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Lauren M. Ouziel

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PROSECUTORS AS PARTISANS

Lauren M. Ouziel*

Prosecution in the United States has long been political. But the nature of prosecutorial politics is changing. Once bipartisan and largely reactive, the politics of prosecution is more partisan and proactive, in ways that both reflect and amplify larger cleavages in American society. This Essay considers the upsides and downsides of this development. On the one hand, political contestation over prosecution democratizes criminal enforcement, stimulates public thinking and debate about the role and purpose of criminal law, and promotes local political agency. On the other, it risks falling prey to the same pitfalls that have impoverished American political life generally in recent decades: societal division, decline in reasoned assessment, difficulties forging sustainable compromise, and erosion of trust in institutions. The Essay concludes with some thoughts on how to maximize the upsides and minimize the downsides in this new era of partisan prosecutorial politics.

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INTRODUCTION

Prosecution in the United States has long been inseparable from politics. The relationship is embedded in the structure of American criminal enforcement, characterized by a vast array of penal statutes, limited enforcement capacity, and elected or politically appointed prosecutors marrying the two. For nearly half a century, from the late 1960s though roughly the early aughts, two key features characterized the politics of criminal enforcement. First, it was largely bipartisan. Democrats and Republicans, Liberals and Conservatives alike shared a vision of how to approach crime and punishment — where to invest resources, what crimes and offenders to prosecute, and how to approach sentencing — even if the motives underlying that vision differed.¹ Second, prosecutors played a mostly reactive role: they tended to respond to the politics of criminal enforcement rather than drive it.²

In recent years, these two defining features of prosecutorial politics have receded. After an initial bipartisan shift in the politics of crime — from emphasis on broad and aggressive enforcement and reduced sentencing discretion to more targeted enforcement and increased sentencing discretion — the bipartisan consensus has begun to unravel.³ Perhaps more importantly, prosecutors are no longer simply reacting to the politics of criminal enforcement; they are, in many ways, making it.⁴

On the left, the progressive prosecution movement has become a driving force in these politics, seeking to change both the targets of prosecution and the penalties they face even in the absence of legislative reforms.⁵ An abolition movement is also building, as are calls for reducing spending on policing and incarceration.⁶ In the center and on the right, criminal justice agendas are increasingly defined in opposition to these forces.⁷ This

1. *See infra* Section I.A.

2. *See infra* Section I.B.

3. *See infra* Part II.

4. *Id.*

5. *See infra* notes 44–45 and accompanying text.

6. Keeanga-Yamahita Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [<https://perma.cc/5H8L-U3NS>] (“In the past year or two, the propositions of defunding or abolishing police and prisons has travelled from incarcerated-activist networks and academic conferences and scholarship into mainstream conversations.”).

7. *See* Martin Kaste, *Republicans Blame Democrats for Rising Crime*, NPR (Nov. 3, 2022, 5:01 AM), <https://www.npr.org/2022/11/03/1133144370/republicans-blame-democrats-crime-complicated-truth> [<https://perma.cc/66PB-6N54>] (discussing Republican

burgeoning rift reflects, and amplifies, larger partisan cleavages in American society. If these trends continue, the future of prosecution (on which the organizers of this symposium have asked us to reflect) may well be not one future but multiple ones, clustered along different points on the political spectrum and different places on the American map.

This Essay develops these descriptive claims and considers their normative implications. A more partisan politics of prosecution could pay dividends in the form of more transparent political tradeoffs, greater public engagement and participation, and enhanced local political agency. But it also carries risks — to societal cohesion, critical assessment, stable and efficacious policy generation, and perceptions of prosecutorial legitimacy. Is there a way to yield the benefits of a more contested and partisan politics of prosecution without succumbing to the downsides of intense partisanship that have infected other aspects of American political life? The Essay sketches some paths that might lead us there. Part I offers a brief overview of the politics of prosecution from the 1960s through the early years of the 21st century, focusing on the two defining features discussed above.⁸ Part II argues that we are entering a new politics of prosecution, one characterized by rising partisanship and polarization, with prosecutors playing more proactive roles.⁹ Part III considers the upsides and downsides of a more partisan politics of prosecution and sketches some ideas to maximize benefits while minimizing risks.¹⁰

Before proceeding, some clarification on terminology (and a caveat). The “politics of prosecution” refers to the ways in which prosecution intersects with, and embodies, public preferences on criminal enforcement as negotiated and refined through elections, appropriations, lawmaking and other political processes. I do not here delve into the political pressures of prosecuting politicians and other public officials (a worthy, but distinct, inquiry). “Partisanship” refers to ideological identification along the left/right political spectrum.¹¹ “Polarization” refers to the process by which people’s stance on a given issue or candidate is more likely to be influenced

campaigns against progressive approaches to criminal enforcement); Jerry Iannelli, *Democrats Would Rather Become Republicans Than Make the Case for Criminal Justice Reform*, APPEAL (June 22, 2022), <https://theappeal.org/democrats-run-from-police-reform/> [<https://perma.cc/LFX9-BTBH>] (discussing some centrist Democrats’ opposition to redistribution of police funding and other decarceral strategies).

8. *See infra* Part I.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See* Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1, 6–11 (2009) (finding, based on National Election Studies data, that “partisanship” in the post-Carter era manifests ideological identification along the left/right political spectrum, and that such ideological thinking is increasingly rooted in social rather than economic issues).

by their identification with a particular political ideology.¹² And the caveat: the political dynamics discussed here are mostly limited to large, urban jurisdictions. In thousands of rural jurisdictions across the United States, the politics of prosecution remains, for now, relatively uncontested.¹³ In prosecution, as with much else in American political life, there is a significant urban-rural divide.¹⁴

I. POLITICS AND PROSECUTORS: A BRIEF HISTORY

Work on the politics of criminal enforcement can fill library stacks, and I will not summarize it here. Instead, I wish to amplify two points that quietly echo through much of this scholarship. The first is that, since at least the late 1960s up until relatively recently, this particular political space has been almost entirely bipartisan. The second is that prosecutors during this era were, for the most part, reactive rather than proactive; they responded to political shifts but didn't often drive them. Section A makes the first point and Section B the second.

A. A Bipartisan Space

To appreciate the relative political uniformity that characterized the tough-on-crime era and its immediate aftermath, it is important to distinguish between political rhetoric and political action. The former did operate in partisan fashion at least at the national level, with Republicans often weaponizing crime against Democrats, and Democrats appearing to succumb to the attacks (George Bush's infamous Willie Horton ad is perhaps the most oft-used illustration of this dynamic).¹⁵

But beneath the rhetoric, at the level of political action — lawmaking, government spending and prototypical enforcement practices — during the last third of the 20th century it would be difficult to distinguish the conservative approach to criminal enforcement from the liberal one. Though he ran on attacking the “root causes” of crime through investments in education and job-creation and civil rights reform, President Lyndon

12. See Delia Baldassarri & Andrew Gelman, *Partisans without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 410 (2008).

13. See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1545 (2020) (finding a strong correlation between degree of political contestation in prosecutor elections and jurisdiction size).

14. James Gimpel et al., *The Urban-Rural Gulf in American Political Behavior*, 42 POL. BEHAV. 1343, 1344–45 (2020) (finding that the political division between urban and rural areas “persists (to varying degrees) across racial and ethnic groups, income brackets, educational attainment, religion, religious devotion, and family structure”).

15. See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 58–59 (1999).

Johnson spearheaded massive investments in local police departments through the Law Enforcement Assistance Act of 1965¹⁶ and the Omnibus Crime Control and Safe Streets Act of 1968.¹⁷ President Nixon campaigned on a “law and order” platform, but his policies were more nuanced, a reflection of the shifting views of the era: he doubled down on the local law enforcement funding begun by Johnson, but also championed bipartisan federal drug legislation that invested heavily in treatment and rehabilitation and reduced penalties for many narcotics offenders.¹⁸ By the 1980s views were no longer in flux; rehabilitation had been thoroughly discarded in favor of incapacitation as the dominant approach to crime policy, reflected in bipartisan federal and state legislation that stiffened penalties for drug crimes and violent crimes and invested further in policing.¹⁹ The punitive turn became even more pronounced in the 1990s, which witnessed a wave of recidivist penalty enhancements across red and blue states and an aggressive federal crime bill enacted by a Democratic Congress and signed by President Bill Clinton.²⁰

By the early 2000s, the bipartisan pendulum began to reverse. From the libertarian right, which emphasized greater freedom from government overreach, to the conservative Right, which emphasized prison spending reductions, to the Left, which emphasized racial and socio-economic

16. Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197, 79 Stat. 828–29.

17. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197–239. For an account of how this Act and others (see, e.g., *supra* note 16), and other efforts under the Johnson Administration, laid the groundwork for the rise of the carceral state, see ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 27–133 (2016). Hinton observes that, “[a]s the product of one of the most ambitious liberal welfare programs in American history, the rise of punitive federal policy over the last fifty years is a thoroughly bipartisan story.” *Id.* at 8.

18. See MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 10 (2006) (“Elite support for the policies that led to the development of the penal state was initially more fragmented, fitful, and tentative, even among reputed hard-liners like Richard Nixon . . . Despite Nixon’s stress on law-and-order themes in the 1968 presidential campaign, rates of imprisonment fell during his first term in office.”); HINTON, *supra* note 17, at 140 (“Given the actual similarities between Johnson’s law enforcement program and Nixon’s own proposals, Nixon’s tough-on-crime stance was to a great extent a matter of rhetoric.”). See generally Lauren M. Ouziel, *The Bureaucratic Afterlife of the Controlled Substances Act*, 18 OHIO ST. J. CRIM. L. 151 (2020) (discussing the demand-reduction approach of the Comprehensive Drug Abuse Prevention and Control Act of 1970).

19. HINTON, *supra* note 17, at 310–14.

20. See JOHN CLARK, JAMES AUSTIN & D. ALAN HENRY, NAT’L INST. JUST., “THREE STRIKES AND YOU’RE OUT”: A REVIEW OF STATE LEGISLATION (1997). Between 1993 and 1995, over 24 states and the federal government adopted three-strikes laws. The two pioneering states were Washington and California; they were joined by seven other states that had also voted for the Democratic candidate in the most recent Presidential election and had a Democratic majority in either one of both houses of the legislature (Connecticut, Maryland, Nevada, New Mexico, Pennsylvania, Wisconsin, and Vermont). See *id.*

disparities in prison populations and the downstream effects of incarceration on Black and Brown communities, a sudden consensus emerged in favor of reform.²¹ Between 2007 and 2016, 31 states of varying political leanings, along with the federal government, had taken measures to reduce incarceration through reforms to sentencing laws, pre-trial release and/or post-incarceration supervision.²²

Bipartisanship on criminal enforcement between the 1960s and the early 2000s is in many ways a “strange bedfellows” story, in which differing motives led to similar policy stances. In the 1980s, liberal reformers, believing that indeterminate sentencing and parole had enabled racial and socio-economic disparities in punishment, joined with tough-on-crime conservatives to push for determinate sentencing, sentencing commissions, and the abolishment of parole.²³ Feminists and women’s rights groups — “not the usual suspects” in Marie Gottschalk’s retelling — aligned with the anti-rape movement in bolstering punitive penal policies.²⁴ The various constituencies on either side of the debate on New York’s Rockefeller Drug laws (widely considered a herald of the tough-on-crime era)²⁵ defied

21. See Marc Mauer, *Sentencing Reform: Amid Mass Incarceration - Guarded Optimism*, 26 CRIM. JUST. 27, 30 (2011) (“The ‘tough on crime’ rhetoric has moderated substantially since its heyday in the 1980s and 1990s . . . replaced by a climate of greater receptivity to policies that are ‘smart on crime’ or ‘evidence-based,’ along with bipartisan political interest in concepts such as reentry and justice reinvestment.”). On the origins of the libertarian and conservative shift, see generally DAVID DAGAN & STEVE TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION (2016).

22. See *31 States Reform Criminal Justice Policies Through Justice Reinvestment*, PEW CHARITABLE TR. (Jan. 2016), https://www.pewtrusts.org/~media/assets/2016/01/pspp_jriformmatrixoverview.pdf?_ga=1.90778586.1149243849.1489431524 [https://perma.cc/N7AX-V6VV] (documenting specific policy shifts between 2007 and 2016 across 31 states beginning with Texas and spanning from states as conservative as Alabama, South Carolina and West Virginia to states as liberal as Illinois, Hawaii and Vermont).

23. The making of this alliance is recounted by David J. Rothman in a 1994 piece for New York Review of Books, where he stated that the dominant view “was that openended sentences adapted to the personal characteristics of the offender — his education, jobs, marital state, and so on — gave judges and parole boards the discretion to penalize blacks and lower-class offenders more heavily than white, middle-class ones.” He continued, “reports also argued that rehabilitation programs were a sham. Not only were they ineffectual, but they made imprisonment seem legitimate and desirable.” David J. Rothman, *The Crime of Punishment*, N.Y. REV. OF BOOKS (Feb. 17, 1994), <https://www.nybooks.com/articles/1994/02/17/the-crime-of-punishment/> [https://perma.cc/DRK9-R7LR] (citing several notable studies by left-leaning thinkers and interest groups).

24. See GOTTSCHALK, *supra* note 18, at 115–38. Aya Gruber has since dug deeper into the relationship between progressive feminism and the carceral state. See AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION 7 (2020).

25. See Julilly Kohler-Hausmann, “*The Attila the Hun Law*”: New York’s Rockefeller Drug Laws and the Making of a Punitive State, 44 J. SOC. HIST. 71, 72 (2010).

traditional political alliances,²⁶ and the final bill ultimately passed with bipartisan support overcoming bipartisan opposition.²⁷

B. Reactive Prosecutors

Throughout this era, prosecutors tended to react to political shifts rather than drive them. Sometimes they supported legislative change, and sometimes they resisted it. Though the politics of the tough-on-crime era has been portrayed as a form of prosecutorial windfall,²⁸ prosecutors did not always see it that way. District Attorneys Associations at times lobbied against the harshest penalties.²⁹ Once harsher sentencing regimes were enacted, some prosecutors' responses were, at least at first, to quietly buck them.³⁰ These positions and reactions do not appear to have been

26. See Jessica Neptune, *Harshest in the Nation: The Rockefeller Drug Laws and the Widening Embrace of Punitive Politics*, 26 SOC. HIST. ALCOHOL & DRUGS 170, 171 (2012); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 173–216 (2015).

27. See William E. Farrell, *Governor's Bill on Drug Traffic Voted by Senate*, N.Y. TIMES (Apr. 28, 1973), <https://www.nytimes.com/1973/04/28/archives/governors-bill-on-drug-traffic-voted-by-senate.html> [<https://perma.cc/C4LG-7M3D>] (stating that the final vote was 41-14 with 11 Democrats voting against passage and nine in favor, including seven from the heavily Democratic New York City, and three Republicans also voting against passage). The vote in the State Assembly, however, was partisan: not a single Democrat voted in favor. See William E. Fowl, *Revised Narcotics Measure Is Voted 80–65 in Assembly*, N.Y. TIMES (May 4, 1973), <https://www.nytimes.com/1973/05/04/archives/revisednarcotics-measure-is-voted-8065-in-assembly-assembly.html> [<https://perma.cc/G6S9-9YPW>].

28. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534–35 (2001) (discussing the natural alliance between legislatures and prosecutors, in which each institutional actor benefits from more, and harsher, penal laws).

29. See FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 6–7 (Oxford Univ. Press ed., 2003) (describing how California's three strikes bill passed notwithstanding the District Attorneys' Associations having lobbied for a narrower bill); Ron Bayer, *Repression, Reform and Drug Abuse – An Analysis of the Response to the Rockefeller Drug Law Proposals of 1973*, 6 J. PSYCHEDELIC DRUGS 299, 304 (1994) (discussing New York District Attorneys Association's efforts to reduce the penalties for lower-level drug offenders proposed in Rockefeller's 1973 drug law).

30. See Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 559–60 (2002) (describing that in years following Guidelines enactment, federal prosecutors learned to use a variety of discretionary tools in resolving cases to lower the applicable Guidelines' penalties at sentencing); 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, 254–55 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (discussing how felony drug arrests and prosecutions in New York declined in the years following enactment of the Rockefeller drug laws); James Austin et al., "Three Strikes and You're Out": The Implementation and Impact of Strike Laws 1, 8, 102 (Mar. 6, 2000) (unpublished manuscript), <https://www.ncjrs.gov/pdffiles1/nij/grants/181297.pdf> [<https://perma.cc/ETK8-ZDKA>] (finding, in a study of three-strikes laws in Washington State, California, and Georgia, little

ideologically motivated. Instead, they reflected a (fairly typical) bureaucratic status quo bias,³¹ as well as concern about prosecutorial capacity and resources. It is in prosecutors' institutional interest to maximize convictions (ideally by guilty pleas) and their own flexibility to achieve that end; if, as prosecutors then surmised, stiff mandatory penalties made trials more likely, then they were not necessarily a value-add.³²

By the late 2010s, as states and the federal government were seeking to curtail harsh sentencing schemes and enlarge judicial discretion, career prosecutors sometimes opposed these shifts.³³ By then, career prosecutors had gotten used to navigating sentencing guidelines and mandatory terms so as to maximize plea-bargaining leverage. But, unlike the more punitive shifts that preceded them decades earlier, these lenitive shifts ultimately led to a more proactive prosecutorial role — at least among some elected or politically appointed prosecutors. The next Part explores that change.

II. THE CURRENT (AND FUTURE?) POLITICS OF PROSECUTION: RISING PARTISANSHIP AND PROACTIVE PROSECUTORS

Over the last decade, the bipartisan consensus on criminal enforcement that had defined American criminal enforcement policy for nearly a half a century has begun to unravel. Debates now more closely track left–right political commitments, with progressive Democrats pushing for less spending on police and prisons, lower sentences and diversion of lower-level offenders and moderates and conservatives generally resisting these reforms.³⁴ The unraveling has not been neatly along party lines; some of the

change in prosecution and sentencing patterns in all but two California counties, in part as a function of prosecutorial and judicial resistance to the new laws).

31. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 561–62 (2020) (discussing career prosecutors' status-quo bias through lens of system justification theory).

32. See Daniel M. Weintraub, '3 Strikes' Law Goes Into Effect, L.A. TIMES (Mar. 8, 1994), <https://www.latimes.com/archives/la-xpm-1994-03-08-la-me-threestrikes-wilson-samuel-timeline-story.html>, [<https://perma.cc/24ST-UZ2Y>] (discussing some prosecutors' objection to the law because of the anticipated effect on guilty pleas). See generally Bayer, *supra* note 29 (discussing similar prosecutorial reasoning in respect to the Rockefeller drug laws).

33. See PROSECUTORS & POL. PROJECT, PROSECUTOR LOBBYING IN THE STATES, 2015-2018, at 4 (2021), <https://law.unc.edu/wp-content/uploads/2021/06/Prosecutor-Lobbying-in-the-States-2015-2018.pdf> [<https://perma.cc/5LLF-GKCN>] (finding that between 2015 and 2018 prosecutors lobbied for more than a quarter of all criminal justice bills introduced, and sought to enlarge criminal laws or penalties twice as often as they sought to narrow them).

34. See Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016, 9:51 PM), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice> [<https://perma.cc/V4EN-R2GV>]; Anna Brown, *Republicans More Likely Than Democrats to Have Confidence in Police*, PEW RSCH. CTR. (Jan. 13, 2017), <https://www.pewresearch.org/fact-tank/2017/01/13/republicans-more-likely-than-democrats-to-have-confidence-in-police/> [<https://perma.cc/3PJV-XRYB>] (finding deep

moderates resisting progressive reforms are Democrats.³⁵ But it is fair to say that today more than in the past, positions on criminal enforcement tend to align with positions on the political spectrum.

Not only is criminal enforcement a more partisan political space, but prosecutors have begun to take on a more proactive role in shaping it. One of the earliest and, in hindsight, potentially defining moments in this shift occurred during the Obama Administration, when then-Attorney General Eric Holder issued a set of detailed charging guidelines to prosecutors for narcotics cases.³⁶ For the first time in memory, an Attorney General was doing more than vaguely instructing federal prosecutors to make “an individualized assessment” in exercising their charging discretion,³⁷ or downplaying that discretion in service of a “general duty” to pursue the most serious legal charge supported by the readily provable facts of the case.³⁸ Instead, Holder instructed prosecutors to exercise their charging discretion in discrete categories of cases so as to evade otherwise applicable mandatory penalties.³⁹

What made Holder’s memo unusual was not what it was suggesting; charge-bargaining (or simply under-charging irrespective of bargaining) had occurred in federal criminal cases, to varying degrees, for a long time.⁴⁰ Nor

partisan divide on policing); John Gramlich, *U.S. Public Divided Over Whether People Convicted of Crimes Spend Too Much or Too Little Time in Prison*, PEW RSCH. CTR. (Dec. 6, 2021), <https://www.pewresearch.org/fact-tank/2021/12/06/u-s-public-divided-over-whether-people-convicted-of-crimes-spend-too-much-or-too-little-time-in-prison/> [https://perma.cc/K4EV-T2V4] (finding deep partisan divide on sentencing, and deepest between liberals and conservatives).

35. See Iannelli, *supra* note 7; Gramlich, *supra* note 34 (finding 41% of moderate/conservative Democrats support current sentencing practices); Amanda Eisenberg, *How Eric Adams Outmaneuvered Manhattan’s Progressive District Attorney*, POLITICO (Feb. 8, 2022, 11:00 AM), <https://www.politico.com/news/2022/02/08/eric-adams-outmaneuvered-district-attorney-00006296> [https://perma.cc/ZPY2-SEK4].

36. Memorandum from Eric Holder, Att’y Gen., U.S. Dep’t of Just., to U.S. Att’y and Assistant Att’y Gen., Crim. Div., U.S. Dep’t of Just., Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013) [hereinafter Holder Memorandum], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [https://perma.cc/LL4T-B4HF].

37. Janet Reno, Memorandum to Holders of United States Attorneys’ Manual, Title 9: Principles of Federal Prosecution, 6 FED. SENT’G REP. 352 (1994).

38. Memorandum from John Ashcroft, Att’y Gen., U.S. Dep’t of Just., to All Fed. Prosecutors, Department Policy Concerning Charging Criminal Offenses, Disposition of Charges and Sentencing (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm [https://perma.cc/W57R-83X2].

39. See Holder Memorandum, *supra* note 36.

40. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta*

was it at the political vanguard; several federal bills were introduced that year and the next seeking to accomplish by law what Holder dictated by memo, though they ultimately lacked sufficient support to become law.⁴¹ Rather, Holder's memo was daring for articulating a new prosecutorial role. Prosecutors, in Holder's vision, need not be confined to lobbying their preferences from the sidelines or effectuating them from the shadows. In a publicly announced, categorical and ex-ante exercise of discretion, they could assert political agency.

For many on the Left who were frustrated with the pace of reform, this vision of the prosecutorial role appealed. Within a year, activists had seized on local prosecutor elections — typically sleepy and uncontested affairs⁴² — as sites of active political contestation.⁴³ And their efforts bore fruit. Over the next several years, and almost exclusively in large urban areas, a series of progressive Democratic candidates for District Attorney campaigned, and won, on promises to leverage charging discretion towards concrete policy reforms (among them reduction of racial and socio-economic disparities; reduction of prison populations; elimination of the death penalty; and reduction of pre-trial detention and elimination of cash bail).⁴⁴ As of today, many of the nation's large cities, Democratic strongholds all, have elected prosecutors who campaigned on the systematic exercise of prosecutorial

Period, 91 NW. U.L. REV. 1284, 1290–93 (1997) (finding that, in study of 10 federal districts, charge bargaining occurred in 20%-35% of cases resolved by plea).

41. Editorial Board, *Sentencing Reform Runs Aground*, N.Y. TIMES (June 21, 2014), <https://www.nytimes.com/2014/06/22/opinion/sunday/bipartisan-push-to-reform-sentencing-stalls-in-congress.html> [<https://perma.cc/9QS9-2GTA>].

42. See Hessick & Morse, *supra* note 13, at 1544–45; Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 600–01 (2014) (finding that incumbent prosecutors rarely face any challengers, and over 80% of prosecutor incumbents run unopposed in both general elections and primaries).

43. See Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> [<https://perma.cc/Z923-XPC2>] (reporting on efforts among progressive activists and progressive donor George Soros, beginning around 2015, to, in the words of one such activist, “interven[e] in these seats to really change the day-to-day realities of criminal justice”); Maurice Chammah, *New Strategy for Justice Reform: Vote Out the DA*, MARSHALL PROJECT (Oct. 18, 2016), <https://www.themarshallproject.org/2016/10/18/new-strategy-for-justice-reform-vote-out-the-da> [<https://perma.cc/U3DR-CELJ>]. See generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

44. See Chammah, *supra* note 43 (“In the last two years, from Chicago to St. Louis to Santa Fe, N.M., voters have unseated district attorneys, or beaten an incumbent's chosen successor, in more than a dozen counties.” The races “signal a shift” and “reflect a growing awareness among reformers that . . . local [prosecutor] elections are a place to push for change.”). On the correlation between contestation and population density, see Hessick & Morse, *supra* note 13, at 1571–74.

discretion to achieve one or more of those policy goals.⁴⁵ By one estimate, these prosecutors serve as the chief law enforcement officers for over 20 million Americans.⁴⁶

In a reversal of the dynamic that reigned for nearly a half century, politicians are now reacting to the policies announced by these prosecutors. And those on the Right are reacting by resisting — not quietly, but vocally. In Pennsylvania, Republicans in the state legislature responded to Philadelphia District Attorney Larry Krasner’s reduced prosecution of gun possession by vesting jurisdiction for gun crimes in the attorney general’s office;⁴⁷ when then-Attorney General Josh Shapiro (a Democrat with eyes on the Governorship) demurred, and after Krasner had successfully secured a second term, Republicans began impeachment proceedings.⁴⁸ In Missouri and Georgia, Republicans are promoting bills that would permit substituting elected local prosecutors with prosecutors appointed by state officials.⁴⁹ In a number of other states, conservatives are backing bills that would permit state prosecutors to take over cases declined by local ones.⁵⁰ In Florida, Governor Ron DeSantis went so far as to remove an elected local prosecutor for the prosecutor’s stated prosecution policies, and install a replacement.⁵¹

45. These include Austin (Jose Garcia), Chicago (Kimberly Foxx), Des Moines (Kimberly Graham), Houston (Kim Ogg), Los Angeles (George Gascon), Minneapolis (Mary Moriarty), New Orleans (Jason Williams) New York – Brooklyn (Eric Gonzalez), New York - Manhattan (Alvin Bragg), Oakland (Pamela Price), Philadelphia (Larry Krasner), Seattle (Leesa Manion), and St. Louis (Wesley Bell). *See, e.g.*, DEVA WOODLY, RECKONING: BLACK LIVES MATTER AND DEMOCRATIC NECESSITY OF MOVEMENTS app. D (2021).

46. *See* Rory Fleming, *Legitimacy Matters: The Case for Public Financing in Prosecutor Elections*, 27 WASH. & LEE J. C.R. & SOC. JUST. 1, 6 (2020).

47. Chris Palmer & Samantha Melamed, *Could a New State Law Strip Control Over Gun Prosecutions From Philly DA Larry Krasner?*, PHILA. INQUIRER (July 8, 2019, 8:40 PM), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-attorney-general-josh-shapiro-gun-law-20190708.html> [<https://perma.cc/F72D-BMFY>].

48. Chris Palmer et al., *Philly DA Larry Krasner Impeached by Pa. House, Advancing GOP Effort to Remove Him from Office*, PHILA. INQUIRER (Nov. 16, 2022, 4:21 PM), <https://www.inquirer.com/news/larry-krasner-impeachment-vote-pennsylvania-house-20221116.html> [<https://perma.cc/6DAW-C6HE>].

49. Rebecca Rivas, *Missouri Prosecutors Face Losing Jurisdiction Over Violent Crime Cases*, MO. INDEPENDENT (Jan. 23, 2023), <https://missouriindependent.com/2023/01/23/missouri-prosecutors-face-losing-jurisdiction-over-violent-crime-cases/> [<https://perma.cc/KK5A-TKVT>]; Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers> [<https://perma.cc/F85N-Y4YJ>].

50. Blakinger, *supra* note 49.

51. Chris Geidner, *Florida Governor Suspends Tampa Prosecutor in Latest Attack on Abortion and Trans Rights*, BOLTS MAG. (Aug. 4, 2022), <https://boltsmag.org/florida-governor-suspends-prosecutor-hillsborough/> [<https://perma.cc/JP9G-7ECJ>]. The local prosecutor for Hillsborough County (home to Tampa), Andrew Warren, had announced that

Republicans in Congress are proposing a “Prosecutors Need to Prosecute Act” which would, among other things, strip federal funding from the offices of local prosecutors in large cities who adopt formal policies against cash bail in firearms cases.⁵² In some cities, centrist Democratic mayors are resisting moves by their city’s more liberal chief prosecutors, reflecting larger political cleavages within the Democratic Party.⁵³

To be sure, some of this is of a piece with the more superficial politics of rhetoric, through which Republicans have sought to differentiate themselves as the party of “law and order” and to weaponize crime in service of less popular conservative agendas.⁵⁴ But there is a key distinction: today, political rhetoric aligns more closely with political action. Many major American cities are currently led by elected prosecutors whose substantive approach to criminal enforcement is distinct from that proposed by adversaries to their right. Whether to systematically decline prosecution of certain categories of crimes or offenders, reduce focus on gun possession crimes, liberalize bail conditions, negotiate lower sentences, seek alternatives to prosecution where possible — these are substantive questions. And for the most part, the answers track closely with political alignment.

In these respects, the politics of prosecution has taken a distinct turn away from the bipartisan; and prosecutors are, in many ways, steering that course. The next Part contemplates the upsides and downsides of this new, more partisan prosecutorial role, and considers pathways for enhancing the former while mitigating the latter.

he would categorically not prosecute women obtaining abortions in violation of Florida’s 15-week ban, or those seeking gender-affirming care for minors even were Florida to criminalize such practices. *See id.*

52. *See* Prosecutors Need to Prosecute Act of 2023, H.R.27, 118th Cong. (2023) (as proposed in the Senate as an amendment to the Omnibus Crime Control and Safe Streets Act of 1968).

53. Eisenberg, *supra* note 35; Spencer S. Hsu, *U.S. Judge Upholds Legality of Charging Gun Cases in Federal Court*, WASH. POST (May 2, 2022), <https://www.washingtonpost.com/dc-md-va/2022/05/02/us-judge-upholds-legality-charging-dc-gun-cases-federal-court/> [<https://perma.cc/AS62-MZES>] (describing an in-court case challenging the prosecution of illegal gun possession cases in federal rather than local court. D.C. Mayor Muriel Bowser advocated the federal program, which carried higher conviction rates and sentences, and the city’s chief prosecutor, Karl Racine, opposed it).

54. *See* Keeanga-Yamahtta Taylor, *Larry Krasner and the Limits of “Law and Order,”* NEW YORKER (Nov. 16, 2022), <https://www.newyorker.com/news/the-political-scene/larry-krasner-and-the-limits-of-law-and-order> [<https://perma.cc/25XF-XYSU>] (“Just as the national Republican Party’s latest round of crime hysteria was not really about crime, the Pennsylvania G.O.P.’s impeachment stunt is not really about Krasner . . . [It is] to rally its base to the polls, in hopes of beating the vulnerable Democrat John Fetterman for a seat in the U.S. Senate and solidifying Republican control of the State Assembly.”).

III. ASSESSING PARTISAN PROSECUTION, AND THE PATH FORWARD

A. Upsides and Downsides

There are a number of upsides to a more partisan prosecutorial role. Here, I focus on what I see as the three greatest benefits. First, surfacing the latent political choices inherent in prosecution enables greater public visibility into those choices. Second, enhanced public visibility enables greater public engagement and more substantive political debate, critical components of a healthy democracy. Third, because political alignment today is so closely linked with local population density and prosecutors are mostly elected on the local level, a more partisan prosecutorial role functionally enhances local political agency. The first section elaborates on these arguments.

The second section considers the downsides of a more partisan politics of prosecution. One is the well-studied negative effects of hyper-partisanship, and resulting polarization, generally: a siloed and divided citizenry, the decline of critical evaluation and assessment, and difficulty in achieving sustainable policy responses to societal problems. The other is potential deleterious effects on perceptions of prosecutorial legitimacy.

1. *The Upsides of Partisan Prosecution*

In the debate over the appropriate uses of criminal justice expertise, a growing body of scholarship is excavating the political choices buried within seemingly neutral decision-making by prosecutors, police, sentencing commissioners and other criminal justice “experts.”⁵⁵ Criminal enforcement presents a series of choices: which crimes and offenders to prioritize; where and how to police; how long to imprison. These choices are, at core, *political* in that they concern the distribution of both the state’s resources and its

55. See, e.g., Benjamin Levin, *Criminal Justice Expertise*, 90 *FORDHAM L. REV.* 2777, 2801 (2022) (“Expertise, appeals to experts, and the language of neutrality are not neutral. They are political.”); Ana Lvovsky, *Rethinking Police Expertise*, 131 *YALE L. J.* 475, 540 (2021) (“In scholarly debates, expertise increasingly figures as a site of struggle, a deeply politicized and contested bid for power.”); Ouziel, *supra* note 31, at 559–60 (explaining that career prosecutors view existing penal regimes as apolitical because “[they] did not experience the political shift that created those tools — and so they do not see them as the product of earlier political choices”); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 *J. LEGAL STUD.* 419, 419–21, 428–31 (2018) (arguing that systems analysis, a decision-making technique that has driven American policy making in the postwar period, disguises implicit political choices in a technical cost-benefit analysis, using criminal justice policies adopted in New York City in the 1960s as an example).

coercive power.⁵⁶ Making these choices privately does not make them less political. It simply makes politics less public.

Pushing these decisions more overtly into the public political space not only acknowledges the embedded political choices inherent in criminal enforcement, but also allows the public to participate in making them. This in turn yields another key upside of politicized prosecution: greater public engagement in and debate of the scope and methods of criminal enforcement. When prosecutor elections present the public with a choice between different enforcement approaches, the public (or at least the voting public) is more likely to engage and participate in the process of choosing. Ample political science research has shown a strong correlation between greater ideological contestation and political participation,⁵⁷ with some evidence that the former generates the latter.⁵⁸ Greater electoral participation is requisite to a healthy democracy, because democracy depends on citizen engagement and engagement in turn strengthens citizens' support for democracy.⁵⁹

Finally, a more partisan politics of prosecution enhances local political agency. Today, political alignment is highly correlated with local population density: the degree of a given locality's urbanization and distance from densely populated areas is a strong predictor of its citizens' political leanings.⁶⁰ Because criminal laws are made at the state level but enforced at the local, greater political contestation in local prosecutor elections functionally generates greater local agency over the political choices criminal enforcement presents — particularly in localities politically polarized from their home states.

56. See HAROLD LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* 75 (1950) (explaining that politics is “the shaping, distribution and exercise of power”); HAROLD LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936) (conceptualizing politics as concerned with the distribution of state resources).

57. Lisa P. Argyle & Jeremy C. Pope, *Does Political Participation Contribute to Polarization in the United States?*, 86 *PUB. OP. Q.* 697, 698 (2022) (surveying the literature and observing that the relationship between ideological leanings and political participation “is a widely observed empirical regularity”).

58. See, e.g., Nicholas A. Valentino, Krysha Gregorowicz & Eric W. Groenendyk, *Efficacy, Emotions and the Habit of Participation*, 31 *POL. BEHAV.* 307, 307 (2009) (finding anger in response to threatened policy changes if an opposing candidate were to win election motivates great political engagement in the election process); Argyle & Pope, *supra* note 57, at 706 (2022) (finding evidence that increased ideological polarization — measured by self-reported ideological leaning on the political spectrum and ideological positions on specific policy issues — “is a consistent precursor to political participation”).

59. Ellen Quintelier & Jan W. van Deth, *Supporting Democracy: Political Participation and Political Attitudes*, 62 *POL. STUD.* 153, 153 (2014) (“[D]emocracy and participation have a mutually stimulating effect: democracy encourages citizens to participate and, in turn, by participating in democratic decision-making processes, citizens strengthen their democratic attitudes”).

60. Gimpel et al., *supra* note 14, at 1362.

This is perhaps the greatest benefit of partisan prosecution. Local control over criminal enforcement is a core founding principle, reflected in the Sixth Amendment's local vicinage requirement and the Fifth Amendment's grand jury clause.⁶¹ It was also a major motivation in the mid-nineteenth century movement from appointment to election of prosecutors.⁶² Now that state criminal codes have expanded and prosecutors have replaced juries (both grand and petit) as the system's local gatekeepers and primary adjudicators,⁶³ prosecutor elections have become an even more important mechanism of local voice. Contested elections give local voice meaning. When candidates offer different visions for how they would gatekeep and adjudicate, the voters' resulting choice is an expression of local preferences.

2. *The Downsides of Partisan Prosecution*

Political scientists have been steadily charting the rise of partisanship, and resulting polarization, in the United States.⁶⁴ While some degree of partisanship can inspire the political participation and engagement necessary for a healthy democracy,⁶⁵ intense partisanship can effect severe harms. Such "pernicious polarization" — in which allegiance to one political camp and detest of the other overshadows "the normal multiplicity of differences in a society" — can divide societies, impoverish critical analysis, and prevent the political compromises necessary for stable responses to societal challenges.⁶⁶

Start with division. In intensely polarized societies, citizens with moderate views, or views that cut across the political divide, have increasingly less political voice as the extremes in each camp come to dominate the debate.⁶⁷ And as extremism takes hold, electoral victories by one side generate backlash and counter-mobilization by the other. The

61. AKIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 88–89 (1998) (“[G]rand and petit jurors could interpose themselves against central tyranny through the devices of presentments, nonindictments, and general verdicts . . . [T]he jury would be composed of citizens from the same community, and its actions were expected to be informed by community values.”).

62. See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 *YALE L.J.* 1528, 1558–61 (2012).

63. See Lauren M. Ouziel, *Prosecution in Public, Prosecution in Private*, 97 *NOTRE DAME L. REV.* 1071, 1079–83 (2022).

64. See generally Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 *J. POL.* 542 (2008); *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/R8S5-CPQZ>].

65. See Argyle & Pope, *supra* note 57.

66. Jennifer McCoy & Murat Somer, *Toward a Theory of Pernicious Polarization and How It Harms Democracies*, 681 *ANNALS AM. ACAD. POL. & SOC. SCI.* 234, 236 (2019).

67. *Id.* at 245.

ensuing cycle ultimately incentivizes one or both sides to change the rules to amass greater power for themselves while limiting powers of the opposition.⁶⁸

This dynamic is already playing out with prosecution in some jurisdictions, particularly those in which local and state constituencies are on different ends of the political spectrum.⁶⁹ Frustrated with an absence of legislative reform at the state level, local prosecutors in some jurisdictions have flouted state laws that prohibit categorical non-enforcement of laws.⁷⁰ In turn, state officials (governors, legislatures and/or attorney generals) have sought to limit those local prosecutors' powers, sometimes pursuant to law and sometimes using tactics of dubious legality — with some notable successes.⁷¹ In this way, rising polarization in prosecutorial politics can ultimately diminish local control over criminal enforcement policy.

Critical analysis is another casualty of pernicious polarization. Political scientists have uncovered the degree to which partisans engage in motivated reasoning when processing information and forming opinions — that is, reasoning directed to the goal of protecting one's partisan identification.⁷²

68. *Id.* at 235.

69. For examples, see *supra* notes 47–53 and accompanying text. On the growing polarization between some urban metro areas and their home states, see generally DAVID F. DAMORE, ROBERT E. LANG & KAREN A. DANIELSEN, *BLUE METROS, RED STATES: THE SHIFTING URBAN-RURAL DIVIDE IN AMERICA'S SWING STATES* (2020).

70. See Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 694–735 (2022) (cataloguing state laws on categorical non-enforcement, finding that many states prohibit local prosecutors from categorical non-enforcement policies, either via Constitutional provisions and state laws explicating banning the practice or granting state officials power to supersede it).

71. In Florida, for instance, then-Governor Scott removed jurisdiction over death-eligible cases from a local elected prosecutor who categorically refused to seek the death penalty, a move subsequently blessed by the State's Supreme Court as a valid exercise of gubernatorial authority. See *Ayala v. Scott*, 224 So. 3d 755, 756, 759 (Fla. 2017). Later, Governor DeSantis' removal of a local elected prosecutor who announced he would not prosecute women seeking abortions was ruled unconstitutional by a federal court, though the court declined to reinstate the local prosecutor. See *Warren v. DeSantis*, No. 22-CV-302-RH, 2023 WL 345802, at *1, *22 (N.D. Fla. Jan. 20, 2023). For more examples of gubernatorial or legislative efforts to curtail local prosecutors' discretion not to prosecute, see *supra* notes 47–53 and accompanying text.

72. See Paul Goren, Christopher M. Federico & Miki Caul Kittilson, *Source Cues, Partisan Identities, and Political Value Expression*, 53 AM. J. POL. SCI. 805, 806 (2009) (“If the cue giver and recipient share a party label, the latter will trust the former and accept the message without reflecting much on message content. But if the cue giver and recipient lie across the partisan divide, the recipient will mistrust the source and reject the message, again without much reflection.”); James N. Druckman, *Pathologies of Studying Public Opinion, Political Communication, and Democratic Responsiveness*, 31 POL. COMM. 467, 477 (2014) (“[A]s soon as citizens are primed to think of polarization, they ignore perceived argument quality, engage in motivated reasoning, and follow their party even when the preferred party offers the weaker argument (one that participants readily admit is weak).”). See generally Toby Bolsen, James N. Druckman & Fay Lomax Cook, *The Influence of Partisan Motivated*

Partisans on either side of the political spectrum are equally susceptible to partisan motivated reasoning, despite each side's belief that only the other's reasoning is compromised.⁷³ Such reasoning can have corrosive effects on political responsiveness: if factual analysis and policy preferences are the product of predetermined partisan allegiance, the public cannot well assess the status quo, proposed policy changes, or the elected officials espousing either alternative.⁷⁴

These harms are particularly acute in the criminal enforcement space, for two key reasons. First, that space is generally devoid of meaningful quantitative data, rendering voters even more prone to reliance on partisan heuristics — and more easily manipulated by political elites seeking to benefit from those tendencies.⁷⁵ Second, the criminal enforcement space has an unusual combination of high and low political salience: crime and its enforcement are highly salient issues, and yet prosecutor elections — even heavily contested elections generating media attention — tend to be decided by a relatively small number of highly partisan voters, at least when those elections are not held during presidential election years.⁷⁶

Reasoning on Public Opinion, 36 POL. BEHAV. 235, 236–37 (2014) (reviewing the literature on partisan motivated reasoning).

73. See Peter H. Ditto et al., *At Least Bias Is Bipartisan: A Meta-Analytic Comparison of Partisan Bias in Liberals and Conservatives*, 14 PERSPS. PSYCH. SCI. 273, 286 (2018).

74. See HOWARD G. LAVINE, CHRISTOPHER D. JOHNSTON & MARCO R. STEENBERGEN, *THE AMBIVALENT PARTISAN: HOW CRITICAL LOYALTY PROMOTES DEMOCRACY* 125 (2012) (“Motivated [partisan] bias . . . raises deeply troubling questions about political representation and accountability that are so central to democratic politics . . . How can an electorate possibly reward or punish an incumbent party if it holds grossly distorted views of political conditions? And how can it elect leaders who will pursue desired policy reform in the face of widespread misperception about where leaders stand and what the central elements and likely consequences of proposed reform are?”); see also Druckman, *supra* note 72, at 472–73 (“[T]he implications of motivated reasoning for opinion quality are obvious and not salubrious . . . [and] not generally seen as strengthening democracy.”).

75. On the dearth of data on pre-charging decisions, the most critical stage of law enforcement decision-making, see Ouziel, *supra* note 63, at 1101–07. On the inverse relationship between information availability and reliance on partisan heuristics, see LAVINE ET AL., *supra* note 74.

76. For instance, the 2017 Philadelphia District Attorney's election was a high-profile, heavily contested race for an open seat. The race took place in a heavily Democratic city in the year following the election of Donald Trump, which saw a surge of Democratic activism and participation in local elections. Yet in that city of 1.5 million people, the primary was decided by little more than 150,000 voters — with just 18% of registered Democrats casting ballots — and the general election by little more than 200,000 voters, a paltry 20% turnout rate (which nevertheless vastly eclipsed prior years' even more paltry turnout rates). See Mark Dent, *Major Increase in Philly Voter Turnout Propels Larry Krasner to Victory*, BILLY PENN (May 17, 2017), <https://billypenn.com/2017/05/17/major-increase-in-philly-voter-turnout-propels-larry-krasner-to-victory/> [<https://perma.cc/6WVL-VUWH>] (reporting primary vote counts and turnout rate); John Geeting, *Five Takeaways From the 2017 Election Results*, PHILA. 3.0 (Nov. 10, 2017), https://www.phila3-0.org/five_takeaways_from_the_2017_election_results [<https://perma.cc/GX4G-AJR7>]

Finally, pernicious polarization hinders the compromise necessary for democracies to offer lasting solutions to societal challenges. When politics devolves to an intractable battle between “Us vs. Them,” it produces policy swings as each side periodically enters and exits power.⁷⁷ The pendulum swing of prosecutorial policies at the Department of Justice is one example in the prosecution context. Holder’s directive on narcotics prosecutions⁷⁸ was swiftly rescinded by Attorney General Jeffrey Sessions, and then reinstated by Attorney General Merrick Garland.⁷⁹ Similar swings have occurred with respect to Justice Department approaches to police department investigations and prosecutions (like drug prosecutions, a polarized issue).⁸⁰

Apart from the pathologies of pernicious polarization, there is a separate reason to be concerned about rising partisanship in prosecution: its potential deleterious effects on perceptions of prosecutorial legitimacy. Public support of law enforcement institutions depends on their legitimacy. Decades of research by social psychologists has empirically proven that

(reporting general election vote counts and turnout rate by ward, showing “most of the turnout increase was in [the city’s most] ‘liberal’ wards”). Likewise, in New York, the 2021 heavily-contested primary for Manhattan District Attorney was decided by just over 260,000 voters — less than a third of the county’s roughly 872,000 registered Democratic voters — while the general election was decided by little more than a fifth of registered voters. See STATEMENT AND RETURN REPORT FOR CERTIFICATION: PRIMARY ELECTION 2021 DEMOCRATIC DISTRICT ATTORNEY NEW YORK COUNTY 14 (2021), https://www.vote.nyc/sites/default/files/pdf/election_results/2021/20210622Primary%20Election/01100800010New%20York%20Democratic%20District%20Attorney%20New%20York%20Recap.pdf [https://perma.cc/Z9PK-MYQ5]; STATEMENT AND RETURN REPORT FOR CERTIFICATION: GENERAL ELECTION 2021 DISTRICT ATTORNEY NEW YORK COUNTY 14 (2021), https://www.vote.nyc/sites/default/files/pdf/election_results/2021/20211102General%20Election/00100600010New%20York%20District%20Attorney%20New%20York%20Recap.pdf [https://perma.cc/9DS8-AC8Q]; NYS VOTER ENROLLMENT BY COUNTY: PARTY AFFILIATION AND STATUS (Feb. 2021), https://www.vote.nyc/sites/default/files/pdf/vote/2021/county_feb21.pdf [https://perma.cc/4KNZ-JGD3]. On the distinctions with presidential election years, see *infra* Section III.B.2. On the partisanship of off-year and primary election voters, see *infra* note 95 and accompanying text.

77. See Jennifer McCoy, Tahmina Rahman & Murat Somer, *Polarization and the Global Crisis of Democracy: Common Patterns, Dynamics, and Pernicious Consequences for Democratic Politics*, 62 AM. BEHAV. SCI. 16, 19 (2018).

78. See *supra* notes 36–41 and accompanying text.

79. Press Release, Jeffrey Sessions, Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/archives/opa/press-release/file/965896/download> [https://perma.cc/P3J9-PUKK]; Merrick Garland, *Additional Department Policies Regarding Charging, Pleas, And Sentencing in Drug Cases* (Dec. 16, 2022), <https://www.justice.gov/media/1265321/dl?inline> [https://perma.cc/U8UX-5DMR].

80. Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3228–35 (2014).

premise⁸¹ and revealed its core psychological components, trust in the procedures undertaken by legal authorities and trust in the authorities' motives.⁸² A key aspect of such trust is *neutrality*: the idea that “authorities are neutral and unbiased and make their decisions using objective indicators, not their personal views.”⁸³ To the extent, then, that prosecution is perceived as influenced by beliefs associated with one political side (for instance, beliefs about the particular ends to which prosecutorial discretion should be exercised), there is a potential tax on public perceptions of prosecutorial neutrality (and so, legitimacy).

The risk is more acute when one considers the role of group identity in shaping perceptions of legitimacy. Studies have shown that identification with the group represented by a legal authority shapes trust in that authority; the lack of a shared group identity can move people to condition trust on the legal system's outcomes rather than its processes.⁸⁴ And because any adversarial legal system necessarily produces outcomes unfavorable to some (or even many), outcome-dependent trust ultimately corrodes a system's legitimacy.⁸⁵ In a society where political allegiance has become a form of group identification,⁸⁶ the perception of prosecutors as agents of the political group to which they belong (whether Democrat or Republican or progressive, moderate or conservative) may erode trust among those who do not share the same political affiliation.⁸⁷

B. Future Pathways

A key question presented by this more partisan, contested politics of prosecution, then, is how to amplify the upsides while minimizing the

81. See Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283–87 (2003) (reviewing the extensive empirical literature).

82. TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 54–96 (2002). The former is termed “procedural justice” and the latter “motive-based trust.” See *id.*

83. Tyler, *supra* note 81, at 298.

84. Yuen J. Huo et al., *Superordinate Identification, Subgroup Identification, and Justice Concerns: Is Separatism the Problem; Is Assimilation the Answer?*, 7 PSYCH. SCI. 40, 42–45 (1996).

85. TYLER & HUO, *supra* note 82, at 131.

86. McCoy et al., *supra* note 77 (“[S]evere polarization . . . includes a significant affective dimension, when distance between groups moves beyond principled issue-based differences to a social identity . . . [which] leads group-members to hold positive sentiment toward in-group members and negative sentiment toward out-group members.”).

87. See Bruce Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. CRIM. L. REV. 805, 842 (2020) (“If the prosecutor implements the policy judgments of the particular political party of which the prosecutor is a member, one might consider that the prosecutor is acting in an impermissibly partisan fashion, promoting the interests of a political party—a private group—at the expense of the general public.”).

downsides. This Section considers potential pathways, grouped according to their two directive aims: first, changing the prosecutorial message; and second, changing the prosecutorial audience.

1. *Changing the Message*

Prosecutors, by exercising discretion in charging, declination, and plea-bargaining, have always made the criminal law on the ground. And even during the tough-on-crime era, there were some prosecutors who sought to make the laws more lenient.⁸⁸ What has changed is less the fact of prosecutorial lawmaking and more the messaging around it. As I have discussed, messaging that makes politics more visible has upsides. But to limit the downsides, prosecutors must recognize that not everyone in their immediate constituency (local voters and politicians) or the larger constituency with power over them (state-level politicians and their voters) will react positively to the message.

That recognition, in turn, leaves two options. Prosecutors can lean into the political disagreement, taking on a more combative approach with political adversaries at the local and state level; or prosecutors can seek to de-escalate, through messaging that does not prime adversaries to a combative response. De-escalation does not require a shift of substantive policies; rather, it requires a shift in how policies are framed.

For instance, a prosecutor wishing to reduce prosecutions of drug possession could announce a categorical policy under which no drug possession cases are prosecuted; or, she could announce that going forward she will focus her office's resources primarily on the drug traffickers that victimize drug users and degrade their communities' public safety and quality of life. To ensure that line prosecutors desist from drug possession prosecutions, the chief prosecutor could direct prosecutors to focus on prosecuting traffickers rather than users and to refrain from charging users as a tactic in trafficking investigations. In practice, the two approaches could yield similar end results; but the absence of a categorical non-enforcement policy leaves the prosecutor less open to critique and, as a result, gives her greater political space to effectuate her substantive goals.

Reframing in this way has costs. First, it makes prosecution less transparent. Second, in eschewing bright-line rules it gives line prosecutors greater discretion, raising the risk of less uniform application of the law within a given jurisdiction.⁸⁹ To mitigate these costs, de-escalatory framing

88. *See supra* note 30 and accompanying text.

89. Even bright-line rules, however, are easily evaded if line prosecutors disagree with them. *See* Ouziel, *supra* note 31, at 561 (discussing career prosecutors' evasion of lead prosecutor's directives); Daniel C. Richman, *Institutional Coordination and Sentencing*

should be accompanied by publication of pre-charging decision-making. Elsewhere, I have made the case that criminal procedure myopically focuses on post-charging practices while the state exercises greater power at the pre-charging stage.⁹⁰ Truly reform-oriented prosecutors would rectify that imbalance by making public not only charging decisions, but detailed declination decisions as well — something no prosecutor has yet done.⁹¹ In this way, prosecutors seeking to remake the criminal law on the ground can do so — and quietly show the receipts — while avoiding the categorical framing that will generate a spiral of increasing polarization and contestation.

Finally, prosecutors should avoid engaging in partisan political rhetoric. Arguing over policy is one thing; openly identifying prosecutorial policy commitments as part of a larger party platform or criticizing opposing policy commitments in partisan terms, is another. Such rhetoric primes sub-group identification and raises questions about the prosecutor's neutrality, undermining legitimacy. Instead, prosecutors should seek to prime *superordinate* identity — that is, the larger group to which all in the prosecutor's constituency belong.⁹² For instance, rather than focusing on her identity as a Democrat or progressive, an elected prosecutor can focus on her identity as a leader of her city and within her state.⁹³

Of course, a de-escalatory, quieter, and less partisan approach to public messaging will not necessarily serve prosecutors seeking to woo partisan voters. For this reason, depolarization requires more than changing the message; it also requires changing the audience.

2. *Changing the Audience*

To reap the benefits of more contested prosecution while minimizing the risks of hyper-partisanship and pernicious polarization, we must enlarge the political audience to include more than the most partisan voters, and imbue that larger audience with greater voice. Three feasible electoral reforms might accomplish these goals. A simple shift in the dates of prosecutorial elections, coupled with allowing top vote-getters (regardless of party) to

Reform, 84 TEX. L. REV 2055, 2055 (2006) (considering the challenges of elected prosecutors controlling line prosecutors in the plea-bargaining context).

90. See Ouziel, *supra* note 63.

91. *Id.* at 1076–77. Such detail need not reveal the identities of uncharged persons; it could consist simply of the number of declined cases in particular crime categories (e.g., marijuana possession, gun possession, etc.) and the reasons for the declination (e.g., evidential insufficiency, offense severity/offender culpability, alternatives to prosecution, etc.).

92. See Huo et al., *supra* note 84.

93. See *id.* (discussing how citizens' superordinate identities with their city, state or nation has been demonstrated to enhance perceptions of legitimacy).

compete in the general election, can enlarge the audience of voters; and ranked-choice voting can give voters greater voice.

A comparison of voter turnout in recent, high-profile contested prosecutor elections demonstrates that votes cast for chief prosecutors in general elections in presidential years are far higher than votes cast in non-presidential years.⁹⁴ This should not surprise; empirical research has demonstrated that turnout in municipal elections increases substantially if held simultaneous with so-called “first-order” elections (more salient races for state or national-level office).⁹⁵ The problem is that in most large cities the real contest for chief prosecutor occurs at the Democratic primary stage, where notoriously low turnout amplifies the voices of the most interested voters (a dynamic that some have blamed for rising polarization).⁹⁶ A pair

94. Compare L.A. COUNTY ELECTION RESULTS (2020), <https://results.lavote.gov/#year=2020&election=4193> [<https://perma.cc/B6K2-J4KZ>] (2020 vote and registration results for Los Angeles County chief prosecutor with 66% of registered voters participating), and PRESIDENTIAL ELECTION POST-ELECTION REPORT (2020), <https://www.cookcountyclerk.kil.gov/sites/default/files/pdfs/Post-Election%20Report%20-%20-%2020110320.pdf> [<https://perma.cc/5EPY-D7H4>] (2020 vote and registration results for Cook County chief prosecutor with 71% of registered voters participating), with *Past Election Results*, PHILA. CITY COMM’RS, <https://vote.phila.gov/resources-data/past-election-results/> [<https://perma.cc/6M2E-7JEA>] (last visited Apr. 24, 2023) (2021 vote totals for Philadelphia chief prosecutor with 20% of registered voters participating), and VOTER REGISTRATION BY PARTY 1940-2022, https://vote.phila.gov/files/department-reports/Historical_Registration_1940-2022G.pdf [<https://perma.cc/75B3-4ZGW>] (last visited Apr. 24, 2023) (Philadelphia voter registration), and STATEMENT AND RETURN REPORT FOR CERTIFICATION: GENERAL ELECTION 2021 (2021), https://www.vote.nyc/sites/default/files/pdf/election_results/2021/20211102General%20Election/00100600010New%20York%20District%20Attorney%20New%20York%20Recap.pdf [<https://perma.cc/GA4S-DYNR>] (2021 vote totals for New York County chief prosecutor with 22% of registered voters participating). See also *NYS Voter Enrollment by County, Party Affiliation and Status*, VOTE NYC, https://www.vote.nyc/sites/default/files/pdf/vote/2021/county_feb21.pdf [<https://perma.cc/6AVL-32DT>] (last visited Apr. 24, 2023) (voter registration for New York County).

95. See Karel Kouba, Jakub Novák & Matyáš Strnad, *Explaining Voter Turnout in Local Elections: A Global Comparative Perspective*, 27 CONTEMP. POL. 58 (2021) (concluding that “currently held first-order elections . . . constitutes one of the surest ways of maximizing turnout in local elections”).

96. In Cook and Los Angeles counties, for instance, turnout in the 2020 primaries was around 30%. See L.A. COUNTY ELECTION RESULTS, *supra* note 94 (Los Angeles vote totals and voter registration); PRESIDENTIAL ELECTION POST-ELECTION REPORT, *supra* note 94 (vote totals and suburban Cook County voter registrations); *Election Results*, CHI. ELECTIONS, <https://chicagoelections.gov/en/election-results-specifics.asp> [<https://perma.cc/VXY3-JTWQ>] (Apr. 24, 2023) (City of Chicago voter registration). On the link between low primary turnout and polarization, see for example Gary Jacobson, *The Electoral Origins of Polarized Politics*, 56 AM. BEHAV. SCI. 1607, 1615 (2012). See also Sarah F. Anzia, *Election Timing and the Electoral Influence of Interest Groups*, 73 J. POL. 412, 412 (2011) (arguing that “the lowering of voter turnout that accompanies off-cycle election timing empowers the largest and best organized interest groups to have increased influence on election outcomes”).

of reforms can translate the high election-day turnout in Presidential general elections to chief prosecutor races: first, shifting all races for chief prosecutor to Presidential years; and second, allowing the top two vote-getters from the primary — regardless of party — to compete in the general election. Los Angeles already does this, and it had a high-turnout, hard-fought race for District Attorney in 2020, with Democrat George Gascon ousting the competing incumbent (also a Democrat).⁹⁷

Increasing voter turnout has a number of obvious advantages. First, it helps legitimize the winning candidate (and, more broadly, the project of electing prosecutors). Second, it ensures that the chosen candidate represents a broader coalition of voters. Allowing the top two vote-getters in the primary to compete in the general election, moreover, has potential salutary effects on polarization. Primary elections tend to draw the most partisan voters and amplify the voice of interest groups, whereas general elections draw a wider audience of voters within each party in addition to unaffiliated voters).⁹⁸

Finally, a third reform has the potential to give voters greater voice at the crowded primary stage: ranked-choice voting. With ranked-choice voting, voters do not vote only for one candidate, but instead rank all candidates by order of preference; votes are then counted in a series of tallies in which the lowest vote-getters are progressively eliminated, and their votes reassigned to the candidate next on their voters' preference list.⁹⁹ A contested prosecutorial primary with numerous candidates can potentially elevate a candidate who is the first choice of a small plurality but the last choice of the voting majority; ranked choice voting corrects for this possibility by elevating candidates who have the broadest (if not the deepest) support across the primary electorate.¹⁰⁰ This tends to produce general-election candidates who are more widely accepted, and less polarizing.

Changing the audience in these ways will give prosecutors more political space to change the message. Changing the message, in turn, will give those prosecutors more political space to accomplish the substantive reforms they seek.

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

98. See Jacobson, *supra* note 96, at 1615; Anzia, *supra* note 96, at 412, 423–25.

99. Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1775 (2022).

100. *Id.* (“Because [Ranked-Choice Voting] creates strong incentives for candidates to appeal beyond their base of ‘first-choice’ support to voters who might still rank them second or third, [Ranked-Choice Voting] is believed to encourage greater coalition-building, less divisive campaigning, and a larger number of elected officials that appeal to a broader array of voters.”).

CONCLUSION

The politics of prosecution has shifted to a more partisan, contested politics in which positions on criminal enforcement align closely with points on the political spectrum. This has important benefits for transparency, democratic engagement, and local agency. But it also carries risks that have hobbled American politics more broadly: societal division, partisan motivated reasoning, policy instability and the delegitimizing of institutions. To reap the benefits of contestation and minimize its risks, we should envision ways to de-polarize prosecution by reframing prosecutorial messaging and enlarging prosecutors' voting constituencies.

Some might resist the ideas here as solutions in search of a problem. The problem, they might argue, is not a risk of pernicious polarization and illegitimacy; it is over-enforcement and its legitimation. I do not think we can solve the second set of problems, however, without attending to the first. If we think (and I do) that the future of prosecution will not depart radically from the past or present — there will be elected public prosecutors, there will be well-funded professional police forces, there will be voters primed to concerns about both crime and enforcement — then we should embrace greater political contestation over prosecution, while ensuring it is not ultimately self-defeating.