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A Fiduciary Theory of Progressive Prosecution

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ABSTRACT

Progressive prosecutors differ from their more traditional counterparts primarily in the way in which they make decisions. They tend to bind their discretion by announcing categorical policies rather than making fact-based decisions case by case. This Article catalogs the unusual degree of pushback progressive prosecutors have encountered from the public, legislatures, courts, police, and their own subordinate prosecutors. Drawing on fiduciary theory, it explains this reaction as a response to progressive prosecutors' abdication of their fiduciary role. As a public fiduciary, prosecutors are entrusted with protecting the public's abstract interest in justice, and an integral part of this role is exercising discretion in individual cases based on a broad array of relevant considerations. This ad hoc discretionary decision-making process assures the public that prosecutors are drawing on their expertise to pursue justice in a basic sense rather than coopting the process for the benefit of some subset of the public. The Article concludes by suggesting ways in which progressive prosecutors can pursue their conception of justice while still adhering to the fiduciary role.

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INTRODUCTION

Since 2016, candidates labeled as "progressive prosecutors" have achieved increasing success at the polls.[1] They are brought together, and supported, by not-for-profit organizations such as Fair and Just Prosecution[2] and the Association of Prosecuting Attorneys.[3] Elected as reformers, these prosecutors have generally responded to over-incarceration and racial injustice in the criminal process by adopting policies to reduce the number of prosecutions of low-level criminal cases, decrease the number of defendants jailed before trial, and hold police accountable for overreach.[4] Many progressive prosecutors have faced pushback from judges, other public officials, police, the media, constituents, and subordinate prosecutors.[5] This Article draws a distinction between progressive criminal justice goals and the process by which contemporary progressive prosecutors seek to obtain these goals, arguing that the goals are certainly legitimate and may be laudable, but the process of implementing them is often both inconsistent with the prosecutor's role and likely to invite challenges.

Progressive prosecutors tend to be more closely identified with a political movement than their more traditional colleagues and predecessors.[6] Traditionally, prosecutors, like judges, convey that they are non-ideological. Indeed, the role has sometimes been characterized as quasi-judicial.[7] Often, traditional prosecutors have given the impression that, like judges, they make decisions that are dictated by the law and facts without regard to political or policy preferences.[8] Although they have at times decided not to enforce certain laws that they regard as outmoded or trivial, and have adopted internal policies to ensure that similar cases are treated

1. *See, e.g.*, Matthew Impelli, *Progressive Prosecutors Win in Midterms Despite GOP's Attacks on Crime*, NEWSWEEK (Nov. 9, 2022), https://www.newsweek.com/progressive-prosecutors-election-outcomes-nationwide-wins-1757651; David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647–48 (2017) (describing prosecutors elected "by promising less incarceration").

2. FAIR AND JUST PROSECUTION, https://fairandjustprosecution.org/.

3. ASSOCIATION OF PROSECUTING ATTORNEYS, https://www.apainc.org/.

4. Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Prosecutors Then and Now,* 110 J. CRIM. L. & CRIMINOLOGY 719, 736–46 (2020) (explaining how progressive prosecutors resemble their predecessors and how they differ); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–18 (2021) (seeking to define progressive prosecutors by sorting them into different types).

5. *See infra* Part I. See also Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 130, 135–53 (2022) (describing and illustrating structural and political barriers to progressive prosecution).

6. Green & Roiphe, *supra* note 4, at 749; Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 188–202 (2021).

7. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 839–52 (2014) (discussing the traditional notion of prosecutorial neutrality).

8. Green & Roiphe, *supra* note 4, at 736–38 (describing characteristics of the professional prosecutor); John Leland, *Robert Morgenthau on His Years as District Attorney: 'I Don't Look Back,'* N.Y. TIMES (Nov. 23, 2016), https://www.nytimes.com/2016/11/23/nyregion/robert-morgenthau-manhattan-district-attorney.html (emphasizing traditional professional values and ethical guidelines as driving decision making in the office).

in similar fashion, traditional prosecutors have conventionally made decisions about whether to bring charges, which charges to bring, what plea bargains to offer, and what sentences to seek, on an ad hoc, case-by-case basis in light of a broad array of relevant facts as well as professional norms and practices in the office.[9]

In several respects, progressive prosecutors tend to resemble other political actors—that is, other elected executive-branch officials or legislators—more than judges. They often draw support from left-leaning political action committees and further support from a national progressive constituency.[10] Once elected, progressive prosecutors have adopted and announced policies directed at reducing incarceration or promoting racial equity in criminal law enforcement.[11] Often, these policies involve declining to prosecute categories of low-level crimes, declining to employ sentencing enhancements, or declining to seek pretrial incarceration in certain types of cases.[12] Where traditional prosecutors purported to make individual discretionary decisions based on considerations internal to criminal law enforcement, such as whether a prosecution would promote deterrence or retribution or would be disproportionately harsh given the nature of the criminal conduct, progressive prosecutors' categorical policies appear more political because they are based on explicit public-policy judgments external to the individual facts of the case.[13] Further, these prosecutors' categorical declination policies invite political controversy because they appear to be inconsistent with the political judgments underlying the criminal laws—namely, a judgment by legislators that the laws in question should at least sometimes be enforced.[14] Finally, in announcing broad policies—not simply announcing individual indictments and convictions—progressive prosecutors often appear more like other political actors in the sense that they seem to be making law, not just enforcing it in individual cases.

The approach that progressive prosecutors take in adopting and publicizing categorical policies aligned with progressive goals is not primarily an ideological departure from the traditional approach because traditional prosecutors could share progressive prosecutors' ideological preferences. It is primarily a difference in the process by which the office makes and announces decisions. In making discretionary decisions on an ad hoc basis, traditional prosecutors have implemented a

9. Green & Roiphe, *supra* note 4, at 741.

10. *See* Rory Fleming, *Legitimacy Matters: The Case for Public Financing in Prosecutor Elections*, 27 WASH. & LEE J. C.R. & SOC. JUST. 1, 10–30 (2020) (detailing the substantial role of funding from Soros-affiliated PACs to the election of progressive prosecutors); *see also* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1540 (2020) ("[A] motivated group of advocates and their supporters have started a movement to elect progressive prosecutors.").

11. *See* PRERNA JAGADEESH, ISA ALOMRAN, LEW BLANK & GUSTAVO SANCHEZ, DATA FOR PROGRESS, A NEW GENERATION OF PROSECUTORS IS LEADING THE CHARGE TO REIMAGINE PUBLIC SAFETY 1 (2021), https://www.filesforprogress.org/memos/new-generation-of-prosecutors-reimagine-public-safety.pdf.

12. *See id.*

13. *See* Part I *infra* (describing legislative and judicial pushback).

14. *Id.*

conception of what justice requires, informed by ideology, the will of their constituents, and expert judgment.

This Article draws on fiduciary theory to argue that the traditional process is a preferable approach to exercising prosecutorial discretion, even when the prosecutor's conception of justice is progressive and the prosecutor seeks to achieve progressive goals. This is the case for two reasons: first, the traditional approach is consistent with the historical and theoretical role that prosecutors play in American democracy,[15] and second, it is the most effective and lasting way to implement a particular vision of what justice requires.[16] Prosecutors are fiduciaries for the public, charged with pursuing its interest in justice. Like other beneficiaries, the public is vulnerable in this relationship, and, in exchange, prosecutors owe duties of care and loyalty. Prosecutors are held accountable to the public not by direct public control over decisions but rather through residual control, judicial checks, and their adherence to certain norms and practices. The fiduciary relationship can be preserved only by subordinating (but not sacrificing) progressive political ideology to the traditional prosecutorial process.

As candidates for elected office, prosecutors should articulate a vision of criminal justice so that voters understand how they will approach the job.[17] But once they take office, prosecutors' general vision should inform individual discretionary decisions made in accordance with the norms and traditions of the office. Announcing categorical imperatives gives the impression that prosecutors are directly implementing a political agenda, as a legislator would, rather than pursuing a particular vision of justice in each case. This invites criticism from political opponents and pushback from judges, police, and politicians, as well as disappointed constituencies.

To make this argument, Part I discusses how progressive prosecutors run into problems by advancing a political agenda through blanket declination and charging policies rather than allowing their vision of justice to shape discretionary decisions. Part II explains the fiduciary theory of prosecution and applies it to progressive prosecutors, arguing that the fiduciary relationship requires distance from the popular will to foster the use of expert knowledge to advance the public's interest in justice. With respect to prosecutors, preserving ad hoc decision making is critical

15. *See* Part II *infra*.

16. *See* Part III *infra*.

17. By way of example, in his reelection campaign, Philadelphia prosecutor Larry Krasner, who is regarded as one of the earliest progressive prosecutors, listed aspirational goals or broad principles, such as "[e]xpand[ing] [a]lternatives to [p]rosecution," "[e]nd[ing] [o]verly [p]unitive [s]entences," "[h]olding [t]hose with [p]ower [a]ccountable," "[s]upporting [v]ictims," "[s]top[ping] [w]rongful [c]onvictions" and exonerating the wrongly convicted, reducing racial disparities, enduring equal treatment of immigrants, protecting democracy, and increasing justice for juveniles. *See Larry Will Continue to Attack Mass Incarceration and Work to Prevent Violence*, LARRY KRASNER FOR DISTRICT ATTORNEY, https://krasnerforda.com/plans-for-the-future (last visited Feb. 5, 2023). These general objectives corresponded to traditional aspirations of criminal prosecution, such as avoiding overly harsh punishment, ensuring equal treatment and fair process, and avoiding punishment of the innocent.

because prosecutors' expertise is not only in matters of law and policy but also in their ability to exercise judgment in complex, fact-specific circumstances. Finally, Part III suggests how progressive prosecutors can still implement their substantive vision of justice without abdicating the fiduciary role and opening themselves up to pushback from judges, police, and subordinate lawyers, as well as hostile and friendly political constituencies. This Part acknowledges that change may not be as quick as some would like but argues that it will be more consistent with the prosecutor's role in America, more effective, and longer lasting.

I. CONTROVERSY AND PUSHBACK

All prosecutors—traditional or progressive—are subject to criticism when they make difficult decisions about whether to prosecute cases in the public eye. For example, Chicago prosecutor Anita Alvarez and St. Louis prosecutor Robert McCulloch were attacked for how they handled cases where police fatally shot Black civilians (Laquan McDonald and Michael Brown). When Alvarez and McCulloch ran for reelection, they lost to reformers, Kim Foxx and Wesley Bell, who numbered among their critics.[18] As others have noted, however, progressive prosecutors are especially controversial.[19] The most obvious illustration was the persistent public attacks on Chesa Boudin, culminating in his recall.[20] But many other progressive prosecutors have been criticized, and not exclusively from the right.[21] Moreover, pushback comes not only from members of the public, the

18. *See* Gregory Krieg, *Missouri Prosecutor Who Didn't Charge Officer in Michael Brown Killing Appears to be Ousted in Primary*, CNN (Aug. 8, 2018), https://www.cnn.com/2018/08/08/politics/wesley-bell-ferguson-prosecutor/index.html (noting that Bell, who "ran as a reformer," said that he would have appointed a special prosecutor to investigate Michael Brown's killing); Leon Neyfakh, *Why Did It Take More Than a Year to Charge the Officer Who Shot Laquan McDonald?*, SLATE (Nov. 25, 2015), https://slate.com/news-and-politics/2015/11/laquan-mcdonald-kim-foxx-on-why-anita-alvarez-mishandled-the-jason-van-dyke-case.html (observing that Foxx "has not been shy about condemning her old boss's handling of the McDonald case").

19. *See, e.g.*, Covert, *supra* note 6, at 191 (describing criticisms of progressives elected in Dallas, Chicago, and Boston); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 15–21 (2019) (describing challenges to prosecutors in Philadelphia, Orlando, and Boston); Yamahiro & Garzón-Montano, *supra* note 5, at 140–53 (describing resistance to reforms initiated by progressive prosecutors in Philadelphia, Los Angeles, and Orlando).

20. Chesa Boudin, San Francisco's elected prosecutor, was the subject of recall campaigns that began within a year of taking office in January 2020, and he faced a recall election in June 2022 that succeeded in unseating him. A progressive prosecutor, Boudin had instituted various reforms, including the increased use of diversion programs for misdemeanor defendants and the elimination of cash bail. Boudin was blamed for the general rise in burglaries and certain other crimes in the city, for his handling of particular prosecutions, and for crimes committed by released offenders. *See* Jonathan Rapping, *Progressive Prosecutors: Pros and Cons: The Costs of the Progressive Prosecution Movement*, 46 CHAMPION 12, 20 (2022) ("[F]orces hostile to reform in San Francisco succeeded in their effort to recall Chesa Boudin, proving that even in the most liberal jurisdictions, the tolerance for a progressive prosecutor to enact meaningful change is precarious.").

21. *See, e.g.*, Itay Ravid & Amit Haim, *Progressive Algorithms*, 12 U.C. IRVINE L. REV. 527, 553–57 (2022) (describing criticisms, on one hand, by political opponents who regard progressive prosecutors as being soft on crime, and, on the other hand, by liberals who believe that progressive prosecutors are preserving an "ultra-punitive [and] racist" power structure). Much of the criticism from the left has come from those, especially "abolitionists," who are skeptical of the very idea of criminal prosecution, and for whom no prosecutor who

media, and political organizations. Progressive prosecutors have been challenged by courts,[22] police with whom they work,[23] and even subordinate prosecutors.[24] These challenges are, at the very least, distractions, if not significant obstacles to progressive prosecutors' ability to implement their policies and achieve their objectives.[25]

There are various reasons why, for progressive prosecutors, pushback is almost inevitable. Although some progressive prosecutors have been politically inexperienced,[26] the problem is not that as a group they are politically less adept than others. After all, they managed to get elected, sometimes defeating incumbents[27] or rising out of a crowded field of candidates.[28] Moreover, they have the support of

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enforces the criminal law could possibly measure up. *See, e.g.*, Covert, *supra* note 6, at 250 ("Prosecutors who are committed to transforming our broken system must be willing to weaken the power their own office wields in order to protect criminal defendants from themselves and their assistants, as well as their successors."); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 169 (2022) (arguing that "[p]rosecutors are antithetical to abolition because they maintain systems of harm, enact state violence, and retain the power to break up families and communities; accordingly, true transformation of the system includes the abolition of prosecutors"); Yamahiro & Garzón-Montano, *supra* note 5, at 132 ("[A]ny movement that embraces prosecution cannot be considered progressive in any meaningful way. . . . '[P]rogressive prosecution' is an ineffective antidote that distracts—and detracts—from the wholesale dismantling and re-envisioning of an approach to harm necessary to meaningfully address the current system's endemic problems.").

22. *See* Judith L. Ritter, *Making a Case for No Case: Judicial Oversight of Prosecutorial Choices - From* In re Michael Flynn *to Progressive Prosecutors*, 26 BERKELEY J. CRIM. L. 31, 40–48 (2021) (providing multiple "examples of progressive prosecutors proposing reform-directed case dispositions for judicial approval and of judges resisting the proposals"); *see also* text accompanying notes 73–78 *infra* (discussing courts' decisions in Arlington, Virginia).

23. *See, e.g.*, Derek Brouwer, *Will Public Safety Worries End Progressive Prosecutor Sarah George's Sweeping Reforms?*, SEVEN DAYS (July 27, 2022), https://www.sevendaysvt.com/vermont/will-public-safety-worries-end-progressive-prosecutor-sarah-georges-sweeping-reforms/Content?oid=36110678; Scott Pohl, *Ingham County Law Enforcement Officials Criticize Prosecutor*, WCMU (Aug. 11, 2021), https://radio.wcmu.org/local-regional-news/2021-08-11/ingham-county-law-enforcement-officials-criticize-prosecutor (describing criticism of Michigan county prosecutor's decision to not pursue cases arising out of traffic stops); Kurt Rivera, *San Joaquin Prosecutor Criticized by Police Union for Participating in Black Lives Matter Protests*, ABC10 (June 30, 2020), https://www.abc10.com/article/news/local/stockton/san-joaquin-prosecutor-criticized-police-union-stockton/103-f8715ce6-71d6-48db-8431-6dc0fd8c0adb.

24. *See* text accompanying notes 68–72 *infra* (discussing lawsuit challenging Los Angeles County prosecutor's sentencing policy); *see also* Davis, *supra* note 19, at 15 ("Someone who has been prosecuting cases for years may have difficulty taking direction from a newly elected District Attorney who has never prosecuted a case, especially if she was previously a criminal defense attorney.").

25. *See, e.g.*, Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography, Part One: Internal Constraints*, 61 B.C. L. REV. ELEC. SUPPLEMENT I.-32, 45 (2020), http://lawdigitalcommons.bc.edu/bclr/vol61/iss9/4/ ("The need for urban DAs to rely on their line prosecutors places the impact of progressive prosecution at risk.").

26. *See, e.g.*, Clarence Page, *Why San Francisco's Progressive Prosecutor Lost After Foxx Won*, LAS VEGAS REV. J. (June 16, 2022), https://www.reviewjournal.com/opinion/clarence-page-why-san-franciscos-progressive-prosecutor-lost-after-foxx-won-2593835/ (noting that Boudin's "bigger problem, according to local observers, was inexperience, particularly in the grassroots hand-shaking, arm-squeezing style of populist campaigning").

27. *See* text accompanying note 18, *supra*.

28. *See* Levin, *supra* note 4, 1425 (noting competition among progressive candidates in Boston, Los Angeles and San Francisco); *see generally* Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 128 (2021) ("The election landscape traditionally protected incumbent prosecutors and prompted little public debate about the best practices and

a movement.[29] Nor is it simply that conservative politicians and political organizations see a chance to score political points by attacking the progressive prosecution movement, although that is a factor.[30] Rather, characteristic features of their approach make progressive prosecutors a lightning rod for criticism. To understand why, it is instructive to compare progressive prosecutors with traditional prosecutors, who, regardless of where they fall on the political spectrum, are much less frequently criticized for their charging decisions.[31] In this Part, Section A describes how progressive prosecutors' announcement of charging policies has led to pushback. Section B describes how their explicit invocation of public policy considerations has similarly invited criticism. Finally, Section C identifies blanket charging policies, as compared with traditional prosecutors' ad hoc, case-by-case decision-making, as a further target of criticism, especially when the announced policies involve declining to enforce particular criminal laws. In undertaking this exercise, it is important to acknowledge that both traditional and progressive prosecutors differ among themselves, and that this Article relies on broad generalizations.[32]

A. The Role of Discretion in Progressive Prosecutors' Decisions

Prior to the progressive prosecution movement, whether prosecutors took a conservative, "tough on crime" approach or they pursued innovative alternatives to prosecution and incarceration, they often evaded scrutiny by portraying their charging decisions as ministerial or bureaucratic. This posture understates the extent of the discretion that prosecutors exercise in making charging decisions and the number and range of plausible decisions that can often be made in a case.[33] Typically, their pretense has been that they are simply following the evidence,

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priorities for their offices. Today, prosecutor elections involve more candidates, presenting more varied and viable choices.").

29. *See* Covert, *supra* note 6, at 194–202 (summarizing the history of the progressive prosecution movement).

30. *See, e.g.*, Zack Smith & Charles "Cully" Stimson, *Meet Kim Foxx, the Rogue Prosecutor Whose Policies are Wreaking Havoc in Chicago*, HERITAGE FOUND. (Nov. 3, 2020), https://www.heritage.org/crime-and-justice/commentary/meet-kim-foxx-the-rogue-prosecutor-whose-policies-are-wreaking-havoc ("[R]ather than implementing policies to combat violent crime there, Cook County State's Attorney Kim Foxx is contributing to it by enacting her 'progressive' agenda that, truthfully, can be more aptly described as lawlessness.").

31. Prior to the advent of the progressive prosecution movement in around 2016, and since, there have been plenty of prosecutors who are politically liberal, if not as left leaning as some progressive prosecutors, and who pursued alternatives to incarceration as a response to criminal conduct. While some of the opposition to progressive prosecutors is undoubtedly ideological, our point is that there are reasons beyond ideology that account for the pushback.

32. As others have noted, there is no fixed definition of "progressive prosecutor," there is room to debate which prosecutors deserve the designation, and those who are popularly regarded as progressive adopt different policies, priorities, and processes. *See, e.g.*, Heather L. Pickerell, Note, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & POL'Y REV. 285, 288 (2020) (identifying progressive prosecution practices and evaluating whether prosecutors conform to them).

33. Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2206 (2022) (reporting, based on a study of prosecutors who reviewed a fictional vignette, that "different prosecutors evaluating the *same* case recommend vastly different charges and punitive sanctions").

much as judges tend to convey that they simply follow the law.[34] Progressive prosecutors, in contrast, make no pretense to be following well-trod paths to inevitable destinations. The very premise of their electoral campaigns is that they will do things differently to achieve different results from their predecessors.[35] This is, of course, likely to antagonize those who built their careers around the status quo, which is to say most judges, law enforcement officers, and subordinate prosecutors.

In promising reform, progressive prosecutors call attention to the amount of discretion that prosecutors possess in charging, sentencing, and other aspects of their work.[36] They do so, in part, by adopting and publicizing policies regarding how their offices will exercise discretion. For example, Burlington, Vermont's prosecutor pursued characteristic policies such as ending cash bail, declining to prosecute cases arising out of pretextual traffic stops, and diverting driving-under-the-influence offenders into restorative justice programs.[37] Progressive prosecutors also emphasize their discretion, and its significance, by implying that, through the exercise of discretion, they can achieve significant social change—for example, reducing incarceration rates or eliminating racial inequities in policing. By acknowledging, and perhaps even overstating, the significance of their discretionary authority,[38] reformers invite the public to later scrutinize both their broad charging policies and their individual charging decisions to determine whether their decisions meet expectations or have negative consequences.

On the other hand, traditional prosecutors make themselves a smaller target by conveying that they pursue justice in individual cases by making case-by-case, fact-intensive decisions.[39] The conventional approach is captured by the American

34. Green & Roiphe, *supra* note 4, at 748–49 ("[M]ainstream prosecutors convey that they are at least nonpartisan, if not apolitical. Much like judges who picture themselves as nonpartisan—for example, as umpires calling balls and strikes—prosecutors . . . often depict themselves in similarly neutral terms: like bloodhounds, they just 'follow the evidence.' The implication is that when presented with similar evidence, other experienced prosecutors, as professionals, would make comparable charging and plea bargaining decisions.").

35. *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1206 (2020) (observing that progressive prosecutors are "prominent representatives of a national movement to leverage prosecutorial power to achieve criminal justice reform").

36. That said, progressive prosecutors cannot entirely be credited with the public's growing recognition of the significance of prosecutorial discretion. *See* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 71–72 (2016) (police shooting cases contributed to the growing public "understand[ing] that prosecutors' decisions about whom to charge, what plea bargains to offer, or what sentences to pursue may be not simply unwise, but abusive, reflecting wrongdoing in an ordinary, if not legal, sense").

37. *See* Brouwer, *supra* note 23.

38. *See* Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 778–81 (2020) (observing the progressive prosecution movement exaggeratedly asserts that prosecutors have "unilateral power to change the criminal justice system," and that "[a] progressive prosecution movement that incorrectly depicts prosecutorial power is bound to fail").

39. We do not purport to be describing all prosecutors who are not "progressive prosecutors." For example, some "law and order" prosecutors have approached discretionary decisions by categorically pursuing all cases in a certain way—e.g., bringing the harshest possible charges or invariably seeking the death penalty in eligible cases—rather than weighing relevant considerations in ad hoc fashion. It would be understandable for a

Bar Association's standards on prosecutors' work, which recognize prosecutors' "obligation to enforce the law while exercising sound discretion" and list sixteen nonexclusive factors "which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge."[40] When the decision to bring or decline charges is fact-intensive, as it ordinarily is for traditional prosecutors, the decision may be criticized, but it is not necessarily representative. Missteps can be dismissed or forgiven as aberrational. In contrast, categorical policies announced by progressive prosecutors—for example, a policy not to prosecute simple marijuana possession or other low-level offenses, not to seek pretrial detention in certain categories of cases, or not to pursue sentencing enhancements—have broad impact. An unpopular policy will rightly seem more momentous, and therefore more troubling, than an unpopular decision in a single case.

Traditional prosecutors rarely explain their individual discretionary decisions, in part because confidentiality obligations restrict them from doing so.[41] If prosecutors decline to bring charges because they doubt the strength of the evidence and the likelihood of a conviction, the public typically cannot review the evidence to assess the legitimacy of the prosecutor's doubts. There was grumbling when several different New York prosecutors recently declined to prosecute Governor Andrew Cuomo for sexual misconduct,[42] but no one in the media could make a well-informed judgment that these prosecutors could have secured convictions because they never saw the evidence. Likewise, there was disappointment when the newly elected Manhattan prosecutor did not conclude the investigation he inherited of Donald Trump's business dealings by obtaining an indictment, but critics could only speculate about the evidence.[43] Only disgruntled insiders, such as the senior lawyers in Manhattan who walked off the investigation of Donald Trump's business dealings,[44] can level fully informed criticisms against prosecutors' individual discretionary decisions, and even then, confidentiality obligations

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prosecutor to always prosecute certain kinds of cases—e.g., homicide cases—when the evidence establishes guilt, but it would be a departure from convention for a prosecutor categorically to decline to exercise discretion in all provable cases.

40. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, standard 3–4.4 (AMERICAN BAR ASS'N., 4th ed. 2017).

41. *See* Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1138 (2021) ("Whether wide discretion is positive or not is difficult to assess due to a lack of transparency. Legal commentators have characterized the 'black box' of prosecutorial discretion as 'dangerous' and 'tyrann[ical]' because it is 'unreviewed and its justifications are unarticulated.'") (footnotes omitted).

42. *See, e.g.*, Chris Churchill, *Be a Lion, Not a Mouse: If I Only Had the Nerve*, TIMES-UNION (Albany), Jan. 6, 2022, at C1 (having found the Governor Cuomo's accuser to be "credible," the Albany prosecutor "should have stuck his neck out for women who have been victimized" and "let the taxpaying citizens of New York see the evidence for themselves").

43. *See* Ewan Palmer, *Alvin Bragg Not Indicting Donald Trump 'Shameful'—Legal Experts*, NEWSWEEK (Mar. 24, 2022), https://www.newsweek.com/alvin-bragg-indict-trump-mark-pomerantz-resignation-letter-1691276.

44. *See* Matt Ford, *Mark Pomerantz Is Furious About Trump's Latest Escape from Justice*, THE NEW REPUBLIC (Mar. 24, 2022), https://newrepublic.com/article/165841/mark-pomerantz-trump-alvin-bragg.

limit the extent to which insiders can explain their displeasure. Like their traditional counterparts, progressive prosecutors preserve confidentiality in individual cases as the law requires. But in contrast to most traditional prosecutors, most progressive prosecutors announce and publicize their internal policies, often from the start of their administrations, and some then publish data about how they are implementing their policies.[45] It is to their credit that progressive prosecutors are more transparent than traditional prosecutors, but their openness provides more to criticize and invites better-informed criticism.

In many cases, and especially in serious felony cases, progressive prosecutors approach charging decisions in a conventional manner.[46] But their departure from convention in low-level cases by implementing broad declination policies invites skepticism of their ad hoc decision making in serious cases, and their inability to explain individual decisions precludes an effective defense. Traditionally, constituents have placed their trust in prosecutors, whom they assume are making decisions based on conventional criteria. But members of the public who are skeptical about progressive prosecutors' policies—for example, those who perceive that the policies are "soft on crime"—are unlikely to give these prosecutors the benefit of the doubt in cases where prosecutors employ traditional case-by-case decision-making.[47]

At the same time, progressive prosecutors' policies may inflate their own supporters' expectations. Constituents may be disappointed when, in individual cases, prosecutors make decisions that appear to be at odds with their promises and policies. That was the case, for example, when Wesley Bell, like his predecessor, found insufficient evidence to prosecute the officer who killed Michael Brown; Bell could not provide a satisfactory explanation to the constituents who wanted the officer indicted.[48] Progressive constituents are equally likely to be disappointed

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45. *See, e.g.*, Josie Duffy Rice, *Kim Foxx Just Released Six Years of Data—Most Prosecutors' Offices Remain Black Boxes*, THE APPEAL (Mar. 7, 2018), https://theappeal.org/kim-foxx-just-released-six-years-of-data-most-prosecutors-offices-remain-black-boxes-238a37ee45f0/.

46. *See* Paul Butler, *Progressive Prosecutors are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1993 (2022) ("When they run for office, progressive prosecutors typically express commitments to law and order, especially with regard to going after violent 'offenders.'"); Chad Flanders & Stephen Galoob, *Progressive Prosecutors in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 691 (2020) ("In many areas, the tactics of so-called progressive prosecution would not, in fact, dramatically change the status quo. Murders, sexual assault, and other violent crimes would still be prosecuted perhaps even more aggressively.").

47. *See, e.g.*, Ann Maher, *Recall Effort Aimed at Soros-Funded Progressive Prosecutor in Fairfax County*, LEGAL NEWSLINE (Apr. 13, 2021), https://legalnewsline.com/stories/589012282-recall-effort-aimed-at-soros-funded-progressive-prosecutor-in-fairfax-county (stating that organizers "plan to call out [Fairfax Commonwealth County Attorney] Descano for his alleged failure to prosecute violent crimes, as well as his record of dismissing charges and reaching 'inequitable' plea deals in cases involving child pornography, incestuous sexual assault of a minor, domestic violence, elder abuse and animal abuse").

48. *See* Rachel Lippmann & Jason Rosenbaum, *St. Louis Prosecutor Bell Will Not Charge Darren Wilson,* ST. LOUIS PUBLIC RADIO, (July 30, 2020), https://news.stlpublicradio.org/law-order/2020-07-30/wesley-bell-will-not-charge-darren-wilson ("Bell's decision did not go over well with activists who helped Bell oust longtime incumbent Bob McCulloch in 2018.").

when prosecutors make exceptions to their original policies or fail to fulfill a campaign promise because the facts of a case don't support the desired outcome.[49]

B. The Role of Public Policy in Progressive Prosecutors' Decisions

Besides simply highlighting their discretion, progressive prosecutors emphasize the significance of public policy to their exercise of discretion, and this is another potential flashpoint. In exercising discretion, both traditional and progressive prosecutors are likely to give some weight to public-policy considerations, but they differ in their view of the significance of public policy and in the extent to which they *disclose* the significance of these considerations. Traditional prosecutors typically do not run on their public policy preferences but on their professional expertise or their general prosecution philosophy.[50] Their public-policy views almost certainly influence some of their decisions, but they rarely acknowledge their views on public policy in the way most other elected officials can be expected to do.[51]

For example, prosecutors' views on immigration policy may influence whether they bring charges that are likely to have deportation consequences.[52] But it would be hard for members of the public to infer prosecutors' unannounced views on immigration policy from their individual charging decisions and unlikely that anyone would try. Prosecutors' policy views, and the charging practices derived from them, would almost certainly be contentious, but traditional prosecutors keep their views to themselves. In contrast, progressive prosecutors are forthcoming; indeed, they campaign on their public-policy views, which can be assumed to dictate both their broad policies and their individual decisions.[53] For example, because progressive prosecutors campaign against "mass incarceration," their decisions in individual cases are not necessarily perceived to be the product of a careful balancing of interests, including the interest in public safety, but as a product of their political commitment to keeping offenders out of prison. When things go awry, such as when lightly sentenced offenders commit more serious crimes, critics can blame

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49. *See* Jamiles Lartey, *New Orleans Battled Mass Incarceration. Then Came the Backlash over Violent Crime.*, MARSHALL PROJECT (July 6, 2022), https://www.themarshallproject.org/2022/07/06/new-orleans-battled-mass-incarceration-then-came-the-rise-in-violent-crime (observing that the New Orleans district attorney Jason Williams's office's use of "sentencing enhancements in some cases involving guns, triggering longer prison terms, a practice Williams criticized during his campaign" and his office's charging of "minors as adults in certain violent crimes, something he'd promised not to do" has "infuriated progressive groups").

50. *See* Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 604–05 (2014) (describing prosecutors' campaign rhetoric as "[s]mall [b]ore").

51. *Id.*

52. *See* Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. 141, 174 (2021) (arguing that progressive prosecutors should "use prosecutorial discretion to prevent immigration penalties").

53. For example, with respect to immigration policy, Philadelphia prosecutor Larry Krasner made the reelection pledge: "Because legal proceedings can affect the status of immigrants and therefore the relationship between communities and law enforcement, Larry will take those effects into account when making prosecutorial decisions and setting prosecutorial police." *On the Issues*, LARRY KRASNER FOR DISTRICT ATTORNEY, https://krasnerforda.com/platform/ (last visited Feb. 3, 2023).

prosecutors' politically-motivated "soft on crime" policies.[54] Progressive prosecutors' expression of, and explicit reliance on, contested public-policy preferences make them appear less judge-like and more like other political actors, making it harder for them to stay above the political fray. And even those sympathetic to progressive prosecutors' views might be concerned that politicking takes resources away from their core job of case-processing.[55]

C. Categorical Decision Making

Perhaps most significantly, the very nature of categorical decision making invites criticism.[56] This is especially true of categorical policies that involve the wholesale, or virtually wholesale, refusal to enforce or implement certain criminal laws or to pursue certain sentences for which the laws provide.[57] For example, on the day he took office in 2022, Manhattan District Attorney Alvin Bragg provoked immediate criticism by issuing an internal memorandum listing various misdemeanor crimes that would never be prosecuted (unless the defendant is also charged with at least one felony charge) and others for which the charges would invariably be less harsh than the law provided.[58] Conservative critics asserted that

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54. *See e.g.*, Zachary Faria, *George Gascón's Policies Have Lethal Consequences*, WASH. EXAMINER (June 16, 2022), https://www.washingtonexaminer.com/opinion/george-gascons-policies-have-lethal-consequences.

55. For example, a veteran Chicago prosecutor in the office of progressive prosecutor Kim Foxx publicly leveled this criticism when he announced his resignation, writing, "This administration is more concerned with political narratives and agendas than with victims and prosecuting violent crime." *Veteran Prosecutor Abruptly Quits, Ripping Foxx in Goodbye Email: 'Zero Confidence'*, CWB CHICAGO (July 29, 2022), https://cwbchicago.com/2022/07/veteran-prosecutor-abruptly-quits-ripping-foxx-in-goodbye-email-zero-confidence.html.

56. *See, e.g.*, Editorial, *Progressive Prosecution: Does it Have a Place in Connecticut*, CONN. LAW TRIB. (Dec. 20, 2019), https://www.law.com/ctlawtribune/2019/12/20/progressive-prosecution-does-it-have-a-place-in-connecticut/ ("What is important is that as the system changes, it continues to embrace prosecutors who can try cases and exercise sound prosecutorial discretion in administering individual justice for all.").

57. *See, e.g.*, Crystal Hill & Ryan Martin, *Marion County Will No Longer Prosecute Simple Marijuana Possession, Officials Say*, INDYSTAR (Sept. 30, 2019), https://www.indystar.com/story/news/2019/09/30/marion-county-no-longer-prosecute-marijuana-possession-officials-say/3818748002/ (quoting police representative's comment on prosecutor's announced policy not to prosecute simple marijuana possession cases, stating "[w]hile we recognize and value prosecutorial discretion, our law enforcement officers have significant concerns any time a single person elects to unilaterally not enforce a state law as a matter of practice or policy"); Craig Trainor, *Taking on "Progressive Prosecutors"*, CITY J. (New York) (Feb. 7, 2021), https://www.city-journal.org/taking-on-progressive-prosecutors ("Prosecutors enjoy immense discretion. In individual cases where the facts and equities compel an appropriate decision to decline prosecution, they are acting in the finest traditions of American justice when they do so. But progressive prosecutors engage in systemic oath-breaking when, as a matter of express and undifferentiated policy, they refuse to enforce the duly enacted criminal laws of their state.").

58. Memorandum from Alvin L. Bragg, Jr., District Attorney, County of New York to All Staff in the District Attorney's Office (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf. Bragg sought the Democratic nomination for Manhattan District Attorney in a crowded field of would-be reformers. Bragg was positioned somewhat center of the field, promising to reform the office while addressing rising crime. He won the primary in July 2021 and the general election (a foregone conclusion for the Democratic nominee) in November 2021. By then, concerns were mounting in New York City and nationally about rising crime rates, and the city simultaneously elected a new mayor, Eric Adams, a former police officer who campaigned in part on a "law and order" platform. Almost immediately after taking office in January 2022, Bragg circulated an internal memo that seemed to reflect his reformist agenda without

the declination policy usurped the legislative role and that "even more disturbing is Bragg's decision to require his deputies to water down (undercharge) serious criminal offenses from serious felonies to mere misdemeanors."[59]

To be sure, categorical policies are not unique to progressive prosecutors. Traditional prosecutors have announced policies limiting subordinates' charging discretion, whether to promote consistency and reduce the impact of implicit biases, deter wrongdoing by publicizing an unyieldingly harsh practice (such as to seek a prison sentence in all gun possession cases), or for other reasons.[60] But a policy not to enforce certain criminal laws seems different. It may be that some traditional prosecutors have also been flatly unwilling to implement certain laws as a matter of policy, but if so, they have generally kept their policies to themselves, recognizing that they invite opposition if they turn a consistent internal practice into an announced policy. Although the office of longtime Manhattan prosecutor Robert Morganthau never sought the death penalty, it escaped criticism, not only because Morgenthau was a powerful political figure in the state, but also because, rather than derogating the law, his office decided whether to seek the death penalty in each eligible case based on the unique facts and circumstances.[61] In contrast, when Morgenthau's counterpart in neighboring Bronx County announced a policy never to seek the death penalty, the Governor removed his authority to prosecute death-penalty-eligible homicide cases and assigned that authority to another prosecutor.[62]

Given this precedent, it was unsurprising years later, when Florida's Governor removed the progressive Orlando prosecutor's authority over capital cases after she announced a similar policy never to seek the death penalty.[63] In other states,

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simultaneously offering a plan to address rising crime. To that end, the memo adopted fairly radical changes in charging decisions and other practices. The memo quickly leaked; it was denounced by the police, editorial writers, and others (although Adams was restrained) and Bragg began backpedaling. Within days, prosecutors in the office reportedly headed for the exits, and by month's end, Bragg was denounced by some as a "rogue prosecutor whose policies are wreaking havoc in Manhattan." The New York Times, which had endorsed Bragg, unfavorably compared his efforts to those of his counterpart in Brooklyn who was said to be more adept at the politics of internal change. Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. TIMES (Apr. 3, 2022), https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html.

59. Zack Smith & Charles "Cully" Stimson, *Meet Alvin Bragg, Rogue Prosecutor Whose Policies are Wreaking Havoc in Manhattan*, HERITAGE FOUND. (Jan. 31, 2022), https://www.heritage.org/crime-and-justice/commentary/meet-alvin-bragg-rogue-prosecutor-whose-policies-are-wreaking-havoc.

60. *See, e.g.*, People v. Gwinn, 314 N.W.2d 562 (Mich. Ct. App. 1981) (upholding policy of charging all eligible defendants as habitual offenders); State v. Brune, 725 P.2d 454 (Wash. Ct. App. 1986) (rejecting challenge to charging policy for certain sex offenses); Locklear v. State, 273 N.W.2d 334 (Wis. 1979) (upholding prosecutor's policy not to charge a person with issuing a worthless check if payment was made within five days of a demand).

61. *See* John A. Horowitz, Note, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2580 n.61 (1997).

62. *See id.* at 2571, 2580 n.61.

63. *See* Ayala v. Scott, 224 So. 3d 755, 759 (Fla. 2017) (upholding Governor's removal of the prosecutor from death penalty cases); Butler, *supra* note 46, at 1995–96, 1998 (asserting that "[w]hat happened to Ayala . . . was bizarre and virtually unprecedented as a response to an exercise of prosecutorial discretion"); Davis, *supra* note

legislators have threatened to remove progressive prosecutors' authority to enforce other laws in response to similar declination policies.[64] Legislators' reaction is predictable because such sweeping policies derogate the legislature's intent (except with respect to criminal laws that are popularly regarded as outdated). Legislatures generally expect prosecutors to exercise discretion in enforcing the laws, which sometimes means declining to pursue eligible cases but also means being open to enforcing the law in some cases.[65] Legislatures rarely adopt criminal laws solely to condemn certain conduct by criminalizing it without expecting prosecutors ever to enforce the laws. When traditional prosecutors go through the process of scrutinizing the evidence and weighing a host of relevant considerations before making a discretionary decision, they are, by all appearances, paying respect to the underlying legislative judgments. In contrast, a progressive prosecutor's promise never to prosecute someone for marijuana possession or for another category of offense is perceived as a rejection of the legislature's judgment that the proscribed conduct is bad or harmful enough to deserve punishment at least sometimes. Little wonder that legislatures push back.

But it is not only legislatures that are offended by categorical declination policies. Many judges view prosecutors' case-by-case exercise of discretion as a defining feature of criminal prosecution, one deeply embedded in the professional culture.[66] In general, judges have limited authority to second guess prosecutors'

19, at 18 (describing the backlash to Ayala's decision as "swift and severe"). It was considerably more surprising when the Florida governor later suspended the Tampa prosecutor for signing a joint statement issued by elected prosecutors around the country that they would exercise their discretion to "refrain from prosecuting those who seek, provide, or support abortions." *See* Patricia Mazzei, *DeSantis Suspends Tampa Prosecutor Who Vowed Not to Criminalize Abortion*, N.Y. TIMES (Aug. 4, 2022) https://www.nytimes.com/2022/08/04/us/desantis-tampa-prosecutor-abortion.html. The prosecutor, Andrew Warren, responded with a civil lawsuit asserting that his suspension violated the First Amendment. *See* Complaint at 3, Warren v. DeSantis, 2023 WL 345802 (N.D. Fla. Aug. 17, 2022) (No. 22cv302), ECF No. 1. The Complaint emphasized Warren's exercise of discretion, including through "Presumptive Non-Prosecution Policies" meant to guide subordinate prosecutors' application of "judgment and discretion to the individual cases before them." *Id*. at 9.

64. *See* 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 (referring to proposed legislation in Georgia, Virginia, Missouri and Texas that would "allow[] the state to take over cases local district attorneys choose not to pursue, undermining the ability of elected prosecutors to carry out reforms"); Jessica Miller, *'It's Clearly Targeted at Me,' Utah County Attorney David Leavitt Says of Bill That Would Limit Prosecutor Reform Efforts*, SALT LAKE TRIB. (Feb. 4, 2022), https://www.sltrib.com/news/politics/2022/02/04/bill-limit-criminal/ (describing proposed legislation to limit prosecutors' use of pretrial diversion); Rory Fleming, *After GOP Sweep, Virginia's AG-Elect Takes Aim at Reform Prosecutors*, FILTER (New York) (Nov. 8, 2021), https://filtermag.org/virginia-ag-republican-prosecutors/ (describing proposal to give state Attorney concurrent jurisdiction over local crimes, to enable the Attorney General to bring charges that progressive prosecutors decline).

65. For an analysis of prosecutors' discretionary authority to decline to prosecute, see generally Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011). For a discussion on legal and policy debates relating to the Boston prosecutors' declination policy, see generally John E. Foster, Note, *Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511 (2019).

66. *See, e.g*., Pugach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) ("The United States Attorney is not a rubber stamp. His problems are not solved by the strict application of an inflexible formula. Rather, their solution

decisions, and even to the extent that judges might do so, they tend to be highly deferential in dealing with traditional prosecutors. But judges have been less deferential to progressive prosecutors.[67]

Progressive prosecutors themselves acknowledge the power of the conventional decision-making paradigm. Responding to challenges to categorical policies, their default has been to defend themselves by purporting simply to be engaging in a variation on traditional discretionary decision making. For example, almost immediately after George Gascón was elected Los Angeles District Attorney in late 2020, a union representing deputy district attorneys sought to block his implementation of charging policies aimed at avoiding excessively harsh punishment. The office had decided to withdraw applications for sentencing enhancements under the state's "three strikes" law in pending cases and to decline to seek enhanced sentencing in future cases.[68] Gascón's supporters defended his policy on the ground that it was a conventional exercise of prosecutorial discretion, asserting:

> No district attorney, or prosecutor at any level, has the resources to prosecute every crime, nor is it a smart use of limited resources to seek the maximum punishment for every offense. . . . [P]rosecutorial discretion exists to allow the criminal law to be enforced in a sensible way — and in a manner that promotes the best interests of the community.[69]

Readers might have been forgiven for inferring from this defense that Gascón's office would be exercising individualized discretion, but the office was in fact implementing a broad policy against enforcing the "three strikes" law just as the Orlando prosecutor had refused ever to seek the death penalty.[70] Supporters' defense of the office's categorical approach ignored that even those who favor leniency in the criminal process might be skeptical of the new sentencing policy, believing that prosecutors should not tie their own hands because sentencing enhancements may be warranted in extreme cases and that their availability serves as a deterrent to repeat offenders. Ultimately, the state appellate court held that, unlike most criminal laws which presuppose the exercise of prosecutorial discretion, the California sentencing law did not give prosecutors discretion to decline to

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calls for the exercise of judgment. Judgment reached primarily by balancing the public interest in effective law enforcement against the growing rights of the accused.").

67. See text accompanying notes 69, 73, *infra* (discussing judicial pushback against Gascón and Tafti).

68. Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief, Ass'n of Deputy Dist. Att'ys for L.A. Cnty. v. Gascón, No. 20STCP04250 (Cal. Super. Ct., Dec. 30, 2020).

69. Erwin Chemerinsky & Miriam Aroni Krinsky, *Op-Ed: Stop The Attempt to Derail D.A. George Gascón's Criminal Justice Reforms*, L.A. TIMES (Jan. 28, 2021), https://www.latimes.com/opinion/story/2021-01-28/george-gascon-los-angeles-district-attorney-lawsuit.

70. Ass'n of Deputy Dist. Att'ys for L.A. Cnty. v. Gascón, 295 Cal. Rptr. 3d 1, 12 (Ct. App. 2022) (quoting policy which says "sentencing enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters").

file for an enhanced sentence when they believed the three-strikes law applied.[71] Further, while acknowledging that courts do not have power to compel prosecutors to offer proof in support of sentencing enhancements, the court warned prosecutors that it might be unethical to refuse to bring forward available proof.[72]

Similarly, in Arlington County, where Parisa Dehghani-Tafti successfully campaigned on a promise not to prosecute low-level marijuana possession cases, local judges resisted the policy.[73] The judges ordered her office to file detailed written requests to drop criminal charges.[74] In defending her office in the press, this progressive prosecutor drew on conventional prosecution values and processes, asserting that the courts were interfering with prosecutors' "discretion . . . to determine what fair and just enforcement of the law in our community looks like and what is the best use of our limited resources to maximize the safety and well-being of our community."[75] Likewise, in moving to dismiss a marijuana possession prosecution initiated before she took office, Dehghani-Tafti cited the ABA's standards, listed the factors it identified, and asserted that it is her "role and obligation . . . to consider factors such as these in determining the trajectory of a case as a matter of public policy."[76] The trial court found good cause to grant the prosecution's motion based on its conventional assertion that the evidence of guilt was lacking. But the court derogated two other justifications offered by the prosecution—that prosecuting marijuana possession cases is an inefficient use of resources and that marijuana possession poses no safety risk; the court held these to be inconsistent with public policy established by the state legislature.[77] Dehghani-Tafti later failed to convince the state supreme court that the trial judges had exceeded their authority in requiring written justifications for her office's discretionary decisions.[78]

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71. *Id.* at 27.

72. *Id.* at 38–39.

73. *See* Peter Vieth, *Arlington Judges Resist Prosecution Policies*, VA. LAWS. WEEKLY (Apr. 13, 2020), https://valawyersweekly.com/2020/04/13/arlington-judges-resist-prosecution-policies/; Parisa Dehghani-Tafti, *Why I Am Fighting for Prosecutorial Discretion in Arlington*, WASH. POST (Aug. 21, 2020) https://www.washingtonpost.com/opinions/local-opinions/why-i-am-fighting-for-prosecutorial-discretion-in-arlington/2020/08/20/9395512e-e0c6-11ea-b69b-64f7b0477ed4_story.html (describing, as a prosecutor, courts' claimed need to ascertain that, in moving to dismiss the indictment in a marijuana possession case, the prosecutors were not engaging in "partisan enforcement of the laws"); *see also* W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 219–20 (2021) (observing "that this judicial second-guessing was apparently unprecedented").

74. *See* Order Governing Criminal Docket Procedures, In re: Criminal Dockets Beginning March 10, 2020 (Va. Cir. Ct. Mar. 4, 2020) (on file with author) (requiring that motions to dismiss criminal charges be filed in writing providing "in detail all factual and not purely conclusory bases in support").

75. Tafti, *supra* note 73.

76. Memorandum of Law in Support of the Commonwealth's Motion for Nolle Prosequi Pursuant to §19-2-265.3, Commonwealth v. Kelley, CR19-1102, at 8–9 (Va. Cir. Ct. Feb. 6, 2020).

77. Memorandum Opinion, Commonwealth v. Kelley, CR19-1102 (Va. Cir. Ct. July 10, 2020).

78. In August 2020, the prosecutor's office petitioned the state supreme court for a writ of prohibition, but the court dismissed the petition. *See* Memorandum in Support of Verified Petition for Writ of Prohibition, In re Parisa Dehghani-Tafti, No. 201004 (Va. Aug. 14, 2020).

Finally, subordinate prosecutors are likely to disfavor categorical policies that restrict their ability to participate in the office's exercise of professional judgment. The deputy district attorneys' successful lawsuit against Gascón's sentencing policy is a dramatic example, but there have been many other cases in which subordinates made their displeasure known, typically by quitting their jobs.[79] Departure rates probably do not reflect the full extent of incumbent subordinates' unhappiness. Subordinate prosecutors understand that the elected prosecutor has ultimate responsibility for the office's charging decisions and other decisions and that such choices should reflect the elected prosecutor's criminal law philosophy and public policy preferences. But they generally believe they have a role to play because the facts of a case matter and they are most familiar with the facts of their cases. The conventional approach allows room for dialogue between those with different views and, often, compromise among those who assess a case differently. Ad hoc decision making thereby reduces the tension between subordinate prosecutors' views and those of supervisory prosecutors and the elected chief prosecutor. That is why subordinate prosecutors typically do not head for the exits after changes in administration. In contrast, progressive prosecutors' political commitments, expressed in categorical charging policies, may foment discontent among current subordinate prosecutors while also limiting the pool of lawyers interested in joining the office.[80]

The practical problems that progressive prosecutors have faced are not merely a product of political disagreement. Rather, as the recall of Boudin and the judicial response to Gascón highlight, they represent a crisis in legitimacy for progressive prosecutors.[81] The tenor of the pushback is not simply that some members of the public would prefer a different prosecutor who better reflects their goals and priorities but rather that the prosecutor has abdicated the role and no longer deserves the public trust. It is the unique nature of the reaction that this Article seeks to explain in the following Part.

II. THEORETICAL CRITIQUE OF PROGRESSIVE PROSECUTION

Part I described the practical obstacles that have faced progressive prosecutors, especially pushback against blanket declination policies. To explain this problem,

79. See *supra* notes 55, 58.

80. *Cf.* Melanie D. Wilson, *The Common Prosecutor*, 53 LOY. U. CHI. L. REV. 325 (2022) (arguing that prosecutors' offices should increase the diversity of subordinate prosecutors by seeking fair-minded, rather than progressive, lawyers).

81. The term legitimacy has multiple meanings. Here, we are referring to what Richard Fallon calls sociological legitimacy, meaning that it is accepted as a matter of fact as deserving respect or obedience. To be legitimate in this sense, the public defers to and accepts the official, law, or institution for reasons beyond fear of sanction. Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005). Legal legitimacy, on the other hand, means that something falls outside the bounds of legal norms. *Id.* at 1794–95. Our argument is that when prosecutors act outside of the norms of their office they lose the public's respect. Essentially the sociological illegitimacy follows on the heels of legal illegitimacy.

this Part draws on our previous work positing a fiduciary theory of prosecution.[82] We argue that the unusual degree of resistance is not inevitable and does not arise out of progressive prosecutors' political ideology. After all, some traditional prosecutors have embraced ideological and political positions similar to those of progressive prosecutors.[83] Instead, we argue that the problem derives from progressive prosecutors' abdication of their fiduciary role in several respects. Progressive prosecutors appear to disregard the views of some members of the public in favor of the views of their supporters, and to prioritize public policy concerns that are peripheral to prosecutorial decision making. They also relinquish discretion in a way that undermines their ability to draw on expertise and professional judgment to resolve questions of criminal justice that necessarily involve complex, fact-specific, inquiries. By way of background, section A summarizes the significance of prosecutors' role as fiduciaries and how this concept makes sense of the public understanding of prosecutors' duty to seek justice. Section B then critiques progressive prosecutors' approach to decision making in light of the fiduciary theory of prosecution.

A. Why Fiduciary Theory?

There is broad agreement in the legal profession, judiciary, and legal academia —including among prosecutors themselves—that prosecutors' duty is to seek justice.[84] In any given case, however, there is often disagreement about what seeking justice means—that is, if the prosecutor is to seek justice, how should the prosecutor exercise discretionary power, given the facts of the case.[85] There is less discussion of why prosecutors should seek justice than of how they should seek justice—that is, of how they should exercise their power given their general responsibilities. The concept of seeking justice has been said to be "undertheorized."[86] Certainly,

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82. *See generally* Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805 (2020) (drawing on fiduciary theory to explain the prosecutor's role in the American system).

83. See, e.g., Green & Roiphe, *supra* note 4, at 741–42 ("Today's progressive prosecutors may be regarded as successors to liberal and reform-minded predecessors of a few years earlier such as Craig Watkins, the Dallas prosecutor who established one of the most prominent conviction integrity units out of concern for the fairness and reliability of death-row defendants' convictions, Milwaukee prosecutor John Chisholm, who was lauded in 2015 for his efforts to reduce the rate of incarceration, and others.").

84. The ABA Model Rules of Professional Conduct note that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate," and that prosecutors must ensure "that the defendant is accorded procedural justice." MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR. ASS'N 1983). See also Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L. J. 607, 612–18 (1999) (describing the history of the tradition that prosecutors ought to seek justice).

85. Green, *supra* note 84 at 625–42 (arguing that prosecutors seek justice because of the nature of the client they serve, the public, and laying out the implications of this reasoning); Bruce A. Green, *Prosecutors' Professional Independence: Reflections on* Garcetti v. Ceballos, 22 CRIM. JUST. 4, 6 (2007) (noting that the ABA Standards on the Prosecution Function do not define a prosecutor's duty to do justice); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?,* 44 VAND. L. REV. 45, 50–53 (1991) (discussing the meaning of the duty to do justice in trial practice).

86. Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 634–35 (2021) (arguing that a just prosecutor should pursue "constitutional abolitionism, critical originalism, and liberation justice").

there is no evidence that prosecutors themselves spend much time asking why they must seek justice; they accept that as a given. But the "why" is important because the concept is capacious and malleable and having an idea of why may help narrow the range of meanings: knowing why may help explain how.[87]

Any deep theory of prosecution should be cross-cutting in several respects. It should be one that makes sense over time, across jurisdictions, and across different political or policy preferences.[88] For example, while a newly-elected California prosecutor in the late-twentieth century may have adopted a personal "new age" philosophy of life, we do not think it would have been useful for that prosecutor to advocate a "new age theory of prosecutors' duty to seek justice," whatever that might mean. Such a theory, by definition, would have been out of the mainstream even in its time and therefore not resonant with most prosecutors in or outside the office; it would not explain what prosecutors were doing before "new age" philosophies were adopted or have a shelf life once the elected prosecutor, or a successor, rejected this approach. In other words, if one is to explain *why* prosecutors should seek justice, one needs an answer that makes sense for all prosecutors yesterday, today, and tomorrow, but still helps clarify how prosecutors ought to approach their job.

We think a fiduciary theory serves that function.[89] Fiduciary theory, unlike other theoretical frameworks, helps explain and justify the unique role of prosecutors in our society.[90] Precisely because it does not prescribe specific outcomes, however, fiduciary theory accommodates changes over time in society, in public understandings, in criminal procedure, and so on. As with other fiduciaries, the public entrusts a certain job to prosecutors and thereby becomes vulnerable to their power. Unlike other public officials, prosecutors are not expected to respond directly to the will of the people. Like judges, they are, at times, required to apply the law to facts and determine the proper course regardless of, and sometimes even despite, what constituents might want. Professional rules and norms require prosecutors to ignore public outcry, at least when it comes to discretionary choices in individual cases.[91] At times, rules of secrecy make it such that prosecutors cannot publicly justify

87. One of us has addressed the question of why prosecutors seek justice. Green, *supra* note 84 at 625–42 (arguing that prosecutors seek justice because they represent the public); The fiduciary theory of prosecution is in keeping with this previous work in that it too views the nature of the beneficiary or the public as critical to understanding the prosecutor's role. Green & Roiphe, *supra* note 82, at 814–23 (reasoning that prosecutors are public fiduciaries with the obligation to pursue the public's abstract interest in justice).

88. Some attempts to advance theories of the prosecutor's role suggest an interpretation that could not be used to describe ethical, well-meaning prosecutors of the past. See Hasbrouck, *supra* note 86, at 634–35; Eric Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 253–70 (2017). While these authors may provide normative arguments about prosecutors today, they are not providing a coherent theory about the prosecutorial role.

89. Green and Roiphe, *supra* note 82, at 814–23 (explaining how courts and others have used the language of a fiduciary relationship to describe prosecutors since the beginning of the republic).

90. *Id*. at 806–14.

91. *See infra* Part II.B.

decisions of intense public interest, such as a decision not to charge a particular suspect.[92]

A fiduciary theory of prosecution identifies broad principles implicit in the concept of seeking justice that arise out of prosecutors' duties of care and loyalty. One can certainly disagree in any given case about what it means for a prosecutor to seek justice as a public fiduciary, but we suggest that, at least in broad terms, this is a theory that explains the process by which prosecutors ought to make decisions. It explains what well-intentioned prosecutors around the country have sought, and been expected, to do in the past and present, and what they ought to do normatively going forward.

Besides being descriptively accurate, this theory adds to the conventional understanding of the prosecutor's duty to seek justice in three ways. First, fiduciary theory helps clarify that adherence to professional norms is itself a critical mechanism to hold prosecutors accountable to the public. Second, fiduciary theory explains why discretionary decision making, including making ad hoc decisions about bail, charging, and sentencing, is central to prosecutors' role and critical to ensure their legitimacy. Third, it clarifies that prosecutors owe duties to the entire population of the state to consider their views and safeguard basic criminal justice values.[93]

Other theories, like democratic theory, usefully explain some aspects of the prosecutor's work, but unlike fiduciary theory, they do not capture the hybrid role prosecutors play as both lawyers with a broad mandate to carry out a particular abstract interest and as public officials.[94] Prosecutors are expected to draw on expert knowledge developed through a practice governed by norms, tradition, and law, and act as officials who are responsive to the public. Because fiduciary theory explains how and why this balance works to benefit the public, we believe it is a better fit.

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92. Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM L. & CRIMINOLOGY 477, 513–19 (2020) (discussing the risks involved when prosecutors make information about investigations public).

93. *See infra* Part II.B.1.

94. For examples of particularly insightful use of democratic theory to explain aspects of the prosecutor's role, see Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 525–34 (2020) (drawing on democratic theory to explain why, in moments where the public's preferences with regard to criminal justice policy are in flux, the relationship between career prosecutors and elected officials can be fraught); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581–83, 591 (2009) (drawing on democratic theory to explain how elections do not adequately serve as a check on prosecutorial power); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 494–95 (2017) (drawing on democratic theory to argue that presidential prosecutorial power is at its zenith when the president acts to protect liberty); Murray, *supra* note 73, at 195 (rejecting the fiduciary model and assessing the proper role of elected prosecutors by drawing on democratic theory). The reliance on democratic theory can lead to placing too much weight on popular preferences. *See* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 71 (2011) ("Because prosecutors act on the public's behalf, their decisions should reflect their constituents' preferences.").

B. Fiduciary Theory and Progressive Prosecutors

Throughout American history, prosecutors have been referred to as fiduciaries. This is not just a rhetorical flourish: it accurately describes prosecutors' role in the American legal system.[95] A traditional fiduciary relationship is characterized by one person who wields discretionary power over the legal, practical, or material interests of another.[96] The building blocks of a fiduciary relationship are discretion, vulnerability, and trust.[97] The beneficiary is necessarily vulnerable and, because there are significant monitoring costs, must trust that the fiduciary is acting in its interest and not engaged in self-dealing. The duties of loyalty and care are designed to protect the vulnerable beneficiary by helping to ensure that fiduciaries fulfill their trust. The trust necessary for the relationship is justified by the fiduciary's expertise.[98] Unlike a traditional fiduciary, a public fiduciary represents the public's interest in an abstract goal.[99] Prosecutors are public fiduciaries who represent the public's abstract interest in justice.[100]

As fiduciaries, local prosecutors represent the interests of the entire community, not just those who supported their campaign. While they can interpret justice through the lens of their supporters' priorities, they owe an obligation to consider the views of all citizens and to protect the interests that the entire public has in criminal justice. To do so, they must draw on their expertise and abide by norms and traditions of the office, including making discretionary decisions based on the facts and particular context of each case.

1. Who is the Progressive Prosecutor's Beneficiary?

Prosecutors are elected by a particular segment of the voters who hold views about criminal law enforcement that are not universally shared. As fiduciaries, however, prosecutors represent the local community, the state, and, to a lesser degree, the nation, in their pursuit of justice. The entire population is, after all, vulnerable to prosecutorial power. This fact does not, of course, mean that prosecutors must ignore the specific interests and concerns of the constituency that elected them, but it does mean that they must prioritize the interests that all citizens share in justice in a broad sense. While there is ample disagreement among citizens about what justice entails, most if not all would agree that protecting the innocent, treating victims and the accused fairly, and keeping the community safe are

95. Green & Roiphe, *supra* note 82 at 814–23.

96. *Id*. at 807.

97. EVAN FOX-DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY 89–90 (2011).

98. Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 706 (2013).

99. Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 565 (2015) (discussing a kind of fiduciary relationship in which the fiduciary is charged with pursuing abstract interests instead of the interests of a person).

100. Green & Roiphe, *supra* note 82, at 808.

central.[101] Prosecutorial expertise, as evidenced by the norms, traditions, and standards of practice, helps ensure that these basic components of justice are furthered by all prosecutors. Following these practices also assures members of the public that even if their preferred candidate lost, the elected prosecutor is safeguarding their interest in justice on this basic level. This is necessary to sustain the trust critical to the fiduciary relationship.

Members of the public understand at some level that elected prosecutors, as fiduciaries, are accountable to the broader public, not just their supporters, and the public reacts negatively when prosecutors appear to forget that. When a senior official in Chesa Boudin's office tweeted that "the 'crime surge' crowd shares the same ideology as Birth of a Nation,"[102] she implied that a segment of the public, of her office's client or beneficiary, was racist, thereby dismissing a significant portion of the population's concern, not to mention treating a basic criminal justice goal—safety—with seeming indifference. While Boudin's office was under no obligation to approach criminal justice as the tough-on-crime advocates would prefer, his office had a responsibility as a fiduciary to address rising crime, and at the very least, to consider the views of all citizens of San Francisco and California.[103] While this official did significant damage to Boudin's legitimacy by insulting a portion of the population, Boudin himself was more circumspect, stating that "Every single criminal-justice reform policy we've implemented is aimed at making our community safer,"[104] thereby acknowledging that he owed an obligation to address rising crime and that he had considered the views of those who had expressed concern about it. But in the lead up to Boudin's recall, opponents charged that he failed to make himself accountable to the entire electorate.[105]

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101. The basic goals and values of the criminal justice system include: enforcing the law such that punishment is proportional to criminal conduct, treating people equally, preserving public safety, protecting the innocent, and ensuring a fair process. Joshua Kleinfeld & Hadar Dancig-Rosenberg, *Social Trust in Criminal Justice: A Metric*, 98 NOTRE DAME L. REV. 815, 816–28 (2022) (describing the basic goals of the criminal justice system and positing "social trust" as a metric for achieving them).

102. Kate Chatfield (@ChatfieldKate), TWITTER (July 4, 2021, 8:44 PM), https://twitter.com/ChatfieldKate/status/1411848440468819969.

103. For some views criticizing the tweet, see Eric Ting, *Chesa Boudin Aide Ignites Firestorm with 'The Birth of a Nation' Tweet*, SF GATE (July 6, 2021), https://www.sfgate.com/bay-area-politics/article/Chesa-Boudin-San-Francisco-crime-KKK-tweet-aide-16296205.php.

104. Zusha Elinson & Jacob Gershman, *Progressive Prosecutor Movement Tested by Rising Crime and Angry Voters*, WALL ST. J. (June 5, 2022), https://www.wsj.com/articles/progressive-prosecutor-movement-tested-by-rising-crime-and-angry-voters-boudin-11654443234.

105. Marco Poggio, *What San Francisco DA's Recall Could Mean for Reformers*, LAW360 (June 17, 2022), https://www.law360.com/articles/1500852/what-san-francisco-da-s-recall-could-mean-for-reformers ("Garry Tan, a venture capitalist who invests in the technology sector and one of the largest donors to the recall campaign, said the effort to remove Boudin was about accountability. 'We expect our elected officials to, at the very least, faithfully perform the very basic functions of their offices. This public duty should always trump ideological crusades and personal political agendas. Elected officials represent the entire community, not just those who voted for them.'").

2. Fiduciary Theory, Discretion, and Prosecutors' Categorical Policies

The obligation to serve all constituents is best preserved through the traditional decision-making process.[106] Discretionary decisions made according to norms and traditions ensure that the entire population's interest in justice is served. Many principles are at stake, but the most fundamental ones include that innocent people should not be convicted of crimes and the public should be kept safe.[107] Prosecutors cannot fulfill the classic fiduciary obligations of care and loyalty, which ensure that these essential values are protected, without exercising discretion in individual cases.[108]

In the context of prosecution, independence captures this notion of fiduciary expertise and effectiveness. Prosecutorial independence is preserved to ensure that expert notions of fairness and proportionality win out over a segment of the population's desired outcome. It is not hard to see how the opposite—outcomes dictated by a certain group's personal or policy goals—would undermine the public's interest in justice broadly defined.[109] Where direct control leaves off, norms and traditions step in as signals to the public that prosecutors are indeed pursuing justice, rather than their own or a faction's personal, political, or ideological agenda. Discretion serves two purposes. First, it allows a prosecutor to pursue justice even when groups within the beneficiary might disagree about what justice entails. Second, it works to capture prosecutors' expertise, which, like that of judges, lies in their ability to apply law, norms, and equitable notions to individual cases, a complex process involving professional judgment not easily reduced to rules or even guidelines.[110]

The fiduciary theory of prosecution holds that as public officials, elected prosecutors owe duties of loyalty and care to the public.[111] Prosecutors fulfill this

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106. For a discussion of the prosecutor's client, *see* Green, *supra* note 84, at 633–37.

107. In two related articles, we argue that without prosecutorial independence and discretionary decisions made in accord with expert professional norms, a powerful political faction or individual could hijack the criminal justice system for personal or political gain. Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018) (arguing that prosecutorial independence is rooted in our history and constitutional system) [hereinafter *Can the President Control the Department of Justice*]; Bruce A. Green & Rebecca Roiphe, *May Federal Prosecutors Take Direction from the President?*, 87 FORDHAM L. REV. 1817 (2019) (arguing that following orders from a political actor can violate rules of professional conduct).

108. Green & Roiphe, *supra* note 82, at 823–36.

109. *Can the President Control the Department of Justice*, *supra* note 107, at 4 (discussing the deep-rooted tradition and persistence of independence in our federal system); Green & Roiphe, *supra* note 82, at 846.

110. Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. L. ETHICS 259, 269–70 (2001) (explaining that it would be hard to draft guidelines to cover prosecutorial decisions); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URBAN L. J. 553, 559 (1999) (arguing that prosecutors' discretionary decisions necessarily involve judgment, something that cannot be reduced to rules or guidelines).

111. Green & Roiphe, *supra* note 82, at 806. The theory builds on prior scholarship developing a fiduciary theory and applying it to judges and other public officials. *See, e.g.*, Miller & Gold, *supra* note 99, at 565 (discussing a kind of fiduciary relationship in which the fiduciary is charged with pursuing abstract interests

obligation principally by pursuing justice in its most general sense, not by pursuing a particular constituency's public-policy objective.[112] This means, in part, that "prosecutors are supposed to make discretionary decisions in individual cases in accordance with the law and with norms and traditions that are relatively constant over time and that reflect generally applicable law enforcement considerations and principles (such as proportionality and equal treatment)."[113] Elected prosecutors can "defer, or give weight, to public preferences regarding broad questions of criminal justice policy,"[114] but they cannot relinquish their discretion without raising alarm bells.[115] Some fiduciary theorists refer to this as the duty of deliberative engagement,[116] but this Article argues that some fiduciaries, such as a guardian for a minor, are engaged for their ability to resolve complex, fact-specific questions. In other words, part of what makes some fiduciaries effective is their ability to exercise judgment. In the case of prosecutors, this requires ad hoc decisions in individual cases.[117]

By releasing a memorandum listing categorical policies on the first day of his tenure as Manhattan District Attorney,[118] Alvin Bragg signaled to many citizens of the state of New York that he was discounting their concerns entirely. Rather than allowing his progressive conception of justice to inform his discretionary judgment, he foreswore the exercise of judgment. This is inconsistent with the fiduciary obligation to weigh and consider the interests of all members of the public, the prosecutor's beneficiary, which is invariably a complex group. It is also, at least at times, inconsistent with the fiduciary obligation to pursue basic criminal justice goals. This does not mean that Bragg could not obtain the same outcome as his blanket policies in most cases, but the announcement itself was destabilizing and delegitimizing because it appeared to be an explicit rejection of any views that did not accord with those of his supporters. These contrary views were not those of a fringe group or merely speculative; many of these views were clearly reflected in the legislative decision to enact certain laws that Bragg chose not to enforce.

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instead of the interests of a person); Leib, Ponet & Serota, *supra* note 98, at 704; Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

112. Green & Roiphe, *supra* note 82, at 823–36.

113. *Id*. at 838.

114. *Id*. at 841.

115. *Infra* Part II.B.3.

116. Some scholars who write on fiduciary theory have argued that in addition to the duties of loyalty and care, there is a duty to deliberate. Leib, Ponet & Serota, *supra* note 98, at 704; Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820, 1829–34 (2016). While there is no consensus on this additional fiduciary obligation, prosecutorial discretion involves just this sort of deliberation. *See* Evan J. Criddle & Evan Fox-Decent, *Keeping the Promise of Public Fiduciary Theory: A Response to Leib and Galoob*, 126 YALE L.J. F. 192, 192–204 (2016) (arguing that there is no such requirement). While a blanket policy may involve deliberation in the first instance, it precludes thoughtful analysis as facts and circumstances change.

117. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010) (arguing that prosecutors pursue justice in part by making "fine grained moral evaluations and distinctions").

118. *See supra* notes 58 and accompanying text.

Why was Manhattan DA Robert Morgenthau, who opposed the death penalty, able to maintain authority over capital cases, when his counterparts in the Bronx and Orlando were not?[119] Morgenthau, unlike the others, did not relinquish his discretion. He did not announce that the portion of the public that believes in the death penalty, and that enacted laws calling for the death penalty, would be ignored outright. Instead, his office seemed to (and perhaps did) consider each death penalty eligible case in light of the particular facts involved as well as relevant empirical understandings justifying skepticism about its legitimacy (e.g., bias in its application, its inability to deter future violent crimes, and racial imbalances). The office then determined not to seek the death penalty in the particular case before it. By making individual discretionary decisions, Morgenthau avoided backlash because members of the public were reassured that even if their desired outcome never eventuated, the process was being conducted according to expert norms and traditions, and thus their views were being considered and basic criminal justice values were being preserved.

Prosecutors as fiduciaries, like corporate managers, draw on expertise to resolve questions that might invite controversy if they polled members of the beneficiary about how best to achieve their goal. As a comparison, shareholders assume, and the business judgment rule ensures, that corporate officers draw on their expertise to determine how best to maximize profit. The public makes a similar assumption about prosecutors. Prosecutors' expertise lies in their ability to apply law to fact and to make nuanced judgment calls based on complex factors. If they do not engage in this work, members of the public will no longer rest assured that prosecutors are not simply favoring one group's preferred outcome over another's.

3. Fiduciary Theory, Discretion, and Accountability

The need for discretion within the fiduciary framework translates into a careful balance of accountability. Although courts and the public can help monitor a fiduciary, at a certain point, monitoring costs are too high, and the beneficiary relies on professional character and norms to ensure that the fiduciary is fulfilling its duties of care and loyalty to the entire beneficiary.[120] Direct supervision risks both hobbling the effectiveness of the fiduciary and capture by a particular segment of the population.[121] Because direct control is not an option and discretion is a necessary component of the relationship, accountability depends, in part, on the professional character of individual fiduciaries.[122] Norms and traditions of practice help

119. *See supra* notes 61–62 and accompanying text.

120. Green & Roiphe, *supra* note 82, at 843–55.

121. Criddle, *supra* note 111, at 127. We have discussed the implications for justice of such capture by one segment of the population at the expense of the broader public interest; *see generally Can the President Control the Department of Justice*, *supra* note 107 (outlining the dangers when the President exercises control over federal prosecutors).

122. Criddle, *supra* note 111, at 133.

cultivate character and ensure that the fiduciary warrants the trust of, and is in fact serving the interest of, the beneficiary as a whole.[123]

This is not to say that outdated or unjust approaches cannot be supplanted while still protecting these fundamental values. The process of revising norms is an integral part of the evolution of expert knowledge, but revision itself should be done according to the norms of practice.[124] This process helps ensure that prosecutors are not subject to whims, fads, or biases.[125] Prosecutors ought to depart from these traditions rarely, and courts can require them to articulate reasons for doing so.[126] Fiduciary theory helps us understand that adhering to these norms is one of the key mechanisms of holding prosecutors accountable and, in the context of prosecution, ensuring that justice is achieved both in individual cases and over time.[127]

The fiduciary's exercise of discretion in keeping with professional and expert norms assures the public that the fiduciary represents its broad interest in justice.[128] The concern is that the fiduciary will act opportunistically, taking advantage of the public trust to engage in self-dealing or to confer a particular benefit on some preferred group.[129] Much of the literature on prosecution has highlighted the ways in which prosecutors have betrayed this trust.[130] While imperfect, of course, fiduciary

123. *Id*.

124. For example, the Department of Justice publishes a manual with procedures and guidelines for federal prosecutors, which can be and is revised periodically. U.S. Dep't of Just., Just. Manual (2018), https://www.justice.gov/jm/justice-manual ("This is the current and official copy of the *Justice Manual* (JM). The JM was previously known as the United States Attorneys' Manual (USAM). It was comprehensively revised and renamed in 2018. Sections may be updated periodically. In general, the date of last revision will be noted at the end of each section.").

125. Bibas, *supra* note 117, at 370; Bruce A Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. LAW REV. 463, 466–67 (2017) (arguing that conflicts are endemic to prosecutorial decision making and that professional norms and judgment are critical in ensuring impartiality).

126. For an explanation of how courts regulate prosecutors, see Bruce A. Green and Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 400–03 (2002). For a discussion of state regulation of prosecutors, see Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis,* 14 OHIO ST. L. REV. 143, 155–63 (2016).

127. Green & Roiphe, *supra* note 82, at 843–55.

128. Criddle, *supra* note 111, at 127; Leib, Ponet & Serota, *supra* note 98, at 729 (arguing that the fiduciary relationship will fail if "legal micromanaging is excessive" and noting that the relationships function because fiduciary norms are deeply rooted).

129. Green & Roiphe, *supra* note 125, at 471–72 (arguing that the central concern with prosecutors' conflicts of interest is ensuring impartiality); Green & Roiphe, *supra*, note 82, at 831 (explaining how law, professional conduct rules, and norms governing prosecutorial conflicts of interest help ensure that prosecutors abide by their duty of loyalty to the public).

130. *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874–84 (2009) (outlining prosecutors' adjudicative and enforcement powers and arguing that the accumulation of these powers is problematic); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 395–448 (2001); Green & Zacharias, *supra* note 126, at 469–78 (discussing the pros and cons of various methods for regulating prosecutorial conduct); Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 396–99 (2017) (explaining prosecutors' role, along with the complicity of the legislature, in expanding the incarceration rate).

law seeks to deter individuals from acting badly and hold them accountable when they do. The need for external control either by the public directly or an appointed monitor, however, must be balanced with the need to preserve the fiduciary's ability to act effectively and the need to avoid capture by one segment of the beneficiary to the detriment of the rest.[131]

Discretionary decision making and the norms that guide it signal that partisan political considerations and other biases have not usurped the search for justice in its most basic form.[132] By replacing their own individualized discretion with blanket policies, progressive prosecutors remove one mechanism of accountability to the public. It is unsurprising that this then leads to a crisis in legitimacy.

The literature on American prosecutors tends to treat their discretion as an obstacle to accountability, but fiduciary theory instructs, to the contrary, that discretion is critical to hold the fiduciary accountable to the public.[133] By exercising discretion, prosecutors draw on expertise and professionalism to serve the entire public's interest in justice. Without it, the public might reasonably suspect that prosecutors are serving a strong or powerful segment of the citizenry instead. Integrating discretion with residual control, such as judicial and popular oversight, is the only way to safeguard the beneficiary's interest.[134] Thus, efforts to eradicate discretion disrupt this careful balance.

Of course, professional norms alone are not enough to reassure the public that prosecutors are abiding by their duties of loyalty and care. Like other fiduciaries, prosecutors are held accountable by residual control (for example, the public enters the process through both the grand and petit jury processes as well as elections) and limited judicial oversight in addition to the enforcement of professional norms.[135] This arrangement balances the need for oversight with the public's desire to accomplish a shared goal with efficiency and expertise.[136] In other words, the fiduciary relationship allows the public to take advantage of prosecutors' expertise while avoiding the inevitable internal conflicts and inexperience that would govern if the public exercised more direct control.[137]

Many progressive prosecutors have dedicated themselves to tracking data regarding their new policies.[138] This is in keeping with the duties of loyalty and care and assists external monitors and the public in their supervision. If the policies are not effective in pursuing stated goals of racial justice and decarceration, these

131. Green & Roiphe, *supra* note 82, at 849; Criddle, *supra* note 111, at 128–35.

132. We have argued previously that prosecutorial independence and the norms of prosecutorial decision-making reassure the public that a particular partisan political interest has not taken hold of the federal criminal justice system. *Can the President Control the Department of Justice*, *supra* note 107, at 70.

133. Green & Roiphe, *supra* note 82, at 852-54; Criddle, *supra* note 111, at 163–64.

134. Green & Roiphe, *supra* note 82, at 843–55.

135. *Id.*

136. *Id.*; Criddle, *supra* note 111, at 127.

137. Green & Roiphe, *supra* note 82 at 843–55; Criddle, *supra* note 111, at 127.

138. *See* Levin, *supra* note 4, at 1437; Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 690 (2020).

prosecutors promise that they are committed to revisiting their methods.[139] While some traditional prosecutors have collected data and used it to make their work more effective,[140] doing so is not a common feature of traditional prosecution.

In this way, progressive prosecutors have been more transparent to the public. A significant part of prosecutors' work is necessarily conducted in private. The grand jury, for instance, is secret by design. But aspects of prosecutors' decision making can be made public and this aids in both trust and accountability, two fundamental aspects of the fiduciary relationship.[141] Insofar as progressive prosecutors are collecting data about the effectiveness of their policies and making the data public, they are fulfilling their duties of care and facilitating political accountability.

Announcing blanket policies is, in a certain way, in keeping with this promise of transparency and may seem to some as part of an effort to increase trust and accountability. This assumes, however, that fiduciaries are held accountable only through the ballot box. But prosecutorial discretion is just as critical a part of a fiduciary's accountability to the public.[142] Prosecutorial expertise—applying law, fact, and traditional criminal justice concerns as well as nuanced judgment to individual cases—is what justifies this discretion. Because announcing categorical policies comes at the expense of discretion and ad hoc decision making, it alters the balance of fiduciary accountability in a way that destabilizes progressive prosecutors' offices rather than fostering public trust.

Along with public monitoring and judicial oversight, expertise helps align the prosecutor's goal with the broad interest in pursuing justice.[143] By way of comparison, the business judgment rule in corporate fiduciary relationships obtains this sort of balance by allowing shareholders to take advantage of corporate officer

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139. *See, e.g.*, Steve Schmadeke, *Kim Foxx Promises "New Path" of Transparency as Cook County State's Attorney,* CHI. TRIB. (Dec. 1, 2016), https://www.chicagotribune.com/news/breaking/ct-kim-foxx-states-attorney-met-20161201-story.html; L.A. CNTY. DIST. ATT'Y'S OFF., YEAR IN REVIEW, DECEMBER 8, 2021, at 2–3 (2021), https://da.lacounty.gov/sites/default/files/pdf/YIR-2021-b.pdf (describing district attorney's office as a "learning organization" that "us[es] data to shape its approach").

140. Green & Roiphe, *supra* note 4, at 753. They are not alone in doing so, but are more consistently dedicated to this endeavor. *See* Chip Brown, *Cyrus Vance Jr.'s Moneyball Approach to Crime*, N.Y. TIMES MAG. (Dec. 3, 2014), https://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html (describing Vance's collection and use of data to inform prosecution in the Manhattan District Attorney's Office). Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019), https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county (noting that Chicago's Kim Foxx "released six years of data" regarding felony prosecutions which showed that "she turned away more than 5,000 cases that would have been pursued by" her predecessor, "mostly by declining to prosecute low-level shoplifting and drug offenses and by diverting more cases to alternative treatment programs"); Catherine Elton, *The Law According to Rachael Rollins*, BOS. MAG. (Aug. 6, 2019), https://www.bostonmagazine.com/news/2019/08/06/rachael-rollins/ (reporting that Suffolk County DA Rachael Rollins "hired a data scientist to analyze past performance and measure the impact of new policies, something she says no other DA in the state is doing").

141. *See* Wright, Yates & Hessick, *supra* note 28, at 125–26.

142. Green & Roiphe, *supra* note 82, at 843–55.

143. Criddle, *supra* note 111, at 127; Leib, Ponet & Serota, *supra* note 98, at 706.

expertise while retaining residual control and oversight.[144] The prosecutor's expertise is not in criminology but rather in making discretionary decisions in individual cases—applying law to fact and using judgment to best achieve proportionality and fairness in prosecution.[145] Like a guardian, prosecutors are trusted as fiduciaries in part because of their ability to exercise judgment to resolve nuanced, case-specific questions that involve factual, legal, and moral considerations.[146] Thus, prosecutorial accountability rests on discretionary decisions exercised in light of professional norms, just as much as external oversight.[147] While the public cannot monitor prosecutors' individual discretionary decisions, the fact that these decisions are being made, presumably in accord with professional norms and values, assures the public that the process has not been captured for the benefit of the prosecutors themselves or a faction of the public.[148]

4. The Result of Blanket Policies and Other Restrictions on Discretion

When progressive prosecutors have announced a blanket policy that they will never charge certain crimes or seek certain sentences, other political actors and segments of the population have questioned whether it is expertise that governed these decisions or something more akin to legislative decision making.[149] After his memo announcing blanket charging policies was met with such significant push-back, Bragg backtracked, circulating a memo to his staff, which he also made public, stating, "This Office will continue to make case decisions that serve safety, accountability, fairness, and justice, . . . You were hired for your keen judgment, and I want you to use that judgment – and experience – in every case."[150] Bragg intuited that to reassure the public, as well as prosecutors within his office, he needed to invoke discretion. He did not suggest that he would be tougher on crime, but rather that he would approach criminal cases in a traditional way. When the judiciary reacted negatively to Gascón's blanket policy, he too invoked discretion.[151] This is because prosecutorial discretion exercised in light of professional norms is a fundamental part of prosecutorial accountability. Without it, the public and courts are right to be concerned that the prosecutor is not functioning as a fiduciary, but rather as a political representative of a segment of the public.

144. Auerbach v. Bennett, 393 N.E.2d 994, 1000–01 (N.Y. 1979) (explaining the business judgment rule); Leib, Ponet & Serota, *supra* note 98, at 736.

145. Bibas, *supra* note 117 at 370; Griffin, *supra* note 110, at 269–70; Levenson, *supra* note 110, at 559.

146. *See supra* note 89–92 and accompanying text (explaining that some fiduciary discretion is justified because of the fiduciary's nuanced judgment); Criddle, *supra* note 111, at 126–28.

147. Green & Roiphe, *supra* note 82, at 843–55.

148. Criddle, *supra* note 111, at 126–27.

149. *See supra* Part I.

150. Gwynne Hogan, *Bragg Walks Back Some Stances in Maligned Policy Memo amid Pressure*, GOTHAMIST (Feb. 4, 2022), https://gothamist.com/news/bragg-walks-back-some-stances-maligned-policy-memo-amid-pressure.

151. See *supra* notes 68–72 and accompanying text.

Fiduciary theory cannot tell us when a prosecutor should charge a particular individual, nor can it dictate what crime ought to be charged in any given context. It cannot calculate the proper sentence to seek, nor can it determine whether it is better to be tough on crime or not. But fiduciary theory offers guidance on how to make decisions, namely, through the exercise of individualized discretion.[152] The process of discretionary decision making helps ensure that prosecutors are promoting justice at the highest level of generality, meaning that innocent people are not convicted, public safety is protected, and the rights of the accused are secure. Further, it reassures the public of this, so that the public will respect outcomes for the most part even when they would have preferred a different result. Finally, individualized discretion ensures that all relevant facts are considered and weighed and that all relevant public interests, which may be in tension with each other, are considered.

Blanket charging policies are therefore problematic whether they are invariably harsh or lenient. For instance, under recent Republican administrations, the Department of Justice adopted a policy requiring subordinate prosecutors to bring the most serious charges and pursue the harshest penalties possible.[153] When the Biden Administration's Acting Attorney General rescinded that policy and returned to that of the Obama Administration, he explained that his goal was "to ensure that decisions about charging, plea agreements, and advocacy at sentencing are based on the merits of each case and reflect an individualized assessment of relevant facts."[154] Progressive prosecutors' blanket policies—for example, forbidding subordinate prosecutors from bringing simple marijuana possession charges—constrain discretion in a similar fashion to the Republican prosecution policy. Of course, in any individual case, when undertaking an individualized assessment, a federal prosecutor who favors aggressive criminal law enforcement might ultimately elect to bring harsh charges because, in her view, the facts of the case warrant them. Likewise, a prosecutor with progressive values might make individual decisions not to bring charges against individuals who possessed a small amount of marijuana for personal use, given the relevant facts and the weight that the prosecutor ascribes to relevant law enforcement interests and public policy considerations.

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152. Green & Roiphe, *supra* note 82, at 805–14.

153. Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Just., to All Fed. Prosecutors 2 (Sept. 22, 2003), https://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm. Eric Holder changed the policy, stating that prosecutors should ordinarily charge the most serious crime but that they should do an individualized analysis of each case. Memorandum from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to All Fed. Prosecutors 2 (May 19, 2010), https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf. The policy reverted to a similar stance as Ashcroft's under the Trump administration. Memorandum from Jeff Sessions, Att'y Gen., U.S. Dep't of Just., to All Fed. Prosecutors 1 (May 10, 2017), https://www.justice.gov/archives/opa/press-release/file/965896/download.

154. Memorandum from Monty Wilkinson, Acting Att'y Gen., U.S. Dep't of Just., to All Fed. Prosecutors 1 (Jan. 29, 2021) https://www.justice.gov/ag/page/file/1362411/download.

One might argue that, if the end result is the same, it does not matter how the respective prosecutors reach their decision and at least progressive prosecutors are transparent about their goals. Fiduciary theory offers a response. First, requiring prosecutors to consult traditional concerns like deterrence, proportionality, and fairness (treating like cases alike), will constrain their actions. Like law, these norms restrict the range of permissible results, while not dictating one specific choice. Second, the means of reaching the result are important in themselves. They provide assurance to the public that prosecutors are considering their interest in justice in the broadest terms, the terms upon which everyone can agree. In the language of fiduciary theory, the process holds prosecutors accountable by ensuring that they are seeking justice rather than simply achieving one constituency's proffered outcome. They also justify the prosecutor's power by communicating to the public that it is getting something in return for its vulnerability, namely, the expertise of a prosecutor who is trained in making complex judgments based on law and fact.

So, where have progressive prosecutors gone wrong? It is, of course, impossible to determine exactly how individual decisions are made within progressive prosecutors' offices, and their offices may be approaching many cases in the same way as their more traditional colleagues. The blanket policies discussed in Part I,[155] however, send a message to the public that these prosecutors are doing something different from what previous prosecutors have done. They are constraining their own choices, not because of the traditional concerns about proportionality, accuracy, deterrence, and fairness—which all necessarily involve a case specific analysis—but seemingly to serve a particular constituency's desired outcome. This understandably leaves other constituents with the concern not only that their own public policy views are unrepresented (the losing constituency must always accept this fact) but rather that their interests are being entirely ignored—that the fiduciary has chosen to protect one group within the complex beneficiary at the expense of another and possibly even at the expense of basic criminal justice concerns.

While prosecutors are charged with enforcing the criminal laws, they have an equally important obligation to ensure the just outcome, to protect the rights of the accused, and to preserve the integrity of the procedure.[156] All of this calls for the exercise of judgment. A comparison to the work of judges helps make the point and is appropriate since prosecutors are often seen as quasi-judicial figures.[157] Imagine that a judge declared that any time an individual is convicted of a crime, the judge will impose the harshest (or most lenient) sentence possible regardless of the position of the local prosecutor, the specific facts of the case, or characteristics

155. *Supra* Part I.C.

156. *Supra* note 84.

157. Yaselli v. Goff, 12 F.2d 396, 404 (2d Cir. 1926) (referring to the United States Attorney as a "quasi-judicial" officer); Green & Zacharias, *supra* note 7, at 839–40 (using the traditional notion of prosecutors as quasi-judicial officers to develop a notion of prosecutorial neutrality).

of the defendant. Like prosecutors, judges are fiduciaries.[158] They serve the public by protecting its interest in justice. Even if this judge's constituency were in accord, it would be inappropriate for the judge to announce in advance that the judge would no longer consider traditional factors in imposing a sentence. While prosecutors differ from judges, they too have a fiduciary responsibility to make complex judgments that account for all relevant facts and interests. The process of investigating and prosecuting crime, like judging, is a public function, and the prosecuting official serves the entire population, not just one faction. The norms, traditions, and practices of the office reassure the population that this is, in fact, the case. By announcing blanket policies on issues like charging, bail, and sentencing, progressive prosecutors have abdicated this role.

III. TOWARD A FIDUCIARY THEORY OF PROGRESSIVE PROSECUTION

So far, we have largely drawn on fiduciary theory to critique progressive prosecutors' practices. But implicit in our critique is an affirmative vision of how, given fiduciary theory, progressive lawyers should conduct their work as prosecutors. First, decisions about whether to bring charges, what charges to bring, what alternatives to offer, and the like, are complex, and should be made on an individual basis, as an exercise of discretion, balancing all the relevant considerations.[159] There are many other ways in which progressive prosecutors can legitimately do things differently from their traditional counterparts, but individualized discretion is an essential feature of prosecution, regardless of one's political, policy, or philosophical preferences. Second, in making individualized decisions, progressive prosecutors should take account of the full range of their constituents' public-policy views. Third, to be accountable to the public, progressive prosecutors should be transparent about how, in a general sense, they make individualized decisions.

Fiduciary theory helps explain the extreme pushback against progressive prosecutors. On some level, the public and other political actors experience the progressive prosecutor's approach as a betrayal. The theory also offers a roadmap for progressive prosecutors to create more lasting change within their offices. If they adhere to fiduciary obligations, they can implement their vision of justice and imprint it on the culture of the office in an enduring way.

Adhering to fiduciary obligations will not preclude the kind of change that progressive prosecutors are elected to make, though it may slow down the rate of change. Nor is it incompatible with progressive prosecutors' values. Individualized exercises of discretion do not presuppose any particular set of values, criminal justice philosophies, political preferences, or empirical assumptions. In making ad hoc, fact-intensive decisions, progressive prosecutors can incorporate

158. *See generally* Leib, Ponet & Serota, *supra* note 98.

159. We do not address progressive prosecutors' efforts to achieve law reform by endorsing legislative change or filing amicus briefs, or by seeking public financing for social programs that might reduce crime or address other social problems, but focus on their core function of decision making in individual cases.

their own values, including those they articulated in campaigning for office. Considering concerns about rising crime does not mean that progressive prosecutors have to resort to traditional ways to combat it.

Although progressive prosecutors' views should not dictate inflexible declination and charging policies, these views should be the basis of articulable principles—articulated both internally and publicly—that will guide complex prosecutorial decision making. For example, progressive prosecutors can legitimately give effect to many of the principles articulated by the nonprofit organization, Fair and Just Prosecution, which supports progressive prosecutors.[160] To begin with, they can express a commitment to avoiding the prosecution of innocent people, and toward that end, progressive prosecutors could commit to the principle that "weak cases [should] be declined or dismissed."[161] And they could implement this principle through procedures such as early, rigorous screening of evidence.[162]

Likewise, progressive prosecutors can articulate principles governing the decision whether to prosecute those whom they believe to be demonstrably guilty—for example, the broad principle that prosecutorial power should be used only when necessary and to the minimal extent necessary. Further, they could give effect to this general principle by recognizing 1) that there is no imperative to charge all offenders (much less all misdemeanor offenders), to bring the harshest charges, or to seek the harshest penalties;[163] 2) that it is preferable, where reconcilable with the interest in public safety and other public interests, to divert offenders out of the criminal process (e.g., to enable them to obtain mental health treatment or drug treatment or to participate in a restorative justice program);[164] and 3) that charging decisions should take account of the collateral consequences of a conviction, including immigration consequences.[165] Progressive prosecutors could also express respect for fair process and for putative defendants' procedural rights by refraining from bringing undeservedly harsh charges to induce defendants to plead guilty,[166] or by refraining from exploiting evidence obtained by illegal or discriminatory methods.[167] In determining the severity of charges or proposed sentences, prosecutors making individualized decisions could take account of a range of considerations bearing on the extent of the offender's blameworthiness, including the offender's socioeconomic or educational advantages or disadvantages.[168] And they could prioritize allocating limited prosecution resources to the most serious

160. FAIR AND JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf.

161. *See id.* at 5.

162. *See id.*

163. *See id.* at 5, 10–11.

164. *See id.* at 4, 7–8, 12–13.

165. *See id.* at 5, 11–12.

166. *See id.*

167. *See id.* at 16.

168. *See id.* at 5.

wrongdoing. All these considerations and others, which might currently explain progressive prosecutors' blanket declination policies, can be brought to bear in making individualized decisions.

Progressive prosecutors may currently be applying principles such as these, if only in an implicit way, when they make decisions in serious felony cases that are not covered by blanket policies. But fiduciary theory would encourage progressive prosecutors to make these principles explicit, so that they will be more consistently applied internally, and to publicize them, so that prosecutors can be held publicly accountable for their application. Indeed, fiduciary theory would encourage progressive prosecutors to articulate and publicize their decision-making criteria with a greater level of specificity than the Fair and Just Prosecution principles. For example, rather than simply pledging not to bring "weak cases," progressive prosecutors should state explicitly how convincing the evidence must be—e.g., strong enough to persuade the prosecutors themselves beyond a reasonable doubt and likewise to persuade a jury.[169] Even more specifically, progressive prosecutors can articulate how they will apply these principles—for example, how much weight, if any, they will give to the kinds of evidence that experience has shown to be unreliable. For example, when will they rely on eyewitness testimony, on the testimony of a jailhouse informant, on the testimony of accomplices, or on testimony procured by promises or threats?

Progressive prosecutors' challenge is not how to incorporate progressive values into their own ad hoc decision making but how to give effect to their values when many or most discretionary decisions are made by subordinates who may not share them. This is particularly difficult in large urban offices where the elected prosecutor cannot supervise many cases but can, at best, provide guidance to supervisors and line prosecutors. Progressive prosecutors' blanket charging policies are designed in part to ensure that progressive values will be implemented, and to reassure constituents of that. The blanket policies bind subordinates who might otherwise not be trusted to make decisions in the same way the elected prosecutor would. The problem is that they bind too tightly, excluding a wide range of relevant decision-making criteria.[170]

Serving as a fiduciary means allowing prosecutors in the office to make individualized decisions. If the elected prosecutor must delegate decision making to subordinates, subordinates' discretion should be guided, not circumscribed. They, too, are fiduciaries serving the public interest in justice. Further, the prosecutor assigned to the case typically has a better understanding of the facts, which is a necessary component of prosecutorial decisions, and therefore a necessary

169. *See generally* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497–501 (2009) (describing range of approaches that prosecutors might take, as gatekeepers, to scrutinize the evidence to avoid prosecuting innocent defendants).

170. For a discussion of the risks and advantages of line prosecutors who do not share the same values as the elected official, *see generally* Ouziel, *supra* note 94 (discussing how this dynamic in times of political change affects legitimacy and democratic responsiveness).

component of prosecutorial accountability under fiduciary theory. Traditional prosecutors might set examples, offer general principles, and review or make some decisions, especially in high-profile cases, but variation is unavoidable. Progressive prosecutors, who want decisions to be made consistently in accordance with progressive principles, have a pedagogic obligation to articulate and justify relevant principles, to transmit them within the office, and to explain how they apply. Subordinate lawyers will likely understand that in our democratic system, the elected prosecutor has the authority and responsibility to decide, within the bounds of the law, how decisions will be made. They should accept that there is a range of acceptable views on public policy, and that the elected prosecutor decides how to take account of them. As a general matter, subordinates should be open to following the elected prosecutor's lead. But leadership should not mean publishing a list of inflexible rules for deciding recurring categories of cases because doing so signals to the public that prosecutors have relinquished a key mechanism of accountability and signals to subordinate prosecutors that the facts of the case may not matter.

To the extent subordinate prosecutors may resist, it will likely be because they are not persuaded—that is, because they have different values, criminal justice philosophies, and empirical assumptions, or simply because they have grown used to doing things in a different way that seems better to them. Rather than imposing blanket policies, elected prosecutors should engage in persuasion. They should have a discussion with other lawyers in which they explain and justify their views—and in which, presumably, they are open to others' views. Progressive prosecutors, to the extent their views make sense, should generally be able to bring subordinate lawyers around. And progressive prosecutors should be open to changing their own minds if their views cannot stand up to evidence and argument.

The public may not be able to articulate the principles of fiduciary theory, but on some level, it grasps the basic features of the relationship. Thus, adhering to the fiduciary role offers a way for an office not only to make better decisions in individual cases, but also for progressive prosecutors to influence the culture of their offices in the long term.[171] Blanket declination policies are easily opposed by competing candidates and easily superseded by future office holders. But decision-making processes based on well-elaborated, persuasive principles may have lasting impact on subordinate prosecutors and those whom they later train and supervise.

Those who support the progressive prosecution movement should embrace this approach. Their objective should not be to elect a progressive prosecutor who announces new office policy and practices that are transient, resisted by subordinate prosecutors, impeded by judges and other office holders, and targeted in the media. Particularly in a large urban office that depends on subordinate prosecutors to implement office policy, the elected prosecutor must win subordinate

171. Changing office culture and practice has been identified as an objective of this century's reform-oriented prosecutors. *See* FAIR AND JUST PROSECUTION ET AL., *supra* note 160, at 14–15.

prosecutors' acceptance of policy changes, so that prosecutors will implement them, not subvert them. Ideally, the elected prosecutor will make changes that are lasting, which requires that they win acceptance not only by current subordinate prosecutors but also by future elected prosecutors. That, in turn, suggests the importance, in general, of winning acceptance by judges, other public officials, and the public.

CONCLUSION

Fiduciary theory offers a way to understand how central individualized discretionary decision making is to our system of prosecution. Critics have targeted prosecutorial discretion as the source of corruption and the cause of mass incarceration and racial injustice. But fiduciary theory instructs that it is not discretion itself that is to blame; it is the application of discretion in a particular way. Discretion itself is essential to the legitimacy of the prosecutor's role. It helps ensure that every citizen's basic interest in justice is preserved, even when the views of one segment of the population are better represented by the elected official. It allows the public to take advantage of prosecutorial expertise as well as prosecutors' experience in exercising judgment in individual cases.

To be sure, the academic movement behind progressive prosecution is profoundly skeptical of neutral expertise. Regardless of what one thinks of this theoretical stance, it cannot be grafted onto a role that has historical roots in a fiduciary obligation without creating massive pushback. Without placing blind faith in expertise, fiduciary theory recognizes that expertise plays a significant and foundational role in private and public life and that certain public officials, like prosecutors, can be held accountable only through a balance of mechanisms, including adherence to professional norms and traditions.

By preserving an individualized decision-making process, progressive prosecutors will not avoid criticism entirely, but they will change the tenor of the pushback. Bragg and Gascón both invoked discretion as a response to the resistance of the public and courts, demonstrating that discretion does not have to serve as a shield for bad policies; it can serve to protect good ones instead. Rather than retreating to the importance of discretion, progressive prosecutors should lead with it, and if they do, they will be able to implement their values and promote their ultimate objectives in a way that will win greater acceptance and better withstand challenges like rising crime. While employing a conventional decision-making process, their office's decisions would be less harsh than those of many traditional prosecutors because prosecutors would bring different values and empirical premises to the process. This approach would ideally enable progressive prosecutors to make lasting change.