

9-2022

## Prosecutorial Nonenforcement and Residual Criminalization

Justin Murray

Follow this and additional works at: [https://digitalcommons.nyls.edu/fac\\_articles\\_chapters](https://digitalcommons.nyls.edu/fac_articles_chapters)

 Part of the [Criminal Law Commons](#)

---

# Prosecutorial Nonenforcement and Residual Criminalization

Justin Murray\*

## ABSTRACT

*In recent years a small but influential group of locally elected prosecutors committed to criminal justice reform have openly refused to enforce various criminal laws—laws prohibiting marijuana possession, sentencing enhancements, laws authorizing the death penalty, and much more—because they see those laws as unjust and incompatible with core reform objectives. Condemned by many on the political right for allegedly usurping the legislature’s lawmaking role and praised by many on the left for bypassing dysfunctional state legislatures in favor of local solutions, these prosecutorial nonenforcement policies are commonly said to have the same effect as nullifying, or even repealing, the laws that they leave unenforced. Yet this idea—the idea that prosecutorial nonenforcement is functionally equivalent to the nullification or repeal of statutory law—is deeply mistaken. This Essay shows why. It uncovers a number of underappreciated mechanisms through which criminal laws may continue to get enforced or to structure social relations despite a district attorney’s policy against enforcing them, producing what this Essay calls “residual criminalization.” The Essay also explains why grappling with this phenomenon of residual criminalization can help reframe ongoing discussions concerning prosecutorial nonenforcement by, on one hand, deflating certain prominent objections to nonenforcement and, on the other, revealing that nonenforcement cannot by itself satisfy criminal justice reformers’ deeper aspirations.*

---

\* Associate Professor of Law, New York Law School. I am grateful for the opportunity to vet drafts of this Essay at the Criminal Justice Ethics Schmooze, the Decarceral Law Professors’ works in progress series, faculty workshops at New York Law School and Rutgers Law School, and the Understanding Drug Sentencing Symposium hosted by The Ohio State University’s Drug Enforcement and Policy Center and Arizona State University’s Academy for Justice. I also owe considerable debts to Zohra Ahmed, Jeff Bellin, Michal Buchhandler-Raphael, Bennett Capers, Nora Demleitner, Jessica Eaglin, Rory Fleming, Cynthia Godsoe, Fareed Hayat, Amy Kimpel, Ethan Lowens, Ngozi Okidegbe, Lauren Ouziel, Ric Simmons, Kate Weisburd, and Ron Wright for their thoughtful discussions about or comments on the paper and to Sandra Alrabaa, a truly first-rate research assistant.

## TABLE OF CONTENTS

ABSTRACT .....	1
INTRODUCTION .....	2
I. EMERGING PATTERNS IN PROSECUTORIAL NONENFORCEMENT .....	7
A. NONENFORCEMENT FOR MARIJUANA POSSESSION IN (PARTS OF) VIRGINIA .....	8
B. NONENFORCEMENT FOR FIFTEEN LOW-LEVEL OFFENSE CATEGORIES IN THE BOSTON AREA.....	12
C. NONENFORCEMENT FOR THREE STRIKES AND OTHER SENTENCE ENHANCEMENTS IN LA .....	16
II. RESIDUAL CRIMINALIZATION .....	20
A. RESIDUAL PROSECUTORIAL ENFORCEMENT.....	22
B. RESIDUAL NONPROSECUTORIAL ENFORCEMENT.....	26
C. RESIDUAL STIGMATIZATION .....	30
III. PROSECUTORIAL NONENFORCEMENT RECONSIDERED .....	32
A. CRITIQUES OF NONENFORCEMENT.....	33
B. RETHINKING PROSECUTION-DRIVEN REFORM.....	36

## INTRODUCTION

American law vests prosecutors with broad discretionary control over key phases of the adjudicative process and, in the aggregate, over the main outcomes the criminal justice system produces. Through the roles they play in connection with charging, bail setting, plea negotiation, sentencing, and other stages, prosecutors have considerable say over who gets formally accused of criminal wrongdoing, whether those facing accusations are confined in a cell or released while their cases are pending, whether they will be convicted, and how severely they are punished.<sup>1</sup> For much of the past half-century, prosecutors have used their power to help build the largest system of mass incarceration the world has ever seen—a system marked by profound racial inequality and one that has failed to deliver on its assurance that we can make ourselves safe by caging others.<sup>2</sup>

---

<sup>1</sup> As to prosecutorial discretion at the charging stage, *see, e.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* ch. 2 (2007). As to prosecutorial influence with respect to judges' bail decisions, *see, e.g.*, Aurélie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* 12–15 (Apr. 9, 2021) (unpublished manuscript) (on file with author). As to prosecutorial control over plea offers and, by extension, sentencing, *see, e.g.*, William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 *HARV. L. REV.* 2548, 2549 (2004).

<sup>2</sup> As to the degree of responsibility prosecutors bear for mass incarceration, *compare, e.g.*, JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL*

Some prosecutors, however, are beginning to press against this longstanding pattern. Over the last decade, a wave of candidates for local district attorney (“DA”)<sup>3</sup> have won election on platforms promising to shrink the criminal justice system’s footprint, alleviate race- and class-based disparities, and pursue alternative strategies for maintaining public safety.<sup>4</sup> According to one recent estimate, reform-oriented DAs now hold power in counties that are home to over twenty percent of the U.S. population.<sup>5</sup> Many of the new reformist DAs would like to reduce or eliminate money bail as a condition for pretrial release in their jurisdictions; some are forming conviction integrity units to investigate and remedy wrongful convictions; and others are implementing diversion initiatives that enable defendants to avoid criminal punishment if they manage to successfully complete rehabilitative programming.<sup>6</sup> Some of the most ambitious reform-oriented DAs are even declining to enforce certain statutorily defined criminal offenses or penalties in many, or all, cases.<sup>7</sup>

Reforms of the latter variety—those calling for categorical or semi-categorical “prosecutorial nonenforcement”—are the focus of this Essay. Many prosecutorial

---

REFORM ch.5 (2017) (primary responsibility), *with, e.g.*, Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856–57 (2018) (reviewing PFAFF, *supra*) (secondary responsibility shared with other actors). For data on mass incarceration and its racial skew, *see, e.g.*, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE Slideshows 1, 6 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>. For varying perspectives on whether and to what extent the explosion in U.S. incarceration rates improved public safety, *compare, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1199–1207 (2015) (skeptical), *with, e.g.*, Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPECTIVES 163, 177–79 (2004) (concluding that “[t]he evidence linking increased punishment to lower crime rates is very strong” but that continued incarceration beyond current rates may yield “sharply declining marginal benefits”).

<sup>3</sup> County prosecutors’ offices and the people elected to lead them go by different names in various parts of the country, such as the district attorney’s office, led by the district attorney, the state’s attorney’s office, led by the state’s attorney, and the commonwealth’s attorney’s office, led by a commonwealth’s attorney. For simplicity this Essay will use the terms district attorney’s office and district attorney to encompass all these variations.

<sup>4</sup> *See, e.g.*, Ryan C. Meldrum et al., *Progressive and Traditional Orientations to Prosecution: An Empirical Assessment in Four Prosecutorial Offices*, 48 CRIM. JUST. & BEHAV. 354, 354–55 (2021).

<sup>5</sup> *See* Akela Lacy & Alice Speri, *Philadelphia District Attorney Larry Krasner Trounces Police-Backed Primary Challenger*, THE INTERCEPT (May 18, 2021, 11:56 PM), <https://theintercept.com/2021/05/18/larry-krasner-carlos-vega-philadelphia/> [<https://perma.cc/M6WM-ARLE>]. Calculating the number of DAs who are dedicated to reform is not a hard science, of course, since one person’s reformer is another’s traditionalist. *See, e.g.*, Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–19 (2021) (critically examining various ways of defining what it means to be a “progressive prosecutor”).

<sup>6</sup> *See, e.g.*, Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6–15 (2019).

<sup>7</sup> For discussion of several of these nonenforcement measures, *see infra* Section I.

nonenforcement measures are restricted to marijuana possession offenses or the death penalty.<sup>8</sup> But some nonenforcement policies cast a wider net, sweeping in other commonly charged low-level offenses like shoplifting, disorderly conduct, non-marijuana drug possession, and drug distribution, in addition to sentence enhancement statutes—such as three strikes laws—that expose defendants to elevated penalties in certain circumstances.<sup>9</sup>

Prosecutorial nonenforcement has become something of a lightning rod over the last few years, producing deep fissures within DA's offices, conflicts between prosecutors and judges, efforts by state and federal officials to sideline local DAs, disputes pitting DA's offices against police departments, and more.<sup>10</sup> Those who oppose nonenforcement contend that a DA's role is to enforce the law as enacted by the legislature, not pass judgment on it, and that slackening enforcement will defeat the law's purposes and provoke a rise in crime.<sup>11</sup> Supporters, by contrast, assert that a DA's responsibility is to seek justice through the sound exercise of discretion or to carry out the local electorate's will and thus that prosecutors should decline to enforce laws that are unjust or at odds with the local community's needs.<sup>12</sup> There is one significant point, though, on which many critics and backers of prosecutorial nonenforcement find themselves in agreement: that a policy against enforcing a criminal statute has substantially the same effect as repealing the statute and, thus, the embrace of nonenforcement by reformist DAs is tantamount to "nullif[ying] democratically enacted law."<sup>13</sup> This idea is deployed by adversaries of nonenforcement to fortify their position that reformist DAs are improperly invading legislative prerogatives and placing the community at risk,

---

<sup>8</sup> For examples of prosecutorial nonenforcement policies relating to marijuana offenses, see *infra* Section I.A. For discussion of nonenforcement policies relating to the death penalty, see *infra* notes 79, 121–26 and accompanying text.

<sup>9</sup> For an example of a declination policy that extends far beyond marijuana possession, see *infra* Section I.B. For discussion of the Los Angeles County DA's nonenforcement policy regarding sentence enhancements, see *infra* Section I.C.

<sup>10</sup> See *infra* notes 32–36, 41–43, 47–48, 51–53, 65–77, 89–99; see also *infra* Section II.

<sup>11</sup> See *infra* notes 33, 43, 65–69, 94–98, 124, 153–57 and accompanying text.

<sup>12</sup> See *infra* notes 167, 169–72 and accompanying text.

<sup>13</sup> W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 179 (2021) (characterizing categorical prosecutorial nonenforcement as nullification while nevertheless defending the practice in limited circumstances); see also, e.g., DEP'T OF JUST., FINAL REPORT, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 8 (2020) (asserting that "categorical non-enforcement of a law is tantamount to its abolition" and attacking broad-based prosecutorial nonenforcement on that basis); Terry Gross, 'Charged' Explains How Prosecutors and Plea Bargains Drive Mass Incarceration, NPR (Apr. 10, 2019, 1:46 PM), <https://www.npr.org/2019/04/10/711654831/charged-explains-how-prosecutors-and-plea-bargains-drive-mass-incarceration> [<https://perma.cc/NB99-G5J2>] (interview with Emily Bazelon) (arguing that nonenforcement measures enable prosecutors to effectively "decriminalize certain offenses, like jumping a turnstile or possessing marijuana," and celebrating that "the great power that prosecutors have [can be] harnessed in a new and different way"). For additional expressions of these same core themes, see *infra* notes 33, 43, 65–69, 94–98, 102–05, 169–72 and accompanying text.

whereas nonenforcement enthusiasts invoke the concept with a different set of goals in view, such as encouraging criminal justice reformers to mobilize in support of reformist DAs and commit a greater share of the reform movement's resources toward winning DA elections and transforming the system from the inside.<sup>14</sup> But while the forces arrayed on each side of this controversy are tempted to compare prosecutorial nonenforcement to statutory repeal or nullification for differing reasons, the nature of their claim is quite similar. And the claim is not entirely implausible: to the extent that what we mean by "law" is "the social activity of law" or "law in action" rather than simply "law on the books,"<sup>15</sup> there is a certain logic to the suggestion that a criminal statute is rendered a dead letter where the DA responsible for enforcing it refuses to do so.

This Essay, however, resists that conclusion—not by disputing the underlying concept that the law is what it does, but by uncovering a variety of underappreciated mechanisms by which criminal statutes continue to be enforced or otherwise structure social relations despite prosecutorial directives against enforcing them. First, prosecutions may persist even after a DA has announced a policy forbidding such prosecutions where the policy gets ignored, blocked, or circumvented by the DA's line prosecutors, judges, or state and local officials, or where the policy itself undergoes change—whether because the reformist DA backtracks or because he or she loses power to a retrenchment candidate.<sup>16</sup> Second, police departments may continue conducting arrests, stops, and other enforcement actions regardless of their local DAs' preferences; likewise, judges tasked with setting bail, probation officers deciding whether to commence revocation proceedings, immigration officials deciding whether to remove a noncitizen from the country, and many other state actors remain free to penalize people in various ways for allegedly violating criminal statutes irrespective of whether such violations are being criminally prosecuted.<sup>17</sup> Third, even with little or no ongoing enforcement by prosecutors or other state actors, the fact that a criminal statute remains on the books can still reinforce social norms against behavior the legislature deems undesirable and stigmatize those who engage in it—especially if the statute generated a high volume of convictions under earlier enforcement regimes and those convictions have not been expunged.<sup>18</sup> These three stories—stories detailing what this Essay terms "residual prosecutorial enforcement,"

---

<sup>14</sup> For discussion of how opponents of nonenforcement leverage comparisons to statutory repeal or nullification, see *infra* Section III.A. For discussion of how nonenforcement's supporters make use of the idea, see *infra* Section III.B.

<sup>15</sup> Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 246–47 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (questioning the distinction between law in action and law on the books and suggesting only the former concept is intelligible).

<sup>16</sup> See *infra* Section II.A.

<sup>17</sup> See *infra* Section II.B.

<sup>18</sup> See *infra* Section II.C.

“residual nonprosecutorial enforcement,” and “residual stigmatization,” or, taken together, “residual criminalization”—reveal that prosecutorial nonenforcement, significant though it is, falls far short of statutory repeal or nullification in its impact on criminal law administration and social ordering.

Reckoning with residual criminalization can help push ongoing discussions surrounding prosecutorial nonenforcement in fruitful directions. On one hand, the concept of residual criminalization tends to deflate certain prominent objections to prosecutorial nonenforcement—particularly objections along the lines that a DA who categorically or semi-categorically refuses to enforce a statute runs afoul of separation-of-powers norms by exercising a legislative function. To be sure, such objections might still be viable in some circumstances. But just as comparisons between prosecutorial nonenforcement and statutory repeal or nullification can be and frequently are pressed into service to magnify concerns regarding the separation of powers and other concerns discussed later on, this Essay’s countervailing sketch of residual criminalization helps shrink those concerns to more manageable proportions.<sup>19</sup>

At the same time, residual criminalization highlights the need for greater realism within certain segments of the criminal justice reform community regarding what the movement can plausibly achieve through prosecutorial nonenforcement and prosecutor-driven reform more broadly. One obvious but important lesson of this Essay is that reformist DAs and their allies have to develop strategies to counteract the various forms of residual criminalization outlined here if they hope to maximize the impact of prosecutorial nonenforcement measures.<sup>20</sup> But the potential countermeasures to residual criminalization suffer from limitations of their own, and some of the most promising tools depend on cooperation from actors outside the DA’s office. The Essay’s larger lesson for reformers, then, may well be that prosecutors’ discretionary authority, at least in the present political environment, is far less “absolute,”<sup>21</sup> “unfettered,”<sup>22</sup> and “unilateral”<sup>23</sup> than many have supposed and that, while the movement should certainly encourage the modest steps that reformist DAs are taking in the direction of decarceration, it arguably should resist calls to center prosecutors as movement leaders or to elevate prosecution-driven reform as the movement’s animating priority.<sup>24</sup>

The Essay has three Parts. Part I illustrates emerging patterns in prosecutorial

---

<sup>19</sup> See *infra* Section III.A.

<sup>20</sup> See *infra* at 53–54.

<sup>21</sup> Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 401–03 (2008).

<sup>22</sup> James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1551 (1981).

<sup>23</sup> Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125, 2132, 2147 (1998).

<sup>24</sup> See *infra* at 53–54.

nonenforcement by describing three sets of nonenforcement initiatives—several marijuana non-prosecution policies adopted by local DAs in Virginia, a policy listing fifteen presumptively non-prosecutable categories of offenses issued by the DA in Suffolk County (includes Boston), and a policy launched by the Los Angeles (“LA”) County DA against pursuing certain sentence enhancements—and documenting how other key actors in the criminal justice ecosystem have responded to each one. Part II challenges the notion that prosecutorial nonenforcement is akin to statutory repeal or nullification by spotlighting residual prosecutorial enforcement, residual nonprosecutorial enforcement, and residual stigmatization: the three pillars of what I am calling “residual criminalization.” Part III contends that residual criminalization weakens some of the main objections that critics have raised concerning prosecutorial nonenforcement. It also explores how reformist DAs, and the broader criminal justice reform movement should adjust their strategies and priorities in light of the limitations of prosecutorial nonenforcement.

#### I. EMERGING PATTERNS IN PROSECUTORIAL NONENFORCEMENT

Prosecutors’ discretionary authority not to enforce criminal statutes—even where all legally relevant facts are readily provable with admissible evidence—has deep roots in American law and practice.<sup>25</sup> The legitimacy of the practice is rarely questioned when prosecutors decide against enforcement based on equitable, tactical, or resource-related justifications arising from circumstances peculiar to a particular case—think, for instance, of a prosecutor cutting a break to a sympathetic defendant or a potential cooperating witness, or shuttering an unduly time-intensive investigation to conserve resources for more urgent matters.<sup>26</sup> Prosecutors have also often used their discretion in a more categorical fashion, though, by declining enforcement (or conversely, by enforcing to the hilt<sup>27</sup>) in many or all cases fitting certain criteria, and this approach to administering

---

<sup>25</sup> See, e.g., Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMPAR. L. 643, 645–49 (2002).

<sup>26</sup> See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (rationalizing “broad [prosecutorial] discretion” over charging by advertent to “[s]uch factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan”).

<sup>27</sup> Although there is a growing body of criminal and administrative law scholarship exploring the legitimacy of categorical *nonenforcement*, see, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011); Murray *supra* note 13; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603 (2020); Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020), few have thought to explore the inverse situation where prosecutors or other enforcers categorically embrace enforcement, resulting in crackdowns. For an impressive recent effort to address this topic, see generally Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017).



discretion, too, has rarely sparked much controversy—until recently.<sup>28</sup>

In the past few years, however, a new generation of reform-oriented DAs have gained power in dozens of urban and suburban counties across the country,<sup>29</sup> and some of these DAs, though not all of them, have put in place categorical or semi-categorical policies against prosecuting certain criminal offenses or against pursuing certain legally authorized criminal penalties. This Part offers a detailed look at three examples that typify this trend: policies relating to marijuana nonenforcement embraced by four DAs in Virginia, a policy adopted by the Suffolk County DA outlining fifteen presumptively non-prosecutable kinds of offenses, and the LA County DA's policy disallowing the pursuit of sentence enhancements. My aim here is not to be comprehensive—other reformist DAs elsewhere in the country are putting in place nonenforcement initiatives of their own, many of which I will mention at later points. For now, the goal is simply to tell the larger story about emerging patterns in prosecutorial nonenforcement by describing a sample of nonenforcement initiatives and discussing how judges, police, and other stakeholders have responded to them.

#### A. *Nonenforcement for Marijuana Possession in (Parts of) Virginia*

Greg Underwood, the elected DA in Norfolk from 2009 to 2021,<sup>30</sup> appears to have been the first in Virginia to announce, in January 2019, a policy of dismissing broad classes of marijuana possession offenses: in this instance, “all misdemeanor marijuana possession cases.”<sup>31</sup> The city's police department immediately announced that it would continue enforcing state laws against marijuana possession despite Underwood's move,<sup>32</sup> and local judges blocked several attempts

---

<sup>28</sup> One study from nearly a century ago, for instance, found that: “it was a common practice for [DAs] to use their discretion in the enforcement or non-enforcement of particular laws;” “there were on the statute books many laws which they *never* enforced”; “these enforcement officers have been and are substituting their own judgments for that of the constitutionally ordained policy-determining body and in so doing have actually been nullifying the law”; and “th[is] practice of nullification has long been an accepted phase of our process of government.” Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POL. SCI. Q. 347, 348, 358 (1930).

<sup>29</sup> EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 290 (2019).

<sup>30</sup> Jonathan Edwards, *As Calls for Criminal Justice Reform Mount, Norfolk Will Get a New Chief Prosecutor. Meet the 3 People Who Want the Job*, VIRGINIAN-PILOT (Apr. 26, 2021, 10:43 AM), <https://www.pilotonline.com/government/elections/vp-nw-elx21-norfolk-commonwealths-attorney-20210426-wdj2u5ar3fbnaeohahon5ida4-story.html> [<https://perma.cc/L9HG-ZK3D>].

<sup>31</sup> Letter from Greg D. Underwood, Office of the Norfolk Commonwealth's Attorney, to Judges, City/State Leaders, and Criminal Justice/Public Safety Colleagues 2 (Jan. 3, 2019), <https://www.virginiamercury.com/wp-content/uploads/2019/04/January-2019-Letter.pdf> [<https://perma.cc/2J82-6QZE>]. The policy was already beginning to take shape, it seems, well before Underwood's letter dated January 3, 2019. *See id.*

<sup>32</sup> Katherine Hafner & Gordon Rago, *Norfolk Prosecutor to End Cash Bail in Many Cases, Dismiss Misdemeanor Marijuana Charges*, VIRGINIAN-PILOT (Jan. 8, 2019, 3:35 PM),

by Underwood’s line prosecutors to dismiss cases pursuant to the policy. One judge told a prosecutor that “this is an attempt to usurp the power of the state legislature” and that, while Underwood’s evidence of racial disparity in marijuana enforcement was “extremely compelling,” any decision to decriminalize “must be made by the General Assembly, not by the commonwealth’s attorney’s office.”<sup>33</sup> The judge also informed the prosecutor that her seven colleagues on the Norfolk bench shared her view: “We are of one mind on this.”<sup>34</sup>

Underwood challenged the Norfolk judges’ position in the Virginia Supreme Court, arguing that the power to dismiss charges is inherent in a prosecutor’s executive power and that judicial intrusion on that authority violates the principle of separation of powers under the state constitution.<sup>35</sup> But the state supreme court sided with the judges, holding that Virginia law “requires the Commonwealth to obtain judicial consent to the dismissal of a charge by *nolle prosequi*.”<sup>36</sup> In response, Underwood instructed his assistants to simply refrain from prosecuting—rather than affirmatively dismissing—marijuana possession cases covered by the policy, in effect leaving it to the police officer and judge involved with each case to manage the adjudicative process.<sup>37</sup>

Stephanie Morales, who first won election as Portsmouth County DA in 2015,<sup>38</sup> unrolled her marijuana policy a few months after Underwood. In a letter addressed to local judges, Morales advised that her office “hereby moves for dismissal with payment of court costs on all Possession of Marijuana charges in the Portsmouth General District Court.”<sup>39</sup> Morales later clarified that “her

---

[https://www.pilotonline.com/news/crime/article\\_51c685da-1352-11e9-9a7c-47667c65cb9e.html](https://www.pilotonline.com/news/crime/article_51c685da-1352-11e9-9a7c-47667c65cb9e.html)  
[<https://perma.cc/UBU5-U75M>].

<sup>33</sup> Jonathan Edwards, *Norfolk Judges Unite to Block Prosecutor from Dropping Marijuana Cases*, VIRGINIAN-PILOT (Feb. 13, 2019, 10:06 AM), [https://www.pilotonline.com/news/crime/article\\_d084f844-2f12-11e9-b607-b3ae37fff812.html](https://www.pilotonline.com/news/crime/article_d084f844-2f12-11e9-b607-b3ae37fff812.html) [https://perma.cc/82ZZ-S9LH].

<sup>34</sup> *Id.*

<sup>35</sup> *In re Underwood*, Nos. 190497, 190498, 32 FED. SENT. REP. 228, 228 (Va. May 2, 2019).

<sup>36</sup> *Id.* at 229 (citing *Duggins v. Commonwealth*, 722 S.E.2d 663, 666 (Va. App. 2012); VA. CODE ANN. § 19.2-265.3 (West 1979)).

<sup>37</sup> See Jonathan Edwards, “*There Wasn’t Any White People in the Courtroom*”: *Norfolk Marijuana Cases Highlight Racial Disparity*, VIRGINIAN-PILOT (Mar. 29, 2019, 11:30 AM), [https://www.pilotonline.com/news/crime/article\\_edd19a88-522b-11e9-9c2a-3b049e3e0eb8.html](https://www.pilotonline.com/news/crime/article_edd19a88-522b-11e9-9c2a-3b049e3e0eb8.html) [https://perma.cc/EPH4-7RJT].

<sup>38</sup> Stephanie N. Morales, *Meet Your Commonwealth’s Attorney*, PORTSMOUTH COMMONWEALTH’S ATTORNEY, <https://www.portsmouthcwa.com/commonwealths-attorney> [https://perma.cc/WN7V-LVPR] (last visited May 16, 2021).

<sup>39</sup> Letter from Stephanie N. Morales, City of Portsmouth’s Commonwealth’s Attorney, to The Honorable Douglas B. Ottinger, The Honorable Roxie O. Holder, and The Honorable Morton V. Witlow, Judges of the Third Judicial District of Virginia (Apr. 8, 2019), [https://media.wavy.com/nxs-wavytv-media-us-east-1/document\\_dev/2019/04/11/Marijuana%20Policy%20Letter%20to%20GDC%20Judges%2004-08-19\\_1555008300781\\_81877763\\_ver1.0.pdf](https://media.wavy.com/nxs-wavytv-media-us-east-1/document_dev/2019/04/11/Marijuana%20Policy%20Letter%20to%20GDC%20Judges%2004-08-19_1555008300781_81877763_ver1.0.pdf) [https://perma.cc/D82Q-TM5B].

prosecutors would likely pursue marijuana charges when they were filed against children in Juvenile and Domestic Relations Court” and “[t]hey also could do so if the defendant was charged with a crime of violence.”<sup>40</sup> The interim police chief indicated that police officers would essentially ignore Morales’ policy: Officers would “make arrests and enforce the law as they do in all criminal matters.”<sup>41</sup> Portsmouth’s judges at first seemed amenable to the policy, “dismissing most marijuana cases when prosecutors asked.”<sup>42</sup> But the judges later changed course (or, depending on whose version is credited, they clarified their initial position) by stating that each dismissal sought by a prosecutor would be reviewed case-by-case, that judges would “continue to apply the law as enacted by the Virginia General Assembly, including those laws related to the possession of marijuana,” and that “[a]t no time has any judge in Portsmouth embraced or advocated for the decriminalization of marijuana.”<sup>43</sup>

In the 2019 election cycle, Steve Descano won the election to become the DA in Fairfax—Virginia’s most populous county—and Parisa Dehghani-Tafti came to power in nearby Arlington and Falls Church.<sup>44</sup> Both had promised during their campaigns to decline prosecution in garden-variety marijuana possession cases,<sup>45</sup> and they quickly acted on their promises upon taking office by instructing line prosecutors to dismiss simple marijuana possession charges in most situations.<sup>46</sup>

---

<sup>40</sup> Scott Daugherty, *Portsmouth Judges Have Been Dismissing Most Marijuana Cases. Now They Say that Could Change*, VIRGINIAN-PILOT (May 21, 2019, 1:46 PM), [https://www.pilotonline.com/news/crime/article\\_0b9c6bcc-7bd2-11e9-b335-9f1e79fc2b86.html](https://www.pilotonline.com/news/crime/article_0b9c6bcc-7bd2-11e9-b335-9f1e79fc2b86.html) [https://perma.cc/7BZM-UVQ6].

<sup>41</sup> *Id.*

<sup>42</sup> Margaret Matray, *Prosecutors Will Be Able to Drop Marijuana Cases—and Others—under New Law Inspired by Norfolk*, VIRGINIAN-PILOT (Oct. 22, 2020, 9:38 AM), <https://www.pilotonline.com/news/crime/vp-nw-prosecutorial-discretion-law-20201022-4xjnmoidqngijbrgq7uzfrsei-story.html> [https://perma.cc/6NVJ-MLUS].

<sup>43</sup> Daugherty, *supra* note 40.

<sup>44</sup> See Rory Fleming, *A Mixed Election Night for Reform Prosecutors: The Key Results*, FILTER MAG. (Nov. 6, 2019), <https://filtermag.org/prosecutor-election-results/> [https://perma.cc/GTT4-CT5Z].

<sup>45</sup> See Daniel Nichanian, *An Interview with Steve Descano: “Ending Mass Incarceration” Requires “a Systemic Approach,”* THE APPEAL (Apr. 18, 2019), <https://theappeal.org/politicalreport/interview-with-descano-fairfax-commonwealths-attorney/> [https://perma.cc/W3G9-V8MY]; see also Daniel Nichanian, *“The Commonwealth’s Attorney Has a Very Holistic Role”: An Interview with Virginia Candidate Parisa Dehghani-Tafti*, THE APPEAL (last updated June 6, 2019), <https://theappeal.org/politicalreport/interview-with-parisa-tafti-candidate-commonwealths-attorney-arlington-virginia/> [https://perma.cc/K2S6-UUWR].

<sup>46</sup> See Justin Jouvenal & Rachel Weiner, *Prosecutors Won’t Pursue Marijuana Possession Charges in 2 Northern Va. Counties*, WASH. POST (Jan. 2, 2020), [https://www.washingtonpost.com/local/public-safety/new-fairfax-county-prosecutor-says-office-wont-prosecute-marijuana-possession/2020/01/02/ab0363a4-2d76-11ea-9b60-817cc18cf173\\_story.html](https://www.washingtonpost.com/local/public-safety/new-fairfax-county-prosecutor-says-office-wont-prosecute-marijuana-possession/2020/01/02/ab0363a4-2d76-11ea-9b60-817cc18cf173_story.html) [https://perma.cc/3Q58-SZRB]. Descano’s dismissal policy covers adult marijuana possession for personal use, see Memorandum from Steve Descano, Office of the Fairfax Commonwealth’s Attorney, to Fairfax County Prosecutors, *Move to Dismiss Simple Possession of*

Descano’s policy encountered some resistance early on from at least one Fairfax judge, who refused a prosecutor’s request to dismiss a marijuana possession case and disapproved the policy’s categorical character, explaining, “[i]n this court, everything is individualized.”<sup>47</sup> But the judge later reversed himself,<sup>48</sup> and I am unaware of any other evidence that the courts in Fairfax have interfered with implementation of Descano’s marijuana possession policy.<sup>49</sup>

Dehghani-Tafti has not been so fortunate. In Arlington County, as in other parts of Virginia, misdemeanor marijuana cases are initially filed and adjudicated in district court; a defendant who is convicted in district court, whether by guilty plea or trial, may then appeal the conviction to the circuit court, and this appeal automatically vacates the district court’s conviction and sets the stage for a second, *de novo* adjudication of the charged offense.<sup>50</sup> While the judges on Arlington’s district court did not interfere with Dehghani-Tafti’s efforts to dismiss newly filed marijuana possession cases, for older cases inherited from the prior DA that had already been adjudicated at the district court level and were now pending in the circuit court, Arlington’s circuit court judges refused to dismiss marijuana possession cases at the request of Dehghani-Tafti’s prosecutors absent a case-specific justification for doing so.<sup>51</sup> The circuit court judges also ordered the DA’s office to file motions to dismiss or for entry of a *nolle prosequi* in writing—in all cases, not just marijuana possession cases—and to “detail all factual and not purely conclusory bases in support thereof.”<sup>52</sup> Dehghani-Tafti sought relief from the circuit court’s order in the Virginia Supreme Court, arguing (among other things)

---

*Marijuana*                      *Charges*                      *Levied*                      *Against*                      *Adults*                      1,  
<https://www.fairfaxcounty.gov/commonwealthattorney/sites/commonwealthattorney/files/assets/documents/fairfax%20cwa%20-%20simple%20possession%20of%20marijuana%20policy.pdf> (last visited May 16, 2021), while Dehghani-Tafti has said her office “will not prosecute simple possession of marijuana,” *On the Issues*, PARISA FOR JUST., [https://parisaforjustice.com/on-the-issues/\[https://perma.cc/8D45-JWBP\]](https://parisaforjustice.com/on-the-issues/[https://perma.cc/8D45-JWBP]) (last visited May 16, 2021), but that it might prosecute certain possession cases where aggravating factors are present, *see Jouvenal & Weiner, supra*.

<sup>47</sup> Jouvenal & Weiner, *supra* note 46.

<sup>48</sup> *Id.*

<sup>49</sup> By contrast, Descano has been widely criticized for his policy, assertedly based on resource constraints, of stepping aside—but not proactively seeking dismissal—in most nonmarijuana misdemeanor cases, a policy that results in police and judges overseeing prosecutions without the involvement of the DA’s office. *See, e.g.*, Editorial Board, *The Fairfax Prosecutor’s Decision to Sit Out Many Misdemeanor Cases Is a Mistake*, WASH. POST (Apr. 24, 2021, 3:09 PM), [https://www.washingtonpost.com/opinions/the-fairfax-prosecutors-decision-to-sit-out-many-misdemeanor-cases-is-a-mistake/2021/04/23/5ea92bda-a3c0-11eb-a774-7b47ceb36ee8\\_story.html](https://www.washingtonpost.com/opinions/the-fairfax-prosecutors-decision-to-sit-out-many-misdemeanor-cases-is-a-mistake/2021/04/23/5ea92bda-a3c0-11eb-a774-7b47ceb36ee8_story.html) [https://perma.cc/W58M-NBQN].

<sup>50</sup> Telephone interview with Parisa Dehghani-Tafti (June 2, 2021).

<sup>51</sup> *Id.*; Tom Jackman, *Arlington Prosecutor Goes to Va. Supreme Court Against Judges Who Challenge Her New Policies*, WASH. POST (Aug. 20, 2020), <https://www.washingtonpost.com/dc-md-va/2020/08/28/arlington-prosecutor-goes-va-supreme-court-against-judges-who-challenge-her-new-policies/> [https://perma.cc/W58M-NBQN].

<sup>52</sup> In re Criminal Dockets Beginning March 10, 2020, Misc. No. CM20000239-00, Order Governing Criminal Docket Procedures (Arlington Cir. Ct. Mar. 4, 2020) (on file with author).

that the order unconstitutionally intruded on her discretionary authority over charging, but the state supreme court ducked the issue on procedural grounds, ruling that Dehghani-Tafti would have to challenge the order's implementation in the context of a particular case.<sup>53</sup>

While Virginia's reformist DAs may have lost some significant early battles over their marijuana nonenforcement initiatives, they, together with their allies in the reform movement, have since gained considerable ground in the larger struggle. In May 2020, the state government, at that time under unified Democrat control, decriminalized simple possession of marijuana and substituted a civil fine capped at \$25 in place of criminal penalties.<sup>54</sup> Then the legislature—"respon[ding] to the Norfolk marijuana cases and similar ones in Northern Virginia"<sup>55</sup>—enacted a bill requiring courts to grant a prosecutor's unopposed motion to dismiss charges in all but the rarest of circumstances.<sup>56</sup> To top it all off, the legislature legalized the possession by adults of up to an ounce of marijuana in 2021 and laid the groundwork to launch a regulated marijuana market in the state in 2024.<sup>57</sup> Reform forces have thus made tremendous inroads on the state's criminal scheme for marijuana possession, but not until they succeeded in building the statewide support necessary to get laws enacted by the legislature.

#### B. *Nonenforcement for Fifteen Low-Level Offense Categories in the Boston Area*

Whereas prosecutorial nonenforcement in Virginia has thus far been limited mainly to marijuana possession offenses,<sup>58</sup> reformist DAs in some other parts of the country have begun embracing nonenforcement on a grander scale when it comes to low-level offenses. This Section explores that emerging trend by looking at the charging policy of Suffolk County DA Rachael Rollins, who distinguished

---

<sup>53</sup> For Dehghani-Tafti's petition for relief and supporting analysis, see Memorandum in Support of Verified Petition for Writ of Prohibition, In re Parisa Dehghani-Tafti, No. 201004 (Va. Dec. 18, 2020) (on file with author). For the court's ruling, see Order, In re Parisa Dehghani-Tafti, No. 201004 (on file with author).

<sup>54</sup> Regarding Democrats' unified control in Virginia, see Matt Cohen, *Democrats Just Swept into Full Control of Virginia's Government*, MOTHER JONES (Nov. 5, 2019), <https://www.motherjones.com/politics/2019/11/democrats-just-swept-into-full-control-of-virginias-government/> [<https://perma.cc/VMR4-WACV>]. The decriminalization measure has been codified in relevant part at VA. CODE ANN. § 4.1-1110 (West 2021).

<sup>55</sup> Matray, *supra* note 42.

<sup>56</sup> See VA. CODE ANN. § 19.2-265.6(A) (West 2021). The legislation allows a judge to deny an unopposed motion to dismiss a charge only where there is "clear and convincing evidence" that the motion resulted from "bribery or . . . bias or prejudice toward a victim." *Id.*

<sup>57</sup> See Sarah Rankin, *Virginia Becomes First Southern State to Legalize Marijuana*, AP (Apr. 7, 2021), <https://apnews.com/article/virginia-1st-southern-state-legalize-marijuana-2346aa3ee52ce43f79b712c14346764d> [<https://perma.cc/C3U2-MZDR>].

<sup>58</sup> The Fairfax DA's office, which under Descano's leadership is declining to get involved in most misdemeanor prosecutions (though without seeking dismissals), is a partial exception to this. See Editorial Board, *supra* note 49.

herself in a crowded 2018 Democratic primary by pledging to presumptively decline prosecution for fifteen categories of commonly charged low-level offenses.<sup>59</sup> (After this Essay was written, Rollins left the Suffolk County DA's office to become the U.S. Attorney for the District of Massachusetts. In January 2022, Kevin Hayden was appointed by the governor to complete Rollins' term as DA.)

The idea behind Rollins' campaign promise was “to reduce the footprint of the criminal justice system where it served no public safety interest,” “allocate more of our prosecution resources to the serious offenses that harm people, families, and the community as a whole,” and avoid punishing people for behavior “commonly driven by poverty, substance use disorder, mental health issues, trauma histories, housing or food insecurity, and other social problems.”<sup>60</sup> Drug possession and possession with intent to distribute, trespassing, larceny of property worth less than \$250, driving on a suspended or revoked license, burglary under specified conditions, resisting arrest (if the sole charge), and disorderly conduct—arrests for these offenses and others would, according to Rollins' campaign website, presumptively lead either to “outright dismiss[al] prior to arraignment” or to diversion, which, in this context, meant that the offense would be “treated as a civil infraction.”<sup>61</sup> The door was left open for prosecutors to seek criminal charges rather than declination or diversion for covered offenses “when necessary,” but only in “exceptional circumstances” after obtaining permission from a supervisor.<sup>62</sup>

After her pledge generated “skepticism and even alarm” from certain influential stakeholders—and, to be sure, excitement from others—Rollins soft-pedaled the policy a bit, casting it as “aspirational” rather than “a mandate” and welcoming input from law enforcement.<sup>63</sup> Yet she stood by the basic concept and,

---

<sup>59</sup> For background on the primary race and Rollins' campaign pledge, see Zaid Jilani, *Underdog Criminal Justice Reformer Rachael Rollins Wins District Attorney Primary in Boston's Suffolk County*, THE INTERCEPT (Sept. 7, 2018, 5:00 AM), <https://theintercept.com/2018/09/07/boston-suffolk-county-district-attorney-rachael-rollins/> [https://perma.cc/F5JN-3CYJ]; *Charges to Be Declined*, ROLLINS4DA.COM, <https://rollins4da.com/policy/charges-to-be-declined> [https://perma.cc/AU5Y-FKAW] (last visited May 17, 2021). For data on the top twenty-five most frequently filed charges in Suffolk County, which includes many of the categories appearing on Rollins' list of presumptively nonprosecutable offenses, see The Rachel Rollins Policy Memo 4–5 (March 2019), <https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5d44a5f79807850001acc3d9/1561564780028/The+Rachael+Rollins+Policy+Memo.pdf> [https://perma.cc/FUQ2-MVN9] [hereinafter Rollins Memo].

<sup>60</sup> Rollins Memo, *supra* note 59, at 25–26.

<sup>61</sup> *Charges to Be Declined*, *supra* note 59.

<sup>62</sup> *Id.*

<sup>63</sup> Maria Cramer, *DA Candidate Rachel Rollins Hailed Nationally, But Locally Her Plan Not to Prosecute Petty Crimes Alarms Some*, BOSTON GLOBE (Sept. 12, 2018, 9:46 PM), <https://www.bostonglobe.com/metro/2018/09/12/candidate-ailed-nationally-but-locally-her-plan-not-prosecute-petty-crimes-alarms-some/pyQX8MT4iWpyJ8XMi6SsFO/story.html>

several months into her term in office, issued a policy memorandum that operationalized—in greater detail and with some modifications—what she had promised during the campaign.<sup>64</sup> The blowback from law enforcement and public safety officials was swift and fierce. The state’s public safety secretary penned a letter attacking core aspects of the policy for “dismiss[ing] categorically the legitimate public safety concerns that individual cases will surely present.”<sup>65</sup> Governor Charlie Baker condemned Rollins’ memorandum,<sup>66</sup> as did the DA for the Cape and Islands, who criticized Rollins and other “social justice [DAs]” for allegedly invading “the sole prerogative of our Legislature” by, in effect, “nullify[ing] an entire class of criminal conduct.”<sup>67</sup> Rollins even drew fire from top *federal* law enforcement officials: Attorney General Bill Barr condemned “anti-law enforcement DAs” who “refus[e] to enforce broad swathes of the criminal law,”<sup>68</sup> and Deputy Attorney General Jeff Rosen faulted Rollins and other reformist DAs for embracing what he characterized as “unfounded

---

[<https://perma.cc/7XKR-EKNN>].

<sup>64</sup> See Rollins Memo, *supra* note 59, at App’x C. The nonenforcement policy set forth in Rollins’ memo is restricted “only to charges that will remain in a Division of the Boston Municipal Court, and Chelsea District Court”—a limitation not apparent from her campaign pledge. *Id.* at C-1. (Suffolk County encompasses Winthrop and Revere in addition to Boston and Chelsea). Also, whereas Rollins’ campaign pledge indicated that the presumptive disposition for covered offenses would be *either* prearrest dismissal *or* diversion, the policy memo states that unconditional dismissal before arraignment should be the default. *Id.* But the policy memo, like the campaign pledge, allows for exceptions to this presumption when warranted by case-specific circumstances; specifically, the memo allows a line prosecutor to (1) impose conditions that the defendant must meet before securing dismissal or (2) move forward with criminal charges after discussion with a supervisor. *Id.* at C-1, C-2; see also C-3–C-9 (discussing exceptions or factors to consider for each offense category within the policy’s scope).

<sup>65</sup> Letter from Thomas A. Turco III, Sec’y, Mass. Exec. Off. of Pub. Safety & Sec., to Rachael Rollins 1 (Apr. 4, 2019), [https://d279m997dpfwgl.cloudfront.net/wp/2019/04/0404\\_turco.pdf](https://d279m997dpfwgl.cloudfront.net/wp/2019/04/0404_turco.pdf) [<https://perma.cc/N6WD-4F7A>].

<sup>66</sup> See Walter Wuthmann, *Rachael Rollins, 100 Days In: What Has Changed, and What Hasn’t, Under the Reformer DA*, WBUR NEWS (Apr. 12, 2019), <https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days> [<https://perma.cc/N9RJ-G79A>].

<sup>67</sup> Michael D. O’Keefe, *The True Role of the District Attorney*, BOSTON GLOBE, <https://www.bostonglobe.com/opinion/2019/05/28/the-true-role-district-attorney/VWBCgWHw2rI8mYOomJYpyN/story.html> [<https://perma.cc/HR96-5C22>] (last updated May 28, 2019, 5:01 AM).

<sup>68</sup> William P. Barr, Att’y Gen., U.S. Dep’t of Just., Remarks at the Grand Lodge Fraternal Order of Police’s 64<sup>th</sup> National Biennial Conference (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th> [<https://perma.cc/7VMK-Y2N6>]. Barr did not tag Rollins by name, but his intended target was clear from context. See, e.g., John Pfaff, *Boston’s New D.A. Pushes Back Against Prosecutors’ ‘Punishment-Centric’ Point of View*, THE APPEAL (Nov. 14, 2018), <https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors/> [<https://perma.cc/7RVH-6QYP>].

decriminalization policies” that are “an affront to the separation of powers.”<sup>69</sup> Not everyone in the law enforcement community was losing sleep over Rollins’ policy: Boston’s police commissioner, for instance, said that he was “not at all” worried about Rollins’ enforcement priorities.<sup>70</sup> On the whole, though, Rollins “has received more attention and public ridicule than any other DA in the state—probably more than all of the rest combined—for [her] policies,” and “it is her marquee [charging] policy . . . that has most rankled her critics.”<sup>71</sup>

Local judges have also pushed back against Rollins’ efforts to dismiss charges on a number of occasions, prompting several interventions by the state’s Supreme Judicial Court (“SJC”) vindicating Rollins’ view of prosecutorial discretion. The first major incident arose when counter-protesters at a “straight pride parade” were arrested after clashing with the police, and a Boston judge refused to dismiss seven of the resulting cases even though the DA’s office sought dismissal.<sup>72</sup> In one of the cases—where the judge declined to dismiss a disorderly conduct charge, citing the state’s Victim Bill of Rights law that requires notification of any victims prior to dismissal—Rollins secured emergency relief from the SJC, which held that the victim’s rights law did not apply in a disorderly conduct prosecution and that, even if it did, that law “does not trump the Commonwealth’s constitutional right to determine when to enter a nolle prosequi.”<sup>73</sup>

In a separate matter involving a different judge, the DA’s office sought to forestall adverse immigration consequences for a noncitizen defendant who had

---

<sup>69</sup> Jeffrey A. Rosen, ‘*Social Justice Reform*’ is No Justice at All, WASH. POST (Nov. 27, 2019), [https://www.washingtonpost.com/opinions/social-justice-reform-is-no-justice-at-all/2019/11/27/139dff76-109b-11ea-b0fc-62cc38411ebb\\_story.html](https://www.washingtonpost.com/opinions/social-justice-reform-is-no-justice-at-all/2019/11/27/139dff76-109b-11ea-b0fc-62cc38411ebb_story.html) [https://perma.cc/6Y2K-D8TS].

<sup>70</sup> Alexi Cohan & Marie Szaniszlo, *Rachael Rollins Taking a ‘Hard Look’ at Decline-to-Prosecute List*, BOSTON HERALD, <https://www.bostonherald.com/2019/01/02/suffolk-da-rollins-taking-a-hard-look-at-decline-to-prosecute-list/> [https://perma.cc/7QU5-9ASH] (last updated Jan. 28, 2019, 1:33 PM). By contrast, the president of Boston’s police union said of Rollins’ policy that “[t]he law is still the law” and “if it’s a revolving door, it’s a revolving door, but we’re still going to do our job.” Cramer, *supra* note 63.

<sup>71</sup> Catherine Elton, *The Law According to Rachael Rollins*, BOSTON MAG. (Aug. 6, 2019, 9:47 AM), <https://www.bostonmagazine.com/news/2019/08/06/rachael-rollins/> [https://perma.cc/37QR-EAED].

<sup>72</sup> Sean Philip Cotter et al., *Judge Warns Protesters ‘Stay out of Boston,’* BOSTON HERALD (Sept. 4, 2019), <https://www.bostonherald.com/2019/09/03/judge-warns-protesters-stay-out-of-boston/> [https://perma.cc/EB4G-6XFZ]; Alyssa Vaughn, *After Straight Pride, a Showdown Brews Between Rachael Rollins and Boston’s Judges*, BOSTON MAG. (Sept. 4, 2019, 12:09 PM), <https://www.bostonmagazine.com/news/2019/09/04/straight-pride-rachael-rollins-judges/> [https://perma.cc/Z23Y-DVE3].

<sup>73</sup> Commonwealth v. Webber, No. SJ-2019-0366, 2019 WL 4263308, at 1–2 (Mass. Sept. 9, 2019). More broadly, the SJC reasoned that a prosecutor’s discretionary authority to decide whether dismissal is warranted before jeopardy attaches “is absolute . . . ‘except possibly in instances of scandalous abuse of authority.’” *Id.* at 3 (quoting Commonwealth v. Dascalakis, 140 N.E. 470, 473 (Mass. 1923)). In addition to requiring the local judge to dismiss charges as requested by the DA’s office, the SJC ordered expungement of government records resulting from the defendant’s unlawful arraignment. *Id.*



been convicted in 2011 of an offense covered by Rollins' policy (larceny under \$250) by supporting the defendant's motion for a new trial and, once the motion was granted, filing a *nolle prosequi* to dismiss the case.<sup>74</sup> The judge who initially granted the new trial motion and dismissed the matter soon realized, however, that the defendant had unsuccessfully requested a new trial (based on different grounds) from a different judge on earlier occasions, and the current judge—feeling deceived since the attorneys did not apprise him of the prior litigation—vacated his orders granting a new trial and dismissing the case.<sup>75</sup> But the SJC again sided with Rollins, reasoning that “entering a *nolle prosequi* is within the exclusive discretion of the executive branch” under the state constitution and that, regardless of whether the new trial motion should have been granted in the first instance, the order of dismissal, once entered, could not be undone.<sup>76</sup> And in yet another spat over judicial authority to second-guess prosecutorial nonenforcement decisions, the SJC granted Rollins relief against a judge who had refused to enter a *nolle prosequi* at the request of the DA's office—and instead issued an arrest warrant, in the midst of the COVID-19 crisis, since the defendant no-showed for court—where the charge was unlicensed operation of a motor vehicle (another offense covered by Rollins' non-prosecution policy).<sup>77</sup>

### C. Nonenforcement for Three Strikes and Other Sentence Enhancements in LA

Prosecutorial nonenforcement policies typically involve a statute defining a criminal *offense*—invariably a more-or-less low-level offense—that the chief prosecutor has determined is not worth pursuing; the policies from Virginia and Suffolk County canvassed earlier are of this type.<sup>78</sup> Increasingly, though, reformist DAs are also subjecting certain *penalty* statutes to categorical or semi-categorical nonenforcement directives such that prosecutors can continue seeking convictions for serious offenses without triggering additional sanctions—beyond the sanctions the law provides for the offense of conviction—that DAs consider excessive.

---

<sup>74</sup> Commonwealth v. Bilal, No. SJ-2019-0504 (Mass. Jan. 28, 2020), <https://www.ma-appellatecourts.org/docket/SJ-2019-0504>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Commonwealth v. Boston Municipal Court, No. SJ-2020-0692 (Mass. Nov. 23, 2020), <https://www.ma-appellatecourts.org/docket/SJ-2020-0692>; Matt Brelis, *DA Rachael Rollins Asks Single Justice of SJC to Stop BMC Judge's Dangerous Behavior. Again*, SUFFOLK CNTY. DISTRICT ATTORNEY (Nov. 21, 2020), <https://www.suffolkdistrictattorney.com/press-releases/items/2020/11/21/da-rachael-rollins-asks-single-justice-of-sjc-to-stop-bmc-judges-dangerous-behavior-again> [<https://perma.cc/FYS7-URTY>].

<sup>78</sup> See Lauren-Brooke Eisen & Courtney M. Oliva, *Reimagining a Prosecutor's Role in Sentencing*, 32 FED. SENT'G REP. 195, 199 (2020) (noting that reformist DAs have thus far focused mainly on “reducing the front-door footprint of our justice system” through measures such as bail and declination policies and arguing that these DAs should do more to “confront the culture of sentencing and punishment that has led to . . . excessive sentences”).

Policies forbidding pursuit of the death penalty offer a familiar example,<sup>79</sup> but some DAs are not content to stop there. One such DA is George Gascón, who recently won election in LA County—the largest county in the Nation—after previously serving as San Francisco’s DA for the better part of a decade.<sup>80</sup> This Section introduces Gascón’s policy against seeking three strikes enhancements and other sentence enhancements under California law—a policy that has evolved somewhat since it was first unveiled—and the fights surrounding it.

The initial version of the policy as it was announced the day Gascón took office decreed that “sentence enhancements or other sentencing allegations . . . shall not be filed in any cases and shall be withdrawn in pending matters.”<sup>81</sup> The policy even contemplated limited retroactive relief: “if a defendant was sentenced within 120 days of December 8 [the day after the policy was announced] . . . they shall be eligible for resentencing under these provisions[,] [and] DDAs [deputy district attorneys] are instructed to not oppose defense counsel’s request for resentencing.”<sup>82</sup> The policy expressly foreclosed the use of prior-strike enhancements and other recidivist enhancements, gang enhancements, special circumstance enhancements that would result in a sentence of life without parole, and enhancements for crimes committed while on bail or recognizance, while making clear that those provisions are “not an exhaustive list of all allegations/enhancements that will no longer be pursued by this office.”<sup>83</sup> Gascón initially refused to allow exceptions to this policy because, in his view, sentence enhancements have “driven mass incarceration in this country,” “they’re racist,” and any exception would “swallow the rule.”<sup>84</sup>

Following an outcry from LGBTQ advocates, prosecutors working under Gascón, and others who worried that the new policy forbade the filing of hate

---

<sup>79</sup> See, e.g., *Local Prosecutor Elections Foreshadow Continued Movement away from Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/local-prosecutor-elections-foreshadow-continued-movement-away-from-death-penalty> [https://perma.cc/6KRT-2NBE] (last updated Nov. 5, 2020) (showcasing newly elected DAs who pledged not to ask for death sentences).

<sup>80</sup> Tim Arango, *‘A Tsunami of Change’: How Protests Fueled a New Crop of Prosecutors*, N.Y. TIMES, <https://www.nytimes.com/2020/12/08/us/george-gascon-la-county-district-attorney.html> [https://perma.cc/8FBX-EVTJ] (last updated Feb. 11, 2021).

<sup>81</sup> George Gascón, District Attorney, L.A. Cnty. District Attorney’s Office Special Directive 20-08, at 1 (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/policies/special-directive-20-08.pdf> [https://perma.cc/5MVF-3WXB].

<sup>82</sup> *Id.* at 2. A separate document lays out Gascón’s resentencing policy in greater detail. See George Gascón, District Attorney, L.A. Cnty. District Attorney’s Office, Special Directive 20-14 (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/policies/special-directive-20-14.pdf> [https://perma.cc/K8D7-58KR].

<sup>83</sup> Gascón, *supra* note 81, at 1–2.

<sup>84</sup> Eric Leonard, *LA County’s New District Attorney Says No Exceptions for His Reduced Punishment Rules*, NBC L.A. (Dec. 17, 2020, 5:36 AM), <https://www.nbclosangeles.com/investigations/los-angeles-county-district-attorney-george-gascon-crime-punishment/2487559/> [https://perma.cc/9GHG-SJ29].

crime enhancements and other enhancements relating to vulnerable victims,<sup>85</sup> Gascón backstepped a bit less than two weeks into his term and made some adjustments to the policy. The revised version allowed line assistants to file enhancements having to do with hate crimes, elder and dependent adult abuse, child physical abuse, sexual abuse, human trafficking, and, in certain circumstances, financial crimes.<sup>86</sup> It also contained a residual clause authorizing the use of certain enhancements—though only after getting sign-off from a bureau director—in “extraordinary circumstances” where the defendant inflicted “extensive” physical injury or “exhibited an extreme and immediate threat to human life.”<sup>87</sup> Significantly, though, the revised policy indicated that even this narrow residual authorization to pursue enhancements did not extend to prior-strike enhancements, gang enhancements, and the other commonly used penalty provisions that, as noted earlier, Gascón had expressly singled out for prohibition in the original policy.<sup>88</sup>

Implementing Gascón’s sentencing initiative has proven troublesome. For one thing, judges quickly “emerged as a significant roadblock to his enhancement policies.”<sup>89</sup> When, for example, a line prosecutor tried to dismiss an enhancement allegation against a defendant with a prior felony conviction shortly after Gascón’s initial policy went into effect, the judge denied the motion, reasoning that the allegation could not be dismissed under California law except for lack of evidence or “in the interest of justice.”<sup>90</sup> Gascón has also run up against formidable internal resistance from staff attorneys.<sup>91</sup> In the case referenced above—and there have been many others like it—Gascón’s line prosecutor made no effort to convince the judge that dismissing the enhancement was in the interest of justice; rather, he said he was simply following orders, effectively inviting the judge to deny his *pro forma* request.<sup>92</sup>

---

<sup>85</sup> See Karen Ocamb, *DA George Gascón Wanted to Scrap Hate Crimes Enhancements. LGBTQ Voters Fought Back*, L.A. MAG. (Dec. 21, 2020), <https://www.lamag.com/citythinkblog/george-gascon-hate-crimes/> [https://perma.cc/J7D4-Q2DL].

<sup>86</sup> George Gascón, District Attorney, L.A. Cnty. District Attorney’s Office Special Directive 20-08.2, at 2 (Dec. 18, 2020), <https://da.lacounty.gov/sites/default/files/policies/SD-20-08-2.pdf> [https://perma.cc/CS96-NUC7].

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 1–2.

<sup>89</sup> James Queally, *George Gascón’s Plans to Overhaul Prosecutions Meet Early Resistance From Judges, Others*, L.A. TIMES, <https://www.latimes.com/california/story/2020-12-18/george-gascon-reform-bid-meets-resistance> [https://perma.cc/9K2G-3CN7] (last updated Dec. 18, 2020, 4:46 PM).

<sup>90</sup> *Id.*

<sup>91</sup> Brian Melley, *Los Angeles DA Faces Resistance for Criminal Justice Reforms*, AP (Mar. 25, 2021), <https://apnews.com/article/race-and-ethnicity-los-angeles-police-reform-f14ee2c940125954ec3fdd98fd9fc67e#:~:text=Other%20county%20district%20attorneys%20took,kic%20off%20to%20recall%20him> [https://perma.cc/ZU6Q-34RX].

<sup>92</sup> Queally, *supra* note 89.

Responding to these developments, Gascón issued a supplemental directive requiring assistants to support their requests for dismissal of enhancements by reading off a paragraph-long script asserting that the sentencing options available for the underlying offense(s) are harsh enough to serve justice without the need for any enhancement and that the decision whether to pursue enhancements belongs entirely to the prosecutor.<sup>93</sup> This did not sit well with many of Gascón’s prosecutors or the union that represents them. Less than a month into Gascón’s term, the county prosecutors’ union sued him and the DA’s office, asking the LA Superior Court for a preliminary injunction putting the brakes on Gascón’s prohibition on alleging prior strikes and certain other aspects of his policy, asserting that Gascón was in effect “[l]egislating by fiat” and that he had “all but repealed California’s sentencing enhancement laws.”<sup>94</sup> Prosecutors and prosecutorial organizations elsewhere in the state and Nation jumped into the fray by filing *amicus* briefs, with the long-established statewide prosecutors’ association siding with the union and dozens of current and former elected prosecutors and attorneys general backing Gascón.<sup>95</sup>

---

<sup>93</sup> George Gascón, District Attorney, L.A. Cnty. District Attorney’s Office Special Directive 20-08.1, at 1 (Dec. 15, 2020), <https://da.lacounty.gov/sites/default/files/policies/SD-20-08-1.pdf> [<https://perma.cc/KH7P-2DQY>]. In fact, the script required assistants to argue that two California statutes that seemingly restrict prosecutors’ authority to dismiss pending enhancement allegations violate the state constitution’s scheme of separation of powers, which, according to the script, “vest[s] the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek.” *Id.* (challenging the constitutionality of sections 667(f)(1) and 1170.12(d)(2) of California’s Penal Code).

<sup>94</sup> Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief at 2–4, Ass’n of Deputy Dist. Att’ys v. Gascón, No. 20STCP04250 (L.A. Cnty. Sup. Ct. Feb. 8, 2021), <https://www.laadda.com/wp-content/uploads/2020/12/2020.12.29-Writ-Petition.pdf> [<https://perma.cc/FK9J-VXAZ>]; *see also id.* at 14 (“As the District Attorney, Respondent Gascón has no authority to legislate and no right to unilaterally abrogate the law—no matter his personal opinion as to the law’s merits.”). Specifically, the union argued: (1) the three strikes law makes the filing of prior strikes mandatory, divesting prosecutors of the discretion they ordinarily enjoy with respect to charging; (2) discretion must be exercised “in particular cases” rather than “by indiscriminately prohibiting the prosecution of all violations of certain offenses,” and (3) certain sentencing enhancements that had been filed previously could be dismissed only for statutorily permissible reasons—*i.e.*, insufficient evidence or in the interest of justice—and only with a judge’s assent. *Id.* at 8–13. Gascón has disputed each claim. *See* Respondents’ Opposition to Petitioner’s Application for Preliminary Injunction at 9–18, Ass’n of Deputy Dist. Att’ys v. Gascón, No. 20STCP04250 (L.A. Cnty. Sup. Ct. Feb. 2, 2021), <https://www.laadda.com/wp-content/uploads/2021/01/2021-01-15-Gascon-Opposition-to-PI.pdf> [<https://perma.cc/L3BM-EU5S>].

<sup>95</sup> *See* California District Attorneys Association Application to File Amicus Brief in Support of Plaintiff and Petitioner Association of Deputy District Attorneys for Los Angeles County, Ass’n of Deputy Dist. Att’ys v. Gascón, No. 20STCP04250 (L.A. Cnty. Sup. Ct. Feb. 2, 2021), <https://www.laadda.com/wp-content/uploads/2021/01/2021-01-26-CDAA-amicus-in-support-of-ADDA.pdf> [<https://perma.cc/HC6H-LYTJ>]; Brief of Amici Curiae Current and Former Elected Prosecutors and Attorneys General in Opposition to Petitioner’s Application for Preliminary Injunction, Ass’n of Deputy Dist. Att’ys v. Gascón, No. 20STCP04250 (L.A. Cnty. Sup. Ct. Feb. 2, 2021), <https://www.laadda.com/wp-content/uploads/2021/01/2021-01-15-AMICUS-by-Chemerinsky-Romano.pdf> [<https://perma.cc/X7SQ-Q2FM>].

The superior court substantially agreed with the union and issued a preliminary injunction blocking implementation of Gascón's policy insofar as it (1) disallowed the filing of enhancement allegations under the three strikes law in new matters and (2) compelled line prosecutors to request dismissal of previously filed enhancement allegations under either the three strikes law or under other enhancement statutes covered by section 1385 of the California Penal Code.<sup>96</sup> On the other hand, the court acknowledged that Gascón's interpretation of the three strikes law was plausible (albeit wrong, in the court's opinion),<sup>97</sup> and the case will likely be resolved by the California Supreme Court.<sup>98</sup> In the meantime, Gascón has revised his sentence enhancement policy a second time to comply with the court's ruling.<sup>99</sup>

## II. RESIDUAL CRIMINALIZATION

With prosecutorial nonenforcement on the rise in reform-oriented DA's offices across the country, criminal justice observers are attempting to assess the significance of this trend and to gauge how far it departs—whether for good or for ill—from conventional approaches to prosecution. To some on the left, recent shifts in prosecution are essentially cosmetic: they serve to “re-entrench and legitimize current power arrangements” without fundamentally altering the way prosecutors and other criminal justice actors characteristically operate.<sup>100</sup> Others view the changes we are seeing in prosecution as half-measures that cannot succeed in producing a meaningful level of decarceration without buy-in from and close coordination with other actors such as legislatures, judges, and police.<sup>101</sup>

---

<sup>96</sup> Decision on Application for Preliminary Injunction; Granted in Large Part at 46 [hereinafter “Preliminary Injunction Ruling”], Ass'n of Deputy Dist. Attorneys v. Gascón, No. 20STCP04250 (L.A. Cnty. Sup. Ct. Feb. 8, 2021), <https://www.laadda.com/wp-content/uploads/2021/02/20STCP04250-Gascon-prelim-inj.pdf> [https://perma.cc/9S3G-S3YB]. Section 1386 of the penal code requires a prosecutor, as a condition for “abandon[ing] a prosecution for a public offense,” to comply with the requirements of section 1385; that section in turn empowers judges to dismiss charges or sentence enhancements “in furtherance of justice.” CAL. PENAL CODE ANN. § 1385 (West 2022); *Id.* at § 1386 (West 1987).

<sup>97</sup> Preliminary Injunction Ruling, *supra* note 96, at 28; *see also id.* at 38 (concluding that line assistants would not violate the state's professional ethics rules by arguing, in line with the script prescribed by Gascón, that the penal code's plead-and-prove requirement for prior strikes infringes the state constitution's separation of powers rule).

<sup>98</sup> Marisa Lagos, *Fight Over George Gascón's LA Criminal Justice Reforms Speaks to Larger National Debate*, KQED (Mar. 2, 2021), <https://www.kqed.org/news/11862532/fight-over-george-gascons-l-a-criminal-justice-reforms-speaks-to-larger-debate> [https://perma.cc/S22F-4QH3].

<sup>99</sup> *See* George Gascón, District Attorney, L.A. Cnty. District Attorney's Office Special Directive 21-01, (Feb. 10, 2021), <https://www.laadda.com/wp-content/uploads/2021/02/SD-21-01-Revised-Policies-Pursuant-to-Preliminary-Injunction.pdf> [https://perma.cc/QX8L-WHSA].

<sup>100</sup> Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 759 (2018) (quoting Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives*, at 4 (2017) (unpublished manuscript) [https://perma.cc/6A24-H87Y]).

<sup>101</sup> *See, e.g.,* Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. &

A third perspective—the perspective this Essay puts under the microscope for sustained analysis—casts prosecutorial nonenforcement as an aggressive decarceral intervention analogous to the outright repeal or nullification of the criminal statutes that are being left unenforced. As we have seen in Part I, analogies of this sort are frequently drawn by those opposed to prosecutorial nonenforcement in an effort to show that reformist DAs are improperly exercising a legislative function rather than an executive one.<sup>102</sup> Indeed, the notion that prosecutorial nonenforcement is tantamount to repeal or nullification of a criminal statute is a widely recurring theme in hostile assessments of reform-minded prosecutors.<sup>103</sup> But nonenforcement’s critics are not alone in comparing prosecutorial nonenforcement to statutory repeal or nullification. Reformist DAs and those who support their work often characterize prosecutorial nonenforcement as a form of decriminalization—a shortcut reformers can leverage to reap the benefits that flow from decarceral legislation without needing to try, perhaps unsuccessfully, to assemble the political support that legislative change would require.<sup>104</sup> Journalists, too, commonly conflate prosecutorial nonenforcement with decriminalization or assert that nonenforcement in effect nullifies statutes that are not being enforced.<sup>105</sup>

This Part exposes the limits of these comparisons. First, criminal charges often continue to be filed despite a DA’s announcement of a nonenforcement policy for manifold reasons that include noncompliance with the policy by line prosecutors, judicial pushback, initiation of prosecutions by outside actors such as the police or other state or local prosecutorial entities, and other causes. The prospect of such enforcement activity, which I call “residual prosecutorial enforcement,” reveals one way in which adjustments to prosecutorial enforcement policies come up short when stacked up against legislative decriminalization. Second, even where prosecutions mostly dry up because of a nonenforcement policy, arrests and other police activities authorized by the statute in question may persist, as might collateral enforcement actions such as the revocation of bail,

---

CRIMINOLOGY 769, 785–90 (2020).

<sup>102</sup> Recall, for instance, that judges in Norfolk and Portsmouth compared their local DAs’ policies on marijuana enforcement to legislative decriminalization; a top-ranking Justice Department official and a DA from Massachusetts accused Rollins and other reformist DAs of, respectively, “decriminaliz[ing]” prohibited conduct and “nullify[ing]” duly enacted laws; and the LA County prosecutors’ union alleged in its lawsuit against Gascón that his sentencing policy amounted to “[l]egislating by fiat” that had “all but repealed California’s sentencing enhancement laws.” *Supra* notes 33, 67, 69, 94 and accompanying text.

<sup>103</sup> See *supra* notes 33, 43, 65–69, 94–98 and accompanying text.

<sup>104</sup> See, e.g., BAZELON, *supra* note 29, at xxxi.

<sup>105</sup> See, e.g., Tom Jackman, *In Some Big Cities, Reform-Minded Prosecutors and Police Chiefs Have Been at Odds. Here’s What Happened When They Met in D.C.*, WASH. POST (July 17, 2019), <https://www.washingtonpost.com/crime-law/2019/07/17/prosecutors-launch-reforms-police-chiefs-convene-national-summit-dc-with-district-attorney-counterparts/> [<https://perma.cc/7MPH-TUDV>] (casting various prosecutorial nonenforcement policies as “moves to decriminalize offenses”).

probation, or parole and the deprivation of various public benefits stemming from violations of the statute—collectively, “residual nonprosecutorial enforcement.” And even if enforcement were to recede completely, unenforced criminal statutes may still play an ongoing role in constructing social norms regarding what sorts of conduct and which groups of people are viewed as legitimate and deserving and which, by contrast, are ostracized as criminal—a process referred to here as “residual stigmatization.” This Part documents these various forms of “residual criminalization” and demonstrates that the multifaceted sociolegal process of criminalization cannot be fully undone by unilateral shifts in enforcement policy on the part of a local DA.

### A. Residual Prosecutorial Enforcement

Efforts to compare prosecutorial nonenforcement with statutory repeal or nullification presuppose that the nonenforcement policy in question will be successful in preventing prosecutors from pursuing the kinds of charges or penalties that the policy prohibits.<sup>106</sup> (After all, a nonenforcement policy that is routinely ignored or circumvented in favor of continued enforcement can hardly be said to effectuate a *de facto* repeal or nullification of a criminal statute.) In certain situations, this assumption proves more or less well-founded: DA Larry Krasner, for example, significantly reduced prosecutions for prostitution offenses in Philadelphia each year—culminating in zero such prosecutions so far for 2021—after rolling out a declination policy for those offenses in early 2018; DA Kim Foxx cut felony retail theft prosecutions by over two-thirds in Cook County (covers Chicago) after directing line prosecutors to charge such cases as misdemeanors instead of felonies unless the stolen property was worth at least \$1,000 (or unless the defendant had a long record of prior felony convictions); and many reformist DAs have followed through on campaign promises never to seek the death penalty.<sup>107</sup> Often, however, criminal charges or penalties within the ambit

---

<sup>106</sup> Success in this regard need not be an all-or-nothing proposition. If a prosecutorial nonenforcement policy succeeds in preventing enforcement in almost all cases, but not in every single one, the assumption examined in this Section will find near-total vindication in relation to that policy; conversely, if the policy in question mostly (but not completely) fails to reduce covered prosecutorial enforcement activities, the assumption should be deemed mostly invalid in that context.

<sup>107</sup> As to Krasner’s policy on sex worker prosecutions, see Phila. Dist. Attorney’s Office, New Policies Announced February 15, 2018, at 1, <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo> [<https://perma.cc/E9Q5-2UC2>] (barring “prostitution cases against sex workers” except where the potential defendant has three or more prior prostitution convictions); *Public Data Dashboard*, PHILA. DIST. ATT’Y’S OFF., [https://data.philadao.com/Charge\\_Report.html](https://data.philadao.com/Charge_Report.html) [<https://perma.cc/4PR2-N3YR>] (last visited June 2, 2021) (discussing relevant data). As to Foxx’s retail theft policy, see, e.g., Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB. (Dec. 15, 2016, 6:00 AM), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html> [<https://perma.cc/Q62B-MERP>] (describing the policy); Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions->

of a nonenforcement policy continue to be sought by prosecutors notwithstanding a DA's attempt to disallow them. This phenomenon—residual prosecutorial enforcement—is fueled by a variety of mechanisms that this Section will unpack.

For one thing, the line prosecutors and mid-level staff who bear responsibility for most of the case-level decisionmaking in a typical modern DA's office do not always see eye-to-eye with their elected bosses' enforcement priorities; when such disagreements arise, there is no guarantee that a reformist DA's subordinates will faithfully implement a nonenforcement policy.<sup>108</sup> As seen in Part I, Gascón has run up against deep-seated internal opposition to his policy on sentencing enhancements—opposition reflected not only in a steady stream of public attacks on the policy by some of his more high-profile employees, but also in the continued filing of prohibited enhancements by prosecutors and in the lawsuit the LA prosecutors' union brought against Gascón and the DA's office to invalidate the policy.<sup>109</sup> Other reformers have likewise struggled to implement their visions for change in the face of inertia or opposition from within. One recent study of four DA's offices led by reformers found that “in all four partner offices[,] . . . messages from the executive team do not always make it down to line prosecutors” insofar as “[m]id-level managers . . . do not support their elected leader's mission” and that line prosecutors “will fall back on conventional ways of doing business if their direct supervisors continue to evaluate them primarily on trial experience and conviction rates.”<sup>110</sup>

Judges sometimes also stand in the way of reformist DAs and their nonenforcement policies. Three of the four Virginia reformers discussed in Part I (Underwood, Morales, and Dehghani-Tafti) met fierce resistance in their local court systems when they sought to implement their nonenforcement policies relating to marijuana possession, and in one instance—the dispute involving Underwood and the Norfolk bench—the Virginia Supreme Court validated the judges' position, forcing Underwood to substantially retool his policy.<sup>111</sup> Rollins' nonenforcement policy was temporarily thwarted by local judges in three highly

---

have-changed-in-cook-county [<https://perma.cc/RZC5-9623>] (discussing relevant data). As to death penalty nonenforcement, *see supra* note 79 and accompanying text; *infra* notes 121–26 and accompanying text.

<sup>108</sup> *See, e.g.*, Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 582–88 (2020).

<sup>109</sup> As to the ongoing battle in the media between Gascón and some of his employees, *see, e.g.*, Jason McGahan, *A Media Savvy Deputy DA Is Leading a Noisy Crusade Against George Gascón*, L.A. MAG. (Apr. 15, 2021). As to prosecutorial noncompliance with Gascón's sentencing enhancement policy and the lawsuit brought by the prosecutors' union challenging the policy, *see supra* notes 90–99 and accompanying text.

<sup>110</sup> BESIKI LUKA KUTATELADZE ET AL., PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE 54 (2018).

<sup>111</sup> *See supra* Section I.A. The fourth Virginia reformer discussed earlier, Descano, was initially criticized by at least one judge in Fairfax County for his marijuana nonenforcement policy, but the judge ultimately backed down. *See supra* notes 47–48 and accompanying text.



publicized incidents (and possibly in a far greater number of less visible matters), though in each instance she was able to successfully challenge the judge's ruling on appeal to the Massachusetts Supreme Judicial Court.<sup>112</sup> And key components of Gascón's sentencing enhancement policy have been on hold for over half a year after a judge largely ruled in favor of the prosecutors' union and against Gascón on the union's motion for preliminary injunctive relief; Gascón's appeal to the California Supreme Court is still pending.<sup>113</sup> Not so long ago, elected DAs could safely bet that judges would defer to their discretionary judgments regarding enforcement priorities.<sup>114</sup> But in jurisdictions where an older cohort of judges—many of them former prosecutors with a punitive orientation on criminal justice—find themselves sharing power with an unconventional group of prosecutors who wish to reduce criminal enforcement in significant domains and emphasize leniency, judicial deference to prosecutors' enforcement decisions can no longer be taken for granted.<sup>115</sup>

Moreover, the fragmentation of prosecutorial power in the United States creates opportunities for rival prosecutors to counterbalance a reformist DA's nonenforcement initiative by ramping up their own enforcement efforts. At the local level, the power to prosecute offenses is often divided between a county-level prosecutor (who goes by various titles, including DA) and a municipal prosecutor; where such arrangements exist, the county prosecutor will typically have exclusive jurisdiction to charge more serious offenses and may also possess concurrent jurisdiction over lesser offenses, while the municipal prosecutor's jurisdiction is restricted to certain lesser offenses.<sup>116</sup> If a reformist DA (*i.e.*, county prosecutor) in such a jurisdiction decides to stop prosecuting lesser offenses over which he or she has concurrent jurisdiction, there is nothing to stop the municipal prosecutor from continuing to prosecute those offenses—or even intensifying municipal enforcement in the hope of restoring the *status quo ante*.<sup>117</sup> Relatedly, “[i]n hundreds of misdemeanor courts in at least [fourteen] states, police officers can file criminal charges and handle court cases, acting as prosecutor as well as witness and negotiator.”<sup>118</sup> A reformist DA in such a jurisdiction may be able to prevent his

---

<sup>112</sup> See *supra* notes 72–77 and accompanying text.

<sup>113</sup> See *supra* notes 96–99 and accompanying text.

<sup>114</sup> See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 969–75 (2009).

<sup>115</sup> See, e.g., Rory Fleming, *How Courts Stand in the Way of Progressive Prosecutors*, FILTER MAG. (Jan. 15, 2020), <https://www.alternet.org/2020/01/reform-prosecutors-are-trying-to-make-the-u-s-justice-system-more-progressive-but-courts-are-trying-to-stop-them/> [<https://perma.cc/Y33Q-5JLD>].

<sup>116</sup> See generally Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548 (2020) (distinguishing county prosecutors from municipal prosecutors).

<sup>117</sup> See Rory Fleming, *Here's How to Abolish Incentives for "Broken Windows" Prosecutions*, FILTER MAG. (Sept. 5, 2019), <https://filtermag.org/abolish-broken-windows-prosecutions/> [<https://perma.cc/4L37-3ZAA>].

<sup>118</sup> Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26,

or her staff attorneys from enforcing certain criminal statutes, but the DA cannot compel the police department to follow suit.<sup>119</sup>

State-level officials also have various tools at their disposal to fight back against local nonenforcement policies that they disfavor.<sup>120</sup> Consider what happened to Aramis Ayala, the DA for two Florida counties that cover Orlando, after she announced—in connection with a horrific and high-profile double murder—that she would never ask for a death sentence.<sup>121</sup> Florida’s governor condemned Ayala’s decision and transferred control over the case to a different DA.<sup>122</sup> The state legislature then proceeded to slash Ayala’s budget by more than \$1 million, and the governor reassigned dozens of other aggravated murder cases within Ayala’s jurisdiction to the outside DA.<sup>123</sup> Ayala tried to challenge the governor’s reassignment of these cases in court, but the Florida Supreme Court ruled against her, concluding that it is the governor, not the local DA, who wields “supreme executive power” under state law and criticizing Ayala for “effectively banning the death penalty in [her jurisdiction] . . . as opposed to making case-specific determinations as to whether the facts of each death-penalty eligible case justify seeking the death penalty.”<sup>124</sup> Ayala was thus forced to abandon her categorical policy never to seek the death penalty; in its place, she set up a death penalty review panel within her office to decide whether to pursue a death sentence in each death-eligible case.<sup>125</sup> She also chose not to run for reelection, explaining that “death penalty law in the state of Florida is in direct conflict with my view and my vision for the administration of justice.”<sup>126</sup>

---

2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> [https://perma.cc/33UU-HWNR].

<sup>119</sup> For an example, see *supra* notes 30–37 and accompanying text (discussing DA Underwood’s nonenforcement policy relating to marijuana possession, which, following a bruising battle in the courts, extricated the DA’s office from most marijuana possession enforcement actions while creating space for police officers acting as prosecutors to fill the enforcement vacuum).

<sup>120</sup> See, e.g., Tyler Q. Yeagain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95 (2018). Federal officials, too, sometimes work at cross-purposes with reformist DAs by escalating their own enforcement efforts in response to local nonenforcement policies. See, e.g., Rory Fleming, *Portland Charges Exemplify Struggle Over Feds’ Prosecution Encroachment*, FILTER MAG. (Sept. 14, 2020), <https://filtermag.org/portland-federal-prosecution/> [https://perma.cc/4SR9-EG76].

<sup>121</sup> See Jordan Smith, *What Happens When a Reform Prosecutor Stands Up to the Death Penalty*, THE INTERCEPT (Dec. 3, 2019, 8:31 AM), <https://theintercept.com/2019/12/03/death-penalty-reform-prosecutors/> [https://perma.cc/6DNR-RMZD].

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Ayala v. Scott, 224 So.3d 755, 757–58 (Fla. 2017).

<sup>125</sup> Gal Tziperman Lotan, *State Attorney Ayala Rescinds Her Death-Penalty Ban*, ORLANDO SENTINEL (Sept. 1, 2017), <https://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-death-penalty-press-conference-20170831-story.html> [https://perma.cc/NJL3-24BV].

<sup>126</sup> Deirdra Funcheon, *With Challengers in the Wings, Florida Prosecutor Who Stood against Death Penalty Won’t Seek Reelection*, POLITICO (May 28, 2019, 4:51 PM),

The fate of Ayala's policy on the death penalty not only illustrates that state officials can sideline reformist DAs when they wish to create greater room for residual prosecutorial enforcement. It also highlights the fact that a prosecutorial nonenforcement policy can be altered or even entirely undone as circumstances evolve. The (relative) ease of electing a reformer and then demanding that he or she unilaterally exercise the DA's discretionary power to embrace nonenforcement—rather than going through all the trouble of reforming state and local criminal justice systems via legislative change—is part of what attracts some criminal justice reformers to prosecutor-centric decarceral strategies: as Emily Bazelon ably explains, “[w]hile it would be nice if lawmakers and the courts threw themselves into fixing the criminal justice system, in the meantime, elections for prosecutors represent a shortcut to addressing a lot of dysfunction.”<sup>127</sup> But the simplicity of changing prosecutorial policy is a double-edged sword. Just as it is (relatively) uncomplicated to recalibrate prosecutorial discretion in the direction of reduced enforcement, it is more-or-less equally straightforward to reverse such changes and revert to the patterns of prosecutorial enforcement that helped make the United States the world's leading jailor.

#### B. *Residual Nonprosecutorial Enforcement*

Criminal prosecution is not the sole mechanism by which criminal statutes get enforced by the state; indeed, for some offenses, mainly lower-level offenses, it is not even the principal method of enforcement.<sup>128</sup> Police officers routinely leverage the authority conferred by criminal statutes to conduct arrests, stops, and other enforcement activities, even in situations where a criminal prosecution or conviction is unlikely to result. People whose freedom is contingent upon complying with state-imposed conditions—such as pretrial defendants who have been released, people serving probation sentences, and people let out of prison on parole—can see their freedom stripped away from them by various state actors for violating a criminal statute even if no prosecutor seeks to charge them with the violation. And a whole host of quasi-criminal penalties and burdens can be imposed on people who are arrested (but not convicted) for a suspected crime, or who are shown to have committed a crime in noncriminal proceedings, regardless of whether a criminal prosecution ever takes place or, indeed, whether such a prosecution would be foreclosed by a DA's nonenforcement policy. To be sure, reformist DAs can try to persuade the state officials responsible for these other

---

<https://www.politico.com/states/florida/story/2019/05/28/with-challengers-in-the-wings-florida-prosecutor-who-stood-against-death-penalty-wont-see-reelection-1030026> [<https://perma.cc/2FDG-6Q5P>].

<sup>127</sup> BAZELON, *supra* note 29, at xxxi. For further discussion of Bazelon's plan for criminal justice reform, see *infra* notes 178–79 and accompanying text.

<sup>128</sup> See, e.g., MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 278 (1979).

enforcement modalities—which I refer to collectively as “residual nonprosecutorial enforcement”—to relent. But prosecutors often do not have the final say on these matters, and it is not inevitable that their views, whatever those views might be, will carry the day.<sup>129</sup>

While legal scholarship and the law school curriculum often cast policing as little more than an adjunct to prosecution—with police work comprising the investigative phase of the criminal process that sets the stage for the all-important adjudicative phase—this framework holds little explanatory value when it comes to the recent wave of prosecutorial nonenforcement initiatives and police responses to them. When reformist DAs announce new nonenforcement policies, police departments do not invariably fall in line with the DAs’ priorities and reallocate their investigative resources accordingly.<sup>130</sup> Time and again, police leaders have responded to newly announced prosecutorial nonenforcement policies by communicating to rank-and-file officers that they should keep enforcing the laws in question as if nothing had changed. Recall, from Part I, that the police departments in Norfolk and Portsmouth greeted Underwood’s and Morales’ non-prosecution policies on marijuana possession by inviting officers to carry on with business as usual.<sup>131</sup> Likewise, when Mike Schmidt, the DA for Multnomah County (covers Portland), directed his staff to dismiss charges in most cases stemming from the summer 2020 racial justice protests, the police chief waved off Schmidt’s move, and officers “ignored the policy altogether and carried on arresting people, often violently, . . . [and] booking them over charges they know will not be prosecuted.”<sup>132</sup> And in Philadelphia, prostitution arrests initially went up, not down, after DA Krasner announced in February 2018 that his office would

---

<sup>129</sup> It is worth noting that just because a reformist DA opposes *prosecutorial* enforcement does not necessarily commit the DA to rejecting *all forms* of enforcement. *See, e.g.*, Letter from Cyrus R. Vance, Jr., District Attorney, to Joseph J. Lhota, Chairman, Metropolitan Transportation Authority, at 2 (Feb. 5, 2018), <https://www.politico.com/states/f/?id=00000161-6c67-d2cf-a3e5-6ce7debc0001> [<https://perma.cc/RD8J-YUYH>] (emphasizing that the Manhattan DA’s Office’s policy against prosecuting most fare evasion charges “does not alter, in practice or in effect, the [New York Police Department’s] enforcement” and stating that “officers are encouraged to stop every farebeater they observe, to arrest those who endanger public safety, and to give criminal or civil summonses to those who don’t”).

<sup>130</sup> *See, e.g.*, Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 288 (2020) (underscoring that “[a] prosecutor’s decision not to prosecute a category of offenses does not necessarily mean that police officers will not arrest those individuals” and that a police arrest by itself entails fingerprinting and the sharing of biometric information with immigration authorities, placing noncitizens at risk).

<sup>131</sup> *See supra* notes 32, 41 and accompanying text.

<sup>132</sup> Alice Spери, *A Progressive Prosecutor Faces Off with Portland’s Aggressive Police*, THE INTERCEPT (Sept. 16, 2020, 12:04 PM), <https://theintercept.com/2020/09/16/portland-protests-prosecutor-police/> [<https://perma.cc/E47P-X58A>]. Some protesters reported that the Portland police did not merely refuse to moderate their tactics in response to Schmidt’s policy but even “doubled down”—perhaps out of “frustration” or in an attempt “to make Mike look bad” by associating his short time in office with a breakdown in law and order. *Id.*

no longer prosecute sex workers in most situations.<sup>133</sup> (Arrests for prostitution eventually plummeted in Philadelphia, but apparently not until the pandemic forced a reordering of priorities.<sup>134</sup>) So whereas line prosecutors can helpfully be thought of as agents of the DA—not always faithful agents, as we have seen,<sup>135</sup> but agents nonetheless—the police are a separate arm of the law enforcement apparatus that can march to their own beat.<sup>136</sup>

As noted earlier, there are some jurisdictions where police have the power to litigate cases and secure convictions without involvement from the DA's office when they disagree with a prosecutorial nonenforcement policy.<sup>137</sup> But that is not the norm. More commonly, residual enforcement by the police happens through the deployment of familiar police functions such as arrests, stops and frisks, executing search warrants, and the like. While these kinds of enforcement measures are generally less intrusive than subjecting someone to a full-blown criminal prosecution culminating in a conviction and sentence, they can still produce a great deal of harm, limiting the gains that reformers can achieve by way of prosecutorial nonenforcement. Arrests strip people of their freedom and temporarily turn them into prisoners, often causing serious trauma and throwing people's lives into disarray in the process.<sup>138</sup> (In fact, *Atwater v. City of Lago Vista* held that the Constitution allows police officers to arrest and temporarily incarcerate people even for minor offenses that, as a matter of state law, could not be punished with jail time).<sup>139</sup> Stops and frisks can be invasive and highly degrading, especially when, as frequently happens, police select their targets based on race and class and subject the same person or group of people to repeated intrusions; they are also pathways to the worst kinds of police violence.<sup>140</sup> And the execution of search warrants can entail significant property damage and expose to prying eyes some of the most sensitive information about a person's life; sometimes people are even killed at the hands of police when warrants are served, as Breonna Taylor's fatal encounter with the Louisville police distressingly

---

<sup>133</sup> See *Public Data Dashboard*, PHILA. DIST. ATT'Y'S OFF., [https://data.philadao.com/Arrest\\_Report.html](https://data.philadao.com/Arrest_Report.html) [<https://perma.cc/V22S-R5Z5>] (last visited Sept. 15, 2021).

<sup>134</sup> See *id.*

<sup>135</sup> See *supra* notes 108–10 and accompanying text.

<sup>136</sup> Cf. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (exploring the distribution of power and roles between prosecutors and agents in federal law enforcement).

<sup>137</sup> See *supra* notes 118–19 and accompanying text.

<sup>138</sup> See, e.g., Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–20 (2016) (cataloguing a range of harms associated with arrests).

<sup>139</sup> 532 U.S. 318 (2001). For a devastating critique of *Atwater*, see generally Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147 (2020).

<sup>140</sup> As to the invasiveness of frisks, see, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 81–85, 96–114 (2017). As to the connection between stops and police violence, particularly violence directed against Black people, see, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1506–08 (2016).

illustrates.<sup>141</sup> Comparing prosecutorial nonenforcement to statutory repeal or nullification renders invisible the manifold ways that criminal statutes expand the power of police to respond to criminalized behavior even without the help of prosecutors.

Such comparisons also fail to appreciate the profound legal consequences that can result from an arrest irrespective of whether a prosecutor moves forward with criminal charges. Consider the pretrial release process. A defendant who is released by a court pending trial must comply with certain conditions or else face the possibility that the court will revoke its release order and incarcerate the defendant for the remainder of the pretrial period—a period that can last months or even, in some backlogged courts, years.<sup>142</sup> A standard condition that courts impose in the pretrial release context is that a defendant must refrain from committing any new crimes, and a common measure used to assess whether the defendant committed a new crime is whether he or she was arrested—not necessarily convicted—for alleged criminal activity.<sup>143</sup>

To illustrate, suppose that a defendant facing prosecution for robbery is released on the condition that he avoid committing any new crime pending trial and that, one month later, police arrest him for allegedly possessing marijuana in violation of a state criminal code provision that the DA's office has chosen not to enforce. The court has discretion in this scenario to revoke the defendant's release and incarcerate him pending trial in the robbery case on account of the marijuana arrest even though the DA's office has no interest in pursuing charges in the marijuana case. To be sure, it is certainly possible, perhaps even probable, that the court will choose to look past the marijuana arrest and give the defendant another chance at pretrial freedom—especially if the DA's office sides with the defendant in arguing that a violation so minor that it does not warrant criminal prosecution should not furnish the basis for revoking pretrial release.<sup>144</sup> (Note, however, that the hypothetical could be modified so that the robbery and marijuana arrests took place in different jurisdictions; if so, it could be the case that the DA's office handling the robbery views marijuana possession arrests far more seriously than

---

<sup>141</sup> See Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> [<https://perma.cc/X779-BY6J>].

<sup>142</sup> See, e.g., Jennifer Gonnerman, *A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, THE NEW YORKER (Sept. 29, 2014), <https://www.newyorker.com/magazine/2014/10/06/before-the-law> [<https://perma.cc/MM3X-MJB2>] (discussing the backlog in Bronx's criminal courts that left one young man—Kalief Browder—stranded in jail while awaiting trial for over three years).

<sup>143</sup> See, e.g., 18 U.S.C. § 3142(b) (2008) (presumptively requiring judges to release defendants pretrial “subject to the condition that the person not commit a Federal, State, or local crime during the period of release”); Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 1005–07 (2019) (noting that rearrest is widely used as a proxy for recidivism in pretrial release decisionmaking and in other contexts).

<sup>144</sup> Cf. *supra* note 1 and accompanying text (noting the influence prosecutors exert over bail outcomes).

the DA's office with the non-prosecution policy and might forcefully argue to the judge that the marijuana arrest justifies revocation in the robbery matter). But the decision would ultimately lie with the court, not the prosecutor, and—depending on the circumstances and on whether the court is supportive of the prosecutor's nonenforcement policy—the court might well decide to take away the defendant's freedom based on an arrest for which the defendant will never be separately prosecuted.

A similar risk—that is, the risk that a defendant who is arrested for or suspected of a crime covered by a prosecutorial nonenforcement policy will nevertheless face quasi-criminal repercussions from state actors—arises in a multitude of other enforcement contexts as well. People on probation, parole or supervised release are often at risk of having their status revoked, potentially resulting in incarceration, if they are rearrested or found to have committed new crimes—or if they fail a drug test.<sup>145</sup> The fact that the new arrest, suspected crime, or bad drug test cannot lead to prosecution might sometimes be seen as a mitigating factor warranting leniency, but in other situations perhaps it will not. Arrests and suspected criminal violations also play a key role in deciding how various public benefits get distributed. As Eisha Jain has shown, “[a] number of actors outside the criminal justice system, such as immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials, among others, routinely receive and review arrest information” such that arrests—not just prosecutions and convictions—“now serve as a significant source of regulation, separate and apart from their role in the criminal justice system.”<sup>146</sup> The prospect of residual nonprosecutorial enforcement thus delivers a second strike against the idea that prosecutorial nonenforcement is akin to the repeal or nullification of a criminal statute.

### C. *Residual Stigmatization*

Up to this point, my aim in this Part has been to document various modes of criminal or quasi-criminal enforcement activity that might persist even in the teeth of a prosecutorial nonenforcement policy in order to cast doubt on overhyped comparisons that many influential voices are drawing between prosecutorial nonenforcement, on one hand, and statutory repeal or nullification, on the other. But suppose for the moment that, despite what I have written in the preceding Sections, the possibility of residual enforcement by prosecutors and other state

---

<sup>145</sup> See, e.g., Jacob Schuman, *Drug Supervision*, OHIO ST. J. CRIM. L. (forthcoming) (manuscript at 26) (last accessed Sept. 15, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3842981](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3842981) [<https://perma.cc/8J2E-QWK3>] (noting, in the context of the federal supervised release program, that probation officers have extensive discretion in “decid[ing] what drug-related behavior will be punished . . . and what will be permitted”).

<sup>146</sup> Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015).

actors could be eliminated or at least reduced to a *de minimis* level for a particular type of criminal conduct in a particular jurisdiction if the DA were to embrace a policy of nonenforcement. Would it then be fair to say that the adoption of a nonenforcement policy by the DA would render the affected criminal statute a dead letter?

Even in this unlikely scenario, I think not. The criminal law regulates human affairs—and burdens those who struggle to abide by its strictures—not only by means of enforcement actions that serve to incapacitate offenders and deter future lawbreaking, but also by reinforcing social norms that stigmatize behaviors and people that are seen as undesirable.<sup>147</sup> Criminal laws prohibiting drug possession and distribution signal that using, sharing, and selling drugs are wrong and that people who associate themselves with drugs are not like the rest of us; laws against fornication inculcate norms tying sex to heterosexual marriage and procreation; hate crime laws teach that violence targeting marginalized groups is the most heinous kind of violence. To be sure, much of the criminal law's norm-constructing work, perhaps most of it, takes place when statutes are enforced—especially when enforcement culminates in the moral drama of a trial (a vanishingly rare occurrence) and a jury verdict reflecting the community's judgment—rather than when the statutes are first enacted or simply allowed to linger on the books, unused and gathering dust.<sup>148</sup> But whether they are enforced or not, criminal statutes express ideas about which behaviors are pro-social and which are out of bounds and about which groups of people are deserving and which, by contrast, should be stigmatized.<sup>149</sup> Decreasing the level of enforcement unquestionably diminishes a criminal statute's norm-shaping potential, but it cannot entirely mute the messages encoded within the law.

Moreover, most of the prosecutorial nonenforcement policies currently on offer have an exclusively prospective sweep: in other words, they are designed to prevent future enforcement measures predicated on a now-disfavored statute, not to disturb the fruits of past enforcement activity pursuant to the statute.<sup>150</sup> In a country where around twenty million people have felony criminal convictions in

---

<sup>147</sup> See generally SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* ch.2 (10th ed. 2017) (surveying leading theories of criminal punishment including theories that emphasize how criminal law and its enforcement shape social norms).

<sup>148</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 947–48 (2006) (noting that “[s]ubstantive criminal law . . . seeks to inculcate and reinforce social and moral norms” but that “criminal procedure’s shortcomings”—in particular, the eclipse of the public trial and the rise of plea bargaining—“obstruct the substantive criminal law’s goals of deterring, educating, vindicating victims, and expressing condemnation”).

<sup>149</sup> See, e.g., Bert I. Huang, *Law and Moral Dilemmas*, 130 HARV. L. REV. 659, 698 (2016) (reviewing F.M. KAMM, *THE TROLLEY PROBLEM MYSTERIES* (2015)) (presenting results of a study finding that participants’ moral intuitions regarding morally ambiguous conduct are influenced by whether the law criminalizes that conduct and that the law’s effect on intuitions persisted even when participants were told that the law would not be enforced).

<sup>150</sup> *But cf. supra* note 82 and accompanying text (noting that Gascón’s policy regarding sentence enhancements has some retroactive application in addition to its prospective aspects).



their background and several times that number have been convicted at some point of a misdemeanor,<sup>151</sup> the criminal law has had ample opportunities to sound its stigmatic message over and over again in relation to countless forms of proscribed conduct. And the accumulated stigma resulting from this great mass of criminal records falls disproportionately on the shoulders of Black people and other marginalized groups, cementing longstanding biases linking certain racial identities with criminality.<sup>152</sup> Prosecutorial nonenforcement initiatives that train their gaze on the present and future while ignoring the past leave this vast reservoir of stigma largely intact.

### III. PROSECUTORIAL NONENFORCEMENT RECONSIDERED

In the burgeoning scholarly literature and public debates surrounding the prosecution function, there is a widespread tendency among both critics and admirers of prosecutorial nonenforcement to claim that nonenforcement has more or less the same effect as repealing or nullifying statutory law. But as I have shown in the previous Part, such claims are mistaken. Even where a DA articulates a policy against enforcing a criminal statute in some or all of the cases the statute covers, residual prosecutorial enforcement remains a distinct possibility, as does ongoing enforcement by police, probation officers, immigration officials, and a host of other state actors whose decisionmaking processes are not controlled by the DA's office. And even in the absence of lingering enforcement activity, the continued existence of the statute in question serves to stigmatize the conduct it proscribes, and the people and groups most closely associated with that conduct, especially if nothing has been done to revisit convictions secured through past enforcement actions based on the statute. These three facets of residual criminalization—residual prosecutorial enforcement, residual nonprosecutorial enforcement, and residual stigmatization—expose the limitations inherent in any effort to compare prosecutorial nonenforcement with legislative decriminalization measures.

Taking seriously the phenomenon of residual criminalization helps push conversations about prosecutorial nonenforcement in fresh new directions. This Part explains why, first by showing that an appreciation of residual criminalization weakens some of the major objections levied against prosecutorial nonenforcement by opponents of reform and then by asking what lessons criminal justice reformers can learn from this Essay's analysis of residual criminalization.

---

<sup>151</sup> See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 1 (2015).

<sup>152</sup> Black adults are incarcerated at nearly 5.9 times the rate of White adults, while Hispanic adults are incarcerated at a rate around 3.1 times that of White adults—a somewhat lower yet still dramatic disparity. E. ANN CARSON, U.S. DEP'T OF JUST.: BUREAU OF JUST. STATS., *PRISONERS IN 2016* 10 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/67SL-6M4F>].

### A. Critiques of Nonenforcement

The central idea this Essay scrutinizes—namely, that prosecutorial nonenforcement policies can fairly be compared to the repeal or nullification of criminal statutes—has featured prominently in attacks on reformist DAs and their nonenforcement policies in recent years. Texas Governor Greg Abbott lambasted Dallas County DA John Creuzot’s policy against prosecuting certain classes of retail theft for supposedly conveying to the public that “[i]f someone is hungry they can just steal some food,” calling the policy “wealth redistribution by theft” and asking: “Where does it end?”<sup>153</sup> The Heritage Foundation has published a whole series of reports and videos indicting “rogue prosecutors” who “usurp the constitutional role of the legislative branch by refusing to prosecute entire categories of crime”<sup>154</sup> and who, by doing so, in effect authorize criminal behavior.<sup>155</sup> Not to be outdone, Fox News’ Tucker Carlson asserted that Gascón’s nonenforcement policy relating to certain misdemeanors had “legalized a whole laundry list of crime,” surely marking “the beginning of the end of society itself.”<sup>156</sup> If some of these pronouncements seem a tad hyperbolic (which does not necessarily make them less influential), Andrew McCarthy of National Review penned a thoughtful critique of reformist prosecutors in which he expressed a similar idea in a more restrained fashion: “If the weighing of the merits of prosecution based on the facts of individual cases morphs into a *programmatic decision not to prosecute various categories of crime*, it becomes an executive veto of the community’s right to define and punish penal offenses through its legislative representatives.”<sup>157</sup>

The three dimensions of residual criminalization fleshed out in Part II

---

<sup>153</sup> Greg Abbott (@GregAbbott\_TX), TWITTER (Apr. 14, 2019, 11:42 PM), [https://twitter.com/gregabbott\\_tx/status/1117634208405557248?lang=en](https://twitter.com/gregabbott_tx/status/1117634208405557248?lang=en).

<sup>154</sup> *Rogue Prosecutors*, THE HERITAGE FOUNDATION, <https://www.heritage.org/rogue-prosecutors> [<https://perma.cc/V4SJ-5RRS>] (last visited Sept. 16, 2021) (linking relevant documents and videos).

<sup>155</sup> See Charles Stimson & Zach Smith, *Meet Rachael Rollins, the Rogue Prosecutor Whose Policies Are Wreaking Havoc in Boston*, THE HERITAGE FOUNDATION (Nov. 12, 2020), <https://www.heritage.org/crime-and-justice/commentary/meet-rachael-rollins-the-rogue-prosecutor-whose-policies-are-wreaking> [<https://perma.cc/W9S9-D7PQ>] (referring to crime categories covered by Rollins’ nonenforcement policy as “15 Crimes You Can Commit in Boston”).

<sup>156</sup> *Tucker Carlson Tonight* (Fox News television broadcast Dec. 8, 2020).

<sup>157</sup> Andrew McCarthy, *The Progressive Prosecutor Project*, COMMENTARY MAG. (Mar. 2020), <https://www.commentary.org/articles/andrew-mccarthy/the-progressive-prosecutor-project/> [<https://perma.cc/M2JK-JF67>] (emphasis in original). In a related area that has sparked controversy of late—involving executive nonenforcement at the federal rather than local level—a handful of administrative law scholars have compared categorical nonenforcement to “executive suspension of statutory law” that impermissibly “strips the law of practical effect for a certain period.” Price, *supra* note 27, at 705–06; see also, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–87 (2013).

significantly deflate these sorts of widely disseminated critiques of prosecutorial nonenforcement. Contrary to Abbott's characterization of Creuzot's non-prosecution policy, no one "can just steal some food" in Dallas considering that, as the earlier discussion of residual prosecutorial enforcement suggests, line prosecutors may potentially disregard Creuzot's policy, judges might stymie its implementation, and Abbott or the state's attorney general could explore the possibility of assigning a different prosecutor to vindicate the state's shoplifting laws in Dallas if they truly thought the sky was falling.<sup>158</sup> Likewise, Gascón's misdemeanor declination policy did not, to use Carlson's expression, "legalize[] a whole laundry list of crime," or even one crime for that matter: the possibility of residual enforcement by police and other state actors ensures that people who violate the laws in question, while less likely to face criminal prosecution than before the advent of the policy, nevertheless face potentially serious repercussions at the hands of the police and other actors.<sup>159</sup> Nor, as McCarthy argued, is a prosecutorial nonenforcement policy akin to "an executive veto of the community's right to define and punish penal offenses through its legislative representatives," since statutes defining offenses are formally unaltered by enforcement choices and may continue to shape norms regarding socially acceptable and opprobrious behavior through residual stigmatization even where enforcement gets dialed back.<sup>160</sup> The practical impact of a criminal statute is of course reduced to some degree—at times a severe degree—when a DA directs his or her staff not to enforce it in all or many cases. But the statute's impact will not approach zero as long as some combination of residual enforcement by prosecutors, residual nonprosecutorial enforcement, and residual stigmatization remain operative.

In fairness, those who oppose prosecutorial nonenforcement have other arguments available to them besides the one this Essay targets. Critics of prosecutorial nonenforcement can (and do) contend that a decision not to enforce criminal statutes in entire classes of cases is at odds with a sound scheme of separation of powers in which the legislature enacts law and the executive faithfully enforces it.<sup>161</sup> More fundamentally, critics also question prosecutorial nonenforcement by simply making the affirmative case for enforcement: whereas robustly prosecuting violations of the criminal law deters and temporarily incapacitates those who might otherwise engage in criminal conduct,

---

<sup>158</sup> For Abbott's claim, *see supra* note 153 and accompanying text. For discussion of residual enforcement by prosecutors, *see supra* Section II.A.

<sup>159</sup> For Carlson's claim, *see Tucker Carlson Tonight supra* note 156 and accompanying text. For discussion of residual enforcement by police, *see supra* notes 130–43 and accompanying text.

<sup>160</sup> For McCarthy's claim, *see supra* note 157 and accompanying text. For discussion of residual stigmatization, *see supra* section II.C.

<sup>161</sup> *See, e.g.,* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 757–61 (2020).

nonenforcement risks precipitating a crime spike—or so the argument goes.<sup>162</sup> In short, there remains ample room to debate whether and in what situations prosecutors should opt against enforcement even once facile comparisons between prosecutorial nonenforcement and statutory repeal or nullification are removed from the equation.

That being said, drawing attention to the phenomenon of residual criminalization partially blunts the force of these other objections as well. With respect to the first point, regarding separation of powers, this Essay's analysis of residual criminalization reveals a potent array of checks and balances that can activate when a DA embraces nonenforcement. Line prosecutors and mid-level staff who oppose nonenforcement policies may find ways to undermine such policies from within.<sup>163</sup> Judges sometimes insert themselves to block dismissals premised on such policies.<sup>164</sup> State officials frequently possess authority to transfer cases from nonenforcing DAs to outside prosecutors who prefer more aggressive enforcement.<sup>165</sup> And the police and other state actors can and often do adopt enforcement priorities of their own that work at cross-purposes with those of reformist DAs.<sup>166</sup> Admittedly, none of this necessarily sweeps the legs out from underneath the objection: one could certainly still argue that prosecutors act outside their relative institutional competence and invade legislative prerogatives when they categorically refuse to enforce laws with which they disagree. But the claim is far weaker when viewed against the backdrop of residual criminalization and the assortment of checks and balances that accompany it than when the objection comes packaged together with insinuations that prosecutors are effectively undoing the legislature's handiwork. Considered as part of a broader defense of prosecutorial nonenforcement drawing on democratic localism and other themes,<sup>167</sup> highlighting residual criminalization may help shift the discussion beyond a proceduralist focus on how to allocate decisional authority between prosecutors and legislatures toward a substantive assessment of whether and under what circumstances nonenforcement is best for society.

Which brings us to the second concern: that prosecutorial nonenforcement stands in the way of salutary criminal law objectives. With respect to the types of offenses that some reformist DAs are categorically or semi-categorically declining

---

<sup>162</sup> See, e.g., Rafael Mangual, *The Troubling Agenda of LA's New "Progressive" Prosecutor and Fellow "Reformers,"* THE HILL (Dec. 10, 2020, 7:00 AM), <https://thehill.com/opinion/criminal-justice/529596-the-troubling-agenda-of-las-new-progressive-prosecutor-and-fellow> [<https://perma.cc/ZHR7-SB6L>].

<sup>163</sup> See *supra* notes 108–10 and accompanying text.

<sup>164</sup> See *supra* notes 111–15 and accompanying text.

<sup>165</sup> See *supra* notes 120–26 and accompanying text.

<sup>166</sup> See *supra* Section II.A.

<sup>167</sup> For several recent impressive efforts to leverage reformist DAs' mandates from local electorates to refute or at least qualify the separation of powers critique of prosecutorial nonenforcement, see, e.g., Murray, *supra* note 13; Sawyer, *supra* note 27; Wright, *supra* note 27.

to prosecute—low-level drug offenses, petty theft, trespass, and the like—it seems to me that there is little to be gained, and much to lose, by adhering to conventional enforcement strategies that punish people for behavior that causes no one serious harm and is often linked to addiction, mental health challenges, and poverty. And the penalty statutes that a few DAs, like Gascón, would prefer to reserve for rare cases or dispense with entirely—such as recidivist enhancements, gang enhancements, and death penalty authorizations—have been criticized, in my view justly, for exacerbating racial disparities and for subjecting many offenders to punishments far beyond what their conduct deserves and greater than is needed to hold crime in check.<sup>168</sup> These rejoinders surely will not win over everyone. But for the unconvinced, perhaps an emerging awareness of residual criminalization will at least offer a measure of reassurance that, although certain criminal laws will be enforced less aggressively than they once were, the laws in question nevertheless remain intact and breaking them might well set in motion other enforcement mechanisms.

### B. *Rethinking Prosecution-Driven Reform*

Those who would criticize prosecutorial nonenforcement are not alone in conceptualizing nonenforcement as the functional equivalent of repealing or nullifying statutory law; thinkers and activists who *support* nonenforcement efforts often frame the stakes in a similar way. The ACLU has lauded reformist DAs for “[u]sing discretion to decriminalize crimes of poverty.”<sup>169</sup> Emily Bazelon, who has written a book-length manifesto urging the reform movement to invest itself in prosecutorial elections,<sup>170</sup> has celebrated reformist DAs for “decriminaliz[ing] certain offenses, like jumping a turnstile or possessing marijuana.”<sup>171</sup> Professors Roger Fairfax, Erik Luna, and Kerrel Murray have authored law review articles defending, at least in part, the use of nonenforcement discretion to effectuate what they refer to, respectively, as “prosecutorial nullification,” “prosecutorial decriminalization,” and “populist prosecutorial nullification.”<sup>172</sup> Much as these

---

<sup>168</sup> See, e.g., ELAN DAGENAIS ET AL., STAN. COMPUTATIONAL POL’Y LAB, SENTENCING ENHANCEMENTS AND INCARCERATION: SAN FRANCISCO, 2005–2017 8–11 (2019) (finding that certain enhancements such as California’s three strikes law have played a major role in driving up incarceration rates and amplifying racial disparities already present in base (nonenhanced) sentences and that any gains in public safety are modest at best).

<sup>169</sup> @ACLU, TWITTER (Aug. 12, 2019, 4:43 PM), <https://twitter.com/ACLU/status/1161015388982960133>.

<sup>170</sup> See BAZELON, *supra* note 29.

<sup>171</sup> Gross, *supra* note 13 (interview with Emily Bazelon).

<sup>172</sup> Fairfax, *supra* note 27, at 1252 (“This Article characterizes ‘prosecutorial nullification,’ as those circumstances in which a prosecutor has sufficient evidence to secure a conviction against a defendant for conduct that violates a criminal law, but declines prosecution because of a disagreement with that law or because of the belief that the application of that law to a particular defendant or in a particular context would be unwise or unfair.”); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 796–97 (2012) (“Through their

sorts of comparisons—when deployed by nonenforcement’s opponents—lend undeserved plausibility to some of the major objections that are directed against prosecutorial nonenforcement,<sup>173</sup> the same conceptual move risks misdirecting reform efforts when made by those striving for decarceration.

One potential danger is that reformist DAs and others in the reform community might fail to anticipate and, thus, fail to counteract the manifold ways in which residual criminalization can hamstring nonenforcement measures. A DA who naively assumes, for example, that his or her policy directive embracing nonenforcement will be faithfully carried out by line prosecutors, effectively repealing or nullifying the targeted law, might get blindsided when those prosecutors—perhaps with a wink and a nod from supervisors inherited from the prior administration—carry on with enforcement actions at odds with the spirit, and possibly even the letter, of the policy.<sup>174</sup> Likewise, a reform coalition captivated by the notion that the keys to the kingdom lie in discretionary enforcement choices by prosecutors—or, to borrow a line from two influential criminal justice scholars, that “prosecutors *are* the criminal justice system”<sup>175</sup>—may be surprised to find police officers, bail-setting judges, probation officers, and immigration and housing officials continuing to penalize people for allegedly violating criminal statutes even after that jurisdiction’s prosecutors are no longer bringing cases under those laws and have moved on to greener pastures.<sup>176</sup> Reformers who are alert to the phenomenon of residual criminalization and the

---

discretionary decisionmaking, prosecutors are treating some conduct as non-criminal and handling other conduct as not quite as criminal as it could be—in other words, prosecutorial decriminalization.”); Murray, *supra* note 13, at 173 (“At least where the prosecutor ties her categorical nullification to the polity’s electorally expressed will, she accomplishes wholesale what nullifying juries could once do retail. I thus dub that wholesale action ‘populist prosecutorial nullification.’”). Zohra Ahmed has also argued for what she terms “prosecutorial nullification” in relation to lower-level offenses, in part as a way of sheltering noncitizens from immigration enforcement. Ahmed, *supra* note 130. I have no real bone to pick with Ahmed’s analysis, however, since her treatment of the subject is acutely sensitive to the risk of residual police enforcement and recognizes that prosecutorial nonenforcement should be leveraged by reformers to push for more ambitious changes, including legislative decriminalization measures. *See id.* at 288, 295–96, 300.

<sup>173</sup> *See supra* Section III.A.

<sup>174</sup> *See supra* notes 108–10 and accompanying text (discussing conflicts between DAs and their subordinates over policy implementation).

<sup>175</sup> Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010) (“For all intents and purposes, prosecutors *are* the criminal justice system through their awesome, deeply problematic powers.”). For a bibliography and a critique of this and other assertions about prosecutorial power in a similar vein, see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 176–82 (2019); *see also* Fryer, *supra* note 101, at 789 (concluding that “prosecutorial power is often exaggerated” insofar as “[t]he sort of power prosecutors possess is a contingent, not unilateral, power that relies on other officials”); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 483 (2016) (arguing that prosecutorial power is not unilateral since “pretty much everything a prosecutor does is done through others”).

<sup>176</sup> *See supra* Section II.B (discussing residual nonprosecutorial enforcement).

variety of forms it might take will be better positioned to plan for and respond to these and other contingencies, whereas those who are complacent may get caught flat-footed.

Of course, it is one thing to see the shape of a complex problem like residual criminalization and another thing entirely to know what should be done about it. Should a DA who is preparing to roll out a potentially explosive nonenforcement initiative head off potential internal noncompliance by firing unsupportive supervisors and line prosecutors and replacing them with committed reformers? Or should the DA try to foster cooperation through softer, more conciliatory bureaucratic measures such as outreach, training, and modified performance metrics? There are no easy answers, and the right approach will surely vary depending on all the circumstances.<sup>177</sup> If beat cops are still stopping and arresting people in droves for drug possession offenses that the local DA has promised not to prosecute, should reformers in the community orchestrate a dialogue with the police department and its union to see if a compromise can be struck? Or should they launch a public relations campaign to shame the department into harmonizing its enforcement practices with those of the DA—or perhaps a lobbying campaign directed at the state legislature, or a class action lawsuit challenging the department’s practices as unconstitutional? Again, each approach brings with it a host of potential risks and rewards, and my purpose here is not to prescribe any single solution. The goal, instead, is to underscore that residual criminalization presents delicate and formidable challenges for reformist DAs and for others who are striving for criminal justice reform. Those challenges need to be managed skillfully, which is made easier when reformers correctly understand what they are up against.

And then there is the matter of opportunity costs. Reformers who fail to perceive any meaningful difference between prosecutorial nonenforcement and legislative decriminalization are at risk of overinvesting in prosecutor-centric reform strategies at the expense of other approaches. Securing a change in the law from a legislative body—particularly a statewide or federal legislature representing a vastly larger constituency than does a local DA—is rarely a simple task, and it can be uniquely daunting where the “pathological politics of criminal law” are at work.<sup>178</sup> There is an understandable temptation, therefore, to treat prosecutorial

---

<sup>177</sup> For an excellent discussion of this dilemma, see Ouziel, *supra* note 108, at 582–89.

<sup>178</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (quotation drawn from title with capitalizations omitted) (attributing mass criminalization to the confluence of transient tough on crime politics along with “[a] deeper politics”—characterized by “tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges”—which, in the author’s view, “always pushes toward broader liability rules, and toward harsher sentences as well” (emphasis in original)). *But cf.* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 274 (2007) (“[A] significant number of states are finding ways to improve legislative outcomes on criminal lawmaking, and their records . . . [are] not noticeably different from their records in other policy areas.”).

elections and prosecutor-led reform as a “shortcut” method of achieving decarceral objectives without having to enact any new laws or to assemble political support beyond what is needed to win a local election.<sup>179</sup> But this Essay’s sketch of residual criminalization suggests that there is no such shortcut. So long as statutory law continues to classify the conduct in question as criminal, people who engage in that conduct will bear the stigma of criminality and are at risk of being intruded upon and penalized by various government officials—even, potentially, by prosecutors if the DA spearheading a nonenforcement initiative cannot foster compliance from within or stave off meddling from without. Prosecutorial nonenforcement is a highly valuable decarceral technique; nothing in this Essay is meant to suggest otherwise.<sup>180</sup> But it cannot be viewed as a substitute for legislative decriminalization or for deep reform efforts targeted at policing, prisons, probation and parole, criminal record expungement, and other pillars of the carceral state.<sup>181</sup>

---

<sup>179</sup> BAZELON, *supra* note 29, at xxxi.

<sup>180</sup> See, e.g., Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1365–66 (2021) (arguing that the election of prosecutors committed to decarceration “should be a vital part of any reform agenda” while emphasizing that “a key metric for identifying whether a prosecutor is, in fact, a real reformer . . . is whether or not they are actively pursuing reforms that limit the leverage they have in criminal cases”); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8, 12 (2018) (“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”); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. \_\_\_\_ (forthcoming 2022) (manuscript on file with author) (applauding the decarceral efforts of reformist prosecutors while emphasizing the limits of prosecutor-driven criminal justice reform). For a more skeptical assessment of prosecutorial nonenforcement from a pro-reform perspective, see, e.g., Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 192, 249 (arguing that declinations and other “policies that come standard with the progressive prosecutor platform . . . are undeniably a trend in the right direction” but that, unless progressive prosecutors shift focus toward reducing their own power, their efforts “will only lead to meager reforms”).

<sup>181</sup> Cf. Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1544–45 (2012) (exploring constructive ways that prosecutors can help ameliorate racial disparity and mass incarceration while also noting that not only prosecutors but “many different actors must transform the way they think about and address issues of race and crime”).