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Progressive Prosecutorial Accountability

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PROGRESSIVE PROSECUTORIAL ACCOUNTABILITY

*Jennifer E. Laurin**

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INTRODUCTION

Two dynamic forces are currently reshaping the landscape of prosecution in the United States. One is the rise within the last decade of the “progressive prosecutor” movement, particularly among state and local prosecutors.¹ The movement emerged against the backdrop of longstanding criticism of the prosecutorial profession as a site of unchecked power wielded in a manner that has predictably driven our country’s carceral explosion.² From criticism

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1. The quite distinctive dynamics of internal and external control of unelected federal prosecutors are not the subject of this Essay.

2. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 85–89 (2010) (criticizing the outsized role that prosecutors play in plea-bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–40 (2011) (discussing the political incentives of prosecutors); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM*

of virtually unfettered discretion to select among or decline charges, to prosecutors' outsized influence over pretrial release and sentencing, to instances of flouting what ethical and constitutional rules do them, calls to reign in prosecutorial power have long been a mainstay of the academic literature and advocacy circles.³ Progressive prosecution has taken a different tack, however, hoisting the profession on its own petard by announcing a commitment to exercising broad discretion in a manner that reexamines charging, bail and sentencing practices, and other practices in a manner aimed at curbing punitive excess and racial disparities in the criminal legal system.⁴ Common progressive prosecutor policy priorities include expanding diversion programs, reducing pretrial detention recommendations and use of cash bail, deprioritizing prosecution of certain non-violent offense, and creating conviction integrity units to review potential wrongful convictions.⁵

A second, more recent and still-emergent force also joins the chorus of concern for prosecutorial power, but in a quite different key. For perhaps the first time in modern memory, political forces have aligned to enact measures to reign in prosecutorial authority and hold prosecutors accountable for misuse of their power. The mechanisms are diverse. In Iowa, lawmakers enacted legislation defunding any district attorney's office that took "any action" that "discourages the enforcement of state, local, or

127–59 (2017) (identifying prosecutors as the most powerful actor in the criminal legal system).

3. See, e.g., ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 19–41 (2009) (discussing prosecutors discretion in charging decisions and the associated power this allows them to wield); EMILY BAZELON, *CHARGED: THE MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* xxv–xxxi (2019) (identifying prosecutors as the actor most capable of curbing mass-incarceration); Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 *CARDOZO L. REV.* 1943 (2010) (discussing the incentives that lead to failures of prosecutorial disclosure).

4. See, e.g., FAIR & 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 [<https://perma.cc/9XK5-MDAK>]. Law professor Benjamin Levin has written helpfully and at length about the indeterminacy — at times vacuousness — of the “progressive prosecution” label, an assessment that I share. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 *MINN. L. REV.* 1415, 1417 (2021). For present purposes, however, it is sufficient and, I believe, accurate, to characterize at least some (mostly newly) elected prosecutors as holding themselves out as pursuing substantial criminal legal reform through their prosecutorial role. In Professor Levin's parlance, I am concerned here with “proceduralist prosecutor[s],” “prosecutorial progressive[s],” and “anti-carceral prosecutor[s].” *Id.* at 1418.

5. See generally PRERNA JAGADEESH ET AL., *A NEW GENERATION OF PROSECUTORS IS LEADING THE CHARGE TO REIMAGINE PUBLIC SAFETY* (2021), <https://www.filesforprogress.org/memos/new-generation-of-prosecutors-reimagine-public-safety.pdf> [<https://perma.cc/G4EL-MWLC>].

municipal laws.”⁶ In Utah, prosecutors are now prohibited from filing Class B or C misdemeanors if evidence in the case supports filing a felony charge.⁷ States have expanded the authority of state attorneys general to overrule a local prosecutor’s decision to decline prosecution and invoked gubernatorial power to remove prosecutors based on their charging practices.⁸ And in Georgia, legislators have created a new Prosecuting Attorneys Oversight Commission with power to “discipline, remove, and cause involuntary retirement of appointed or elected district attorneys” who engage in a range of prohibited acts.⁹ Prosecutorial accountability is having a moment.

The two forces are deeply interrelated, but in a somewhat counterintuitive and, this Essay argues, illuminating way. Politically, progressive prosecution has taken hold mostly in Democratic strongholds and has been associated with broader calls to shrink the footprint of the American criminal legal system by reform to a variety of institutions and practices beyond the prosecutor’s office itself — policing, pretrial detention practices, excessive sentencing, and so forth.¹⁰ In recent years, many critics of the American criminal legal system have included weak prosecutorial accountability — their absolute immunity from suit for misconduct in the course of prosecution being one contributor — on the list of contributors to mass incarceration, racial disparities, wrongful convictions, and other ills.¹¹ But the recent surge in energy around curbing prosecutorial authority have not

6. IOWA CODE ANN. §§ 27B.2, 5 (West 2023) (withdrawing funds from prosecutors’ offices that take “any action” that “discourages the enforcement of state, local, or municipal laws”).

7. UTAH CODE ANN. § 78A-7-105(b) (West 2023).

8. H.R. 1614, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); H.R. 9071, 112th Gen. Assemb., Reg. Sess. (Tenn. 2021).

9. H.R. 231, 157th Gen. Assemb., Reg. Sess. (Ga. 2023); *see also* Warren v. DeSantis, No. 4:22CV302, 2023 WL 345802, at *1 (N.D. Fla. Jan. 20, 2023) (describing Governor Ron DeSantis’s invocation of Florida constitutional provision to remove State Attorney Andrew Warren from office).

10. *See* Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1369–72 (2021) (describing range of broader criminal legal reforms that some progressive prosecutors have supported); Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 804–05 (2020) (observing that progressive prosecution is a phenomenon essentially limited to urban Democratic counties).

11. *See, e.g.*, INNOCENCE PROJECT, SIX REASONS WHY WE NEED PROSECUTORIAL ACCOUNTABILITY (2018), <https://innocenceproject.org/6-reasons-we-need-prosecutorial-accountability> [<https://perma.cc/XW6B-VCSR>] (connecting absolute immunity to prosecutorial misconduct); *Written Testimony Supporting Senate Bill 307, An Act Concerning Prosecutorial Accountability and Priority Given to Cases Prosecuted*, ACLU CT., https://www.acluct.org/sites/default/files/acluct_2022_written_testimony_supporting_sb_307_prosecutorial_accountability.pdf [<https://perma.cc/X3NQ-PT7J>] (last visited Apr. 30, 2023) (advocating for external oversight of prosecutors as means to curbing mass incarceration and racial disparity).

emerged from these corners. Rather, its point of origin is the political right, and it is sounding in the register of law-and-order politics and conservative political ideology in a direct challenge to the aims and tactics of the progressive prosecution movement.¹² Texas's Republican Lieutenant Governor Dan Patrick provided a representative rebuke and threat in the weeks preceding the start of Texas's 2023 legislative session, calling out district attorneys who "just won't charge anyone with a crime," and calling on state lawmakers to "figure a way within the law and within the Constitution either to move those cases to another district attorney in another county, or to recall those district attorneys"¹³ An unsuccessful bill filed in Indiana's 2022 legislative session would have created a special counsel mechanism to supersede a local prosecutor's decision not to prosecute, and its sponsor named "social justice prosecutors," including those who had pledged not to prosecute abortion-related offenses, as the bill's target.¹⁴

However bold an assault on the tradition of prosecutorial discretion in charging and non-charging, the Republican effort to tamp down on "progressive" charge declination is tactically unsurprising in a political moment where the right has reclaimed its role as champion of law and order.¹⁵ This is especially so as new crimes increasingly target conservative political red meat like abortion, voting, and gender identity; blue city prosecutors' threatened nullification of these crimes through non-prosecution now cuts to the quick of Republican political priorities. What is more interesting, however, is what the conservative move to check prosecutorial power illuminates about the progressive prosecution movement's complex relationship to accountability. That is the relationship this Essay aims to examine and assess.

While there is already ample scholarly examination of this still-nascent movement, the focus has by in large been on the substantive dimensions of what the movement has to offer: the merits, utility, or legitimacy of the

12. See Barkow, *supra* note 10, at 1375–83 (describing resistance to progressive prosecutors from other political actors).

13. Steven Pickering, *Texas Lt. Governor Upset With Large County District Attorneys*, MSN (Dec. 5, 2022), <https://www.msn.com/en-us/news/us/texas-lt-governor-patrick-upset-with-large-county-district-attorneys/ar-AA14UIIa> [<https://perma.cc/427Z-TZ3M>].

14. Kara Kenney, *Bill Aimed at "Noncompliant" County Prosecutors Moves Forward*, WRTV (Feb. 14, 2022), <https://www.wrtv.com/news/wrtv-investigates/bill-aimed-at-noncompliant-county-prosecutors-moves-forward> [<https://perma.cc/22UX-3ZSG>].

15. See, e.g., Jill Ament & Caroline Covington, *Greg Abbott Focuses On Law And Order Leading Up To Elections, 2021 Legislative Session*, TEX. STANDARD (Sept. 25, 2020), <https://www.texasstandard.org/stories/greg-abbott-focuses-on-law-and-order-leading-up-to-elections-2021-legislative-session> [<https://perma.cc/8W9Z-RC3W>]; Beth Schwartzapfel, *What Trump Really Means When He Tweets "LAW & ORDER!!!"*, MARSHALL PROJECT (Oct. 7, 2020), <https://www.themarshallproject.org/2020/10/07/what-trump-really-means-when-he-tweets-law-order> [<https://perma.cc/D45S-HA2T>].

various reforms to how adjudication of a criminal case will be approached by a prosecutor's office.¹⁶ Far less focused attention has been paid to the question of how the movement envisions accountability. This is an important oversight given the importance of accountability questions in a democratic system generally, and the centrality of the idea of accountability, or lack thereof, in debates about prosecutorial identity, efficacy, and legitimacy.¹⁷ Prosecutors, including progressive ones, wield enormous power, threaten dire and destructive consequences for peoples' lives. How and the degree to which they are checked in that work matters from the standpoint of ensuring accuracy and fairness. Moreover, prosecutors, especially progressive ones, purport to do their work in a register of not just legal but moral authority. In a democratic system, ensuring that the work is done in a manner that comports with the will of the public and not simply the idiosyncratic view of an elected prosecutor or their subordinates is a core concern. Finally, inattention to accountability will curtail the contributions of the progressive prosecution movement itself. Self-identified progressive prosecutors who neglect attention to mechanisms of accountability risk alienating those potentially aligned with their substantive goals who justifiably will demand that a new breed of prosecutor move beyond the "trust us" paradigm that characterizes the profession traditionally.¹⁸ And sidelining oversight questions from the currently energized reform

16. See, e.g., Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 194 (2021) (calling on progressive prosecutor movement to prioritize different substantive goals than it currently does); Stephanie Holmes Didwania, *Redundant Leniency and Redundant Punishment in Prosecutorial Reforms*, 75 OKLA. L. REV. 25, 27 (2022) (assessing progressive prosecutors' questionable progress in reducing incarceration); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 173 (2022) (questioning progressive prosecutors' ability to transform rather than reform criminal legal system); Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 640 (2021) (arguing that just prosecution should be informed by "abolition constitutionalism, critical originalism, and liberation justice principles"); Romero, *supra* note 10, at 815 (arguing that prosecutors "cannot claim to be progressive or even transgressive without, at the very least, actively working to completely dismantle the systems and hierarchies in which they exist").

17. See, e.g., DAVIS, *supra* note 3, at 176 ("For the most part, the media, the electorate, the judiciary, and the legislature have taken a 'hands-off' approach towards the American prosecutor . . ."); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1588 (2010) ("Prosecutors the world over must cope with an accountability deficit. Scholars have noted this deficit for years, but their proposals to confront the problem have either been too modest, or else they have been too unrealistic and thus have gone unheeded.").

18. See Bruce Green & Ellen Yaroshfsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 53 (2016) (describing "the traditional view—the view that most prosecutors could be counted on to act lawfully and ethically and that their offices promote lawful and ethical conduct").

conversation leaves the accountability landscape disturbingly bare if, or more likely when, the political pendulum swings in the other direction.¹⁹

Part I of the Essay sets the stage by sketching existing potential mechanisms for holding prosecutors accountable.²⁰ Borrowing from the public administration literature, it assesses the landscape of legal, bureaucratic, and political accountability regimes.²¹ It comes out where most other commentators have: There is good reason to characterize the status quo of prosecutorial accountability — particularly outside the federal system — as quite weak along all of these dimensions. Part II then asks how the progressive prosecution movement grapples with this accountability deficit.²² Examining publications, statements, and actions within the movement, a portrait emerges of both a negative vision — specifically, a rejection of legal accountability mechanisms — and an affirmative vision — namely, bureaucratic accountability to leadership within the prosecutor’s office and political accountability to the voting public. Indeed, strategies promoted for and adopted by many progressive prosecutors take aim at many of the conditions that the academic literature has long lamented as stunting electoral and bureaucratic accountability.²³

Finally, Part III delivers an ambivalent assessment of this landscape.²⁴ It identifies predictable weaknesses in bureaucratic and political accountability mechanisms in the particular context of progressive prosecution, including the worries that in practice they may operate both too weakly and too effectively. Some design improvements flow from these diagnoses,

19. See David Alan Sklansky, *Forward: The Future of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. i, v (2021) (“Restraining the power and discretion of prosecutors is important not just to make individual prosecutorial decisions less arbitrary and more accountable, but also to guard against a return to the overly harsh, tougher-is-always-better policies of the past several decades.”).

20. “Accountable for what?,” one might sensibly ask. Cf. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIMENTS 115, 117 (Michael Dowdle ed., 2006) (enumerating multiple dimensions of accountability, including the question what the accountable agent is “liable to be called to account for”). This Essay’s survey of accountability focuses on *to whom* prosecutors may be accountable, through what *processes* and, to some degree, the *effects* of a finding that standards are breached. It brackets the important and deeply contested normative question of against what metrics prosecutors’ work should be measured. See, e.g., Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1210 (2020) (asserting that “academics, judges, and practitioners have made . . . little progress articulating concrete guidance for prosecutorial behavior”); see also *infra* Part I.

21. See, e.g., Mashaw, *supra* note 20, at 120.

22. See *infra* Part II.

23. See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 PENN. L. REV. 959 (2009); Lauren Ouziel, *Prosecution in Public, Prosecution in Private*, 97 NOTRE DAME L. REV. 1071, 1074 (2022); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014).

24. See *infra* Part III.

including addressing bureaucratic insularity, attending to the design of data transparency, and prioritizing production of information about prosecutorial inaction. But while acknowledging the potential promise of progressive prosecutorial accountability, Part III also urges greater, albeit judicious and deliberate, openness to legal scrutiny of prosecutorial conduct than what the progressive prosecutorial movement has contemplated to date.

I. THE CURRENT ACCOUNTABILITY LANDSCAPE

This Part surveys existing mechanisms by which American prosecutors are held “accountable” — meaning, that their performance along any dimension is assessed by another with the power to attach some consequence to their assessment.²⁵ While any taxonomy is likely to be both incomplete and arguable at the margins of sorting, the public administration literature’s depiction of public accountability as chiefly operating through “legal” regimes that “operate through the authoritative application of law to facts,” “bureaucratic” regimes that operate through hierarchical control within a body, and “political” regimes is a useful framework insofar as it maps fairly well onto the terrain of existing prosecutorial accountability.²⁶

A. Legal Accountability

Legal accountability mechanisms can be understood as those by which prosecutors would be held externally accountable to a formal legal standard that a party is empowered to find the prosecutor in compliance with or in violation of. The existing terrain here is a mixed bag of no rules, and rules with weak enforceability.

Consider first the greatest power — by dint of both breadth and magnitude of impact — that a prosecutor wields: the power to charge or not to charge, or to select among the range of potential charges. As a constitutional matter, the power is virtually unfettered. Prosecutors, the courts have held, are free to select from the broad menu of criminal charges legislatures have written for them so long as there is probable cause to believe an offense was

25. I take this to be a fairly uncontroversial definition of the term. *See, e.g.*, Mashaw, *supra* note 20, at 117–18; Jonathan GS Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder,”* 65 PUB. ADMIN. REV. 94, 95–99 (2005).

26. *See* Mashaw, *supra* note 20, at 120.

committed.²⁷ Or, they may decline to charge at will.²⁸ Article III and the Sixth and Fourteenth Amendments of the U.S. Constitution contemplate that juries will hold prosecutors accountable for their charging choices by vetting them for proof beyond a reasonable doubt,²⁹ but that mechanism has been supplanted by a system driven overwhelmingly by guilty pleas.³⁰ Moreover, prosecutors may permissibly grease the wheels of negotiated resolution with enormous discounts or enormous penalties so long as their intentions are disclosed in the “give-and-take” of plea bargaining.³¹

Subconstitutional checks on charging or non-charging are available in theory but are weak in fact. Law professor Darryl Brown, surveying the state landscape here, finds that few states have laws giving courts the power to review prosecutors’ charges, and in those that do courts have “interpreted the power narrowly and seem to exercise it sparingly.”³² And while courts frequently cite the availability of regulation through ethical rules promulgated by the legal profession,³³ in fact the content of those rules leaves wide berth for all but egregious behavior, and even that is rarely enforced by the profession’s notoriously lax professional discipline infrastructure.³⁴

27. *U.S. v. Batchelder*, 442 U.S. 114, 123–24 (1979) (holding that prosecutors have the discretion to charge an act as a violation of multiple statutes); Stuntz, *supra* note 2, at 566 (discussing how legislatures have created numerous overlapping statutes that prosecutors have the discretion to charge from).

28. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379 (2d Cir. 1973) (“[F]ederal courts have traditionally and, to our knowledge, uniformly refrained from overturning . . . discretionary decisions of federal prosecuting authorities not to prosecute . . .”).

29. U.S. CONST. art. III, § 2, cl.3.; U.S. CONST. amends. VI & XIV.

30. *See Missouri v. Frye*, 566 U.S. 134, 144 (2012) (asserting that plea bargaining “‘is not some adjunct to the criminal justice system; it *is* the criminal justice system’” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992))); Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment*, 43 *LITIGATION* 25, 25 (2017).

31. *Bordenkircher v. Hays*, 434 U.S. 357, 364 (1978) (holding that it is permissible and inevitable that prosecutors will use their negotiating power to dissuade defendants from exercising their trials rights).

32. *See* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 *WM. & MARY L. REV.* 1225, 1248–53 (2016).

33. *See Connick v. Thompson*, 563 U.S. 51, 66 (citing prosecutors’ ethical obligations, and consequences for violating those obligations, as a basis for denying civil relief); *Imbler v. Patchman*, 424 U.S. 409, 428–29 (1976) (holding that a prosecutor that comports with their ethical and professional is absolutely immune from civil liability but could, nevertheless, be held accountable by a professional association such as the American Bar Association (ABA)).

34. *See, e.g., Bruce A. Green, Prosecutorial Ethics in Retrospect*, 30 *GEO. J. LEGAL ETHICS* 461, 466–67 (2017).

To be sure, there are legal rules that constrain prosecutors. They may not invidiously discriminate or retaliate in charging.³⁵ They may not fabricate evidence or hide favorable evidence.³⁶ But in practice enforcement faces enormous burdens. Restrictive standards of proof and high barriers to obtaining discovery on charging render the formal bar on selective prosecution effectively a dead letter.³⁷ Appellate and post-conviction litigation of prosecutors' constitutional missteps in criminal cases is notoriously unsuccessful.³⁸ And civil litigation of prosecutorial overreach in the course of charging or prosecuting a case is effectively off the table due to the doctrine of absolute immunity.³⁹

There's probably more juice to be squeezed even from the current regime's fruit. If substantive criminal law were less vast, and thus presented prosecutors with a smaller menu of crimes, the legal requirement that a charge be supported by probable cause would have more bite.⁴⁰ Judges presiding in criminal cases could — and sometimes do — do more to scrutinize charges or pleas, or bail or sentencing recommendations in individual cases — or even across cases.⁴¹ But it is difficult to argue with the conventional wisdom that legal boundaries themselves do little to control prosecutors' day-to-day work.⁴²

35. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding that discriminatory enforcement violates the Equal Protection Clause); *Blackledge v. Perry*, 417 U.S. 21, 28–29 (holding vindictive prosecution violates the Due Process Clause).

36. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (holding that the State may not knowingly use false evidence to obtain a conviction); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of favorable evidence by the prosecutor violates due process).

37. *See United States v. Armstrong*, 517 U.S. 456, 470 (1996) (holding that defendant must present some evidence tending to show the existence of discriminatory effect and discriminatory intent in order to reach the discovery stage); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 214 (2007) (discussing barriers to successfully litigating selective prosecution claim after *Armstrong*). *Cf.* Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1005–08 (2021) (discussing trend among lower federal courts applying lower burden to selective enforcement claims against police).

38. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 98–102 (2008) (discussing evidence of low rates of success litigating claimed trial error including prosecutor-driven error); NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 26 (2007), <https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf> [<https://perma.cc/L65Z-J7DJ>].

39. *See, e.g.*, MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 3:4 (3d ed. 2022).

40. *See generally* Stuntz, *supra* note 2.

41. Work by law professor Andrew Crespo explores how courts already have the informational tools at their disposal to monitor prosecutors more effectively. *See, e.g.*, Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2086–87 (2016).

42. *See* Bibas, *supra* note 23, at 975–79.

B. Bureaucratic Accountability

Consider instead bureaucratic accountability mechanisms, by which a hierarchical relationship between prosecutors and an accouter — think, line prosecutors, mid-level supervisors, and top-level supervisors within an office — create conditions by which subordinates' work is monitored and checked internally. The academic literature on prosecutors has long encouraged attending to the conditions of effective bureaucratic accountability within prosecutors' offices, particularly given the weak prospects for effective legal accountability.⁴³ Commentators have surfaced examples of effective office supervision that brought individual prosecutors' decisionmaking in line with organizational goals — at least along certain dimensions: District Attorney Harry Connick's effective implementation of charge screening to bring down plea bargaining in New Orleans is an oft-cited example.⁴⁴

Because bureaucratic accountability structures are internal to an organization they tend to be opaque to the outsider; beyond a handful of qualitative empirical efforts little is known about precisely how well-functioning prosecutorial agencies are along this dimension. But there is reason in theory to be skeptical. Effective accountability along these lines would require, at a minimum, clearly formulated and communicated rules, individuals empowered and motivated to monitor performance, and sufficient data generated sufficiently promptly to enable monitoring.⁴⁵ While (as discussed below) the tide may be shifting in some prosecutors' offices, commentators have long observed that the prosecution profession as a whole — and particularly in its many rural manifestations — exhibits weaknesses among all these dimensions.⁴⁶

To be sure, bureaucratic accountability may be enhanced through mechanisms that would be missed by an unduly narrow focus on the prosecutorial agency's internal structure. Necessary relationships with other actors in the criminal legal system — investigators and defense lawyers among them, who have perspectives that can serve as antidote to a myopia that can predictably hamper bureaucracies — can contribute to what law

43. See, e.g., *id.*; Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

44. See generally Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

45. See Bibas, *supra* note 23, at 997–1015 (discussing conditions for effective internal regulation of prosecutors).

46. See, e.g., Green & Yaroshefsky, *supra* note 18, at 66; Bibas, *supra* note 23, at 997–1015 (observing absence of and challenges of creating in prosecutors' offices many of the conditions for internal regulation).

professor Dan Richman has described as “networked accountability” for prosecutors.⁴⁷ Still and all, the current landscape of bureaucratic accountability for state and local prosecutors is not excessively fertile. Moreover, even where relatively well-functioning its existence is quite opaque to outsiders. This may not be a concern to the extent that the goal of prosecutorial accountability is simply ensuring people do a “good job,” however defined. But accountability is thought to have important legitimating functions as well – important in a democratic system, and particularly important as the power and discretion of the putatively accountable actor, *vis-à-vis* the public, increases.⁴⁸ Bureaucratic accountability’s opacity is a weakness on that score.

C. Political Accountability

Against the backdrop of lax competitor accountability regimes, scholars of American state and local prosecutors have long characterized American prosecutors as globally unique in the degree to which they are *politically* checked.⁴⁹ Chief prosecutors, at least, are by in large directly elected at the state and local level.⁵⁰ Incentive to please voters with popular office outputs, or at least to avoid displeasing voters with unattractive outputs, renders the chief accountable to the local electorate, which in turn provides some incentive for elected prosecutors to shape the work of their subordinates. (In this regard, if political accountability is to do any work throughout a prosecutorial agency, it must work hand in hand with some other regime – say, a bureaucratic one.)

But scholars of prosecutorial elections have consistently found structural deficits that render them weak accountability devices in practice. Prosecutorial elections are nearly always won by incumbents who frequently run unchallenged, especially in the country’s (many, many) rural jurisdictions.⁵¹ Perhaps more critically from the standpoint of conceiving of an election as a referendum on prosecutors’ *performance*, voters typically

47. Daniel C. Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40, 69 (Maximo Langer & David Sklansky eds., 2017).

48. See Wright & Miller, *supra* note 17, at 1595.

49. See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548, 1550–51 (2020); Ronald F. Wright, *How Prosecutorial Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581 (2009).

50. See JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY 19–28 (1980) (describing rise and near uniformity of trend toward prosecutorial elections). Four states — Alaska, Connecticut, Delaware, and New Jersey — join the federal government in appointing prosecutors. See Hessick & Morse, *supra* note 49, at 1550–51.

51. *Id.* at 1561 (finding that incumbent elected prosecutors run for reelection in 76% of cases, win that election in 95% of cases, and runs uncontested in 85% of elections).

lack information that would be required to give meaningful feedback.⁵² A voter interested in evaluating the work of their elected prosecutor's office would struggle in most jurisdictions to find much in the way of data to inform their view other than, likely, caseloads, conviction rates, and sentences.⁵³ The few extant empirical studies of prosecutor elections show that the impetus to campaign for office does little to nothing to cure that information deficit: At least until recently (as discussed below), prosecutors running for office campaigned on their individual qualities rather than the work of their offices, and to the extent office outputs were emphasized at all the metrics were exceedingly blunt — caseloads and convictions.⁵⁴ In practice, there is little evidence that prosecutorial elections provide broad-based or well-informed feedback on the actual conduct of prosecution.

D. Conclusion

This, then, is the traditional landscape in which prosecutors, described by two leading scholars of the institution as “among the least accountable public officials,” operate.⁵⁵ It is, in sum, an environment of tremendous discretion checked by an accountability regime that is characterized by relatively little formal legal constraint, quite varied and low-visibility bureaucratic constraint, and formal but fairly dysfunctional political constraint. How if at all has the progressive prosecution movement interacted with that accountability environment? It is to that question that the next Part turns.

II. PROGRESSIVE PROSECUTORIAL ACCOUNTABILITY SKETCHED

What began perhaps a decade ago as uncoordinated district attorney candidates being elected on reform platforms has evolved into a relatively coordinated and networked group of elected district attorneys and the advocates who work to elect and advise them across the country — the

52. See Ouziel, *supra* note 23, at 1076–77 (broadening examination of the opacity of prosecution); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 671 (2017) (“Prosecutors do much of their most important work not in open court but behind closed doors And prosecutors’ offices tend to be secretive and opaque, far more so than even most police departments.”).

53. See Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 349 (2002).

54. Wright, *supra* note 49, at 600–04 (finding that coverage around prosecutorial elections focuses on the individual qualities of the candidates and weakly probative statistics like backlogged cases and conviction rates). *But see* Ronald F. Wright, Jeffrey L. Yates, & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 150–51 (2021) (finding that prosecutor elections in 200 high-population districts in the United States between 2012 and 2020 resulted a lower rate of incumbents running unopposed and a lower rate of incumbents winning reelection).

55. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 902 (2004).

progressive prosecutor movement.⁵⁶ What “counts” as a progressive prosecutor remains to some degree up for grabs, but there is nevertheless an identifiable core that advances the substantive goals of executing the prosecutorial role in a manner that ameliorates acknowledged excesses and pathologies in our punishment system.⁵⁷ It is sensible, then, to ask what that core of the progressive prosecutor movement has to say about one of the most conspicuous excesses of the American criminal legal system: the excess of prosecutorial power. More precisely, the task of this Part is to illuminate the progressive prosecutor movement’s own vision of prosecutorial accountability.

To that end, this Part makes two points. First, there is a version of the story that has progressive prosecutors on the wrong side of accountability debates. Progressive prosecution has had an antagonistic relationship with emerging efforts to bolster mechanisms of legal accountability for prosecutors. To some degree that is reflective of political tug-and-pull between blue-county district attorneys and red-state lawmakers over progressive prosecution priorities (e.g., no to prosecuting abortion, yes to prosecuting police), and is perhaps justifiable as an effort to protect local democratic control over state encroachment. But some progressive prosecutors have resisted less politically polarized efforts to hold them legally accountable, a stance that complicates the relationship between progressivism and power. Second, and nevertheless, it would be a mistake to categorically disassociate progressive prosecution with prosecutorial accountability. Rather, examining strategic guidance, public rhetoric, and policies of actors within the movement reveals a vision of relatively robust bureaucratic and political accountability as compared to the traditional landscape.

A. The Progressive Pushback on Legal Accountability

Perhaps one of the greatest ironies of the progressive prosecution movement is the degree to which it has sparked an unprecedented wave of efforts to erect heretofore politically unviable legal checks on prosecutorial discretion — and the degree to which those efforts have cast progressive prosecutors as opponents of prosecutorial accountability. In dozens of states,

56. See BAZELON, *supra* note 3, at xxvii (describing “movement of organizers and activists and local leaders and defense lawyers and professor and students and donors” behind effort to elect progressive prosecutors); Sklansky, *supra* note 52, at 651–54 (tracing beginning of wave to 2013 election of Ken Thompson in Brooklyn).

57. See Levin, *supra* note 4, at 1423–24; see also Hessick & Morse, *supra* note 49, at 1540–41 (acknowledging multiple meanings of “progressive prosecutor” but associating it with, at least, “prosecutors who have specifically championed or adopted prosecutorial practices that are intended to make the criminal justice system less punitive”).

legislatures, judges, and other actors have expanded, sharpened, and invented anew mechanisms for punishing or removing prosecutors deemed “rogue” — a rhetorical flourish deployed by lawmakers and commentators summoning the image of an aberrant and uncontrolled force.⁵⁸

Some efforts have squarely targeted one tactic of some progressive prosecutors: categorical deprioritization or declination of particular offenses.⁵⁹ In Georgia, for example, the legislature in 2023 created a Prosecuting Attorneys Oversight Commission empowered to remove prosecutors for, among other misdeeds, having “[a] stated policy, written or otherwise, which demonstrates that the district attorney . . . categorically refuses to prosecute any offense or offenses of which he or she is required by law to prosecute.”⁶⁰ Other efforts have swept more broadly, with bill language that could plausibly be construed as reigning in conduct falling quite comfortably within traditional exercises of prosecutorial discretion in charging. Iowa legislators, for example, enacted legislation defunding any district attorney’s office that took “any action” that “discourages the enforcement of state, local, or municipal laws” — language plausibly encompassing not only any declination or diversion decision but also charge bargaining by Iowa prosecutors.⁶¹ In Arlington, Virginia, circuit court judges reacted to newly elected progressive prosecutor Parisa Dehghani-Tafti’s move to dismiss marijuana possession charges with an administrative order requiring prosecutors to provide “in detail all factual and not conclusory bases” for dismissing or amending charges in any cases.⁶²

58. See JORGE CAMACHO ET AL., PREEMPTING PROGRESS: STATES TAKE AIM AT LOCAL PROSECUTORS 1–6 (2023), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/63cf18da2a1300367cfe-c952/1674516705430/ProsecutorialDiscretion2023.pdf> [https://perma.cc/A87Q-93UU] (detailing efforts across states); Scott S. Greengrger, *Republicans Try to Reign in “Rogue” Progressive Prosecutors*, STATELINE (Mar. 23, 2023), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2023/03/23/republicans-try-to-rein-in-rogue-progressive-prosecutors> [https://perma.cc/ZHF4-NKUA]; see also *Rogue*, MIRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rogue> [https://perma.cc/F5WG-T2J9] (last visited April 25, 2023) (listing first definition as “isolated, aberrant, dangerous, or uncontrollable”).

59. See *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [https://perma.cc/3J5Y-B3LJ] (stating intention of signatory prosecutors to “decline to use our offices’ resources to criminalize reproductive health decisions”).

60. S.B. 92, 157th Gen. Assemb., Reg. Sess. (Ga. 2023).

61. IOWA CODE ANN. §§ 27B.2, 5 (West 2023); see also *supra* note 6 and accompanying text.

62. Tom Jackman, *Arlington Prosecutor Goes to Va. Supreme Court Against Judges Who Challenge Her New Policies*, WASH. POST (Aug. 28, 2020), <https://www.washingtonpost.com/dc-md-va/2020/08/28/arlington-prosecutor-goes-va->

Perhaps not surprisingly, progressive prosecutors — sometimes alongside other prosecutors across these states — have pushed back. As the Missouri legislature sought in a variety of ways to strip prosecutors of local control over charging decisions, both the statewide prosecutor association as well as St. Louis Circuit Attorney Kim R. Gardner, one of the targets of the law, lobbied in opposition.⁶³ (Gardner has since resigned her position, stating that she did so in the hopes of staving off passage of the most extreme and targeted of these efforts — a bill to strip St. Louis of the power to elect its prosecutor.)⁶⁴ In Virginia, Dehghani-Tafti responded to judicial efforts to limit her office’s discretion by suing the circuit judges in the Virginia Supreme Court, an effort backed by sixty progressive prosecutors around the country who opposed the “Arlington court’s erosion of settled and longstanding principles of prosecutorial discretion.”⁶⁵ Progressive prosecutors nationally have organized against other efforts to impose legal limits on prosecutorial discretion, as when they intervened to oppose the civil suit seeking an injunction against Los Angeles District Attorney George Gascón’s charging policies, arguing that “[p]rosecutors exercise discretion on whether to charge cases, what charges and penalties to pursue, and what plea bargains to offer” and have “‘complete authority’ to enforce the state criminal law in their counties.”⁶⁶ “Hands off our discretion,” progressive prosecutors can be heard to chant.

To be sure, faced with initiatives aimed at undoing their policy platforms, progressive prosecutors’ opposing salvo is unsurprising and perhaps tactically — existentially — necessary. Moreover, it has plausible roots in an understanding of the primacy of *political* accountability through local elections, which many of these legal accountability measures seek (openly)

supreme-court-against-judges-who-challenge-her-new-policies/&cd=3&hl=en&ct=clnk&gl=us [https://perma.cc/LF7H-Y966].

63. See Rebecca Rivas, *House Passes Bill to Allow for State Takeover of Missouri Prosecutor Offices*, MO. INDEP. (Feb. 9, 2023), <https://missouriindependent.com/2023/02/09/house-passes-bill-to-allow-for-state-takeover-of-missouri-prosecutor-offices> [https://perma.cc/4JBN-3HRA].

64. Brian Heffernan, *Kim Gardner’s Resignation Letter*, ST. LOUIS AMERICAN (May 4, 2023), https://www.stlamerican.com/news/local_news/kim-gardners-resignation-letter/article_ff115c4a-ead7-11ed-8ff1-0b3f1030927a.html [https://perma.cc/Rf4M-H62H].

65. See Verified Petition for Writ of Prohibition, *In re Parisa Dehghani-Tafti*, No. 201004 (Va. Sup. Ct. Dec. 18, 2020); Amicus Curiae Brief of Current and Former Elected Prosecutors in Support of Petitioner at 2, *In re Parisa Dehghani-Tafti*, No. 201004 (Va. Sup. Ct. Dec. 18, 2020).

66. Brief of Amici Curiae Current and Former Elected Prosecutors and Attorneys General in Opposition to Petitioner’s Application for Preliminary Injunction at 10, *Association of Deputy District Attorneys for Los Angeles County v. Gascón*, No. 20STCP04250 (L.A. Cty. Sup. Ct. Feb. 8, 2021).

to countermand.⁶⁷ But it nevertheless places them in the uncomfortable and ironic position of adopting the “trust-us” stance that prosecutors have traditionally taken in order to insulate precisely the charging excesses that the new wave of progressives opposes.⁶⁸ Further though, efforts by members of the progressive prosecution movement to limit legal accountability for their work has not been so confined. For example, progressive prosecutors sued for alleged constitutional violations during their own tenure or during the tenure of their predecessors have shielded themselves from liability through absolute immunity.⁶⁹ Cook County States Attorney Kim Foxx successfully invoked absolute immunity to obtain dismissal of a vindictive prosecution suit.⁷⁰ Philadelphia District Attorney Larry Krasner did so in a constitutional suit challenging his office’s policies on COVID early release.⁷¹ And Brooklyn District Attorney Eric Gonzalez has invoked absolute immunity in numerous suits — for alleged fabrications by prosecutors, claimed *Brady* violations, and more.⁷² More novel non-merits-based defenses have been invoked by other progressive prosecutors. When the New Orleans District Attorney’s office, headed by former defense attorney Jason Williams, was sued by three men exonerated by the office’s own conviction integrity unit’s discovery of decades-old *Brady* violations in their cases, the office attempted to have all three cases dismissed on the ground that the office was an arm of the state and therefore not a proper

67. See Amicus Curiae Brief of Current and Former Elected Prosecutors in Support of Petitioner, *supra* note 65, at 12–15.

68. Cf. Brief of John L. Hill et al. as Amicus Curiae in Support of Petitioner at *6, *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (offering argument from Texas prosecutors that the Due Process clause not bar habitual offender charge following plea offer rejection by defendant because “[i]t is a pragmatism of today’s society that a prosecutor must be allowed a certain amount of discretion in plea bargaining” and that “[t]o hold otherwise would be to ignore the possibility that some defendants are deserving of offers of leniency and would force the prosecutor to seek the maximum indictment without plea bargaining in every case”). One wonders if it was irony or oversight that led the prosecutor amici supporting George Gascón to cite *McCleskey v. Kemp* in support of their normalization of prosecutorial discretion. See Brief of Amici Curiae Current and Former Elected Prosecutors and Attorneys General in Opposition to Petitioner’s Application for Preliminary Injunction, *supra* note 66, at 10.

69. The examples that follow emerge from a decidedly incomplete and unsystematic search of Westlaw for cases including the term “absolute immunity” and that listed Kim Foxx, Larry Krasner, or Eric Gonzalez as a party.

70. *Romero v. City of Chicago*, No. 21C1592, 2022 WL 874664, at *3 (N.D. Ill. Mar. 24, 2022).

71. *Shelton v. City of Philadelphia*, No. 2:20-CV-04178, 2021 WL 3857856, at *6 (E.D. Pa. Aug. 30, 2021).

72. *Waite v. Gonzalez*, No. 21CV2506PKCRLM, 2023 WL 2742296, at *7 (E.D.N.Y. Mar. 31, 2023); *Malik v. City of New York*, No. 118CV1956FBRML, 2020 WL 2747979, at *2 (E.D.N.Y. May 27, 2020), *aff’d sub nom. Malik v. City of New York*, 841 F. App’x 281 (2d Cir. 2021).

defendant in a Section 1983 action.⁷³ Significantly, dismissal on that ground would have required overruling long-standing Fifth Circuit precedent. The office lost each of their motions.⁷⁴

These examples serve simply to juxtapose progressive prosecutors' bold calls for reimagining the ends to which prosecutorial discretion may be put with their strikingly small-c conservative embrace of existing tools — wielded in equally discretionary fashion — for shielding their conduct from legal scrutiny. In this respect, at least, the accusation in some academic quarters that progressive prosecutors have yet to “challenge[] . . . the excessive power of prosecutors themselves” may be well-taken.⁷⁵

B. Progressive Prosecutorial Accountability

To spotlight progressive prosecutors' uncomfortable relationship with legal accountability is not, however, to contend that the movement has failed to give consideration to questions of accountability writ large. To the contrary, this Section sketches an emergent progressive prosecutorial accountability vision: one that centers and touts the development and enhancement of bureaucratic and political accountability tools. The primary sources for this sketch are the movement's texts and statements: papers and reports of the various academic and advocacy entities have been at the forefront of providing technical assistance to the progressive prosecutor movement, and illustrative actions of self-defined progressive prosecutors themselves.

Consider first the degree to which bureaucratic accountability looms large on the progressive prosecutorial accountability agenda. Recall that the prevailing view has been that state and local prosecutors' offices have traditionally understood to be quite weakly bureaucratically controlled. In Stephanos Bibas's words, “Many prosecutors' offices drift along without centralized leadership or a hierarchical structure, which impedes monitoring of subordinates. Line prosecutors in these offices remain free to do what they wish and ignore office policies and stakeholders' interests.”⁷⁶

The progressive prosecution movement's accountability rhetoric suggests a shift in this state of affairs. The organization Fair and Just Prosecution (“FJP”), one of the leading organizing and strategic advising entity for

73. *Reeder v. Williams*, No. CV 22-4614, 2023 WL 2771481, at *1–3 (E.D. La. Apr. 4, 2023).

74. *Id.* at *3 (rejecting Williams's argument consistent with decision reached by district judges in two other cases).

75. Sklansky, *supra* note 19, at iv; *see also* Barkow, *supra* note 10, at 1390 (“[P]rosecutors should use the authority of their office to push for needed institutional changes that limit the excessive powers of prosecutors.”).

76. Bibas, *supra* note 23, at 1001.

progressive prosecutors nationally, lists “Accountability, Transparency, and Measuring Success” as the second of nine issues spotlighted on the group’s web site. The content of the corresponding web site highlights three innovations – all addressed to internal, bureaucratic accountability. First, the organization endorses emerging work to develop performance standards and measures that align with an elected prosecutor’s progressive substantive goals, rather than the limited and thin output measurements — cases filed, conviction rates, and sentences — traditionally tracked by offices.⁷⁷ Second, the organization promotes the creation of internal conviction integrity units — dedicated units for investigating and remedying wrongful convictions — to aid offices in discovering past errors and learning from them.⁷⁸ Finally, progressive prosecutors are exhorted to embrace “open and early” discovery in criminal cases, and to manage and enforce compliance with “comprehensive” policies and “ongoing supervision and random audits.”⁷⁹ FJP’s 2018 manifesto, “21 Principles for the Twenty-First Century Prosecutor” — “practical steps prosecutors can take to transform their offices, and collectively, their profession” — packages these ideas in operational terms that make clear the primacy of internal management to the progressive prosecution project.⁸⁰ The principles encompass adoption of “performance standards that reflect your values” and that are used in promotion; gathering data on “charging, plea dispositions, and sentencing (including racial disparity), findings of prosecutorial misconduct, . . . and other outcomes” to understand what results are being achieved by the office; requiring supervisory approval for charging; and adoption of internal discovery policies along with “rigorous training and supervision to ensure compliance” and “appropriate consequences for prosecutors who improperly and intentionally fail to disclose evidence.”⁸¹ Those familiar with the work of scholars who have called for more robust systems of internal accountability in prosecution through attention to, among other tools, office supervisory hierarchy, formal policies, and increased data infrastructure for

77. *Issues: Accountability, Transparency, and Measuring Success*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/issues/accountability-transparency-and-measuring-success> [<https://perma.cc/2Q7V-9XBW>] (last visited Apr. 1, 2023); see also *supra* notes 52–54 and accompanying text.

78. *Issues: Accountability, Transparency, and Measuring Success*, *supra* note 77.

79. *Id.*; FAIR & JUST PROSECUTION, ISSUES AT A GLANCE: PROMOTING TRANSPARENCY AND FAIRNESS THROUGH OPEN AND EARLY DISCOVERY PRACTICES 6–7 (2018), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/01/FJP.Brief_Discovery.pdf [<https://perma.cc/G8GA-VUX7>].

80. FAIR & JUST PROSECUTION ET AL., *supra* note 4, at 3.

81. *Id.* at 13–18.

internal performance review will readily recognize its influence in these proposals.⁸²

Critically, these are not the idiosyncratic ideas of an isolated think tank. Emily Bazelon documents in her chronicle of progressive prosecution that FJP’s principles — which her book promotes — were a collaborative effort of multiple organizations, academics, and the network of district attorneys associated with FJP.⁸³ The content of FJP’s principles is echoed in research and recommendations from other progressive prosecution partners.⁸⁴ And it is reflected, at least aspirationally, in a number of office policies and data-collection initiatives publicly announced by newly elected self-styled progressive prosecutors.⁸⁵ Progressive offices have, for example, partnered with research institutions and collaboratives like the Prosecutorial Performance Indicators project (“PPI”), an initiative to assist individual offices in developing detailed goals for office performance and data capacity to measure performance.⁸⁶ PPI has developed a tool to measure fifty-five

82. See *supra* note 41.

83. See BAZELON, *supra* note 3, at 315.

84. See, e.g., JEREMY TRAVIS ET AL., PROSECUTORS, DEMOCRACY, AND JUSTICE: HOLDING PROSECUTORS ACCOUNTABLE 18 (2019), https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5d6d8d224f45fb00014076d5/1567460643414/Prosecutors,+Democracy,+Justice_FORMATTED+9.2.19.pdf [<https://perma.cc/D6H8-K9QY>] (encouraging attention to office policies, internal metrics of compliance, and supervisory oversight of line prosecutors’ compliance as the heart of reform prosecution’s accountability structure); FLA. INT’L UNIV. ET AL., PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE 1 (2018), <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/FIU-Loyola-MacAthruth-Prosecution-Project-Report-One-PDF.pdf> [<https://perma.cc/J7VG-PTJC>] (“Many prosecutors are beginning to embrace the use of data, not only to hold themselves accountable but also to identify problems, design solutions, and track progress.”).

85. See, e.g., Letter from John Creuzot, Dallas County District Attorney, to the People of Dallas County (Apr. 11, 2019), https://www.dallascounty.org/Assets/uploads/docs/district-attorney/messages-from-da/Official-DACreuzotPoliciesLetter_April112019.pdf [<https://perma.cc/Z3DH-G53L>]; Off. of the Fairfax Commonwealth’s Att’y, *Criminal Justice Reforms*, FAIRFAX CNTY., <https://www.fairfaxcounty.gov/commonwealthattorney/reforms> [<https://perma.cc/L9VP-NLBE>] (last visited Mar. 15, 2023); *Office Policies*, PHILA. DIST. ATT’Y’S OFF., <https://phillyda.org/resources/#dao-policies> [<https://perma.cc/X486-P4NV>] (last visited Mar. 15, 2023); *Filing and Disposition Standards*, KING CNTY. PROSECUTING ATT’Y, <https://kingcounty.gov/~media/depts/prosecutor/documents/FADS/FADS.ashx?la=en> [<https://perma.cc/HEL9-E5QT>] (last visited Mar. 15, 2023); THE RACHAEL ROLLINS POLICY MEMO (2019), <https://s3.documentcloud.org/documents/5980546/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/9MCN-TEZ6>].

86. FLA. INT’L UNIV. ET AL., IMPLEMENTATION GUIDE FOR PROSECUTOR PERFORMANCE INDICATORS 2 (2020), <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/2020-PPL-Implementation-Guide-FINAL-with-links.pdf> [<https://perma.cc/546Y-UFH7>]; *Partner Offices*, PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org/partners> [<https://perma.cc/DY47-S2CG>] (last visited Apr. 10, 2023). A similar example is the Durham County District Attorney’s

aspects of office performance that bear on “capacity and efficiency,” “community safety and well-being,” and “fairness and justice.”⁸⁷ For example, nineteen categories of data, including “acquittal for violent crimes,” “violent recidivism,” “escalation in offending,” “speedy contact with victims,” and “witness cooperation,” supply an office with the means of evaluating its performance with respect to “community safety and well-being.”⁸⁸ The tool is a significant intervention in allowing supervisors to evaluate the quality of an office’s work along multiple dimensions and to identify the sources of positive or negative contribution to that work within an office.

Internal regulation is, however, only a piece of the progressive prosecution accountability vision. There is a parallel role for political accountability — indeed, one to some degree baked into the DNA of the movement. After all, one of the hallmarks of the rise of new, non-incumbent district attorney candidates aligned with the progressive prosecution movement is the degree to which it has mobilized local political energy to make prosecutor elections — long understood as sleepy affairs — sites for pitched and substantive contest.⁸⁹ And so, the progressive prosecutor movement offers an inherent improvement to one of the dimensions along which political accountability for prosecutors has commonly been criticized: the traditional lack of meaningful political alternatives for which voters can signal approval or disapproval in their trip to the ballot box.⁹⁰

But guidance from advisors of the progressive prosecution movement posit a commitment to political accountability in a potentially thicker sense, encouraging “transparency” along various dimensions to enable the voting public to assess fit between the stated reform goals of elected prosecutors and the actual work of the office. Scholars of prosecution have long observed that a variety of informational barriers compromise the ability of the public to hold prosecutors accountable: prosecutor offices have not traditionally shared meaningful information about what the goals of the office are or meaningful data permitting evaluation of whether the office is succeeding.⁹¹ The FJP’s “21 Principles,” by contrast, encourage not only

partnership with Duke University to assess the office’s plea policies. *See, e.g.*, DURHAM CNTY. DIST. ATT’YS OFF., 2020 ANNUAL REPORT 4–5 (2020), <https://medium.com/durham-district-attorneys-office/durham-county-district-attorneys-office-releases-2020-annual-report-780734505784> [<https://perma.cc/G8AJ-NR4C>].

87. *The Prosecutorial Performance Indicators*, PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org> [<https://perma.cc/87BX-APQD>] (last visited Apr. 1, 2023).

88. *Id.*

89. *See supra* note 51 (discussing uncontested prosecutor elections).

90. *Id.*

91. *See supra* notes 52–54.

gathering and maintaining data on an array of case outcomes, but also making that data “available to the public so you can be held accountable for the performance of the office.”⁹² The Institute for Innovation in Prosecution at John Jay College, another progressive prosecutor partner, exhorts, “Policies on the exercise of discretion outlined above should be published. Data on the operations of the office should be made public. Goals should be clearly stated and progress towards those goals should be shared publicly, on a regular basis.”⁹³ The Prosecutorial Performance Indicators project encourages pushing out data generated by the initiative by “creating a PPI dashboard as a transparency and community engagement tool” — something several large progressive offices have done.⁹⁴ Some progressive offices have gone farther than simply pushing out data, and instead have affirmatively facilitated public input into the office’s work. For example, Arlington County Commonwealth’s Attorney Parisa Dehghani-Tafti launched a Community Advisory Board of seven-to-ten community members tasked with attending quarterly meetings with office representatives and “provid[ing] input on criminal justice reform and public safety, analyz[ing] policy for equity impact, and keep[ing] the community informed of the office’s goals and objectives.”⁹⁵

In sum, while progressive prosecutors have resisted efforts to strengthen legal accountability measures, leaders in the movement have very much embraced enhancement of bureaucratic and political accountability structures as part and parcel of the reform work they are undertaking. Perhaps this is entirely unsurprising. Elected prosecutors are, among their many roles, managers responsible for ensuring that their organization performs as intended. Managers who, like progressive prosecutors, aspire to bring about radical organizational change must be intentional about organizational structure, messaging, outcomes, and responsibility to create the conditions for and be assured of the reality of that change.⁹⁶ And officials who, like progressive prosecutors, come into power based on a promise of change well understand that voters will be looking for the proverbial receipts for their efforts. This is not to suggest that robust internal management and transparency to the political community are inevitable or uniform achievements of progressive prosecutors; there is undoubtedly actual

92. FAIR & JUST PROSECUTION ET AL., *supra* note 4, at 14.

93. TRAVIS ET AL., *supra* note 84, at 18.

94. See FLORIDA INT’L UNIV. ET AL., *supra* note 86, at 22.

95. *The Justice Digest Issue II*, OFF. OF COMMONWEALTH’S ATT’Y FOR ARLINGTON CNTY. & CITY OF FALLS CHURCH (Oct. 2020), https://content.govdelivery.com/bulletins/gd/VAARLINGTON-2a5a7bb?wgt_ref=VAARLINGTON_WIDGET_539 [<https://perma.cc/D5TV-RMDL>].

96. See Bibas, *supra* note 23 (discussing management literature).

variation, subjective disagreement about how to characterize the quality of any such interventions, and, as the next Part explores, predictable barriers to success. The more limited but important point for present purposes is that despite being branded, at least in some circles, as champions of unchecked aggrandizement of prosecutorial power, the progressive prosecution movement does offer a meaningful vision of a prosecutorial accountability regime.

III. PROGRESSIVE PROSECUTORIAL ACCOUNTABILITY TRADEOFFS

If the progressive prosecution movement to some degree vindicates scholars' longstanding calls for prosecutors to lean into internal management and local political responsiveness, so too does it provide a case study in the limitations of and tradeoffs presented by such an approach to accountability. Full exploration and theorization of these dynamics is beyond the scope of this Essay. But a preliminary assessment here can form the basis for further inquiry, as well as inform the work of stakeholders aiming to design approaches that mitigate these risks.

First, there are at least two reasons to worry that reliance on internal, bureaucratic control as the primary means of ensuring the regularity and legality of the work of a progressive prosecutor's office will yield suboptimal results. The first stems from a concern that the bureaucracy will function too well. An elected district attorney whose supervisory regime achieves a high level of uniformity within the organizational culture of the office should worry whether that success creates a cognitive echo chamber in which misjudgment is unlikely to be caught or called out. Those who study the criminal adjudicative process in general and prosecution in particular are well-aware of the degree to which individual cognitive biases predictably lead to error; there is ample support for the concern that in a group context these biases can become magnified by group polarization.⁹⁷ The second worry contemplates a less successful or complete cultural shift accompanied by robust organizational control. A district attorney's office characterized by a high degree of conflict between supervisors and line prosecutors, or high levels of turnover due to a clash between old and new regimes risks sacrificing quality and regularity in day-to-day functioning for the end of mission alignment. Indeed, there is some evidence that new progressive prosecutor regimes have been hampered by this dynamic.⁹⁸

97. See generally Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (describing interplay between cognitive biases and prosecution).

98. See, e.g., Jim Morrison, *How Norfolk's Progressive Prosecutor Ended Up in the Crosshairs of Debate Over Rising Crime*, VA. MERCURY (Feb. 28, 2023), <https://www.virginiamercury.com/2023/02/28/how-norfolks-progressive-prosecutor-ended->

So too should we be cautious about putting too much stock in political accountability for progressive prosecutors. As a general matter there is good reason to think there is a relatively low upper bound to voters' informed and sustained engagement with the work of prosecution, particularly if their primary vehicle for engagement is a quadrennial election. Even assuming, optimistically, that most voters have the time and inclination to consume detailed data on an office's output to inform their votes, most individuals lack the knowledge required to contextualize and draw meaningful conclusions from that data.⁹⁹ The problem is exacerbated by inevitable blind spots in the informational picture prosecutors can supply. Among other drivers of opacity, legal and practical barriers exist to disclosure of the details of what work prosecutors do *not* do: the details of charges not brought rarely see the light of day, for reasons that include grand jury secrecy and, even where disclosure is legally permissible, concerns about compromising ongoing investigations and the privacy interests of witnesses or targets in investigations.¹⁰⁰ This is a special challenge for progressive prosecutors whose mandate is largely rooted in a commitment *not* to charge crimes: The heart of their agenda is uniquely ill-suited for public scrutiny of the manner in which it is being executed.

A perhaps greater concern about effective bureaucratic and political accountability flows from the recent surge in efforts to enhance legal mechanisms to supplant or remove elected prosecutors in direct response to progressive district attorneys' assertions of muscular declination authority. Where elected prosecutors perceive a local mandate to pursue decarceral reforms, the reality or prospect of sanction if evidence of that pursuit comes to light will be less likely to curtail the pursuit than to exert downward pressure on transparency. Elected prosecutors who know their constituents continue to want, for example, non-prosecution of marijuana possession may continue to pursue that end even after passage of laws barring policies that "discourage[s] enforcement" (in the language of the new Iowa law) — without publicizing the policies that guide that activity. So too might the increased prospect of external legal scrutiny push offices away from even adopting the formal office policies and clearly articulated lines of internal control touted by FJP — soft targets for backlash if made known externally — in favor of less formal means of inculcating consistent practice. Put

up-in-the-crosshairs-of-debate-over-rising-crime [<https://perma.cc/X6VZ-Z4B2>] (discussing impact of staff departures under new elected prosecutors).

99. See Tiago Peixoto, *The Uncertain Relationship Between Open Data and Accountability: A Response to Yu and Robinson's The New Ambiguity of "Open Government,"* 60 UCLA L. REV. DISC. 200, 203 (2013) (problematizing connection between data transparency and political accountability).

100. See Ouziel, *supra* note 23, at 1084–1107; Jessica Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 513–19 (2020).

differently, the current political clash over progressive prosecutors' embrace of the power not to charge powerfully illuminates the potential for accountability trade-offs: legal accountability has the potential to suppress other accountability types.

If there are reasons for caution about the promise of progressive prosecutorial accountability, the progressive prosecution movement's push to think anew and creatively about institutional design offers an opportunity to consider strategies for improving upon the vision. If strong bureaucratic control risks suboptimal insularity, prosecutors would do well to consider designing opportunities for external inputs to the hierarchy from stakeholders with relevant information about prosecutors' performance; defense lawyers, judges, and police are leading candidates.¹⁰¹ The idea is mechanically simple — create, say, a designated supervisor tasked with regular outreach to a counterpart in the local public defender office (in jurisdictions with such an institution) — but intellectually and politically challenging, particularly in the many jurisdictions where progressive prosecutor and other criminal legal actors have been at odds.¹⁰² Indeed, the accountability trade-off dynamics discussed above may well (and unfortunately) render receptivity to networked accountability unworkable in jurisdictions with substantial stakeholder hostility. Still, particularly in jurisdictions where progressive prosecutors are less likely to face legal repercussions for open pursuit of their policy goals, formalized input even from stakeholders with foundational disagreement with those goals should not be off the table.

The emerging embrace of data transparency among progressive prosecutors should be attentive to limited public capacity for consumption and comprehension of raw data, and also to the potential value of greater information about and contextualization of critical *unseen* work of prosecutors — in particular, non-charging. Projects like PPI are in this vein an important advance in that they offer the public a window into information about office outputs and also pre-package that information into meaningful performance metrics on which the information has bearing. Progressive prosecutors would be well-advised to recognize the important role that such data mediators play in allowing information to generate political accountability, and to recognize, in a world of inevitable trade-offs, that more

101. Cf. Richman, *supra* note 47, at 68–69 (describing virtue of networked accountability).

102. See, e.g., Daniel Weigel, *The Trailer: Cops vs. Krasner: A Fight Over Criminal Justice Reform in Philadelphia*, WASH. POST (Apr. 20, 2021), <https://www.washingtonpost.com/politics/2021/04/20/trailer-cops-vs-krasner-fight-over-criminal-justice-reform-philadelphia/&cd=11&hl=en&ct=clnk&gl=us> [https://perma.cc/8GE6-ZMAJ] (describing animosity between Philadelphia police and District Attorney Larry Krasner).

direct-to-market data is likely inferior to less but well-mediated disclosures.¹⁰³ Additionally, progressive prosecutors should prioritize disclosure of information that will permit the public to evaluate what their offices have *declined* to prosecute; that is to say, beyond raw numbers showing drops in charging or numbers of diversions, progressive prosecutors should make efforts to explain those decisions — at least in aggregate through de-identified reports or case studies.¹⁰⁴

These suggestions offer the possibility of furthering the meaningful advancement in the design of accountability mechanisms that is on offer from the progressive prosecution movement. But it is important to return to the matter of what to date has been altogether absent from the progressive prosecutorial agenda: what the Essay has been classifying as “legal accountability” — tools that would increase the ability of external actors to check prosecutors’ exercise of discretion. The preceding discussion supports two somewhat competing observations on this matter, which combined point to a middle path. On the one hand, the coincident forces of progressive prosecution and curtailment of prosecutorial discretion place in relief the downsides of blunt efforts to hold prosecutors’ feet to the legal fire. The weakness of formal legal constraint on prosecutors has undoubtedly aided and abetted misuse of power, but the current moment demonstrates the degree to which it also facilitates course corrections and affirmatively supports the enhancement of alternate accountability mechanisms. These circumstances should give pause to those who call for a radical ratcheting up of legal constraints on prosecutorial discretion — including calls for complete abolition of absolute prosecutorial immunity — as a means of achieving a more just criminal legal system.

On the other hand, complete failure to grapple with what is *lost* in the environment of limited legal accountability for prosecutors is equally regrettable in a moment where prosecutors are embracing the use of their power and platforms to end or mitigate American criminal legal practices that cause demonstrable, unjustifiable, and disparately imposed harms. Those harms include, for example, the *Brady* violations and resulting wrongful convictions that plaintiffs allege occurred in the Orleans Parish District Attorney’s Office prior to the current progressive prosecutor’s regimes — past harms that no forward-looking accountability scheme can rectify.¹⁰⁵ One can imagine a path perhaps not yet taken, at least not openly by the movement — a path in which progressive prosecutors and those who support them take a clear-eyed and courageous look at what legal insulation

103. Peixoto, *supra* note 99, at 205.

104. See Roth, *supra* note 100, at 544–45 (giving examples of such practices).

105. See *supra* notes 73–74 and accompanying text.

is strictly necessary to accomplish their goals and what insulation generate externalities unjustified by their benefits to the proper work of prosecutors. To state the nature of the inquiry is not to suggest that it is easy or straightforward. But it is as worthy an inquiry as interrogating the deadweight losses of other practices of the criminal legal system on the progressive prosecutorial chopping block.

CONCLUSION

The primary task of this Essay has been to examine the progressive prosecution movement through the lens of prosecutorial accountability. One aim in doing so has been to elucidate uncomfortable dimensions of that relationship — progressive prosecution’s oppositional relationship to legal accountability — but a coequal aim has been to illuminate the very real enhancements to certain dimensions of prosecutorial accountability that the movement may be poised to bring about. Appreciating the multiple and dynamic mechanisms at work in this space allows a clearer eyed understanding of progressive prosecution’s affirmative embrace of the value of accountability, and its particular model of how to constrain prosecutorial power. It also forms the basis for a call for a more critical examination, both of the pressures on that model as it operates in the wild, and of whether the insulation of progressive prosecutors that is bought by the model’s rejection of external legal accountability is worth its price. As progressive prosecutors and the stakeholders and communities around them continue to shape the meaning and impact of the movement they should lean into these critical inquiries.