Gonzalez also invoked the concept of fairness to support his nonenforcement decision—namely that the burdens associated with enforcing the marijuana laws had fallen unequally on different groups in the past.[200]

While the Gonzalez decision seems like an easy case of non-enforcement based on policy considerations, articulating a clear definition of what constitutes a policy concern as compared to the other nonenforcement justifications proves to be quite difficult. Take resource constraints. The idea behind resource constraints is that not all cases can be prosecuted, so some cases must go unenforced in order to devote resources to other cases. But which cases should be prioritized and which should be abandoned? Presumably it depends on a determination of which cases are more important to pursue than others.[201] But "more important" will often require a judgment call. We would all agree, for example, that a murder case should be prioritized above a case of jaywalking. But what about a drug possession case and a case involving a trespass? A vandalism case and a petty theft case? Distinguishing between such cases requires policy determinations—that is, a decision whether drug crime is more important than property crime and a decision whether taking property is more deserving of punishment than damaging it.

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199. KRINSKY, *supra* note 104, at 152-53.

200. *See id.*

201. FREDERICK & STEMEN, FINAL REPORT, *supra* note 131, at 90 (describing the decision-making surrounding resource constraints as "a process of prioritizing in which cases are ranked from strongest to weakest, from the worst to least bad offense, from a high amount of victim cooperation to a low amount, from newest to oldest, from in custody defendants to not in custody" (emphasis omitted)).

Resource-based decisions are not the only decisions that require such judgment calls. Nonevidentiary factual circumstances can also resemble policy decisions. Take the practice of refraining from pursuing a case if the victim expresses a desire to avoid prosecution.[202] At first glance, such a practice might seem uncontroversial. After all, the victim is the person who was most affected by the crime. But in domestic violence cases, for example, whether to follow the victim's wishes is a source of heated debate.[203] On the one hand, forcing a victim to participate in a prosecution seems like an unreasonable hardship. On the other hand, the victim might be in danger if the defendant is not incarcerated. Whether to prioritize a victim's wishes or a victim's safety is a decision about priorities that requires the exercise of judgment.[204]

Because these judgment calls are referred to as "policy considerations," it might be tempting to think that such justifications do not arise in ad hoc nonenforcement decisions. After all, those nonenforcement decisions are made in the absence of office nonenforcement *policies*. But that conflates two meanings of the word "policy." An office's *nonenforcement policy* provides guidelines for individual prosecutors, while *policy considerations* are reasons that depend upon value judgments.[205] When line prosecutors engage

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202. *See supra* note 182 and accompanying text.

203. *See, e.g.*, Kimberly D. Bailey, *It's Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777 (2012); Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849 (1996).

204. That judgment can depend on multiple factors. The 2012 Vera Institute study of prosecutorial discretion found that prosecutors accounted for victim wishes differently in different types of cases. FREDERICK & STEMEN, SUMMARY REPORT, *supra* note 175, at 13. As a general matter, prosecutors said:

> Victim credibility and probable participation at trial may influence the decision to proceed with a case. A victim's wishes also affect whether a case should proceed. Some prosecutors said it is often unfair to make victims proceed against their wishes, particularly in sex offenses. In domestic violence cases, though, prosecutors were said to try to 'keep the victim out of the process.' Similarly, other units consider uncooperative victims when evaluating evidence strength, but disregard uncooperative victims' desires when evaluating whether a case should proceed.

Id.

205. The word "policy" has multiple definitions. The term "nonenforcement policy" invokes the definition "[a] settled or definite course or method adopted and followed by a government, institution, body, or individual." 2 WEBSTER'S NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1908 (2d ed. 1949). The term "policy consideration" invokes the definition "[p]rudence or wisdom in the management of public and private affairs; wisdom." *Id.*

in ad hoc decision-making, they can (and do) base their nonenforcement decisions on policy considerations. For example, one study of prosecutorial decision-making found that a prosecutor's decision about "whether a case should go forward includes evaluating defendant characteristics and circumstances to judge whether the potential consequences are fair."[206] Fairness is, at bottom, a value judgment.[207] Thus, to the extent that an individual prosecutor is basing her ad hoc nonenforcement decisions on an individualized assessment of whether a criminal conviction would be fair, then her nonenforcement decisions are based on policy considerations.

Although ad hoc nonenforcement decisions can be driven by policy considerations, such considerations are more visible when they are enshrined in office policies. When head prosecutors adopt enforcement priorities, presumptions against enforcement, or mandatory nonenforcement policies, they may choose to announce those decisions and explain the rationale behind them. Especially those prosecutors who are elected to office may seek to define or defend their decisions in terms that sound political. The voters who elected Mark Gonzalez, for example, may have shared his view that the criminal law should not be used to punish those who possess marijuana.[208] In contrast, ad hoc nonenforcement decisions are rarely publicly defended, and thus their rationale may be less widely known.[209] But whether the reasons for a nonenforcement decision are publicly announced is distinct from whether those reasons may be fairly characterized as policy considerations.

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206. *See* FREDERICK & STEMEN, SUMMARY REPORT, *supra* note 175, at 11, 13 ("Focus group participants said that they evaluate 'fairness' in terms of the impact of their decisions on the life of a defendant and adjust their decisions according to the consequences they view as appropriate, given a defendant's characteristics and circumstances. In addition to criminal history, these could include quasi-legal and extra-legal factors such as age, gender, employment, parental status, substance abuse, mental health status, treatment history, victim-offender relationships, and defendant's demeanor."). Josh Bowers refers to this phenomenon as "equitable discretion" not to enforce certain laws in certain cases. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1658-59 (2010).

207. That judgment may certainly contemplate some, or even all, of the other nonenforcement reasons described above. But how a prosecutor balances those factors comes down to a values-based decision about what outcome is "fair" in a given case.

208. *See supra* notes 199-200 and accompanying text.

209. *See* Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 615-17 (2019).

C. Nonenforcement Decision Makers

This Section identifies the actors involved in deciding not to prosecute. Much of the existing literature seems to focus on the head prosecutor as the person who sets broadly applicable nonenforcement policies or on the line prosecutor as the person who exercises case-by-case discretion. But supervisory prosecutors can serve as intermediaries between head prosecutors and line prosecutors, and thus their role in nonenforcement deserves more scrutiny.[210]

Importantly, the role that each of these types of prosecutors plays varies greatly depending on the size of the office. In small offices there may be little distinction between the head prosecutor and line prosecutors—every prosecutor manages their own caseload with little or no formal oversight.[211] In large offices there can be hundreds of line prosecutors split into teams or units, each with supervisors managing the daily decisions; in those offices the head prosecutor serves a more political and administrative role.[212]

Regardless of the size and structure of the office, it is important to recognize that these decision makers are the means through which the methods and reasons for nonenforcement are filtered in practice. To account for these varying roles, this section begins by discussing the role of line prosecutors responsible for individual cases before moving on to discuss supervising prosecutors and concluding with head—elected or appointed—prosecutors.

1. Line Prosecutors

"Line prosecutor" is the term typically used to describe the more junior—or non-supervisory—prosecutors who handle individual cases on a daily basis. However, the exact nature of this role varies depending on the size and structure of the office. In a small office,

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210. Kay Levine and Ron Wright's work on the structure of prosecutors' offices has been a valuable contribution in this area. *See generally* Levine & Wright, *supra* note 117 (describing the structure of prosecutors' offices and the professional identity that structure produces and reinforces).

211. *Cf. id.* (contrasting organizational models in prosecutor offices and hypothesizing that those differences are likely correlated with office size).

212. *Cf. id.* (same).

line prosecutors may have just as much or even more experience than the head prosecutor, and there may be little or no formal oversight of their work.[213] In all offices, however, line prosecutors are those prosecutors who are primarily responsible for analyzing the facts and circumstances of a case, negotiating with defense attorneys, attending court, and conducting investigatory work when needed.[214] Line prosecutors are responsible for making ad hoc nonenforcement decisions. And they may be better suited to assess evidentiary reasons and case-specific, nonevidentiary circumstances when making nonenforcement decisions due to their proximity to the specific facts of a case.

Line prosecutors also apply the policies set by the elected prosecutor, including any nonenforcement policies.[215] Office-wide enforcement priorities, presumptions against enforcement, and other office policies restrict line prosecutors' discretion, limiting the range of available decisions they can make when handling a case.[216] And when they do exercise their discretion, line prosecutors may have their decisions reviewed or reversed by supervisory prosecutors. But even though line prosecutors' discretion may be limited, they must still evaluate each case and use their professional judgment to determine how that case fits within a given policy.[217] Indeed, Manhattan District Attorney Alvin Bragg responded to backlash against his initial nonenforcement policies by reminding his line prosecutors that they "were hired for [their] keen judgment, and [he] want[ed] [them] to use [their] judgment—and experience—in every case."[218]

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213. *See id.* at 1138-39.

214. *See, e.g.*, VERA INST., UNLOCKING THE BLACK BOX OF PROSECUTION: THE ROLE OF THE PROSECUTOR, https://www.vera.org/unlocking-the-black-box-of-prosecution/for-community-members [https://perma.cc/NEG6-Q85E].

215. *See, e.g.*, Levine & Wright, *supra* note 117, at 1151-52, 1156-57.

216. Levine & Wright, *supra* note 117, at 1150-51 ("Metro lawyers learn pretty quickly that there is no room for discretion when it comes to the hard-and-fast rules.... Deviation will yield a reprimand and could ultimately lead to serious discipline, including loss of one's job.").

217. *See* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 558-59 (1999).

218. Letter from Alvin L. Bragg, Jr., Manhattan Dist. Att'y, to All Staff, Work of the Office (Feb. 4, 2022) [hereinafter Bragg Letter], https://www.manhattanda.org/wp-content/uploads/2022/02/2022.02.04.Letter.pdf [https://perma.cc/J6RQ-G9S9].

The foregoing paragraphs describe how the position of line prosecutor operates in theory. In practice, the role may be more complicated. When line prosecutors disagree with the decisions and policies set by the head prosecutor, they may actively resist, rather than apply, nonenforcement policies.[219] In one extreme example, line prosecutors in the Los Angeles District Attorney's Office filed suit in response to nonenforcement policies enacted by their newly elected head prosecutor, George Gascón.[220] They argued that the policies would force them to violate their legal and ethical obligations to enforce the law, and they had significant success in preventing Gascón from implementing some of his nonenforcement policies while he was still in office.[221]

2. Supervisory Prosecutors

Many large and mid-sized prosecutor offices include supervisory prosecutors. These prosecutors are responsible for leading specialized teams of line prosecutors, or they serve as deputies responsible for administrative matters and daily oversight within the office.[222] Supervisory prosecutors are also often responsible for ensuring compliance with office policies.[223] But these policy-related roles can be a double-edged sword for the head prosecutor. On one hand, supervisors can play a crucial role in influencing office culture when implementing nonenforcement policies.[224] But on the other, supervisors who are holdovers from previous administrations can also be powerful resisters who seek to maintain the status quo and refuse to ensure compliance with new head prosecutors' policies.[225]

219. *See* Ouziel, *supra* note 57, at 564; Godsoe & Romero, *supra* note 170, at 1406-15.

220. Godsoe & Romero, *supra* note 170, at 1406-10.

221. *Id.* at 1407-09.

222. Levine & Wright, *supra* note 117, at 1133 n.37, 1137-38.

223. *See id.*

224. *E.g.*, *id.* at 1144 n.83, 1159, 1161.

225. *See* Godsoe & Romero, *supra* note 170, at 1406-19 (describing forms and patterns of "prosecutorial mutiny" against head prosecutors); RECLAIM CHI., THE PEOPLE'S LOBBY, CHI. COUNCIL OF LAWS. & CHI. APPLESEED FUND FOR JUST., CREATING A CULTURE OF FAIRNESS AND ACCOUNTABILITY: DEFENSE ATTORNEYS REPORT ON KIM FOXX'S PROGRESS TOWARDS TRANSFORMING THE PRIORITIES OF HER OFFICE 1 (2019) ("[S]ome Assistant State's Attorneys, particularly those in supervisory positions and those with long histories in the office, still staunchly maintained former State's Attorney Anita Alvarez's tough-on-crime policies and callousness towards people facing charges and their attorneys.").

Supervisory prosecutors' roles are not limited to nonenforcement polices; they are also involved in ad hoc nonenforcement. Some offices require supervisors to review all decisions not to pursue cases, even in the absence of governing policy.[226] If that review is deferential, then the supervisor's role may be minimal. But to the extent that the review is more searching, a supervisor may be engaged in her own case-by-case decision-making that mimics the line prosecutor's ad hoc decision-making. But where, exactly, supervisory prosecutors fall on the spectrum between head prosecutors and line prosecutors often varies depending on the size and shape of their office. In small offices, supervisory prosecutors may play a dual role as both managers and courtroom prosecutors responsible for their own caseload.[227] In large offices, supervisory prosecutors may be directly involved only in complex or high-profile cases; otherwise, they serve in an administrative role that is farther removed from decision-making in individual cases.

Regardless of the nature and function in any given office, supervisory prosecutors play a unique and powerful role in setting, implementing, and influencing nonenforcement policy. Some supervisors do not merely review the decisions of line prosecutors and ensure the implementation of office-wide policies. They also set policies themselves. Sometimes that policy creation occurs in collaboration with the head prosecutor,[228] but it can also occur independently. Indeed, at least in some offices, supervisors appear to be a greater source of policies than head prosecutors. A 2012 study from the Vera Institute of Justice found that "[d]istrict attorneys established very few office-wide policies governing case outcomes. However, prosecution units within offices established policies and norms that limited the exercise of discretion."[229] In the two offices that were the focus of the study, the district attorneys appear to have delegated the setting of nonenforcement policies to supervisors—both in terms of "articulat[ing] an overarching

226. *See, e.g.*, Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 835 (2018) (describing a method of nonenforcement for defendants who avoided rearrest that required approval from a supervisor).

227. *E.g.*, Levine & Wright, *supra* note 117, at 1155.

228. *See* FREDERICK & STEMEN, SUMMARY REPORT, *supra* note 175, at 15; Levine & Wright, *supra* note 117, at 1144, 1159.

229. FREDERICK & STEMEN, SUMMARY REPORT, *supra* note 175, at 4.

philosophy" and in terms of "establish[ing] guidelines that governed decision-making in some circumstances, calling for prosecutors to decline certain cases at screening, charge cases in a particular way, and offer specific conditions in plea offers."[230]

Supervisory prosecutors' roles in prosecutors' offices—especially in ensuring that office priorities, presumptions, and policies are being followed—can thus complicate the debate between nonenforcement minimalists and maximalists. That complexity was on display in the office of former Suffolk County State's Attorney Rachael Rollins, who publicly announced a series of broadly applicable nonenforcement policies before taking office.[231] Rollins's official memo describing those policies made clear that they were presumptions against enforcement: The line prosecutor "always retain[ed] discretion to seek a deviation ... when a person pose[d] an identifiable threat to another individual or other circumstances of similar gravity."[232] In order to pursue a case, the line prosecutor was instructed to consult with the supervising attorney and explain why the case should be pursued. The supervisor then made a determination about whether to prosecute, and both the line prosecutor's justification and the supervisor's determination were to be placed in the case file.[233] Discussions of Rollins's policies were often framed in terms of a refusal to enforce the law,[234] or as bringing uniformity to disparate enforcement decision-making.[235] But the policy was more complicated than that—it relied on supervisory prosecutors to serve both as a source of case-by-case enforcement discretion, as well as enforcers of office-wide policies.

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230. *Id.* at 15.

231. *See* Hessick & Hessick, *National Police Association*, *supra* note 65.

232. SUFFOLK CNTY. DIST. ATT'Y, THE RACHAEL ROLLINS POLICY MEMO app. C, at C-2 (2019) [hereinafter ROLLINS MEMO], https://www.ilrc.org/sites/default/files/resources/therachaelrollinspolicymemo.pdf [https://perma.cc/3D5P-LA5N].

233. *Id.*

234. *See* Charles "Cully" Stimson & Zack 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/8X59-WAWS]; Hessick & Hessick, *National Police Association*, *supra* note 65 (describing an ethics complaint filed against Rachael Rollins by the National Police Association concerning her policy memo).

235. *E.g.*, Foster, *supra* note 65, at 2545 ("Adoption and publication of prosecution guidelines, as illustrated by the Rollins Memo, should reduce claims of arbitrariness and unfairness in the circumstances where the office chooses to prosecute.").

As this example illustrates, supervisory prosecutors can constrain discretion, review discretionary decisions, and engage in discretionary decision-making themselves—sometimes even in the same case! In other words, supervisory prosecutors play an important and sometimes underappreciated role in prosecutorial nonenforcement. And any nuanced account of prosecutorial decision-making must engage with that role.[236]

3. Head Prosecutors

Head prosecutors sit at the top of the hierarchy in a prosecutor's office.[237] In larger offices, head prosecutors rarely exercise case-by-case discretion because their time is devoted to administrative duties. But in smaller offices—or when they decide to personally appear in a case—head prosecutors still handle individual cases themselves.[238] Likewise, head prosecutors in large offices may delegate a significant amount of supervision and management responsibilities to supervisors, whereas in small offices the head prosecutor might directly supervise line prosecutors.[239] Regardless of office size, head prosecutors are responsible for setting any broad policies that guide supervisory and line prosecutors' decision-making. Head prosecutors may do this explicitly, such as when they enact policies with explicit enforcement criteria, but they also indirectly influence decision-making by establishing the norms of their office's culture.

Take, for example, Philadelphia District Attorney Larry Krasner. Shortly after taking office he decided to drop pending marijuana

236. Kay Levine and Ron Wright's work provides crucial insight into the dynamics and structures of supervision in prosecutors' offices. *See generally* Levine & Wright, *supra* note 117 (describing the structure of prosecutors' offices and the professional identity that structure produces and reinforces).

237. Most states provide for the election of the head prosecutors, Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549-51 (2020), but the following analysis also applies to appointed prosecutors who lead their given offices.

238. *See* MARQUETTE LAW SCHOOL, *Prosecutors and Politics: A Conversation About—and with—District Attorneys*, at 49:15-50:25 (YouTube, Nov. 15, 2022), https://www.youtube.com/watch?v=TKE23BWwN5I [https://perma.cc/5LH6-Y5EH] (noting that elected prosecutors in smaller jurisdictions are "working prosecutors" who try cases and are responsible for the most serious cases).

239. *See* Levine & Wright, *supra* note 117, at 1165.

possession cases and to decline future prosecutions of sex workers with fewer than two previous convictions.[240] Krasner also decided to fire supervisory and line prosecutors who would not follow his vision and policies, saying: "You have to see whether the people who are in the office are consistent with the mission."[241] In their place, Krasner hired new assistant district attorneys whose training was intended to instill the values underlying the office's policies.[242] These policies and personnel decisions reflect how Krasner used both explicit policies and indirect cultural norms to influence nonenforcement decisions in his office, and they demonstrate the relationships that exist between head prosecutors and their line and supervisory prosecutors regarding the implementation of policies.

When it comes to nonenforcement, head prosecutors receive the most scrutiny. Sometimes that scrutiny is invited—such as by those local prosecutors who have run on platforms of reducing or ending enforcement of certain offenses.[243] These prosecutors have sometimes published written nonenforcement policies,[244] which has resulted in significant commentary—some positive and some negative.[245] Other times the scrutiny appears unavoidable—such as

240. Zayrha Rodriguez, "*Philly D.A.": Larry Krasner's First Term, Under a Lens*, MARSHALL PROJECT (June 5, 2021, at 07:00 ET), https://www.themarshallproject.org/2021/06/05/philly-d-a-larry-krasner-s-first-term-under-a-lens [https://perma.cc/CQ4W-TLAX].

241. *Id.*

242. Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration [https://perma.cc/B6QG-C2DH] (statement of Larry Krasner) ("We want people who are about to exercise their discretion and deal with the realities of homelessness and addiction and mental illness and danger ... to have been in the vicinity of and to have spoken to some homeless people.").

243. *See* Murray, *Nullification*, *supra* note 1, at 209-10; *see also* Tammy Grubb, *Orange-Chatham Voters Have Rare Chance to Pick DA, Guide Future of Criminal Justice*, RALEIGH NEWS & OBSERVER (Apr. 22, 2022, at 10:03 ET), https://www.newsobserver.com/news/politics-government/election/voter-guide/article260340120.html [https://perma.cc/V3TQ-UERF] (reporting that both candidates for prosecutor in North Carolina committed to not seeking the death penalty if elected).

244. *See, e.g.*, Bell Memo, *supra* note 167; Bragg Letter, *supra* note 218; Krasner Memo, *supra* note 136; ROLLINS MEMO, *supra* note 232; WASHTENAW CNTY. OFF. OF THE PROSECUTING ATT'Y, *supra* note 162.

245. *See, e.g.*, Larry Miller, Opinion, *With a New Gun Investigations Unit, Could Larry Krasner Be Changing His Tune on Prosecutions?*, PHILA. INQUIRER (May 31, 2024, at 05:02 ET), https://www.inquirer.com/opinion/commentary/larry-krasner-district-attorney-prolific-gun-offenders-20240531.html [https://perma.cc/58HR-3REH]; Eric Tegethoff, *Behind the Right's War on Prosecutors*, APPEAL (Aug. 3, 2023), https://theappeal.org/conservatives-

when a head prosecutor must explain a decision not to bring charges in a high-profile case.[246]

Although head prosecutors receive more scrutiny about nonenforcement decisions than line prosecutors and supervisory prosecutors, that does not mean that their decisions are always subject to scrutiny. For example, one survey found that 80 percent of elected prosecutors had not announced their marijuana enforcement policies to the public.[247] Some survey respondents explained their lack of announcement on the grounds that no one had asked about their policies.[248] But one survey respondent's answer suggested another reason for failing to announce policies—namely that there would be "too much room for misunderstanding."[249] Perhaps in order to avoid any misunderstandings, a number of incumbent prosecutors reported that they did not publicly announce any of their office's enforcement policies.[250]

III. NONENFORCEMENT TRADEOFFS

As the preceding Part demonstrates, prosecutorial nonenforcement comes in many different forms—reserving different amounts of discretion, relying on different reasons, and assigning power to different people. Much of the legal literature on prosecutorial nonenforcement asserts that one form is superior to another.[251] That is not our goal in this Part. Instead, we seek to identify the different values that are served or hindered by the different approaches

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progressive-prosecutors-reform/ [https://perma.cc/DGG7-SQPA].

246. *See* Roth, *supra* note 1, at 529-31 (noting that some prosecutors' offices have adopted policies on explaining declination decisions in police shootings, murders, and other high-profile cases).

247. ENFORCING MARIJUANA PROHIBITIONS, *supra* note 35, at 13, 40 (reporting that more than half of surveyed prosecutor offices had adopted policies of less than full enforcement in possession of marijuana cases, but only 19 percent of offices had publicly announced their office policy on enforcement).

248. *Id.* at 40.

249. *Id.*

250. *Id.*

251. *See* Davis, *Good Prosecutor*, *supra* note 92, at 12 ("The election of progressive prosecutors willing to use their power and discretion to effect change is essential to bringing fairness and racial equity to our criminal justice system."); Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1433-34 ("[M]aking discretionary decisions on an ad hoc basis ... is a preferable approach to exercising prosecutorial discretion.").

to nonenforcement. In other words, this Part reframes common themes in the debate between nonenforcement minimalists and maximalists as tradeoffs that do not necessarily provide clear answers to the question of when prosecutorial nonenforcement is appropriate.

In order to understand the debate surrounding nonenforcement as a debate about tradeoffs, it is first necessary to recast some of the most common arguments in favor and against nonenforcement in more general terms. Only when those specific arguments are framed as broader values does it become clear that the nonenforcement debate involves *competing* values: Different methods of nonenforcement further (or frustrate) different values, as do different justifications for nonenforcement and different decision makers.

In the Sections below, we identify four distinct tradeoffs in the nonenforcement debate. First, we identify the tradeoff between individualization and consistency that occurs in the selection of nonenforcement methods. Second, we identify the tradeoff between neutrality and justice that is implicated in the different reasons offered in support of nonenforcement decisions. Third, we identify the tradeoff between accountability and knowledge that can occur depending on who is making nonenforcement decisions.

Finally, we identify a fourth tradeoff—a tradeoff between transparency and accountability. This tradeoff is not directly tied to any of the three facets of nonenforcement that we have identified in Part II. Instead, this tradeoff is tied to decisions about whether to publicly announce nonenforcement policies. Although the public announcement of nonenforcement policies is not directly tied to the various features of nonenforcement we discuss in the taxonomy, we nonetheless include it in this Article because it is related to both the method of nonenforcement and the identity of the nonenforcement decision maker. We also include it because transparency and accountability are often referenced in the debate over prosecutorial nonenforcement.

Although the main purpose of this Part is to recast the debate over prosecutorial nonenforcement as a tradeoff between competing values rather than to take a position on the desirability of nonenforcement, that does not mean we express no opinions in this Part. To the contrary, we express several. Perhaps most notably, we

express an opinion about the appropriate tradeoff between individualization and consistency. As we explain in the first Section below, there are methods of nonenforcement that strike a balance between these competing values. Specifically, either setting enforcement priorities or articulating presumptions against enforcement strike a balance between individualization and consistency, rather than maximizing one value at the expense of another. Because such a balance is possible, and because we think that individualization and consistency are both worthy goals, we suggest that these may be the best approaches to nonenforcement methods.

We do not express an opinion on the appropriate balance of the other competing values. But that does not mean we fail to offer views on those tradeoffs. To the contrary, consistent with our view that setting enforcement priorities or articulating presumptions are preferable methods of nonenforcement, our general view is that attempting to balance competing values—rather than maximizing one value at the expense of the other—is the best approach to nonenforcement decisions. In addition, in discussing the tradeoffs, we express a number of views that can be best characterized as skepticism. For example, we express skepticism about the ability to insulate nonenforcement decisions from so-called policy concerns. Similarly, we express skepticism about the accuracy of claims that have been made by nonenforcement maximalists and minimalists about the effects of announcing nonenforcement policies. As we explain in more detail below, there are reasons to doubt claims by minimalists that such announcements will lead to more lawbreaking, as well as claims by maximalists that such announcements result in more democratic accountability for prosecutors.

Perhaps most importantly, we express skepticism that an abstract balancing of the tradeoffs implicated by different nonenforcement decisions can satisfactorily resolve the debate surrounding nonenforcement. While much of that debate is framed in abstract terms, the substantive decisions themselves undoubtedly influence the supporters and detractors of nonenforcement. Disentangling the appropriate resolution of the abstract values at stake in prosecutorial nonenforcement from the concrete examples of which crimes and defendants go unpunished may prove difficult,

but it is necessary in order to ensure that nonenforcement decisions can be appropriately understood and evaluated.

A. Individualization Versus Consistency

Two important values implicated in the nonenforcement debate are individualization and consistency. These values come into play in the discussion of nonenforcement methods—some nonenforcement methods discussed in Part II.A allow for more individualization, while others allow for more consistency.

In order to understand how the nonenforcement debate touches upon individualization and consistency, we must first understand that different nonenforcement methods afford prosecutors different amounts of discretion. As a general matter, affording prosecutors discretion allows them to individualize nonenforcement decisions—that is, to tailor their nonenforcement decisions to particular circumstances. On the other hand, affording individual prosecutors significant discretion over nonenforcement decisions often comes at the expense of consistency, because different prosecutors are likely to make different decisions when faced with similar circumstances. Put simply, the more discretion a prosecutor possesses, the more ability she has to individualize her nonenforcement decisions; the less discretion a prosecutor has, the more consistent nonenforcement decisions will be within an office and over time.

Looking at the different methods of nonenforcement, we see that ad hoc decision-making maximizes individualization. When individual prosecutors are free to make nonenforcement decisions on a case-by-case basis, they can consider any facts and circumstances they deem relevant, and then they can arrive at an enforcement decision that accounts for all of those considerations. But this ability to individualize comes at the expense of consistency. Different prosecutors will deem different facts and circumstances relevant, and they may account for those considerations in different ways. The result is that similarly situated defendants are treated differently: Whether a case is pursued depends on the identity of the prosecutor rather than the facts.

In contrast, mandatory nonenforcement policies maximize consistency. Mandatory nonenforcement policies articulate the

circumstances under which enforcement is inappropriate, ensuring that similar cases are treated similarly.[252] For example, if an office adopts a mandatory nonenforcement policy for retail theft under $200, then no case of retail theft below that amount will be prosecuted, regardless which individual prosecutor has been assigned to each case. But that consistency comes at the expense of individualization. Mandatory policies do not allow prosecutors to treat cases differently even when there might be a good reason to do so. To return to the retail theft example, such a mandatory policy would not allow prosecution even if an individual prosecutor thought it was warranted in a particular case—such as if a defendant had multiple prior arrests for similar behavior.

Of course, ad hoc decisions and mandatory nonenforcement policies are not the only methods of nonenforcement. Other nonenforcement methods strike different balances between individualization and consistency. Setting enforcement priorities, for example, channels prosecutorial discretion by providing guidance about what cases ought to receive less time and attention than others. To the extent that prosecutors respond to that guidance in similar ways,[253] then the priority will result in greater uniformity while still preserving significant discretion to individualize.

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252. The tradeoff between individualization and consistency has been explored extensively in the literature on criminal sentencing. *See generally, e.g.*, LYNDON HARRIS, ACHIEVING CONSISTENCY IN SENTENCING (2022) (examining the sentencing system in England and Wales and offering lessons and methods for achieving greater consistency in sentencing); PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1977) (assessing federal sentencing and offering an agenda for legislative reform); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998) (presenting a history, analysis, and critique of the federal sentencing guidelines); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976) (arguing for sentencing reform based primarily on a theory of just deserts); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991) (describing the movement from individualized to aggregated sentences and arguing that the movement has made sentencing less just); Covey, *supra* note 118 (examining sentencing law using the rules-versus-standards legal conundrum); Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992) (examining and critiquing the federal sentencing guidelines).

253. Notably, as we discuss in Part II.A.2, it is not clear that prosecutors will necessarily respond to that guidance in similar ways—some might decide to offer very favorable plea deals, while others might decline to bring charges at all. *See supra* Part II.A.2.

Policies that create presumptions against enforcement are likely to result in more consistency and less individualization than the mere setting of enforcement priorities. That is because presumptions create a default rule of nonenforcement that must be overcome in order for a prosecution to move forward. The more difficult it is to overcome the presumption, the more consistency such a policy will produce. Whether a presumption will be difficult to overcome depends both on how it is phrased and how it is enforced. Presumptions that are based on qualitative language, such as "in the interests of justice," for example, may be easy to overcome so long as supervising attorneys do not interpret that language as setting a high bar and any review of that determination is deferential. But if supervisors interpret that language narrowly and conduct a searching review of any such determination, then there will be more uniformity because fewer cases will proceed.

Presumptions against enforcement can also create more consistency by providing more specificity. A presumption against enforcement that is triggered by a clear factual predicate creates both clarity and expectations about when prosecutions should move forward. Imagine, for example, a presumption against enforcing cases involving public urination that has a specific carve-out for cases involving defendants with prior arrests for the same crime. Such a presumption is likely to be applied similarly by different prosecutors both because it is clear that only certain facts can overcome the presumption (prior arrests) and because that carve-out contains an implicit suggestion that prior arrests are a good reason to move forward with a prosecution. The result is that most cases involving defendants without prior arrests will not be prosecuted, while most cases with such prior arrests will go forward.

Of course, reducing prosecutorial discretion is not the only tool that offices may use to promote consistency. Larger offices can employ supervisors as a check on the nonenforcement decisions of individual line prosecutors when the method of nonenforcement is one of ad hoc decision-making. Supervisory prosecutors can articulate their own informal priorities or presumptions against enforcement, which would ensure more consistency by limiting line prosecutors' discretion. And even if supervisors do not articulate informal policies that would limit line prosecutor discretion, they

could ensure more consistency by simply reviewing enforcement and nonenforcement decisions. By personally reviewing these decisions, they can smooth out some of the inconsistency that arises from different prosecutors using different criteria to assess cases.[254]

Consistency may also be possible in smaller prosecutor offices, even if the office employs ad hoc decision-making. In smaller offices, the prosecutors can more easily speak with each other about nonenforcement issues as they arise in individual cases. Through those discussions the line prosecutors may develop similar views about how to treat cases. Those similar views can lead to relatively consistent nonenforcement decisions across decision makers, even in the absence of formal or informal policies.[255]

Once we reconceptualize questions about nonenforcement methods as a tradeoff between individualization and consistency, it allows for a different view of the academic literature about nonenforcement. Some nonenforcement minimalists are quite clear about their preference for individualization over consistency. Bruce Green and Rebecca Roiphe, for example, embrace ad hoc decision-making on the grounds that it allows prosecutors to individualize nonenforcement decisions—that is, to "apply law, norms, and equitable notions to individual cases, a complex process involving professional judgment not easily reduced to rules or even guidelines."[256]

Other nonenforcement minimalists suggest that nonenforcement consistency is outside of the appropriate bounds of prosecutorial power. The argument appears to be that, to the extent a criminal law will never be enforced (or never be enforced under particular circumstances), that consistency encroaches on the power of the legislature.[257] In other words, they argue that mandatory and

254. This assumes that supervisors treat cases consistently in the absence of explicitly articulated criteria, which would allow them to ensure uniformity through this case-by-case review.

255. *See* FREDERICK & STEMEN, SUMMARY REPORT, *supra* note 175, at 15 ("[F]ocus group participants said that advice from mentors, formal roundtable discussions, and informal discussions among colleagues contributed to group norms and helped prosecutors understand the acceptable range of decisions.").

256. Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1453. The idea that rules or guidelines restrict discretion and prevent individualization has a long history in the criminal justice literature. *See, e.g.*, Covey, *supra* note 118, at 447.

257. *See supra* notes 69-74 and accompanying text.

consistent nonenforcement essentially rewrites the law to remove that conduct from the substantive criminal law—a quintessentially legislative power that lies outside of the constitutional sphere of the executive. Under this view, while mandatory nonenforcement policies violate the separation of powers, ad hoc decision-making or other nonmandatory approaches to nonenforcement are permissible because they do not fully negate the substantive criminal law and thus do not encroach upon the legislative power.

We do not take up the merits of this constitutional argument in this Article.[258] However, we note that this argument against consistency implicitly suggests that some minimum number of prosecutions are necessary in order to satisfy the Constitution. Whether such an approach seems appropriate may depend on the law at issue. For those laws about which there is disagreement over enforcement, it might seem unobjectionable to say that at least some prosecutions must go forward. But for laws that have fallen into desuetude, it may seem more objectionable.

Take, for example, Jonathan Adams, a district attorney in Georgia. He recently objected to a new state law which forbids nonenforcement policies and instead requires prosecutors to assess every case individually.[259] Adams noted that the Georgia legislature has not repealed its law criminalizing adultery, but he has an office policy of mandatory nonenforcement for adultery.[260] Under the argument that consistency in nonenforcement is forbidden, his office would have to prosecute some adultery cases in order to avoid usurping the legislative power. That outcome is unpalatable because adultery, while still frowned upon, is no longer considered the sort of behavior that should be criminalized. Perhaps enforcing the adultery criminal laws would force the Georgia legislature to repeal its outdated law.[261] But in the meantime, individuals would face

258. For one response critical of the idea that prosecutorial nonenforcement represents the nullification of substantive criminal law, see Murray, *Prosecutorial Nonenforcement*, *supra* note 1, at 395-96.

259. Amy, *supra* note 58.

260. *Id.*

261. *See* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 828-31 (2016) (arguing that more aggressive enforcement can lead to legislative change and the narrowing of criminal laws).

conviction and punishment for engaging in behavior that almost certainly would not be criminalized if it were put to a vote today.

While we do not take up the constitutional argument, we nonetheless do take a position on the tradeoff between individualization and consistency. In particular, we believe that both principles are important, and it is both desirable and possible to strike a balance between the two principles, rather than endorsing one to the exclusion of another. Thus, we think that offices should adopt either enforcement priorities or presumptions against enforcement for the crimes that most commonly come before the office. The amount of consistency and individualization can differ significantly based on whether the office adopts priorities or presumptions; and it can also differ significantly based on how those priorities or presumptions are framed (for example, using qualitative standards or clear factual predicates). The position that we take does not extend to these more granular concerns. Instead, we offer only the somewhat general view that nonenforcement methods should seek to strike a balance between these competing values, and we leave for another day the precise balance that ought to be struck.

We also leave open the possibility that different balances ought to be struck for different types of crimes. For example, when it comes to crimes that have fallen into desuetude, such as criminal prohibitions on adultery, it may be appropriate to strike a balance that leads to more consistency and preserves only a small role for individualization. A presumption against enforcement of laws against adultery should likely contain a high hurdle to overcome—such as a qualitative statement that admits of few exceptions, or a factual hurdle of other criminal wrongdoing. Such a presumption would ensure that a crime that has fallen into desuetude is being enforced only in the rarest of circumstances, if at all.

B. Neutrality Versus Justice

Arguments about the reasons for nonenforcement can be understood as a tradeoff between neutrality and justice. Indeed, it takes very little to recast the debate over nonenforcement in these terms because nonenforcement minimalists and nonenforcement maximalists tend to group the reasons for nonenforcement into two

major categories—policy reasons and nonpolicy reasons (in particular, evidentiary concerns and resource constraints).[262] Maximalists support using policy reasons to shape nonenforcement policies, while minimalists believe that policy reasons are an inappropriate basis for nonenforcement.[263] All that is necessary to recast these arguments in terms of a tradeoff between neutrality and justice is to understand why maximalists support policy-based nonenforcement and minimalists oppose it.

Maximalists support policy-based nonenforcement because it allows prosecutors to better achieve justice. To be clear, nonenforcement maximalists do not necessarily use the term "justice" in explaining their support for policy-based nonenforcement. Instead, they talk about redirecting criminal justice away from underprivileged communities or eschewing the enforcement of laws that disproportionately affect racial minorities.[264] Put differently, the argument is that the burden of these laws fell disproportionately on historically marginalized communities, and that it is unfair and unjust to allow such a disproportionate burden to continue.

Echoes of justice can also be seen in the argument by maximalists that nonenforcement of less serious crime allows prosecutors to prioritize more serious crime. For example, Rebecca Blair and Miriam Krinsky argue that

> [l]ow clearance rates endanger the community not just by allowing those who commit serious crimes to evade accountability, but also by hampering community trust in law enforcement ....

262. *See supra* Parts I.C.1, I.C.2.

263. *See supra* Parts I.C.1, I.C.2.

264. *See, e.g.*, Goldstein, *supra* note 92, at 1191 ("[W]hen heavily minority jurisdictions that bear the brunt of mass incarceration elect prosecutors on platforms of reducing incarceration's footprint and its racial disparities, there is something objectionable about state governments representing majority-white constituencies second-guessing those choices."). Importantly, some progressive prosecutors do use the term "justice" in describing their approach to the office. *See* KRINSKY, *supra* note 104, at 56 (statement by Parisa Dehhani-Tafti, a prosecutor in Virginia) ("To make the world more just, ... [we must] move from the idea of punishment to repair, and from prosecution to protection."); Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 9, 2019), https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement/ [https://perma.cc/JC3Z-U9G9] (recounting that Chesa Boudin framed his election in terms of voters demanding "radical change to how we envision justice").

> Available evidence and common sense both suggest that investing more resources in the investigation of serious crimes is necessary to solve more of those crimes.[265]

The idea that crime seriousness ought to drive punishment decisions is foundational to multiple theories of punishment,[266] most notably retributivism.[267]

While it is easy to explain how justice is an underlying theme in the maximalist arguments in favor of allowing policy concerns to drive nonenforcement decisions, to understand how neutrality underlies the minimalist arguments against policy-driven nonenforcement decisions requires a bit more explanation. The major minimalist argument against policy-driven nonenforcement decisions is that policy—that is, decisions about what conduct should be illegal and what conduct should be legal—is a matter for the legislature.[268] Reasons that minimalists support—evidentiary concerns and resource allocation—do not implicate the legislature's policy choices. Evidentiary concerns and resource allocation are distinct considerations that are separate from judgments of whether a law is good or bad. Instead, minimalists rely on technical or morally neutral reasoning about the likely success of a case or the amount of time and money that an office can devote to pursuing cases writ large.[269]

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265. Blair & Krinsky, *supra* note 41, at 21 (footnote omitted).

266. *See generally* Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321 (2010) (arguing that a requirement of proportionality is consistent with deterrence, incapacitation, and rehabilitation).

267. *See, e.g.*, ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 72 (3d ed. 2010) (stating that the touchstone of retributivism is proportionality concerning "the relative seriousness of offences among themselves"). Theories of punishment usually function as justifications for punishment and guides for how much punishment ought to be imposed, see, for example, Farrell, *supra* note 266, at 335-59, but the framework could also be used as a guide to what laws ought to go unenforced.

268. *See supra* Part I.C.1.

269. *See, e.g.*, Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1454-55 (stating that "[p]rosecutors' expertise lies in their ability to apply law to fact and to make nuanced judgment calls based on complex factors" and that is how prosecutors ought to "pursu[e] justice in its most general sense, not by pursuing a particular constituency's public-policy objective"); *see also* Price, *Enforcement Discretion*, *supra* note 1, at 754-56 (distinguishing priority setting—which accounts for "the prosecutor's risks and uncertainties at trial" and the conservation of "prosecutorial resources for other cases"—and policymaking—which "overrid[es] congressional policies").

Even outside the context of prosecutorial enforcement decisions, there is real value in government officials basing their decisions on neutral principles. In a pluralistic society, basing government decisions on neutral principles has the advantage of avoiding contentious disagreements. Whether there is sufficient evidence to convince a jury to convict, for example, can be debated on the morally neutral grounds of how much evidence is available and whether it is likely to convince a jury.[270] Policy reasons are the opposite of neutral; they rely on contested values to conclude that certain policy outcomes are good and others are bad. Thus, basing decisions on policy reasons steps right into those disagreements; as a predicate, they require a clear sense of what is good policy and what is bad policy—a topic about which many people likely disagree.

Although there is value in relying on neutral principles in nonenforcement decisions, as noted in Part II above, it can be difficult to distinguish between the different justifications for nonenforcement.[271] Resource constraints, for example, require prosecutors to decide which cases deserve more resources and which deserve fewer. But while resource constraints may make nonenforcement inevitable, those constraints say nothing about which cases should go unprosecuted. That decision will almost certainly be driven by policy considerations.[272]

For example, when former Baltimore State's Attorney Marilyn Mosby announced that her office would no longer prosecute defendants for possessing any amount of marijuana, regardless of a defendant's criminal history, she justified this policy with multiple rationales, including that the use of limited law enforcement and judicial resources to prosecute marijuana took away resources that could be used to address violent crime.[273] But Mosby also discussed racial disparities in the criminal justice system and the minimal

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270. To be clear, a person's moral judgments can affect this determination. For example, in her work on how prosecutors use fictional jurors to make and defend enforcement decisions, Anna Offit documents several instances of so-called jury appeal standing in for a prosecutor's personal views about a case. *See* ANNA OFFIT, THE IMAGINED JUROR: HOW HYPOTHETICAL JURIES INFLUENCE FEDERAL PROSECUTORS 30-31, 34 (2022). But the external debate is not based on those moral judgments.

271. *See supra* Part II.B.

272. *See supra* Part II.B.4.

273. KRINSKY, *supra* note 104, at 148. *See generally* BALTIMORE CITY REPORT, *supra* note 185 (discussing how marijuana prosecutions divert resources from violent crime prosecutions).

public health risks of marijuana use to justify her decision.[274] This example demonstrates that even when prosecutors set enforcement policies motivated by resource constraints, deciding which offenses are deserving of prosecution resources often involves public policy considerations as well.

Unlike resource constraints, evidentiary considerations may seem to provide an objective basis for deciding which cases to pursue and which to abandon: Cases with strong evidence go forward, and those with weak evidence do not. But even decisions based on evidentiary concerns can involve policy considerations. One example is the past practice of prosecutors refusing to pursue cases of sexual assault if the victim had been drinking at the time of the assault or if the victim and the defendant had previously been intimate.[275] These decisions have been rightly criticized as reinforcing inappropriate norms about sexuality and consent.[276] But they were also grounded, at least in part, on prosecutorial concerns that juries would not find those victims' testimony credible.[277] As this example demonstrates, determinations about whether evidence is sufficient to obtain a conviction are, in many cases, prosecutorial predictions about what a jury is likely to do.[278] Those predictions can depend on implicit value judgments—such as judgments about a victim's behavior—and thus may not avoid contentious disagreements.

Even assuming that evidentiary concerns and resources are, in fact, neutral principles, embracing those neutral principles can come at the expense of justice. That is because, at least in some cases, making nonenforcement decisions based on evidentiary issues and resource constraints can place a thumb on the scale in favor of injustice. Very serious crimes are sometimes the hardest to prove—such as murder or sex crimes against children.[279] Prior research

274. BALTIMORE CITY REPORT, *supra* note 185, at 4, 7.

275. *See, e.g.*, David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1246-50 (1997) (collecting sources).

276. *See, e.g.*, *id.* at 1250-51.

277. *See id.* at 1246-48.

278. *See id.* at 1247 ("[C]ritics of prosecutors have focused mainly on their excessive use of 'winnability' as a criterion for filing charges."). *See generally* OFFIT, *supra* note 270 (describing how prosecutors rely on hypothetical and imagined jurors when making decisions).

279. *Cf.* Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 39-40 (2013) (noting that certain more serious crimes require greater resources to prosecute than less serious crimes).

indicates that when prosecutor offices are facing resource constraints, they often focus more on so-called victimless crimes because those are most easily proven and thus require fewer resources.[280] But crimes with victims tend to be more serious; thus, under most theories of criminal justice, they are the crimes we should be most interested in seeing prosecuted.[281]

As the preceding paragraphs indicate, there are difficulties associated with using neutral principles to make nonenforcement decisions. But there are also significant difficulties in using policy considerations to make such decisions. That is because even if one agrees with the principle that nonenforcement decisions should be guided by the policies that would best achieve justice, such a principle has very little to offer in the way of substance.

The conventional wisdom is that the duty of the prosecutor is to seek justice. The prosecutor's duty to seek justice can be found in many court opinions[282] and countless law review articles.[283] But what, precisely, it means to "seek justice" or to "do justice" is quite unclear. It is by some accounts an empty command that "covers everything and therefore demands nothing."[284] Criminal justice reform advocates may cite the duty to seek justice to encourage prosecutors to exercise leniency, while those arguing for a tough-on-crime approach may argue that justice requires severity in enforcement.[285] By this understanding, telling prosecutors to do justice provides little guidance for their decision-making and says nothing about what an optimal nonenforcement policy may be.[286]

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280. In their interviews with prosecutors, Stemen and Frederick found that a lack of support staff within their offices impedes prosecutors' ability to prepare or investigate cases—especially cases involving witnesses or victims—thus affecting decisions about what cases to pursue. *See id.* Cases involving witnesses or victims tend to be cases of property crime and violent crime, while drug cases "were less affected." *Id.* at 40.

281. *See supra* notes 266-67 and accompanying text.

282. *E.g.*, Berger v. United States, 295 U.S. 78, 88 (1935).

283. *E.g.*, Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999).

284. Bellin, *supra* note 17, at 1216.

285. *Id.* at 1208, 1217.

286. Interestingly, serious attempts to offer a more definitive framework of a prosecutor's duty seem to favor a decision-making model that results in fuller enforcement, whether by focusing on maximizing punishment or eschewing personal evaluations of how the law should be applied. *See, e.g.*, Epps, *supra* note 261; Bellin, *supra* note 17. To be clear, both Epps and Bellin contemplate some amount of nonenforcement. *See* Epps, *supra* note 261, at 836-37; Bellin, *supra* note 17, at 1241-42. But neither endorses the nonenforcement maximalist view

That the meaning of the phrases "seek justice" and "do justice" are unclear should perhaps not surprise us. After all, those who have devoted their professional lives to the philosophy of punishment disagree about what justice requires. Some retributivists, for example, believe that punishment must be proportional to a defendant's culpability and the harm that she has caused, while others believe that culpability and harm set only a ceiling for the appropriate amount of punishment and that justice can be served by lesser punishment if deterrence or rehabilitation concerns so indicate.[287]

We do not offer any definitive insight into what it would mean to "do justice" or to "seek justice" in a particular case—indeed, it is possible that there is no single correct answer in many individual cases. Nonetheless, we are skeptical that dramatically increasing nonenforcement, especially through mandatory nonenforcement policies, will necessarily lead to more just outcomes. For one thing, in the broader legal literature, "doing justice" is often characterized as a reason to resist bright-line rules and instead adopt more flexible standards.[288] Put differently, "doing justice" is often given as a reason for individualized decision-making, which in the context of nonprosecution would militate in favor of ad hoc decision-making, rather than other policy-based nonenforcement methods.[289] Thus, it is far from clear that "doing justice" is an adequate basis for the broad nonenforcement methods that nonenforcement maximalists support.

What is more, the substance of nonenforcement decisions cannot be easily separated from whether justice is being achieved. In the

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that suggests greater nonenforcement leads to more justice. *See* Epps, *supra* note 261, at 854; Bellin, *supra* note 17, at 1253.

287. *Compare, e.g.*, Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179-80 (Ferdinand Schoeman ed., 1987) (punishment proportional to culpability), *with* NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 192, 198 (1982) (punishment limited by culpability).

288. The basic idea is that rules tend to be over- or underinclusive, while standards provide a framework for decision-making while still allowing personal judgement to avoid unjust outcomes. This rules-versus-standards framework might suggest that nonenforcement policies are inferior to ad hoc decision-making because unbridled discretion maximizes the opportunity for personal judgment. *Cf.* Carissa Byrne Hessick, *Legality, Legal Standards, and the Legacy of Marvin Frankel*, 35 FED. SENT. REP. 249, 250 (2023) (noting the reasons to prefer standards in determinations of whether criminal punishment is just).

289. *See supra* Part III.A.

context of state prosecutors who run for office on progressive platforms, the discussion centers largely on low-level crimes, such as drug possession.[290] But those are hardly the only areas where we have seen nonenforcement in this country. There is evidence that white collar crimes are underenforced, and have been underenforced for decades.[291] Another high-profile example of nonenforcement comes from rural sheriffs who have declared that they will not enforce gun laws.[292] There is little doubt that these nonenforcement decisions have been based, at least in part, on policy considerations. But whether those examples of nonenforcement result in more justice is, at a minimum, up for debate. Ultimately, a person's conclusion about whether a policy-driven nonenforcement decision furthers the ends of justice will almost certainly turn on whether someone agrees with the moral judgements underlying the policy positions that the prosecutor has endorsed.

In sum, acknowledging the tradeoff between neutrality and justice allows us to better appreciate the complexity of the debate over prosecutorial nonenforcement. While both neutrality and justice are worthy goals for prosecutorial decision-making, so-called neutral decision criteria do not avoid contestable moral questions, and the pursuit of justice does not provide a clear standard for evaluating decision criteria. Consequently, rather than debating whether policy considerations are generally an appropriate basis for nonenforcement decisions, it may be more fruitful to simply debate the substance of specific nonenforcement decisions.

C. Knowledge Versus Accountability

Arguments about who should be making enforcement decisions—an individual line prosecutor or the head prosecutor—can be understood as arguments about knowledge and accountability.[293]

290. *See, e.g.*, *supra* notes 199-200 and accompanying text.

291. *See* Natapoff, *supra* note 8, at 1716 n.8 ("It has long been suggested that white-collar and environmental crimes are underenforced and under-punished.").

292. *See* Jesse McKinley & Cole Louison, *Another Challenge to New York's Gun Law: Sheriffs Who Won't Enforce It*, N.Y. TIMES (Oct. 9, 2022), https://www.nytimes.com/2022/10/09/nyregion/ny-gun-law-sheriffs.html [https://perma.cc/E96J-JZJQ].

293. To be clear, these arguments are often not just about the identity of the decision maker, but also about the method of decision. Nonenforcement decisions by line prosecutors are assumed to be made on an ad hoc basis, while decisions by head prosecutors are assumed

Some nonenforcement minimalists have argued that nonenforcement decisions ought to be made by individual line prosecutors because those are the actors who possess sufficient knowledge to make a high-quality nonenforcement decision.[294] In contrast, some nonenforcement maximalists have suggested that nonenforcement decisions ought to be made by the head prosecutor because that is the actor who is democratically accountable for such decisions.[295]

The line prosecutor is presumed to have more knowledge because she is the person who knows the most about the facts and circumstances of an individual case.[296] That knowledge allows line prosecutors to make a higher quality decision, so the argument goes, because they can account for all of the facts and circumstances in making a nonenforcement decision.[297] To put this in the terms discussed in Part III.A, line prosecutors have more knowledge about a case, and they are thus in a better position to make an individualized nonenforcement decision. Head prosecutors, on the other hand, will be less familiar with the facts and circumstances of particular cases, and thus they will have less knowledge about the appropriate nonenforcement decision.

While the line prosecutor may have more knowledge about an individual case, the head prosecutor is more accountable to the public. Unlike line prosecutors, head prosecutors are accountable because they must answer—either directly or indirectly—to the voting public.[298] It is this accountability to voters that nonenforcement maximalists point to in support of broad nonenforcement policies—such as the mandatory nonenforcement policies adopted by elected prosecutors.[299] They see this democratic accountability as legitimizing nonenforcement, arguing that "local prosecutorial elections arose, in significant part, because policymakers recognized

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to be made through policies, such as presumptions or mandatory policies. But, as noted above, the identity of the decision maker can be disentangled from the method of decision-making. *See supra* Parts II.A, II.C.

294. *See, e.g.*, Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1464-65.

295. *See, e.g.*, Blair & Krinksy, *supra* note 41, at 22-24, 27-28.

296. *See* Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1447 ("Subordinate prosecutors ... generally believe they have a role to play [in charging decisions] because the facts of a case matter and they are more familiar with the facts of their cases.").

297. *See id.* at 1464-65.

298. *See* Hessick & Morse, *supra* note 237, at 1550 tbl. 1 (cataloging the states that elect prosecutors and those that appoint them).

299. *See, e.g.*, Blair & Krinsky, *supra* note 41, at 22-24, 27-28.

that the criminal legal system would continue to require normative judgments" and that "voters are best positioned to decide who should lead their local justice system; when subjective questions arise, voters have the right to answer."[300] Line prosecutors, in contrast, are not accountable to voters.

To the extent that nonenforcement minimalists address the accountability argument, they either place less value on democratic accountability or they offer an alternative view of which democratic choices matter. Green and Roiphe, for example, see a limited role for democratic accountability—namely that "prosecutors are not expected to respond directly to the will of the people. Like judges, they are, at times, required to apply the law to facts and determine the proper course regardless of, and sometimes even despite, what constituents might want."[301] As a result, Green and Roiphe conclude that fiduciary theory, rather than democratic theory, is the better approach for evaluating the work of prosecutors generally and the nonenforcement policies of so-called progressive prosecutors in particular.[302] In part because they reject a democratic theory analysis of prosecutorial nonenforcement, Green and Roiphe also reject the idea that prosecutors should adopt policies that are responsive to the preferences of voters who elected them.[303] In other words, Green and Roiphe not only believe that knowledge ought to take priority over democratic accountability, but they are also skeptical of the role that democratic accountability ought to play in nonenforcement decisions at all.

Burdette and Carruthers, on the other hand, do not discount the value of democratic choices. Instead, they emphasize that the legislators who enacted the relevant statutes were also elected.[304] Because legislators are tasked with the power to write laws, they

300. *Id.* at 27-28.

301. Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1449. To be clear, Green and Roiphe express this view in the context of "discretionary choices in individual cases." *Id.*

302. *Id.* at 1449-50 ("Other theories, like democratic theory, usefully explain some aspects of the prosecutor's work, but unlike fiduciary theory, they do not capture the hybrid role prosecutors play as both lawyers with a broad mandate to carry out a particular abstract interest and as public officials.").

303. *See id.* at 1452 (arguing, as a general matter, that "elected prosecutors, as fiduciaries, are accountable to the broader public, not just their supporters" and, more specifically, that the elected district attorney in California "had a responsibility ... at the very least, to consider the views of all citizens of San Francisco and California").

304. Burdette & Carruthers, *supra* note 60, at 191.

see the legislators' democratic accountability as the more important democratic choice regarding nonenforcement.[305]

For their part, nonenforcement maximalists do not appear to place much value on the knowledge of line prosecutors. Whether this is because they prioritize consistency over individualization,[306] or whether it is because they value public accountability over individualized decision-making is unclear.[307]

In discussions of knowledge and accountability, line prosecutors and head prosecutors loom large, and the supervising prosecutor is often missing.[308] This is an unfortunate omission because supervisors appear to fall somewhere in the middle of the knowledge and accountability spectrums. In order to review line prosecutors' nonenforcement decisions, supervisors must have at least some knowledge of an individual case. Of course, supervisors will likely have less knowledge than the line prosecutor—they will know only what the line prosecutor has told them or what information is available in the case file. But the supervisory prosecutor will have more knowledge than the head prosecutor about the particular circumstances of a case because the head prosecutor will have less time to familiarize herself about those circumstances, given the demands of the office.

Their role as intermediary also makes supervisory prosecutors more accountable than are line prosecutors. Supervisors are responsible for implementing policies from the head prosecutor and they are answerable to the head prosecutor for the performance of their units.[309] Of course, the head prosecutor is more democratically accountable than the supervisory prosecutor. While the supervisory prosecutor is accountable to the head prosecutor, it is only the head

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305. *Id.* at 191-92.

306. See *supra* Part III.A for a discussion of these principles.

307. It is possible that, for progressive prosecutors, individualized decision-making may be seen as a threat to the progressive goals of the elected prosecutor, many of whom ran on platforms of changing the status quo. *See generally* KRINSKY, *supra* note 104 (documenting and discussing various progressive prosecutors and their elections and policies). Individualized decision-making could allow the status quo to continue, especially when line prosecutors are a source of internal resistance to the changes the elected DA seeks to implement. *See generally* Godsoe & Romero, *supra* note 170 (documenting and discussing such resistance).

308. One notable exception is Levine & Wright, *supra* note 117, which includes a nuanced discussion of the role of supervising prosecutors.

309. *See supra* Part II.C.2.

prosecutor who is directly accountable to the voters or the appointing official. Supervisory prosecutors are thus indirectly accountable to voters (or other political actors) who select the head prosecutor.

It is important to note the background assumptions about decision makers that animate the nonenforcement debate: Line prosecutors have the most knowledge and the least accountability, while head prosecutors have the most accountability and the least knowledge, and supervisors fall somewhere in the middle on both issues. But these assumptions likely do not hold true across all prosecutors' offices. Instead, they are more likely to be true in larger offices than in smaller offices.

The tradeoff between knowledge and accountability is less acute in smaller prosecutors' offices. In those offices, head prosecutors are often responsible for their own docket of cases—indeed, sometimes they may be the only prosecutor in the office.[310] In that case, knowledge and accountability are both maximized. But even when the head prosecutor is not personally handling cases in small offices, she is likely to have more knowledge about individual cases because she is operating as the direct supervisor for the small number of line prosecutors in her office, rather than as the manager of multiple supervising attorneys, as does the head prosecutor in a large office.[311]

Another key difference between large and small offices is the amount of democratic accountability that occurs in practice. Nationwide, most elected prosecutors run for office unopposed.[312] But the rate of uncontested elections is much higher for small offices than for large offices: One national study of prosecutor elections found that only 26 percent of prosecutors in the smallest offices ran in a contested election, as compared to 65 percent of prosecutors in the largest offices.[313] If voters do not have a choice between candidates in a prosecutor election—as is the case for nearly three

310. *See supra* note 238 and accompanying text.

311. *See supra* Part II.C.3.

312. Hessick & Morse, *supra* note 237, at 1563 tbl. 5.

313. *Id.* A more recent study found an even larger margin: Only 22 percent of prosecutors in the smallest offices ran in a contested election, as compared to 91 percent of prosecutors in the largest offices. THE PROSECUTORS & POL. PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS AND CAMPAIGN CONTRIBUTIONS: 2018-2019, 6 tbl. E1 (Dec. 2024), https://law.unc.edu/wp-content/uploads/2024/12/R2-Election-Report-FINAL.pdf [https://perma.cc/WMD2-RXS2].

quarters of elections in the smallest jurisdictions—then there can be no democratic accountability for a head prosecutor's nonenforcement decisions.

Democratic accountability is not only a problem in small offices and in uncontested elections. Even in large offices, where candidates are more likely to face electoral challengers, there may be limited democratic accountability for nonenforcement decisions. Unless nonenforcement policies are made public, voters do not have an opportunity to decide whether they support such policies. And the available evidence suggests that, of those offices which have adopted nonenforcement policies, public disclosure is the exception, rather than the rule.[314]

These democratic deficits indicate that democratic accountability may be more apparent than real. In the absence of public disclosure—a topic taken up in the next section—changing the identity of the nonenforcement decision maker will have no effect on democratic accountability. Thus, to the extent that knowledge and accountability will be traded off based on a change in decision maker, it is not clear that accountability will necessarily be obtained.

The increased knowledge that is obtained by assigning nonenforcement decisions to line prosecutors may also be overstated. In theory, the prosecutor to whom the case belongs has acquired more information about the case than someone higher up the chain of responsibility. In practice, caseloads may give prosecutors very little time to learn much about a case before having to make a nonenforcement decision.[315]

And even when line prosecutors have enough time to obtain significant information about a particular case, they only gain a particular type of knowledge—knowledge about the facts and circumstances related to a particular case. This knowledge may allow them to make superior nonenforcement decisions based on evidentiary concerns and other case-specific circumstances. But there are other types of knowledge that are important for

314. *See supra* notes 88-91 and accompanying text.

315. *Cf.* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 56 (2021) (reporting conversation with defense attorney who "thought some prosecutors do not conduct any independent investigation ... [and] instead rely only on the police report to decide what charges to bring and what plea offer to give").

nonenforcement decisions as well—such as knowledge about resource constraints. With respect to this type of knowledge, line prosecutors may have superior knowledge about the time and effort that they can devote to the cases that have been assigned to them. But the head prosecutor is likely to have more knowledge about the resource constraints of the office writ large.[316]

The democratic deficits and the different types of relevant knowledge lead us to abstain from expressing an opinion about the appropriate balance between knowledge and accountability. But while we do not offer our own view on this matter, we do note that the debate over nonenforcement would benefit from greater discussion of the role that supervisors play in larger offices and more consideration of how the size of a prosecutor office should affect assumptions about the role of line prosecutors and head prosecutors.

D. Public Safety Versus Transparency

Part of the debate between nonenforcement minimalists and nonenforcement maximalists is best understood as an argument about how to trade off public safety and transparency. As noted in Part I.C, much of the debate surrounding nonenforcement policies has centered on public safety. Nonenforcement minimalists argue that crime will rise if nonenforcement policies are announced. For example, Zachary Price stated that prosecutorial nonenforcement policies may "encourage or authorize illegal conduct by providing prospective assurances that those who engage in it will face no repercussions."[317] This prospective authorization critique is not just about the broad nature of the policies; it also focuses on prosecutors publicly announcing their nonenforcement policies as opposed to quietly following internal guidelines, as has traditionally been the norm.[318]

Nonenforcement maximalists sometimes debate the public safety argument on its own terms, pointing to some recent evidence that suggests nonenforcement policies may reduce crime.[319] But they also

316. We are indebted to Justin Murray for this insight.

317. Price, *Faithful Execution*, *supra* note 1, at 667.

318. *See* Green & Roiphe, *Fiduciary Theory*, *supra* note 1, at 1438-41 (identifying the traditional norm).

319. *See supra* Part I.C.2.

make a different argument grounded in transparency—namely that being transparent about nonenforcement decisions and policies is itself beneficial because it allows for community input and informed voters in prosecutor elections.[320]

To the extent that nonenforcement minimalists are correct, and the public announcement of nonenforcement policies does reduce deterrence, then there is a tradeoff between transparency and accountability. This tradeoff is not directly related to the three features of nonenforcement that we identify in Part II, but we address it nonetheless because the public safety and transparency tradeoff is so important in the nonenforcement debate.

It is worth noting that some of the minimalists' predictions about nonenforcement and public safety bear a great resemblance to Meir Dan-Cohen's acoustic separation theory. Acoustic separation draws a distinction between conduct rules (the law as shared with the public to guide behavior) and decision rules (the law as shared with officials who apply and enforce it).[321] In Dan-Cohen's account, acoustic separation occurs when the knowledge of the rules are completely segregated, with the public only aware of the conduct rules and public officials only aware of the decision rules.[322] Of course, in the real world the separation is not so stark. Instead, Dan-Cohen argues that there is a selective transmission of legal expectations with the signals to the public indicating a need for strict compliance with the law and signals to officials indicating that not all violations of the law are worthy of punishment.[323] Acoustic separation theory tells us that, although nonenforcement policies may be inevitable, publicly communicating those rules will transform them from decision rules into conduct rules and encourage more lawbreaking.

Leaving to one side whether the predictive claim about the public announcement of policies decreasing deterrence could be empirically tested, it is important to note that the minimalists' public safety argument assumes that decisional rules remain known only to insiders in the absence of public announcements. In other words,

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320. *See supra* Part I.C.2.

321. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627 (1984).

322. *Id.* at 630.

323. *Id.* at 635, 648.

the argument assumes that if prosecutors do not announce their nonenforcement policies, then the general public will not know that prosecutors sometimes decline to enforce laws. For example, if a prosecutor does not say that she will never seek the death penalty, then the public will believe that the death penalty remains an available option in the jurisdiction and capital punishment retains its deterrent force.

We are quite skeptical of this assumption because it rests on asymmetric assumptions about public knowledge. The public is presumed to have perfect knowledge of the content of formal law, while at the same time having no knowledge about enforcement practices. The truth is likely somewhere in between—imperfect knowledge of both the law on the books and the law on the streets.[324] Returning to the death penalty example, it is likely fair to assume that people know whether their state has kept or abolished the death penalty, but not fair to assume that they are familiar with the statutory aggravating and mitigating factors that would make a murder eligible for the death penalty. In other words, they know some, but certainly not all, of the formal law.[325]

A similar inference might be appropriate when it comes to enforcement policies. People might know if their locally elected prosecutor has said that she will never seek the death penalty and never prosecute possession of marijuana or shoplifting, for example. But if there is a presumption of nonenforcement that identifies factors that would warrant enforcement under certain circumstances, that knowledge is likely too complex to be widely known and acted upon. To put this in Dan-Cohen's terms, only when decision rules are incredibly straightforward are they likely to be treated as conduct rules. If they are not easily transmitted, then even publicly announced decision rules are unlikely to change conduct.

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324. *See* Stuntz, *supra* note 45, at 508 (providing "law on the street" and "law on the books" terminology).

325. While there is some amount of legal knowledge across populations, ignorance and misunderstanding of the law is common. *See* Benjamin van Rooij, *Do People Know the Law? Empirical Evidence About Legal Knowledge and Its Implications for Compliance*, *in* THE CAMBRIDGE HANDBOOK OF COMPLIANCE 467, 481-82 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

Of course, a critic of publicly announced nonenforcement policies might point out that making all nonenforcement decisions on a case-by-case basis is least likely to change conduct. If the decision not to enforce is not subject to *any* decision rules, so the argument goes, then there is no risk of a decision rule becoming a conduct rule.

But we think that argument may go too far. The fact that nonenforcement decisions do not follow any discernable policy does not mean that the public would be wholly unaware of nonenforcement decisions. Indeed, to the extent that they are familiar with others who have been accused of crimes or victims of crimes, a member of the public might perceive that nonenforcement decisions are being made on an arbitrary basis.[326]

Ironically, arbitrary enforcement—or the perception of arbitrary enforcement—could decrease the deterrent value of the criminal law. If members of the public know that nonenforcement decisions are arbitrary, then they will perceive their overall chances of being punished as reduced. Social science evidence suggests that it is the possibility of detection and punishment, rather than the amount of punishment, which has the greater deterrent effect.[327] Thus, arbitrary enforcement (or perceived arbitrariness) could also increase law breaking and decrease public safety. What is more, if nonenforcement is perceived as *intentionally* arbitrary, that could also decrease public safety by (further) undermining the legitimacy of the criminal justice system. That could also have negative public safety consequences, as there is some evidence that perceived illegitimacy can reduce compliance with the law.[328]

To be clear, these inferential arguments we have offered about how ad hoc decision-making can decrease public safety are certainly subject to dispute. But, at a minimum, they suggest that public safety does not definitively counsel against the public announcement of nonenforcement policies.

To the extent that our inferential arguments are correct, they also suggest that the benefits of transparency may be overstated. As

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326. Indeed, if nonenforcement decisions are being made on a purely ad hoc basis with minimal review, that perception might be correct!

327. *See, e.g.*, Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 200-05 (2013) (collecting and describing research).

328. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006) (discussing the role of legitimacy, as opposed to fear of punishment, in ensuring compliance with the law).

noted in Part III.C above, one of the supposed benefits of transparency is that it allows for democratic accountability. If voters disagree with their prosecutor's nonenforcement policies, then they can lobby their elected prosecutor to adopt different policies or even vote her out of office. But if the public is unable to process or remember anything but the crudest nonenforcement rules, the public announcement of nonenforcement will not actually lead to informed voters or helpful community input. Instead, voters will make decisions based on limited or even incorrect information.[329]

In short, we are skeptical of the empirical claims surrounding the public announcement of nonenforcement policies. Claims about public safety and transparency may be overstated, and plausible inferences can be drawn that point in opposite directions. As a result, we do not offer an opinion about how to best strike a balance between public safety and transparency.

CONCLUSION

Having provided a taxonomy of nonenforcement and identified the key tradeoffs between nonenforcement minimalism and nonenforcement maximalism, we might be expected to offer our own detailed proposal on how to properly structure prosecutorial nonenforcement. But we decline to do so. To be clear, we have offered some thoughts on the matter including that, as a general matter, maximizing one value at the expense of another is generally unwise. Most importantly, as we explained in Part III.A, we believe that either the setting of priorities or the articulation of presumptions against nonenforcement are superior methods of nonenforcement than either ad hoc decision-making or mandatory policies. But developing a more detailed approach to structuring those priorities or presumptions is a complex task that goes beyond the scope of this Article. A more detailed approach would inevitably need to resolve questions

329. For more on voter ignorance, see Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 371-73 (2013) (collecting and describing the political science literature). *Cf.* Hessick, *supra* note 56, at 985 ("[B]ecause 'doing less' is a key feature of the progressive prosecutor brand, it may be difficult for progressive prosecutors to successfully communicate when they take affirmative action to address crime. The uninformed voter sees the progressive prosecutor label, assumes that the prosecutor is doing less, and never bothers to inform herself about whether the prosecutor is actually 'doing more.'").

about the appropriate reasons for nonenforcement policies, questions about the ideal nonenforcement decision maker, and questions about whether and how to publicly announce such policies—questions for which we do not have ready answers.

In addition to this uncertainty, we believe that it may be unwise to debate questions about prosecutorial nonenforcement solely in the abstract. Views about the desirability of nonenforcement are often tied to the substance of such decisions. A person might support the nonenforcement of marijuana laws but oppose the nonenforcement of gun laws. If that is the case, then the debate about prosecutorial nonenforcement of those laws should explicitly address the substance of the laws being enforced (or not, as the case may be), rather than attempting to settle the question on abstract terms.

That is not to say that the method of nonenforcement, the reasons for nonenforcement, and the identity of the nonenforcement decision maker are unimportant. To the contrary, as we have explained, choices on these matters implicate important competing values, and thus they should receive attention and care.[330] Our point is that selecting the correct method, reason, or person for nonenforcement does not address concerns about the substance of a nonenforcement decision. Indeed, at times concerns about the proper form of nonenforcement may obscure disagreement about those substantive choices. In other words, when it comes to nonenforcement both form *and* substance matter, and it is important that disputes about form are more than just proxy fights for disputes about substance.

It is our hope that we have minimized the chances of conflating form with substance by disentangling the three major features of nonenforcement and clarifying that those features implicate competing values. In clarifying the terms and the stakes of the different *forms* of nonenforcement, we have been better able to assess our own views about the best method, reasons, and decision maker for prosecutorial nonenforcement. And we hope it will do the same for others.

330. *See supra* Part III.