

# DEMOCRACY, BUREAUCRACY, AND CRIMINAL JUSTICE REFORM

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**Abstract:** American criminal justice systems blend elected or politically appointed leaders with career civil servants. This organizational hybrid creates challenges at the intersection of democratic accountability and enforcement discretion. In moments of stasis in the politics of criminal justice, those challenges are largely invisible: the public, elected officials, and civil servants generally share a unity of interest, borne of like-minded policy commitments that have developed over time. But in moments of political transition—that is, when public preferences on criminal justice policy are in flux—the relationship between bureaucracy and democracy can be fraught. Public demand for change may or may not accord with the commitments, ideals, and culture of the bureaucracy’s front-line actors. Elected leaders are voted in with high expectations for transformative change, but may be stymied by institutional resistance to it. The bureaucracy, in turn, may seek to alter the political narrative that is fueling the political transition, further complicating the democratic process. And in a system in which criminal lawmaking and enforcement power is spread across three different levels of government—local, state, and federal—with overlapping authority yet different constituencies, the complexity of interplay between “public” and bureaucracy deepens.

Across America, a growing number of jurisdictions are entering moments of political transition in criminal justice. This Article explores the political and institutional arrangements that alternatively impede, permit, or even accelerate a resulting change in criminal enforcement on the ground. Drawing on the democracy/bureaucracy framework developed in the fields of political theory and public administration, the Article considers how these fields and others can enrich our understanding of current political and institutional dynamics in American criminal justice. The Article then reflects on these dynamics’ implications for democratic responsiveness and systemic legitimacy, arguing, counterintuitively, that the very features of the democracy/bureaucracy relationship capable of slowing democratically sanctioned change in criminal enforcement can also end up hastening political shifts; and that, properly leveraged, the criminal enforcement bureaucracy can help realize deliberative and participatory democratic ideals.

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## INTRODUCTION

Public attitudes towards crime and punishment are in flux. Voters have passed state referenda reducing prison terms, decriminalizing certain offenses, strengthening police oversight, and re-enfranchising convicted felons.<sup>1</sup> They have pushed mayors to commit to police reform, both with respect to who is policed and how they are policed.<sup>2</sup> Prosecutorial elections over the last several cycles have seen candidates increasingly campaigning—and winning—on platforms of reforming bail, charging, and plea-bargaining practices.<sup>3</sup> And although these electoral outcomes and pressures have yet to gain broad traction, neither are they geographically or culturally limited: they have touched jurisdictions from north to south and from east to west, from major cities to rural counties, and from more punitive regions to more merciful ones.<sup>4</sup> These results

<sup>1</sup> See Daniel Gotoff & Celinda Lake, *Voters Want Criminal Justice Reform. Are Politicians Listening?*, MARSHALL PROJECT (Nov. 13, 2018), <https://www.themarshallproject.org/2018/11/13/voters-want-criminal-justice-reform-are-politicians-listening> [<https://perma.cc/RU7H-YXXXV>] (summarizing a series of criminal justice reforms passed by voters in 2018 elections); Nicole D. Porter, *The State of Sentencing 2014: Developments in Policy and Practice*, SENTENCING PROJECT (Feb. 1, 2014), <https://www.sentencingproject.org/publications/the-state-of-sentencing-2014-developments-in-policy-and-practice> [<https://perma.cc/U8EW-6ZMF>] (describing voter initiatives that decriminalized specific crimes).

<sup>2</sup> See JR Ball, *Baton Rouge Mayor Vows Police Reform Despite Justice Department Changes*, NEW ORLEANS TIMES-PICAYUNE (Mar. 3, 2017), [https://www.nola.com/archive/article\\_4681177c-b09e-5af0-b2bf-ccb291ca315f.html](https://www.nola.com/archive/article_4681177c-b09e-5af0-b2bf-ccb291ca315f.html) [<https://perma.cc/QL5N-NEY4>] (detailing the Baton Rouge mayor's campaign promises and plans to enhance the police department's relationship with the public); Lynh Bui & Peter Hermann, *Baltimore Mayor, Police Commissioner Pledge to Move Forward on Reform Efforts*, WASH. POST (Apr. 4, 2017), [https://www.washingtonpost.com/local/public-safety/baltimore-police-commissioner-pledges-reform-despite-justice-dept-action/2017/04/04/5b745ce8-b88b-4b5e-a14b-4f9f84376168\\_story.html?noredirect=on&utm\\_term=.a63a8328f3d3](https://www.washingtonpost.com/local/public-safety/baltimore-police-commissioner-pledges-reform-despite-justice-dept-action/2017/04/04/5b745ce8-b88b-4b5e-a14b-4f9f84376168_story.html?noredirect=on&utm_term=.a63a8328f3d3) [<https://perma.cc/G8RL-BG3Q>] (relaying the Baltimore mayor's public remarks on continued efforts to reform the city's police department); Mayor Rahm Emanuel, *Our Next Steps on Road to Police Reform*, CHI. SUN TIMES (May 13, 2016), <https://chicago.suntimes.com/opinion/mayor-emanuel-our-next-steps-on-road-to-police-reform/> [<https://perma.cc/Z5VW-7MKD>] (pledging to improve accountability in the Chicago Police Department); Maura Ewing, *A Reckoning in Philadelphia*, THE ATLANTIC (Mar. 3, 2016), <https://www.theatlantic.com/politics/archive/2016/03/a-reckoning-in-philadelphia/472092/> [<https://perma.cc/4MH6-TLFC>] (making note of the Philadelphia mayor's claims that he seeks to reduce incarceration rates and address the cash bail issue).

<sup>3</sup> David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 650 (2017); Maurice Chammah, *These Prosecutors Campaigned for Less Jail Time—And Won*, MARSHALL PROJECT (Nov. 9, 2016), <https://www.themarshallproject.org/2016/11/09/these-prosecutors-campaigned-for-less-jail-time-and-won#.Rj6p3Dhd8> [<https://perma.cc/B9VD-CRDE>]; Daniel Nichanian, *Voters Beyond Big Cities Rejected Mass Incarceration in Tuesday's Elections*, THE APPEAL (Nov. 7, 2019), <https://theappeal.org/politicalreport/voters-beyond-big-cities-rejected-mass-incarceration-in-tuesdays-elections/> [<https://perma.cc/H952-SD9T>] (describing a “wave of decarceral candidates” emerging victorious in prosecutor races across the country in 2019).

<sup>4</sup> See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/5ZE8-9LN3>] (“[B]egin-

also accord with national public opinion polls over the last several years showing strong public support for reducing incarceration for non-violent offenses, reforming the bail system, and increasing police oversight and accountability.<sup>5</sup> A Congress that has struggled to achieve bipartisan legislative achievements recently passed, by a wide bipartisan margin, a federal criminal justice reform bill that, among other things, reduces (or in some cases eliminates) mandatory minimum penalties for certain offenses and offenders and improves conditions of confinement.<sup>6</sup> Though modest in its reforms, the legislation adds to the accumulating evidence of a changing politics of crime.

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ning in 2013, when the late Ken Thompson unseated a 23-year incumbent in Brooklyn, voters have elected 30 reform-minded prosecutors, in municipalities as varied as Corpus Christi, Kansas City and San Francisco.”); Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), <http://prospect.org/article/new-reformer-das> [<https://perma.cc/HFR4-PGDN>] (stating that reform-oriented prosecutors have won office in Florida, Louisiana, Mississippi, Texas, New Mexico, Colorado, and Illinois); Joseph Neff, *How Prosecutor Reform Is Shaking Up Small DA Races*, MARSHALL PROJECT (May 1, 2018), <https://www.themarshallproject.org/2018/05/01/how-prosecutor-reform-is-shaking-up-small-da-races?ref=collections> [<https://perma.cc/BYK4-LFWU>] (arguing that reform platforms among prosecutors running in Philadelphia, Chicago, and Houston have now spread to Durham, North Carolina as well); Nichanian, *supra* note 3 (describing victories for progressive prosecutors in 2019 in rural and suburban districts in Virginia, Mississippi, and Pennsylvania).

<sup>5</sup> See RICH MORIN ET AL., PEW RESEARCH CTR., BEHIND THE BADGE: AMID PROTESTS AND CALLS FOR REFORM, HOW POLICE VIEW THEIR JOBS, KEY ISSUES AND RECENT FATAL ENCOUNTERS BETWEEN BLACKS AND POLICE 75, 81 (Jan. 11, 2017), [https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report\\_FINAL\\_web.pdf](https://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf) (surveying 4,538 adults and finding sixty percent of the public, including a majority of whites, believes deaths of blacks during police encounters in recent years are signs of a broader problem); PEW RESEARCH CTR., AMERICA’S CHANGING DRUG POLICY LANDSCAPE 1 (Apr. 2, 2014), <https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/04-02-14-Drug-Policy-Release.pdf> (surveying 1,821 adults and finding 67% favored treatment over prosecution for those who use cocaine and heroin, and 63% favored states moving away from mandatory drug penalties); *Black, White, and Blue: Americans’ Attitudes on Race and Police*, ROPER CTR. FOR PUB. OPINION RESEARCH (Sept. 22, 2015), <https://ropercenter.cornell.edu/blog/black-white-and-blue-americans-attitudes-race-and-police> [<https://perma.cc/AG55-L6ZM>] (reviewing a variety of recent polls by major mainstream news outlets and finding that large majorities of both whites and blacks support investigations of police misconduct by outside, independent prosecutors, better training for police on civilian confrontations, public videotaping of police/citizen encounters, and use of police bodycams); Gotoff & Lake, *supra* note 1 (“[S]olid majorities of voters support major reform of the criminal justice system in the United States (57 percent), including nearly one-in-five voters (19 percent) who support a complete overhaul of the system. This sentiment crosses partisan lines, too, with majorities of Democrats (64 percent) and independents (58 percent) and nearly half of all Republicans (48 percent) backing the call for major reform of the criminal justice system.”); *New Survey: With Increased Understanding of Current Practices, Americans Support Reforms to Pretrial and Money Bail Systems*, CHARLES KOCH INST. (July 12, 2018), <https://www.charleskochinstitute.org/news/survey-americans-support-reforms-pretrial-money-bail-systems/> [<https://perma.cc/M4AW-EX5L>] (surveying 1,400 registered voters and finding 57% favor ending cash bail for those who cannot afford it in all but the most extreme circumstances and 72% favor limiting time in pretrial detention for those who cannot afford bail).

<sup>6</sup> See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; John Wagner & Philip Rucker, *House Backs Bipartisan Criminal Justice Overhaul, Sends Bill to Trump*, WASH. POST (Dec. 20, 2018), <https://www.washingtonpost.com/powerpost/house-backs-bipartisan-criminal-justice-overhaul->

To be sure, significant change in who and how many are policed, charged, and imprisoned will require deeper adjustments in public views, particularly with respect to violent offenders.<sup>7</sup> Still, it is not too early to begin asking the critical next questions: how responsive is the criminal justice enforcement apparatus to changes in public preferences, and how responsive should it be? Or, to put the question more broadly: what is, and what should be, the relationship between democracy and bureaucracy in American criminal justice?

The relationship is complex. The thousands of criminal justice systems that collectively comprise American criminal justice exist within, and are subject to, both democratic and bureaucratic processes. Comparative work tends to highlight the extent to which American criminal justice is relatively *unbureaucratic*, at least as compared to democracies with inquisitorial criminal justice systems.<sup>8</sup> That it is. But strong bureaucratic elements exist here, too. Chief prosecutors (local district attorneys and state attorneys general) are mostly elected; but they take the reins of an office filled with career civil servants, many of whom began their careers long before the election and will remain long after. Police commissioners are appointed by elected mayors, and sheriffs are elected; but they lead departments of career law enforcement officers. And on the federal side, the chief law enforcement officer of the nation and

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sends-bill-to-trump/2018/12/20/11e57e2-0448-11e9-b6a9-0aa5c2fcc9e4\_story.html [https://perma.cc/V76U-C74R]. The First Step Act's penalty-reduction measures are relatively modest: it makes retroactive a 2010 amendment to penalties for distribution of crack cocaine, expands safety-valve eligibility (allowing certain drug offenders to be sentenced below the otherwise-applicable mandatory minimum), reduces mandatory minimum penalties for certain recidivist drug offenders, and eliminates a steep penalty increase that applied to defendants charged with multiple counts of using a firearm in furtherance of a drug trafficking crime or crime of violence. See U.S. SENTENCING COMM'N, FIRST STEP ACT (Feb. 2019), [https://www.uscc.gov/sites/default/files/pdf/training/newsletters/2019-special\\_FIRST-STEP-Act.pdf](https://www.uscc.gov/sites/default/files/pdf/training/newsletters/2019-special_FIRST-STEP-Act.pdf) (summarizing the sentencing reforms of the First Step Act of 2018). Still, the law accomplished the most significant federal penalty reductions in a generation, and its passage and title—implying the start of something more—reflects a widening political space for de-incarceration reform. See *id.*; see also Maggie Astor, *Left and Right Agree on Criminal Justice: They Were Both Wrong Before*, N.Y. TIMES (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/politics/criminal-justice-system.html?searchResultPosition=1> [https://perma.cc/6D25-9AQ9] (describing criminal justice reform proposals laid out by politicians and political activists from both left and right in a 2019 Brennan Center report, which collectively “show how profoundly the debate has changed,” revealing “a wholesale reversal of [the] bipartisan consensus” on criminal enforcement).

<sup>7</sup> See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 185–86 (2017) (arguing that politicians and reformers focus mostly on reducing penalties for nonviolent crimes but need to seek reforms for violent crimes to achieve real progress).

<sup>8</sup> See, e.g., Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1 (2012); cf. Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587 (2010) (highlighting both the differences and similarities in forms of prosecutorial accountability between the U.S. election-based system and civil law bureaucratic systems).

of each district is appointed by the democratically elected President; but they lead thousands of attorneys who spend their careers within the Department of Justice (DOJ).

Ours is a blended system. This Article explores its fault lines at a moment of political transition. I use the term “political transition” to describe a period in which public preferences on criminal justice policy are shifting, causing palpable electoral effects—not radically, and not everywhere, but to a degree and across a sufficient number and diversity of jurisdictions that serious observers can reasonably describe as new political trends.<sup>9</sup> Whether these trends mark a short-term or longer-term shift remains to be seen. I use the term “transition” here to describe the present, not predict the future (or, with limited exceptions, to recall the past).<sup>10</sup> For now, at least, the “one-way ratchet” towards severity that once defined the politics of crime in America no longer applies uniformly.<sup>11</sup>

But shifts in the politics of criminal justice, even those that yield change to penal laws, may not translate into changes in enforcement practices. How and why they do, or do not, is the key puzzle our blended system presents. In the face of changing public preferences on criminal justice, how do current political and institutional arrangements enable or impede change in law-on-the-ground?

To begin to unpack this question, this Article takes on three primary tasks. The first is to highlight the absence of answers in the last several decades of scholarship, which by and large has charted the relationship between democracy and the criminal enforcement bureaucracy in an era of nearly uniform penal

<sup>9</sup> See, e.g., David Cole, *The Changing Politics of Crime and the Future of Mass Incarceration*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 13, 13 (Erik Luna ed., 2017) (“For too many years, it seemed that the only possible stance a politician could take on crime was to be tougher than his opponent. . . . Today, however, ‘smart on crime’ has replaced ‘tough on crime.’ Rather than simply being tougher than the next guy, politicians and government officials increasingly seek solutions that are based on evidence and reason rather than heated rhetoric and demagoguery.”); James Forman, Jr., *Justice Springs Eternal*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/opinion/sunday/justice-springs-eternal.html> [<https://perma.cc/HZ3R-5D5J>] (observing that, after fifty years of tough-on-crime politics, a “movement for a more merciful criminal justice system” is “stronger than ever” as evidenced by the results of local prosecutor elections and state referenda in numerous jurisdictions in 2016); Sklansky, *supra* note 3, at 650 (surveying a number of recent elections in which the electorate chose reform-oriented prosecutors over more traditional ones).

<sup>10</sup> See *infra* notes 139–142 and accompanying text (describing reactions by career enforcers during the earlier shift to harsher sentencing regimes).

<sup>11</sup> See David Michael Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1960 & n.57 (2012) (“Scholars have long observed that the criminal law seems to act as a ‘one-way ratchet’ perpetually expanding its scope and enhancing its penalties.”) (footnote omitted) (citing Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 (2011)).

severity. The second is to identify the starting points of an updated inquiry: the key features of electoral politics, enforcement agency dynamics, and federalism that can hasten or slow political transition in criminal justice and exacerbate or mitigate its effects. The third task is to consider the implications of current institutional and political arrangements for democratic responsiveness and systemic legitimacy. In particular, I explore whether bureaucratic resistance in the criminal justice space is necessarily anti-democratic, or whether it is—or can be—a feature of democratic criminal justice.

Updating our assessment of the relationship between democracy and the criminal enforcement bureaucracy raises a subset of new questions, among them:

- How does the composition of the “public”—which varies both by jurisdiction and level of government (local, state, federal)—and the influences on voter choice affect elected leaders’ responsiveness in matters of criminal enforcement?
- How do the incentives and interests of elected leaders on the one hand, career enforcers on the other, and the interaction of the two affect the way voters’ choices are translated down through enforcement bureaucracies?
- How do vertical bureaucratic arrangements (i.e., those between federal, state, and local enforcers) within the criminal justice arena alternatively fuel or stymie shifts in public preferences?

These questions go to the heart of a tension long observed in the democracy/bureaucracy relationship. Max Weber first conceptualized democracy’s dependence on bureaucracy to implement democratically chosen policies, and the tax on democracy this dependence exacts.<sup>12</sup> This tension has generated rich inquiry in the fields of organizational sociology,<sup>13</sup> political theory,<sup>14</sup> public administration,<sup>15</sup> and administrative law.<sup>16</sup> But scholars of criminal justice administration have yet to fully mine its implications for criminal justice reform.

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<sup>12</sup> FROM MAX WEBER: ESSAYS IN SOCIOLOGY 224–26 (H.H. Gerth & C. Wright Mills eds. & trans., 1958) (1946) (observing that “bureaucratization in the state administration itself is a parallel phenomenon of democracy,” yet one that ultimately exacts a “leveling of the governed in opposition to the ruling and bureaucratically articulated group, which in its turn may occupy a quite autocratic position, both in fact and in form”).

<sup>13</sup> See, e.g., PETER M. BLAU, THE DYNAMICS OF BUREAUCRACY: A STUDY OF INTERPERSONAL RELATIONS IN TWO GOVERNMENT AGENCIES 249, 250–65 (1963) (asking “[h]ow . . . a democratic society assure[s] that the direction and speed of changes in its bureaucracies conform to the common interest, regardless of the personal ideals and interests of their members?” and concluding the “paradox” of democracy and bureaucracy “is the crucial problem of our age”).

<sup>14</sup> See generally KENNETH J. MEIER & LAURENCE J. O’TOOLE, JR., BUREAUCRACY IN A DEMOCRATIC STATE 21–26 (2006) (surveying the literature).

<sup>15</sup> See *id.* at 26–30 (surveying the literature).

That is because the literature straddling democratic theory and criminal justice administration over the last half-century has been captivated by a particular political narrative, of overly punitive voting majorities and a criminal enforcement bureaucracy eager to do their bidding. Whether scholars have approached democracy and bureaucracy in criminal justice more from the former side<sup>17</sup> or the latter,<sup>18</sup> or even right down the middle,<sup>19</sup> the focus has been almost exclusively on those aspects of the relationship that increase penal severity.<sup>20</sup>

<sup>16</sup> See generally Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982) (discussing the implications for political accountability of lawmaking delegation to agencies); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (critiquing how the fields of administrative law and corporate law have treated the bureaucracy/democracy tension).

<sup>17</sup> See generally MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2016) (focusing on the American political system's appetite for heavy criminal enforcement); MICHAEL O'HEAR, *THE FAILED PROMISE OF SENTENCING REFORM* (2017) (same); DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* (2008) (same); Nicola Lacey, *American Imprisonment in Comparative Perspective*, DAEDALUS, Summer 2010, at 102 (same); Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1577&context=uclf> [<https://perma.cc/XQT7-PCDC>] (same).

<sup>18</sup> See generally Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387 (2017) (discussing the U.S. Department of Justice's (DOJ) influence on federal crime policy). A large chunk of the policing literature focuses on organizational challenges. See, e.g., Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 93 (2016) (arguing that those with a stake in the prison industry are currently incentivized to favor high imprisonment); Stephen D. Mastrofski & James J. Willis, *Police Organization Continuity and Change: Into the Twenty-First Century*, 39 CRIME & JUST. 55 (2010) (collecting the literature); Marcia L. McCormick, *Our Uneasiness with Police Unions: Power and Voice for the Powerful?*, 35 ST. LOUIS U. PUB. L. REV. 47, 54–59 (2015) (noting that police unions may impede reform measures and general accountability).

<sup>19</sup> See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2015) (ascribing America's penal severity in part to an escalating cycle in which "insiders"—the criminal justice professionals, including prosecutors, defense attorneys, and judges—operate largely without public input, invoking attempts by "outsiders"—the general voting public—to constrain insiders' discretion through harsh penal laws, the evasion of which by insiders in turn invokes even harsher legislative response); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055 (2006) (discussing challenges of head prosecutors in implementing uniform sentencing policies in the post-Booker age); Stuntz, *supra* note 11 (exploring how a unity of interest between politicians and prosecutors, particularly in the federal system, generated harsher penalties in the latter quarter of the 20th century).

<sup>20</sup> Darryl Brown's work has challenged the dominant narrative, at least as respects criminalization. See generally Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007) [hereinafter Brown, *Democracy and Decriminalization*]; Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009) [hereinafter Brown, *Prosecutors and Overcriminalization*]. But Brown distinguishes criminalization from punishment, arguing that although certain features of the democratic process have reduced or kept in check the scope of substantive criminal law over time, the law of punishment has become more severe. See Brown, *Democracy and Decriminalization*, *supra*, at 267–68. Increasingly,

The prescriptions for this arrangement (or “pathology,” as Bill Stuntz famously described it) have varied.<sup>21</sup> Some scholars call for broadening forms of public input, through extra-electoral mechanisms<sup>22</sup> or redistricting.<sup>23</sup> Others call for de-emphasizing the role of politics in criminal justice by giving greater power to courts and experts.<sup>24</sup> Collectively, though, these accounts have paid scant attention to two increasingly urgent questions. First, can voting majorities within the existing political structure ratchet down criminal enforcement?<sup>25</sup> Second, are enforcement institutions, comprised of politically accountable enforcement leaders and career civil servants, responsive to political change?<sup>26</sup>

To be sure, until very recently such inattention was justified. In moments of stasis in the politics of criminal justice, political accountability and enforcement discretion may operate largely in tandem. A given jurisdiction’s vot-

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though, legislatures are ratcheting down punishment, raising new questions about the political dynamics of punishment and its relationship to enforcement discretion.

<sup>21</sup> See generally Stuntz, *supra* note 11 and accompanying text.

<sup>22</sup> See Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407–27 (2016) (arguing for greater direct public oversight of police through video recordings of police/citizen interactions); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2034–39 (2008) (arguing for giving greater power to local juries). Another line of scholarship in this vein seeks to democratize criminal justice professionals’ decision making by requiring that such decisions be made publicly and ex-ante, through legislation or notice-and-comment rulemaking. See generally Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012); Barry Friedman & Maria Pomomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).

<sup>23</sup> See PFAFF, *supra* note 7, at 214–16 (arguing for re-zoning of prosecutorial districts to give greater political power to urban constituencies); Stuntz, *supra* note 22, at 2002–03 (linking the rise in criminalization and harsh penalties to the growing political clout of suburbs in metropolitan counties).

<sup>24</sup> See RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 2–6 (2019) (arguing for an institutional shift away from electoral politics to data-driven, expert-based criminal justice decision making); Lacey, *supra* note 17, at 111 (arguing for a greater role of experts in setting criminal justice policies); Stuntz, *supra* note 11, at 587–98 (arguing for more robust constitutional review of criminal law); see also VANESSA BARKER, *THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS* 10–13 (2009) (drawing connections between the severity of state penal regimes and the degree and form of lay participation versus expert input in penal policy).

<sup>25</sup> Some recent work has explored voters’ agency in criminal justice reform. See generally PFAFF, *supra* note 7; Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 250, 250–75 (Máximo Langer & David Alan Sklansky eds., 2017); Sklansky, *supra* note 3. Yet these nascent discussions have not yet advanced to the next question: how criminal justice preferences registered at the ballot box get translated into enforcement changes on the ground.

<sup>26</sup> Dan Richman has considered the challenges of executing a uniform sentencing policy when line-level prosecutors have so many discretionary tools to resist it. See Richman, *supra* note 19, at 2065–69. Many others have considered what drives line-level prosecutors’ choices (though much work on this question remains to be done). See generally Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012); Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667 (2018). But there has been no focus on the interplay between the pressures and incentives of politically accountable leaders and those of line-level enforcers when political circumstances are in flux.



ers, elected officials, and civil servants generally share a unity of interest, borne of like-minded commitments that have developed over time.<sup>27</sup> To the extent criminal justice outputs differ from public expectations, they are difficult to see—particularly in a system so opaque to begin with.<sup>28</sup>

But at moments of political transition, the relationship can be fraught. Public demand for change may or may not accord with the commitments, ideals, and culture of the bureaucracy's front-line actors. Elected leaders are voted in with high expectations for transformative change, yet may be stymied by the bureaucracy's resistance to it. The bureaucracy, in turn, may seek to alter (or at least counter) the political narrative that is fueling the democratic transition, further complicating the democratic process. And in a system in which criminal lawmaking and enforcement power is spread across three different levels of government—local, state, and federal—with overlapping authority yet very different constituencies, the complexity of interplay between “public” and bureaucracy deepens.

These tensions have surfaced in recent years, sometimes dramatically. How is it, for instance, that though New York City's mayor campaigned extensively for his first term on a platform of police reform, few substantive reforms were operationalized in the years that followed?<sup>29</sup> Why has bail reform stalled in jurisdictions where elected prosecutors campaigned on bail reform and have taken affirmative steps to achieve it?<sup>30</sup> Amidst broad political support for cur-

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<sup>27</sup> See Stuntz, *supra* note 11, at 547–57 (describing a symbiotic relationship between lawmakers and prosecutors).

<sup>28</sup> See generally Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077 (2017) (exploring the disconnect between the publicly-expressed goals and prosecutorial outcomes of federal criminal laws, using federal drug enforcement as a case study of the phenomenon); Richman, *supra* note 19 (discussing the role of largely invisible pre-adjudicative decisions by police and prosecutors in the production of sentencing outcomes).

<sup>29</sup> See J. David Goodman, *De Blasio's Police Reform Pledges May Burden His Re-election Bid*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/nyregion/de-blasios-police-reform-pledges-may-burden-his-re-election-bid.html> [<https://perma.cc/6FYP-FKQW>] (documenting disparities between De Blasio's rhetoric and actual change on the ground, a situation described by a former employee in the Mayor's Office of Criminal Justice as, “[y]ou have this really exciting rhetoric of reform that has been embraced by almost everyone, including the police and prosecutors . . . [b]ut in practice, it's business as usual”); Gloria Pazmino, *De Blasio Facing Consternation on the Left for Silence on NYPD*, POLITICO (Dec. 14, 2018), <https://www.politico.com/states/new-york/city-hall/story/2018/12/13/de-blasio-facing-consternation-on-the-left-for-silence-on-nypd-746345> [<https://perma.cc/V9HP-HFBD>] (describing police accountability as “a central tenet in [De Blasio's] ‘tale of two cities’ [campaign] message”).

<sup>30</sup> See, e.g., RECLAIM CHI. ET AL., CREATING A CULTURE OF FAIRNESS AND ACCOUNTABILITY: DEFENSE ATTORNEYS REPORT ON KIM FOXX'S PROGRESS TOWARDS TRANSFORMING THE PRIORITIES OF HER OFFICE 7 (Oct. 2019) [hereinafter DEFENSE ATTORNEYS REPORT ON KIM FOXX'S PROGRESS], [https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/10/2019-10-Report-Kim-Foxx\\_ForPrint\\_FINAL.pdf](https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/10/2019-10-Report-Kim-Foxx_ForPrint_FINAL.pdf) (describing a mixed record on cash bond reduction in 2018 and 2019); RECLAIM CHI. ET AL., IN PURSUIT OF JUSTICE FOR ALL: AN EVALUATION OF KIM FOXX'S FIRST

tailoring long sentences for drug offenders in the federal system, did the Attorney General's prosecutorial charging directive aimed to achieve that result erode democratic legitimacy, or enhance it?<sup>31</sup> And did the line prosecutors subject to the directive effectuate or frustrate it—and why?<sup>32</sup>

Unpacking these sorts of questions is a requisite to thoroughgoing, durable criminal justice reform. The reform literature in recent years has rightly focused on the need for voters and politicians to further adjust their attitudes about crime and punishment. But we risk the prospective gains from these adjustments if we do not address what happens, and what should happen, once they occur. This Article begins that task.

It proceeds as follows. Part I tests the limits of the criminal justice reform literature, arguing that its nearly universal premise—of a uniformly punitive politics of crime—is outdated.<sup>33</sup> Preferences on criminal justice among electorates are more diverse than the standard accounts portray. We lack insight into how voting majorities and criminal enforcement bureaucracies, and leaders and subordinates within those bureaucracies, interrelate within moments of political transition. Part II lays out those insights, examining the relationship between democracy and bureaucracy in criminal justice today across three vantage points: the public; the bureaucracy; and the sovereign.<sup>34</sup> Part III reflects on the implications for democratic responsiveness and systemic legitimacy at a moment of political transition.<sup>35</sup> I argue that the very features of the democracy/bureaucracy relationship capable of slowing democratically sanc-

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YEAR IN OFFICE 5–6 (Dec. 2017) [hereinafter EVALUATION OF KIM FOXX'S FIRST YEAR IN OFFICE], [https://www.chicagoreader.com/general/201712/Equal\\_Justice\\_for\\_All\\_-\\_A\\_Report\\_on\\_Kim\\_Foxx\\_s\\_First%20Year-ForWeb.pdf](https://www.chicagoreader.com/general/201712/Equal_Justice_for_All_-_A_Report_on_Kim_Foxx_s_First%20Year-ForWeb.pdf) (observing that Foxx's bail initiatives have been offered to only a small percentage of defendants); Aurelie Ouss & Megan T. Stevenson, Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors 3 (Jan. 19, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3335138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138) (in a pre-post study of effects of District Attorney Larry Krasner's directive to prosecutors to cease requesting cash bail in certain categories of cases, finding no detectable effect on pre-trial detention, and nearly 40% of eligible cases continuing to receive monetary or supervisory release conditions); Neff, *supra* note 4 (discussing the disconnect between the Durham County District Attorney's promises on reforming cash bail, and his ADAs' position on bail in bond hearings).

<sup>31</sup> See generally Memorandum on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases from Eric Holder, Jr., Att'y Gen., U.S. Dep't of Justice, to the U.S. Att'ys & Assistant Att'y Gen. for the Criminal Div. (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

<sup>32</sup> See generally OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE DEPARTMENT'S IMPLEMENTATION OF PROSECUTION AND SENTENCING REFORM PRINCIPLES UNDER THE SMART ON CRIME INITIATIVE (June 2017) [hereinafter OFFICE OF THE INSPECTOR GEN.], <https://oig.justice.gov/reports/2017/e1704.pdf>.

<sup>33</sup> See *infra* notes 36–57 and accompanying text.

<sup>34</sup> See *infra* notes 58–208 and accompanying text.

<sup>35</sup> See *infra* notes 209–271 and accompanying text.

tioned change in criminal enforcement can end up hastening political shifts; and that, properly leveraged, the criminal enforcement bureaucracy can help realize more deliberative and participatory democratic ideals.

### I. THE CRIMINAL JUSTICE REFORM LITERATURE AND ITS LIMITS

Criminal justice scholarship at the intersection of democracy and bureaucracy is plentiful, but limited in important respects. First, most accounts envision a uniform political dynamic across jurisdictions, in which the preferences of voting majorities interact with enforcement bureaucracies to produce aggressive and punitive enforcement policies. Second, in considering the interplay of democracy and the enforcement bureaucracy, much of the literature elides the distinctions between the more politically accountable leaders of enforcement bureaucracies and their career-level employees.

These limitations are important, because we are entering a period in which voting majorities in a number of jurisdictions are less punitive. Prescriptions, then, need not only focus on ways to counterbalance majoritarian systems; they can, and should, consider also how to leverage electoral change.

This Part reviews the literature at the intersection of democracy and bureaucracy, categorizing it into two groups: (i) scholarship whose prescriptions focus primarily on the democracy side, advocating for altering the public's role in criminal justice administration; and (ii) scholarship whose prescriptions focus primarily on the bureaucracy side, advocating organizational redesign of criminal justice institutions (police departments, prosecutors' offices, and courts). This categorization is not to suggest two separate literatures. To the contrary, the work of a number of scholars straddles both. But the frame enables us to see how the dominant accounts of the last decades treat the challenges of democracy on the one hand and bureaucracy on the other, and the limitations that they both share. Section A of this Part surveys the first category,<sup>36</sup> and Section B the second.<sup>37</sup>

#### A. Democracy-Focused Scholarship

Criminal justice policy in the United States begins with democracy. Penal laws are enacted by elected legislators. Those laws are enforced on the streets by police departments, led by commissioners who are in turn appointed by elected mayors. The laws are enforced in the courts by line prosecutors who report to an elected or politically-appointed chief, and at the sentencing stage

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<sup>36</sup> See *infra* notes 38–49 and accompanying text.

<sup>37</sup> See *infra* notes 50–57 and accompanying text.

by judges, the vast majority of whom are elected and a minority of whom are politically appointed.<sup>38</sup>

Befittingly, a large portion of the scholarly reform agenda focuses on the political economy of criminal enforcement. Some scholars highlight the importance of changing how voters think about crime and punishment.<sup>39</sup> Others advocate moving lawmaking and enforcement power away from majoritarian institutions (legislatures and elected prosecutors) to institutions such as juries, civilian review boards, or courts, which can protect and give voice to those with less political power.<sup>40</sup> Some call for a devolution of lawmaking and enforcement power from federal, state, and geographically broad counties to more narrowly drawn “local” governments, in an effort to expand political power to under-represented communities.<sup>41</sup> And a smaller group of scholars points to the advantages of placing crime policy in the hands of criminal justice professionals (sentencing commissions, advisory panels, and so on), removed from the fever of majoritarian politics.<sup>42</sup>

Although varied in its approaches to reform, this body of scholarship emphasizes the public’s role in constraining or enabling the excesses of legisla-

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<sup>38</sup> Chief prosecutors are elected in all jurisdictions except those in Alaska, Connecticut, Delaware, and New Jersey (and, of course, the federal system). See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. (forthcoming 2020) (manuscript at 14–15) (on file with author). Judicial selection varies widely across states and even across jurisdictions within a state; nevertheless, thirty-nine states allow for direct voter input in selection of trial court judges at either the initial or retention stage. See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUSTICE, <http://judicialselectionmap.brennancenter.org/?court=Trial> [<https://perma.cc/8ZE5-2SWB>].

<sup>39</sup> See GOTTSCHALK, *supra* note 17, at 2 (claiming that the biggest challenge in reducing high incarceration rates in the United States is making it a highly important issue for voters and changing the political system to be more reform oriented); O’HEAR, *supra* note 17, at 212 (stating that incarceration will only significantly decline once old public attitudes of severely punishing crime are changed); PFAFF, *supra* note 7, at 227–29 (arguing that changing U.S. citizens’ “attitudes toward crime” is the most important reform); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 606–08 (2009) (urging different metrics by which voters could assess chief prosecutors).

<sup>40</sup> See BIBAS, *supra* note 19, at 144–50 (advocating for increased citizen participation in local policing through avenues such as community review boards and community advocates positioned within police units and prosecutorial offices); Brown, *Prosecutors and Overcriminalization*, *supra* note 20, at 464 (suggesting that courts should take a larger role in supervising prosecutors by expanding judicial doctrines); Simonson, *supra* note 22, at 407–27 (citing civilian copwatching as a method of increasing police accountability and public participation in policing); Stuntz, *supra* note 11, at 587–98 (promoting the idea of greater judicial oversight over criminal law through active constitutional scrutiny).

<sup>41</sup> See PFAFF, *supra* note 7, at 214–16 (calling for dividing prosecutorial offices into smaller urban and suburban zones so that citizens in areas with a lot of crime have more of a say in politics); see also Stuntz, *supra* note 22, at 2002–03 (explaining that in large county-wide prosecutorial offices, white suburban voters have had more voting power than minority urban voters).

<sup>42</sup> See, e.g., BARKOW, *supra* note 24, at 2–6 (arguing for an institutional shift away from electoral politics to data-driven, expert-based criminal justice decision making); Lacey, *supra* note 17, at 111 (arguing for a greater role for experts in setting criminal justice policies).

tures and criminal enforcers. Whether the prescription is a greater public role or a lesser one, or a reframing of who the public should be, the analysis mostly begins and ends there. That is, it begins by diagnosing features of the political economy that produce sub-optimal criminal enforcement, and it ends with a prescription for changing or constraining those features through a recalibration of the manner or degree of public input. Little consideration is given to how, upon recalibration, the enforcement rank-and-file will respond to, and execute, the policies that then emanate.

That omission matters. First, the success record of the “democratization”<sup>43</sup> movement thus far has been decidedly mixed, in no small part due to the difficulties of translating change through the enforcement bureaucracy’s front-line actors. Consider the great embrace of “community policing” in the 1990s. In the hands of many police departments, it turned into “order-maintenance” and “quality-of-life policing”—philosophies that borrowed but ultimately stepped away from the community-based ideal.<sup>44</sup> Civilian review boards have largely proven ineffective.<sup>45</sup> And although “copwatching”—the practice in which citizens record police conduct in real time by video—has given voice to traditionally powerless groups, it has yet to result in tangible reform gains, in no small part because of police officers’ and departments’ rejection of and hostility to the practice.<sup>46</sup>

Second, the political economy against which the public-facing criminal justice reform literature aligns is no longer a monolith. Local elections over the last several years have seen mayors and prosecutors campaigning and winning on promises of reforming criminal enforcement—in narrowly drawn urban

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<sup>43</sup> I use this term in line with Joshua Kleinfeld’s use, as a broad-brush description of scholars generally seeking to inject greater community voice into criminal justice administration. See Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1397 (2017) (referring to a democratic criminal justice system as one that invites public participation and deliberation and is responsive to the common people). I recognize that not all self-identify with the term as used here. See, e.g., Tracey Meares, *Policing and Procedural Justice: Shaping Citizens’ Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1526 (2017) (finding a role for experts and bureaucracy in a democratic criminal justice system).

<sup>44</sup> See THE CHALLENGE OF COMMUNITY POLICING: TESTING THE PROMISES 294–95 (Dennis P. Rosenbaum ed., 1994) (collecting empirical studies showing mixed results of community policing programs in a number of jurisdictions); Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611, 627 (2016) (“Community policing has failed to live up to its promise because of definitional failures, implementation and evaluation failures, and, most importantly, cultural resistance within law enforcement.”).

<sup>45</sup> See Rachel Moran, *Ending the Internal Affairs Farce*, 64 BUFF. L. REV. 837, 845 (2016) (noting that civilian review of police departments has “[f]or the most part . . . met with limited success,” and postulating reasons for the shortcomings).

<sup>46</sup> See Simonson, *supra* note 22, at 438–41 (discussing police hostility to copwatching, and arguing in favor of a more open-minded approach on the part of police departments).

counties,<sup>47</sup> suburban counties,<sup>48</sup> and even in broadly drawn counties where suburban “collar” voters dilute the political power of urban constituencies.<sup>49</sup> In these jurisdictions, existing political structures have generated changes to penal laws and enforcement leadership. And yet, in a number of those jurisdictions, enforcement patterns are slow to follow suit. This is a puzzle unaddressed by public-facing accounts.

At the heart of that puzzle is an increasingly complex relationship between politics and the enforcement bureaucracy. As the last decade has seen growing public interest in some parts in mitigating penal severity and ratcheting down enforcement in certain offense categories, it has also seen a widening divide between the enforcement bureaucracy’s leaders (elected or appointed) and its rank-and-file. The incentives of law enforcement and corrections officer unions, line prosecutors, and street cops are not always aligned with the elected or appointed leader of their department—particularly at moments of transition in public attitudes about crime and punishment. It is therefore difficult today to speak of “prosecutors” or “police” and their relationship with “legislators” and “voters.” Those relationships will vary markedly depending on which members of a prosecutor’s office or police department, and which elected representatives and voting constituencies, one is talking about.

### B. Bureaucracy-Focused Scholarship

American criminal justice may begin with democracy, but it is dispensed through bureaucracy. Politically accountable leaders helm our policy-making, policing, and prosecutorial institutions, but day-to-day justice is meted out by career enforcers who operate largely under the radar. Data exists on numbers and categories of arrests, charges, plea rates, conviction rates, and sentences imposed. Yet true indicators of the quality of justice—who police decline to

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<sup>47</sup> Philadelphia and Brooklyn, both sites of recent victories by progressive prosecutors, are examples of so-called “consolidated city-counties,” in which the city’s and county’s borders are coterminous. See *List of Consolidated City-County Governments*, NAT’L LEAGUE OF CITIES, <https://www.nlc.org/list-of-consolidated-city-county-governments> [<https://perma.cc/9FS8-DUHF>] (listing Philadelphia, Pennsylvania and Brooklyn, New York as such).

<sup>48</sup> See Chammah, *supra* note 3 (describing victories by reformist prosecutors in Hillsborough County, Florida, Harris County, Texas and the city-county of Denver, Colorado).

<sup>49</sup> Both John Pfaff and the late Bill Stuntz use Cook County, Illinois as a primary example of districting that dilutes urban constituents’ political voice. See *supra* note 23 and accompanying text. Yet that did not prevent the ascendance of Cook County State’s Attorney Kim Foxx, who campaigned on bail reform, prosecution of police misconduct, approaching drug abuse through treatment rather than prosecution, increasing prosecutorial transparency, and reducing aggressive charging. See Micah Uetricht, *The Criminal-Justice Crusade of Kim Foxx*, CHI. READER (Mar. 9, 2016), <https://www.chicagoreader.com/chicago/kim-foxx-bid-unseat-anita-alvarez-cook-county/Content?oid=21359641> [<https://perma.cc/J59Q-3HPR>] (documenting Foxx’s campaign and some of her criminal justice policy positions).

arrest, how plea bargains are struck, what charges were declined or dropped, what evidence is disclosed or withheld, or how sentencing recommendations were made—remain largely invisible. Collectively, they are the product of daily decisions by hundreds of thousands of enforcers on the ground.

How to better regulate these sorts of decisions is the worthy fixation of a large body of criminal reform scholarship. This scholarship, too, diagnoses an unhealthy relationship between majoritarian politics and the criminal enforcement bureaucracy. But it focuses on redesigning enforcement institutions to check enforcers' power.<sup>50</sup> These scholars look to the role of courts,<sup>51</sup> legislatures,<sup>52</sup> defense counsel,<sup>53</sup> and the public<sup>54</sup> in the governance of enforcement institutions, with the public less as a casualty of or solution to political failures (as in the democracy-focused scholarship) and more a feature of institutional design. (In this sense, one might loosely incorporate the procedural justice literature, with its focus on redesigning policing to enhance public trust.)<sup>55</sup>

The focus on the design of enforcement institutions is a necessary component of reform. But this literature, too, has limitations. First, its focus on governance at the institutional level tends, as does the democracy-focused literature, to bypass distinctions between institutional leadership and the rank-and-file. There are noteworthy exceptions (though most are quite dated).<sup>56</sup> And

<sup>50</sup> See, e.g., Barkow & Osler, *supra* note 18, at 456–73 (proposing changes to the federal executive branch so that presidents receive advice on criminal justice that is independent from DOJ prosecutors); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 880, 895–97 (2009) (blaming the rise of federal prosecutors' power in part on politics of crime, and arguing for more attention to institutional design of prosecutors' offices); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–805 (1998) (discussing congressional constraints on federal enforcement discretion); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1482–84 (2008) (discussing the need to recalibrate sentencing discretion as between prosecutors and courts).

<sup>51</sup> See Stith, *supra* note 50, at 1493 (discussing the importance of courts in calibrating prosecutorial power and discretion).

<sup>52</sup> See Richman, *supra* note 50, at 789–805 (discussing congressional constraints on federal enforcement discretion).

<sup>53</sup> See Barkow & Osler, *supra* note 18, at 467, 473 (advocating for more individuals with criminal defense backgrounds to be appointed within the DOJ and as federal judges).

<sup>54</sup> See Bierschbach & Bibas, *supra* note 22, at 34–37 (calling for public notice-and-comment procedures when creating sentencing policy); Friedman & Ponomarenko, *supra* note 22, at 1877 (arguing for public input and rulemaking for police practices).

<sup>55</sup> See, e.g., Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U. L. REV. 1537, 1549–54 (2017) (suggesting that police promote procedural justice to build trust with their communities).

<sup>56</sup> There is, however, more recent scholarship available. See generally Richman, *supra* note 19; David Alan Sklansky & Monique Marks, *The Role of the Rank and File in Police Reform*, 18 POLICING & SOC'Y 1 (2008) (introducing a conference focused specifically on this topic). Empirical work in this area is decades old. See generally MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* (1988) (studying attitudes and decision making of street patrol

even the limited recent work in this area leaves tantalizing questions at the intersection of political accountability, leadership, and line-level enforcement discretion.

Second, this literature gives scant attention to the role of politics in institutional redesign. Yet significant change to the organization and overall approach of criminal enforcement institutions, or to the allocation of power among those institutions, will not come absent political pressure.<sup>57</sup> Put differently: the organizational and institutional literature has offered great insight into how criminal justice institutions do operate and how they should operate; but it largely omits the essential question of how, in a blended democratic/bureaucratic system, operational change ultimately comes to pass. The omission made sense when voting majorities were unlikely to support changes designed to limit enforcers' power. It may no longer.

Criminal justice scholarship at the intersection of democracy and bureaucracy has offered important contributions. It has diagnosed the challenges of majoritarian criminal justice, as well as those of bureaucratic power and discretion. Yet it holds too monolithic a view of both politics and enforcers. The last decade's shift in the politics of crime challenges standard accounts of how politics and the enforcement bureaucracy interact. Although that shift remains small, the difficulties in operationalizing relatively uncontroversial reforms lay bare the task ahead. It is time we think about how criminal justice institutions navigate moments of political transition, and how they should.

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officers in three police departments in Southern California); LIEF H. CARTER, *THE LIMITS OF ORDER* (1974) (seminal study of failed efforts, in one California district, to systematize decision making by line prosecutors); ELIZABETH REUSS-IANNI, *TWO CULTURES OF POLICING: STREET COPS AND MANAGEMENT COPS* (1983) (finding significant distinctions in professional culture between management and line officers in a two-year study of social organization in the New York City Police Department).

<sup>57</sup> This is true, as well, of courts in the criminal context, as others have shown. See Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1368 (2004) (demonstrating the role of public opinion in producing the Warren Court's supposedly most "revolutionary" criminal procedure opinions); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 125–33 (2012) (drawing links between judicial constraint of death penalty and public opinion). Interestingly, the Court's decisions in *Blakely v. Washington* and *United States v. Booker*, which had the effect of reducing prosecutorial plea-bargaining power, came about only after a sustained period of falling crime rates and growing public concern about the extent of prosecutorial power. *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).



## II. DEMOCRACY AND BUREAUCRACY IN CRIMINAL JUSTICE

Democracy, as has been famously observed, is an essentially contested concept.<sup>58</sup> The same might be said, to a lesser degree, of bureaucracy, which can take on very different forms depending on the field, level of government, and type of government institution. At the outset, then, some clarification is in order.

By “democracy,” I refer to the processes by which voters within U.S. jurisdictions participate in the generation of criminal justice policy. That process is, of course, not a monolith; as political scientists and political sociologists have shown, variations in political structures and in the extent and nature of public involvement in the policy-making process account, at least in part, for variations in penal policy both horizontally<sup>59</sup> and vertically.<sup>60</sup> My focus in this Part is on one, narrow aspect of the policy-generation process: elections. Specifically, I explore how certain features of the electoral process (namely, interest group formation and voter choice dynamics) differ vertically, and on how those differences in turn affect enforcement institutions’ political responsiveness.<sup>61</sup>

My focus on electoral processes is not to suggest that democracy can or should be reduced to simple majoritarianism, or that other aspects of the democratic process, such as lawmaking, appropriations, and other forms of policy-generation, are any less influential. To the contrary, the normative claims advanced in Part III rest heavily on deliberative and participatory concepts of democracy, and on how those concepts can be realized in criminal justice beyond the electoral context.<sup>62</sup> Nevertheless, I focus in this Part on elections because, in most instances, elections directly determine the leadership of a key (some would say *the* key) institutional actor in the criminal enforcement bureaucracy—prosecutors<sup>63</sup>—and indirectly determine the leadership of local police departments and federal enforcement agencies. An assessment of the interaction between the “public” and the criminal enforcement bureaucracy,

<sup>58</sup> See David Collier et al., *Essentially Contested Concepts: Debates and Applications*, 11 J. POL. IDEOLOGIES 211, 222–28 (2006) (discussing scholarly applications of W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167 (1956), on the concept of democracy).

<sup>59</sup> See BARKER, *supra* note 24 (linking differences between three states’ penal policies to differences in states’ political structures and political agency of states’ citizens).

<sup>60</sup> See generally LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* (2008) (linking differences between federal, state, and local penal policies to differences in interest groups’ roles in the legislative process at each level of government).

<sup>61</sup> Thus, my agenda differs from Miller’s in that I focus on vertical differences’ effects on electoral choice, whereas Miller focuses on their effects on the legislative process. See *id.*

<sup>62</sup> See *infra* Part III.

<sup>63</sup> See PFAFF, *supra* note 7, at 133 (naming prosecutors as “the most powerful actors in the criminal justice system”). But see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191–203 (2019) (arguing that prosecutors have less power over criminal justice outcomes than other institutional actors).

then, must begin by assessing how well elections today reflect public preferences on criminal enforcement and communicate those preferences to the enforcement bureaucracy.

My use of the term “bureaucracy” here is shorthand for the members of law enforcement institutions—elected or politically appointed leaders on the one hand, and civil servants on the other—rather than the structure or organization of the institutions themselves. A member-centric approach attends to differences in how these two sets of actors perceive, interact with, and respond to changes in public preferences. It bridges two literatures: one on how the structure and organization of law enforcement bureaucracies influence enforcer behavior,<sup>64</sup> and the other on how the interests and motivations of different institutional actors in the criminal enforcement ecosystem (police, prosecutors, defense attorneys, and judges) collectively create the criminal law on the ground.<sup>65</sup>

Democracy and bureaucracy in criminal justice interact along three vectors: the preferences expressed by the voting public; the response to those preferences within the institutions that enforce the criminal laws; and the relationship between the voting public and criminal enforcement institutions in a system of near-complete jurisdictional overlap and independence along the vertical (federal/state/local) axis. Section A considers the first vector;<sup>66</sup> Section B the second;<sup>67</sup> and Section C the third.<sup>68</sup>

### A. The Public

Who is “the public” in criminal justice? The answer is more complex than a simple analysis of jurisdictional boundaries might indicate. Two factors unique to criminal justice make this so.

First, crime and its enforcement affect communities, and groups of people within a single community, differently. Communities that are over-policed or under-secured (or both) have different concerns than communities that rarely feel crime and criminal enforcement up-close. Within a community affected by crime and its enforcement, some may perceive the need for greater enforcement, while others feel enforcement should be dialed back, or perhaps refo-

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<sup>64</sup> See generally JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW & ORDER IN EIGHT COMMUNITIES (1978); Mastrofski & Willis, *supra* note 18 (reviewing the literature).

<sup>65</sup> See generally BIBAS, *supra* note 19; JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003).

<sup>66</sup> See *infra* notes 69–104 and accompanying text.

<sup>67</sup> See *infra* notes 105–150 and accompanying text.

<sup>68</sup> See *infra* notes 151–208 and accompanying text.

cused on different sorts of crimes. As both James Forman, Jr. and Michael Fortner have shown, even in narrowly drawn communities in which racial minorities make up political majorities, community members can be deeply divided about crime policy.<sup>69</sup>

Second, criminal enforcement entails inevitable tradeoffs between communal security and individual freedoms. This tradeoff requires constant recalibration: at a given moment in time, security may be of paramount concern, while at another moment, state overreach may be perceived as the greater threat. A community's views on the proper balance between the two can be affected both by external factors (the crime rate, or public revelation of a particular state overreach) and internal beliefs (perceptions of safety, or beliefs about, and trust in, government).<sup>70</sup>

These two features of criminal justice—its differing effects on different communities and community members, and the constant recalibration of the security/liberty tradeoff—make the idea of a single “public” itself contestable. It is better, then, to speak in terms of *communities of interest*,<sup>71</sup> recognizing that such communities are dynamic, constantly shifting and realigning, and subject to fissures within.

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<sup>69</sup> JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 119–217 (2017) (documenting the divergence in views of criminal enforcement among the Black community in Washington, D.C. in the 1980s and 90s); MICHAEL JAVEN FORTNER, BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT 173–216 (2015) (documenting strong support among working-class African Americans for Governor Nelson Rockefeller's punitive drug laws in the 1970s, and less support for those laws among African-American politicians). Collectively, these accounts of local constituencies' role in the drug war undermine the notion that localism necessarily breeds lenity.

<sup>70</sup> See Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 156–58 (2012) (finding a link between public perceptions of bad motives on the part of police and willingness to exclude evidence); Jim Norman, *Americans' Concerns About National Crime Abating*, GALLUP (Nov. 7, 2018), <https://news.gallup.com/poll/244394/americans-concerns-national-crime-abating.aspx> [<https://perma.cc/H2LT-GALS>] (documenting the correlation between public perceptions of crime both nationally and locally and the tough-on-crime era of the 1980s and 90s).

<sup>71</sup> My use of this term is somewhat different from its use by the Supreme Court in setting out the parameters of constitutionally acceptable community drawing for purposes of electoral districting. See Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 351, 382–83 (1999) (discussing the Court's use of the term to denote “a geographically-identifiable community the majority of which share political interests,” taking into account such indicia as geographic contiguity, political affiliation, socio-economic status, occupation, religion, and race). My use of the term is far narrower, denoting a community of interest as respect to beliefs on matters of criminal justice: about, among other things, the proper role and visibility of policing, penal sanctions, and the exercise of prosecutorial discretion to prioritize certain crimes over others.

## 1. Interests and Outcomes

Redefining the “public” in criminal justice as dynamic communities of interest sheds light on a recurring scholarly debate about political support for the tough-on-crime measures of the 1980s and 90s. On one side are those for whom the rise of order-maintenance policing and mandatory minimum sentences is primarily a product of the amplified political power of white suburban voters over racial and ethnic minorities in cities.<sup>72</sup> On the other are those who point out the political agency of those urban communities, and how that agency could be, and indeed was, utilized to get tough on crime.<sup>73</sup> Understanding the criminal justice “public” as dynamic communities of interest helps us see how both of these accounts are true. Across very different communities with very different concerns and interests, there was an agreement that the balance between liberty and security had, at that moment in time, to be recalibrated sharply towards security.<sup>74</sup> At the same time, within those communities most affected by the recalibration, there were also disagreements about this approach (though the dissenters ultimately were in the minority).<sup>75</sup> So, too, today: any effort to describe a shift in public preferences must be heavily bracketed by the inter- and intra-community fissures that inevitably attend it.

A communities-of-interest understanding also helps us see, in part, why certain criminal justice policies succeed politically while others fail. There are a number of potential policy approaches to crime: at the back end, incapacitation, and at the front end, prevention and deterrence. Back-end tools—policing, prosecution, and imprisonment—may serve a front-end purpose as well, if one believes their use both prevents and deters would-be offenders (the evidence is

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<sup>72</sup> Stuntz, *supra* note 22, at 2002–03; *see also* Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230, 236–37 (2007) (arguing that the politicization of crime that began in the 1970s was fueled by whites who had lost their battles against civil rights in the 1960s).

<sup>73</sup> *See* FORMAN, *supra* note 69, at 124–50 (documenting how politicians seized on African-American communities’ frustrations with drugs and violence in Washington, D.C. to enact harsher sentencing laws in the 1980s); FORTNER, *supra* note 69, at 173–216 (discussing political support within African-American communities in New York for Governor Rockefeller’s harsh drug laws); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1162–63 (1998) (discussing rising political agency of African-American communities in large cities and implications for criminal law and procedure). *See generally* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

<sup>74</sup> In particular, Michael Fortner’s analysis of New York’s various demographic constituencies—racial, economic, and urban/suburban/rural—and the role each played in supporting New York’s turn to harsh drug laws, is illuminating on this point. *See* FORTNER, *supra* note 69, at 217–56.

<sup>75</sup> *See* FORMAN, *supra* note 69, at 139–43 (detailing how, in spite of organized opposition, the Washington, D.C. city council enacted mandatory minimum sentences for drug offenses by significant margins in the early 1980s); FORTNER, *supra* note 69, at 192–99 (portraying a climate of majority support within African-American communities for Rockefeller’s drug laws intermixed with currents of dissent).

mixed).<sup>76</sup> Yet there are other long-term methods of crime prevention, such as investing more in elementary and secondary public education, job training, and child care. But because these front-end methods both intersect with other political commitments (to ideals such as limited government and lower taxes, for instance) and are so rarely framed as front-end crime-fighting tools to begin with, political support becomes complicated and ultimately splintered.<sup>77</sup> As James Forman, Jr. and Lisa Miller have each cogently argued in different contexts, voting majorities can desire a front-end approach to criminal justice, and yet, through the compromise of the lawmaking process, come away with only back-end policies.<sup>78</sup>

Understanding communities of interest in criminal justice helps us see, as well, that voting majorities on matters of criminal justice are not fixed interest blocs, nor do they necessarily cleave along racial lines. The shift from liberty to security that occurred at the end of the last century gained momentum from a variety of communities of interest.<sup>79</sup> Likewise, swings in the other direction are now taking place in jurisdictions that are majority-minority and majority white.<sup>80</sup>

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<sup>76</sup> See Anthony A. Braga et al., *Focused Deterrence Strategies and Crime Control: An Updated Systematic Review and Meta-Analysis of the Empirical Evidence*, 17 CRIMINOLOGY & PUB. POL'Y 205, 241 (2018) (finding that focused deterrence strategies have moderate crime-reducing effects but that more and better evidence is still needed).

<sup>77</sup> See generally Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007) (providing an overview of empirical research on issue framing and its effects on public opinion).

<sup>78</sup> FORMAN, *supra* note 69, at 12 (observing that many African Americans in Washington, D.C. sought to respond to rising crime rates with both increased criminal enforcement and plans to improve jobs, school, and housing—"a Marshall Plan for urban America"—but for a variety of reasons, they ended up with only criminal enforcement); LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* 121–60 (2016) (demonstrating how and why political outcomes in the crime space in the last decades of the 20th century did not reflect public preferences, which often sought broader social policy answers to the problem of violence). For an account of how back-end policies overtook front-end policies at an earlier time, during the Kennedy and Johnson Administrations, see generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016).

<sup>79</sup> See *supra* notes 72–75 and accompanying text.

<sup>80</sup> For instance, Delaware County, Pennsylvania, which in 2019 ousted an incumbent district attorney in favor of the more reform-minded Jack Stollsteimer, is 69% White, 22% African-American, and 4% Latino. See *QuickFacts: Delaware County, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/delawarecountypennsylvania,US/PST045218> [<https://perma.cc/AY2H-PCNH>]. Duval County, Florida, which in 2016 ousted an incumbent district attorney in favor of the reformer Melissa Nelson, is 53% White, 31% African-American, and 10% Latino. See *QuickFacts: Duval County, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/duvalcountyflorida> [<https://perma.cc/GU93-5HHU>]. Cook County, Illinois, where reformist State's Attorney Kim Foxx ousted the incumbent in 2016, is 42% White, 24% African-American, and 26% Latino. See *QuickFacts: Cook County, Illinois*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/cookcountyillinois/PST045217> [<https://perma.cc/P5UJ-54AY>]. The four counties comprising Mississippi's 16th Judicial District, where reformist Scott Colom ousted the incumbent district attorney

All of which is to say that the “public” in criminal justice over the last half-century has been a messy, dynamic, and constantly shifting concept. The implications of this for the enforcement bureaucracy are explored further below. But first, our account of the criminal justice “public” must be placed in the context of voting constituencies and voter choice.

## 2. Communities and Responsiveness

In American democracy, voters choose representatives at three levels: federal, state, and local. Criminal justice cuts across all three because each level of government has significant power and authority on matters of criminal justice. At the local level, sheriffs, police, and district attorneys have the most direct control: their decisions determine who is policed and who is prosecuted, and for what crimes. At the state level, legislatures enact criminal laws and pay for the prisons that house offenders, while attorneys general prosecute some crimes (though far fewer than local prosecutors). At the federal level, Congress enacts, and the DOJ enforces, federal criminal laws that reach comparatively fewer persons than do state criminal laws; and Congress uses its spending power to fund (and through funding, to encourage or constrain) state and local enforcers.

Scholars have long observed asymmetries in authority and responsibility for criminal justice across levels of government. And they have blamed these asymmetries in part for criminal enforcement excesses.<sup>81</sup> Less attention has been paid to asymmetries in political responsiveness—that is, the extent to which federal, state, and local governments’ criminal justice policies reflect their constituents’ preferences. Yet any account of democracy and bureaucracy in criminal enforcement must first attend to how the democratic process internalizes voters’ views on criminal justice. And there is reason to think that, all else being equal, this internalization is not symmetric across levels of government.<sup>82</sup> Specifically, as one moves from the local to the national, political re-

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in 2015 are, collectively, nearly evenly divided between Whites and African Americans, as is Philadelphia, Pennsylvania, which elected reformer district attorney Larry Krasner in 2017. *See QuickFacts: Clay, Oktibbeha, Noxubee, and Lowndes Counties, Mississippi*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/claycountymississippi,oktibbehacountymississippi,noxubecountymississippi,lowndescountymississippi/PST045217> [<https://perma.cc/83NB-ZEAR>]; *QuickFacts: Philadelphia and Delaware Counties, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/philadelphiacountypennsylvania,delawarecountypennsylvania,US/PST045218> [<https://perma.cc/VL8Q-FQ46>].

<sup>81</sup> See PFAFF, *supra* note 7, at 142–43 (suggesting that states’ responsibility for the costs of prisons has perverse effects on local prosecutors, because they do not bear the ultimate costs of conviction); Stuntz, *supra* note 11, at 526 (same).

<sup>82</sup> The political science literature on electoral accountability, generally, and principal-agent modeling of it, specifically, is vast and rich, and I will not summarize it here. For a helpful overview, see

sponsiveness likely diminishes. Differences in the political agency of interest groups across local, state, and national legislative venues produce asymmetric responsiveness in the criminal justice policy space.<sup>83</sup> But additional factors related to voter choice compound asymmetric responsiveness in criminal justice.

One of these differences is the greater number of issues in play in national level elections as compared to local and even state elections. Crime can sometimes be a salient issue in state and federal elections (the infamous Willie Horton ad in the 1988 election between Michael Dukakis and George H.W. Bush is a particularly potent example).<sup>84</sup> But presidential and congressional elections turn on multiple issues in addition to crime and public safety—national security, taxes, the economy, healthcare, gun laws, and abortion rights to name just a few—and it is difficult to disentangle which among these many issues actually influences voters.<sup>85</sup> It is therefore equally difficult to attribute, as some have, any particular approach to criminal justice favored by the national-level voting public—one that is “tough-on-crime” or otherwise.<sup>86</sup>

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Sean Gailmaid, *Accountability and Principal-Agent Theory*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 90, 90–101 (Mark Bovens et al. eds., 2014). My point is that, all else being equal with respect to the inherent limitations the electoral system has already been shown to place on accountability, responsiveness to criminal justice policy preferences is not necessarily symmetric across the local, state, and federal levels.

<sup>83</sup> See MILLER, *supra* note 60, at 120–46 (arguing that a wider range of interest groups and policy preferences at the local level makes local criminal justice policy more politically responsive than state and national criminal justice policy).

<sup>84</sup> See Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015), <https://www.themarshallproject.org/2015/05/13/willie-horton-revisited> [<https://perma.cc/YTN3-DQFM>] (“Ever since 1988, when the George H. W. Bush presidential campaign machine wielded the Horton horror story against his Democratic rival, the threat of being ‘Willie Horton’ed’ has shaped the politics of crime and punishment.”).

<sup>85</sup> See generally R. MICHAEL ALVAREZ, INFORMATION AND ELECTIONS (1998) (discussing how voters process information on candidate stances on issues); Kent Redding et al., *Elections and Voting*, in HANDBOOK OF POLITICS: STATE AND SOCIETY IN GLOBAL PERSPECTIVE 493 (Kevin T. Leicht & J. Craig Jenkins eds., 2010) (reviewing conflicting models of voter choice and summarizing debates on the salience of race, class, culture, economics, and other issues to voter choice).

<sup>86</sup> See, e.g., John J. Donohue, *Comey, Trump, and the Puzzling Pattern of Crime in 2015 and Beyond*, 117 COLUM. L. REV. 1297, 1297 (2017) (postulating that an eight-point rise in Gallup surveys of Americans’ fear of crime “buoyed Donald Trump to the presidency on his promise to restore law and order”); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 416 (1999) (“Pivotal elections are decided on the basis of candidates’ positions on capital punishment”) (referring to the infamous Willie Horton advertisement in the 1988 U.S. presidential election). Strong voter correlations across a variety of issues—race, education, socio-economic status, feelings about immigration, trade, jobs, crime, and the police, for example—make such reductive claims particularly suspect. See Redding et al., *supra* note 85, at 499–509 (discussing the difficulties of disentangling related determinates of voting behavior). Indeed, political scientists are still attempting to unravel what motivated Donald Trump’s voters, and have yet to come up with a definitive answer. Compare, e.g., Diana C. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115 PROC. NAT’L ACAD. SCI. 4330, 4337 (May 8, 2018) (observing in a cross-panel study of Obama/Trump voters that relatively higher levels of social dominance orientation—indicating perceived status threat—and

There is a second link between voter choice and asymmetries in responsiveness on criminal justice policy. Recent work in political science has cast doubt on whether voter choice in national and state level elections is a product of candidates' positions on issues or policies at all. To the contrary, this work shows that voter choice is primarily a product of both partisan loyalty and negative partisanship—that is, both identification with one's party and aversion to the opposing party.<sup>87</sup>

Both of these circumstances—issue proliferation and partisanship/negative partisanship—are significantly mitigated in the local elections that most affect the administration of criminal justice: those for mayor, chief prosecutor, and (to a lesser degree) sheriff.<sup>88</sup> First, local elections invariably involve fewer is-

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feelings about trade and China's rising economic dominance each predicted support for Trump, while feelings about immigration and the economy did not predict support), with John Sides, *Race, Religion and Immigration in 2016: How the Debate Over American Identity Shaped the Election and What It Means for a Trump Presidency*, DEMOCRACY FUND VOTER STUDY GRP. REPORT 1, 9–13 (June 2017), <https://www.voterstudygroup.org/publications/2016-elections/race-religion-immigration-2016> [<https://perma.cc/SX9D-L4JD>] (concluding that, in a cross-panel study of white Obama/Trump voters and white Romney/Clinton voters, the salience of race, religion, and immigration in the 2016 U.S. presidential election largely accounted for voters' choice).

<sup>87</sup> See generally CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* (2016) (surveying decades of social science research on voting, concluding that national-level election outcomes reflect voters' partisan loyalties rather than feelings on issues, that partisan loyalty is in turn determined primarily by social identity, and that voters alter issue stances to accord with those of candidates in their chosen party); Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 *ELECTORAL STUD.* 12 (2016) (discussing the rise of straight party-line voting in national elections, and demonstrating a causal link to voter feelings of partisanship and negative partisanship); Shanto Iyengar & Masha Krupenkin, *The Strengthening of Partisan Affect*, 39 *ADVANCES POL. PSYCHOL.* 201 (2018) (same, from a psychological frame); Joel Sievert & Seth C. McKee, *Nationalization in U.S. Senate and Gubernatorial Elections*, 47 *AM. POL. RES.* 1055 (2019) (finding, based on analysis of election results and exit polling data in presidential election years, a significant increase in same-party votes with respect to U.S. Senate elections and, to a slightly lesser degree, gubernatorial elections—with over ninety percent of voters polled reporting having voted for the same party in presidential, senatorial, and gubernatorial races in 2008 and 2012); see also generally Jonathan Kropko & Kevin K. Banda, *Issue Scales, Information Cues, and the Proximity and Directional Models of Voter Choice*, 71 *POL. RES. Q.* 772 (2018) (discussing a rise in directional voting, in which voters choose candidates based on positions to the right or left of center even if a position is more distant from the voter's actual preference on the issue, and drawing a link to the rise of political polarization and extreme candidates).

<sup>88</sup> I exclude from my analysis local legislative (city or county council) elections because of local legislative bodies' negligible impact on local criminal justice policy. Because nearly all crimes are legislated at the state rather than local level, enforcement practices (controlled by police commissioners and prosecutors) have a far greater effect on the local administration of criminal justice. See *infra* Part II.C.1. Sheriffs have a relatively lesser impact on criminal justice than prosecutors and mayors, because their policing authority extends only to areas of a county without a municipal police force, or where they contract with a municipality to offer policing services. See, e.g., James Tomberlin, Note, "Don't Elect Me": Sheriffs and the Need for Reform in County Law Enforcement, 104 *VA. L. REV.* 113, 122–23 (2018) ("Many sheriffs are now without law enforcement power, either because a county



sues than national and state level elections; a small set of issues, or even a single issue, can more easily dominate a given campaign. A prime example is the 2013 mayoral campaign in New York City, which revolved around concerns about policing (specifically the New York City Police Department's stop & frisk policy) and income inequality.<sup>89</sup> What's more, the small group of issues at play in local elections invariably includes crime and safety.<sup>90</sup>

Second, and more importantly, in light of the research on partisanship and voter choice, local elections tend to be far less about partisan identity than state and national elections. Research on partisanship in big-city mayoral elections has shown it to be of little moment, even as political polarization has risen nationally.<sup>91</sup> And the scant available research on prosecutor elections<sup>92</sup> tends to

police force has taken over that task or because there are no unincorporated areas in a county for the sheriff to police.”)

<sup>89</sup> See Michael Barbaro & David W. Chen, *De Blasio Is Elected New York City Mayor in Landslide*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/de-blasio-is-elected-new-york-city-mayor.html> [https://perma.cc/LN5G-PP9X]; Jim Dwyer, *Vowing to Slay the (Already Subdued) Stop-and-Frisk Dragon*, N.Y. TIMES (Dec. 5, 2013), <http://www.nytimes.com/2013/12/06/nyregion/de-blasio-and-bratton-promise-to-deliver-on-goals-but-give-no-credit.html> [https://perma.cc/PW63-5TG8]. A more recent example is the 2018 San Francisco mayoral election, a hotly contested race that centered mainly on the city's housing affordability crisis. See Nitasha Tiku, *How Tech Shaped San Francisco's Unresolved Mayor's Race*, WIRED (June 11, 2018), <https://www.wired.com/story/how-tech-shaped-san-franciscos-unresolved-mayors-race/> [https://perma.cc/SSEE-FL48] (“The mayor's race centered around a vigorous battle over housing in the city, where buying a home is inconceivable for many and longtime residents are being squeezed out.”).

<sup>90</sup> See R. Douglas Arnold & Nicholas Carnes, *Holding Mayors Accountable: New York's Executives from Koch to Bloomberg*, 56 AM. J. POL. SCI. 949, 960 (2012) (finding a linkage between the New York Mayor's approval rating and the crime rate). Prosecutor campaigns are by nature single-issue.

<sup>91</sup> See KAREN M. KAUFMANN, *THE URBAN VOTER: GROUP CONFLICT & MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES* 3 (2004) (finding, in a deep study of mayoral elections in New York and Los Angeles, and in a cursory review of other major cities' mayoral election results, that “party identification, so important to presidential and congressional voting, is not always salient in local elections”); David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 420 (2007) (“Philadelphia and Los Angeles . . . ha[ve] had some competitive mayoral elections, although without the type of sustained partisan or other group competition that marks other executive races like Presidential and gubernatorial campaigns . . .”); Schleicher, *supra*, at 439 (“That voters behave differently in local elections than they do in national elections is . . . assumed by most political scientists of all stripes.”).

<sup>92</sup> There are three empirical studies of prosecutor elections. Two, by Professor Ronald Wright, collectively surveyed all prosecutorial elections between 1996 and 2006 in fifteen states, studying both the outcomes of the races (whether an incumbent ran opposed or unopposed, and the result), along with the major campaign issues as portrayed in news accounts during the races. See Wright, *supra* note 39, at 592 (initial study, evaluating prosecutor election results from ten states); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 600 (2014) [hereinafter Wright, *Beyond Prosecutor Elections*] (subsequent study, evaluating prosecutorial election results from an additional five states). The third study, by Professor Carissa Hessick and Michael Morse, has collected data on prosecutor elections from 2,318 jurisdictions across forty-five states in 2014 and 2016 and analyzed

show that partisanship plays little, if any, role in outcomes.<sup>93</sup> To the extent partisanship (and negative partisanship) does play a role, it of course does so only at the general election stage. Yet as voters continue to self-segregate politically along local jurisdictional boundaries—generally, left-leaning voters cluster in urban counties and right-leaning voters in rural counties<sup>94</sup>—local elections in lopsidedly partisan counties can end up becoming most competitive in the primary stage, where, with party identification removed from the voter choice calculus, issues and policies can and do take center stage.<sup>95</sup>

This is not to say that mayoral, prosecutor, and sheriff elections produce politically responsive mayors, prosecutors, and sheriffs. Dynamics other than partisanship—among them strong incumbency advantage, limited information, and low salience (and turnout) among voters—can hamper political responsiveness in local prosecutor and sheriff elections.<sup>96</sup> But unlike the partisan-

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the number of contested elections and incumbent victories. See Hessick & Morse, *supra* note 38 (manuscript at 20–23).

<sup>93</sup> See Wright, *supra* note 39, at 606 (finding, in a study of over two thousand elections in ten states, that “the candidates do not place much weight on [party labels],” and that “[h]eavier use of party labels might not accomplish much in prosecutor elections—Democrats and Republicans are equally capable of talking about the best combination of toughness and fairness”); see also Wright, *Beyond Prosecutor Elections*, *supra* note 92, at 603 (finding, in a study incorporating election data from 1996 to 2006 from fifteen states, some with non-partisan prosecutor elections, no significant differences in the effects of partisanship on incumbency advantage, but finding that fewer incumbents ran unopposed in nonpartisan elections). I am aware of no research on voter choice in sheriff elections; this is an area in need of study.

<sup>94</sup> KIM PARKER ET AL., PEW RESEARCH CTR., WHAT UNITES AND DIVIDES URBAN, SUBURBAN AND RURAL COMMUNITIES 29–37 (May 22, 2018), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2018/05/02094832/Pew-Research-Center-Community-Type-Full-Report-FINAL.pdf>. For a visual demonstration, one need only view a county-by-county map of voting in the 2016 U.S. presidential election. See, e.g., *Election Results 2016 by State and County*, POLITICO (Nov. 8, 2016), <https://www.politico.com/story/2016/10/election-results-2016-by-state-and-county-229735> [<https://perma.cc/JR4P-LHA3>] (showing election results by county).

<sup>95</sup> Of course, this occurs in state and national level primaries in lopsidedly partisan jurisdictions, too; it is why, for instance, presidential candidates campaign in the lopsidedly partisan state of South Carolina at the primary stage (it holds its primary elections early in the cycle) and all but ignore this state at the general election stage. See Lindsey Cook et al., *U.S. News & World Report Presidential Campaign Tracker*, GITHUB, <https://github.com/lindzcook/USNCampaignTracker> [<https://perma.cc/2EP9-BDBA>] (compiling visits by primary candidates to early primary states); *Two-thirds of Presidential Campaign Is in Just 6 States*, NAT’L POPULAR VOTE, <https://www.nationalpopularvote.com/campaign-events-2016> [<https://perma.cc/J9MW-MQSS>] (compiling state-by-state data on the number of post-convention campaign visits by 2016 U.S. presidential candidates). But *at the level of governance*, the sum total result of national and state level general elections tends (with some exceptions) to reflect the partisan divides of the state or nation as a whole. See David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017) (observing that state elections tend to follow national-level partisan divides, with a few exceptions in some gubernatorial races). Not so at the local level of governance, where elected officials reflect the policy preferences—as opposed to partisan preferences—of the dominant party’s primary voters.

<sup>96</sup> See Wright, *supra* note 39, at 582 (discussing the prevalence of the incumbency advantage and lack of information in an empirical study of local prosecutor elections in ten states); Tomberlin, *supra*

ship/negative partisanship dynamic, which has played a more pronounced role in national and state level elections in recent years, these other responsiveness-reducing dynamics are waning. In recent years, for instance, prosecutor elections are becoming more salient, and incumbency has been, in a notable series of elections, more of a liability than an advantage.<sup>97</sup> The same might be said of some recent sheriff elections.<sup>98</sup>

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note 88, at 143–44 (discussing the prevalence of these dynamics in sheriff elections). Mayoral elections are generally high-salience elections. See Schleicher, *supra* note 91, at 468 (claiming that mayoral elections produce a lot of media attention and campaign spending that can provide voters with more information than other types of local elections).

Money can also play a distorting role, as others have observed. See generally JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016). Yet while researchers have begun to document the influence of money on national and state level elections, we know little, beyond anecdotal accounts, about the financing of campaigns for elected enforcement leaders and its effect on electoral outcomes. See Michael Smolens, *Soros' Bid to Overhaul Criminal Justice System Hits a Wall in Calif.*, SAN DIEGO UNION-TRIB. (June 6, 2018), <https://www.sandiegouniontribune.com/news/columnists/michael-smolens/sd-me-elex-smolens-20180605-story.html> [<https://perma.cc/YP8X-77SM>] (describing a series of prosecutor elections in which heavy spending by outside groups on both sides did not seem to change the races' fundamentals); Paige St. John & Abbie Vansickle, *Prosecutor Elections Now a Front Line in the Justice Wars*, MARSHALL PROJECT (May 23, 2018), <https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars> [<https://perma.cc/WEG9-7X2F>] (reporting on the millions of dollars donated by wealthy philanthropists to support reformist prosecutor candidates in a number of high profile races around the country, and on financing from police and prosecutor unions and other groups to support incumbents). Fortunately, a much-needed systematic study in this area is currently underway. See Carissa Byrne Hessick, *The Prosecutors and Politics Project: Study of Campaign Contributions in Prosecutorial Elections* (July 18, 2018) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3202875](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202875)) (describing ongoing data collection on campaign contributions in prosecutorial elections).

<sup>97</sup> See Neff, *supra* note 4 (examining a number of recent prosecutorial elections in which progressive candidates defeated incumbents); Sklansky, *supra* note 3, at 667 (same).

<sup>98</sup> See, e.g., Aris Folley, *North Carolina Voters Oust Sheriff Who Backed Trump's Immigration Policies*, THE HILL (May 14, 2018), <https://thehill.com/homenews/campaign/387555-north-carolina-voters-oust-sheriff-for-backing-trumps-immigration-policies> [<https://perma.cc/B92S-8Y2B>] (reporting on the May 2018 primary election for sheriff of Mecklenburg County, North Carolina, in which Democratic primary voters effectively elected a new sheriff due to the absence of any Republican challenger, ousting the incumbent who had helped federal immigration authorities identify deportable aliens); Michael Kiefer & Rebekah L. Sanders, *Penzon Unseats 'Toughest Sheriff' Arpaio*, ARIZ. REPUBLIC (Nov. 8, 2016), <https://www.azcentral.com/story/news/politics/elections/2016/11/08/maricopa-county-sheriff-joe-arpaio-paul-penzon-election-results/93169028/> [<https://perma.cc/5M72-V5C9>] (reporting on the November 2016 election for sheriff of Maricopa County, Arizona, in which voters ousted an incumbent who gained national notoriety for his aggressive enforcement of federal immigration laws and illegal racial profiling); Margaret Matray, *Michael Moore Ousts Longtime Portsmouth Sheriff Bill Watson*, VIRGINIAN PILOT (Nov. 7, 2017), [https://pilotonline.com/news/government/politics/local/article\\_0430346d-ba52-57d0-8a94-e2711a3a6d9f.html](https://pilotonline.com/news/government/politics/local/article_0430346d-ba52-57d0-8a94-e2711a3a6d9f.html) [<https://perma.cc/7XCG-S4X9>] (reporting on the November 2017 election for sheriff of Portsmouth County, Virginia, in which voters ousted a twelve-year incumbent in favor of a former federal law enforcement agent who favored rehabilitative approaches to incarceration).

All of these distinctions between local elections and national and state level elections have important implications for political responsiveness. The first is that election results for political offices most impacting criminal enforcement on the ground—mayors, local prosecutors, and (to a lesser degree) sheriffs—likely better reflect voters’ criminal justice preferences than national and state level election results. (State-level ballot propositions on criminal justice issues might seem an exception, but research on direct democracy has shown it to be less reflective of the public’s preferences than representative democracy.)<sup>99</sup> The second, a corollary of the first, is that local elections place relatively more pressure on the winners to respond to those preferences once in office. If elections are determined more by negative partisanship than beliefs about issues and policies, then voters have less interest in an elected official’s policy stances, and the official in turn has little incentive to defer to voter preference in enacting policies.<sup>100</sup>

This sliding scale of political responsiveness is particularly meaningful in the criminal justice arena, in which federal, state, and local governments have overlapping yet largely independent policy-making authority.<sup>101</sup> It helps explain the gap between public opinion polls that show strong public support from a broad cross-section of Americans for criminal justice reforms such as

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<sup>99</sup> Among ballot propositions’ weaknesses as an instrument of representative policy making are an absence of alternative policy choices beyond the binary yes or no; the ease with which different results are reached depending on how ballot propositions are ordered and presented; when multiple alternatives are presented, the absence of ranked-choice voting; and the ease with which special interest groups can put a proposal on the ballot, short-circuiting the give-and-take required for legislation. For a detailed discussion of these problems, see generally JOHN HASKELL, *DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT? DISPELLING THE POPULIST MYTH* (2001); PETER SCHRAG, *PARADISE LOST: CALIFORNIA’S EXPERIENCE, AMERICA’S FUTURE* (1998).

<sup>100</sup> See Iyengar & Krupenkin, *supra* note 87, at 212 (“The logic of positive motivations holds candidates accountable—if they fail to deliver, citizens will no longer support them. However, when citizens’ support for a candidate stems primarily from their strong dislike for the opposing candidate, they are less subject to the logic of accountability. Their psychic satisfaction comes more from defeating and humiliating the outgroup, and less from any performance or policy benefits that might accrue from the victory of the in-party.”).

<sup>101</sup> See, e.g., Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 *CRIMINAL JUSTICE 2000, BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS* 81, 91–96 (Charles M. Friel ed., 2000) (noting that despite the overlap in substantive law and authority between the federal and state systems, the two sides have coordinated over time to carve out relatively discrete areas of authority). Few other policy-making arenas share this feature. Although many permit concurrent regulation by states and the federal government, such dual-sovereign regulation “comes at the grace of Congress,” in the form of permission granted by federal statutes. Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 585 (2011); see also *id.* at 539–40 (discussing a variety of federal regulatory statutes with this feature). In contrast, criminal lawmaking and enforcement authority as between the federal government and state and local governments is both overlapping and independent; cooperation between federal and local enforcers is a function of choice rather than law, a feature I explore in further detail in Part II.C.

reducing mandatory minimum penalties and decriminalizing certain offenses, and divergent policies on the federal level.<sup>102</sup> It also helps explain, at least in small part, the disconnect between the law-and-order platform of the Trump Administration and the more progressive criminal justice platforms of some local elected leaders in counties won by President Trump in the 2016 election.<sup>103</sup>

### 3. Implications

In discussing the political responsiveness of a bureaucracy, the antecedent question remains: responsive to whom?<sup>104</sup> The notable features of the criminal justice “public”—shifting interests and alignments, and asymmetric political responsiveness across levels of government—have important implications for the criminal enforcement bureaucracy. If the public’s preferences on criminal justice are constantly shifting and realigning, and if its electoral choices can be written off as manifestations of partisanship and negative partisanship rather than clear preferences on issues, then actual public preferences on criminal justice policy are more easily ignored by elected officials and, in turn, the criminal enforcement bureaucracy that reports to them. If, on the other hand, the democratic process reflects public preferences on criminal justice and elec-

<sup>102</sup> See CHARLES KOCH INST., *New Poll Suggests Surprising Support for Criminal Justice Reforms Among Trump Voters* (Apr. 26, 2017), <https://www.charleskochinstitute.org/news/new-poll-suggests-surprising-support-criminal-justice-reforms-among-trump-voters/> [https://perma.cc/LG36-YCJ6]; Lydia Wheeler, *Poll: 3/4 of Americans Support Criminal Justice Reform*, THE HILL (Jan. 25 2018), <http://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform> [https://perma.cc/3X8E-LL66].

<sup>103</sup> For instance, Duval County, Florida voted for Trump in the 2016 U.S. presidential election by a margin of 1.5% (10,570 votes), although the same county just months earlier ousted longtime incumbent prosecutor Angela Corey in favor of more reform-minded candidate Melissa Nelson, by a margin of thirty-eight points (both candidates were Republican; no Democrat ran). See Jessica Pishko, *Voters Have Ousted Notorious Florida Prosecutor Angela Corey*, THE NATION (Aug. 31, 2016), <https://www.thenation.com/article/voters-have-ousted-notorious-florida-prosecutor-angela-corey/> [https://perma.cc/NF5G-R4P8]; *2016 Florida Presidential Election Results by County*, POLITICO (Dec. 13, 2016), <https://www.politico.com/2016-election/results/map/president/florida/> [https://perma.cc/JA26-Q5YJ]. Similarly, voters in conservative Lowndes County, Mississippi voted for Donald Trump in the 2016 U.S. presidential election by a margin of 6.3% (1,579 votes), while in the prior year’s contested district attorney race between Independent incumbent Forrest Allgood and Democratic reformist Scott Colom, Colom lost by only a 2.6% margin (690 votes) in the county—even though county-wide voter turnout in the 2015 district attorney race exceeded the 2016 U.S. presidential election by over 2,200 votes. See MISS. SEC’y OF STATE, *2015 General Election Results*, <http://www.sos.ms.gov/Elections-Voting/Pages/2015-General-Election.aspx> [https://perma.cc/E5R4-K29M] (reflecting Colom’s ultimate victory in the race, which covered a four-county jurisdiction); *2016 Mississippi Presidential Election Results by County*, POLITICO (Dec. 13, 2016), <https://www.politico.com/2016-election/results/map/president/mississippi/> [https://perma.cc/4RAA-V53K].

<sup>104</sup> See JUDITH E. GRUBER, *CONTROLLING BUREAUCRACIES: DILEMMAS IN DEMOCRATIC GOVERNANCE* 48–60 (1987) (observing that discussions about mechanisms for controlling bureaucracies proceed from underlying normative beliefs about whose interests one is controlling for, as well as presumptions about political actors’ capacity to advance those interests).

tion outcomes, elected officials—and the career civil servants they lead—will feel greater pressure to take those preferences into account in calibrating enforcement discretion.

From this starting point we can begin to sketch a working hypothesis about bureaucratic responsiveness in criminal justice: local criminal enforcement bureaucracies are positioned to be more responsive to public preferences—and changes in public preferences—than state and national level enforcement bureaucracies. But this hypothesis only considers the interplay between the voting public and elected leaders on matters of criminal justice. There is also interplay between elected leaders and the career enforcers they lead. Its varying aspects, and effects on political responsiveness, are considered next.

### B. The Bureaucracy

How do apolitical actors in the criminal enforcement space respond to their elected or politically appointed leaders? Specifically, if we place criminal enforcement institutions in a principal-agent frame, who is the principal and who is the agent?<sup>105</sup> How do the interests and goals of elected and appointed enforcement leaders on the one hand, and career enforcers on the other, create differing incentives for each group?<sup>106</sup> Further, what are the motivations of each group, and how do these motivations affect attitudes towards system reform?<sup>107</sup> These questions are the subject of this Section.

#### 1. Principles and Agents

Although the fields of public administration, political theory, and administrative law have long considered the tensions between elected and politically appointed leaders and career civil servants, little of that scholarship looks below the federal level.<sup>108</sup> The principal-agent concept as applied in the context of federal executive branch agencies most often conceptualizes the agency and

<sup>105</sup> See *infra* notes 108–117 and accompanying text.

<sup>106</sup> See *infra* notes 118–129 and accompanying text.

<sup>107</sup> See *infra* notes 130–150 and accompanying text.

<sup>108</sup> See GRUBER, *supra* note 104, at 48–60 (summarizing the literature); see also Gailmard, *supra* note 82, at 95 (“One of the earliest, and still most robust, principal-agent literatures in political science takes bureaucrats as agents of some constellation of political principals—most often Congress, the president or executive actors, and/or courts.”). For a notable exception, see generally MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* (1980), examining local level bureaucracies and their leaders.

its employees as the “agent,” and Congress, which oversees the agencies and determines their spending allocations, as the “principal.”<sup>109</sup>

This frame is quite useful in exploring criminal enforcement dynamics at the federal level.<sup>110</sup> But it does not map as easily onto local criminal justice. In the local context, enforcement agents—police departments and prosecutors—have a range of principals. These include the voters themselves, who, every few years, elect the chief prosecutor of their local jurisdiction and the sheriff of their county; mayors, who hire and can fire the police commissioner; local and state legislative bodies that have responsibility in varying degrees for allocating prosecutors’ and police departments’ budgets;<sup>111</sup> and federal programs of officers, who keep tabs on local police departments’ and prosecutors’ offices’ use of federal grant program funds and compliance with funding requirements.<sup>112</sup>

This diffusion of principals makes local criminal enforcement institutions less politically responsive than a pure voter choice analysis would indicate.<sup>113</sup> An elected district attorney, for instance, may receive one message about enforcement priorities from her constituents, another from the city council, and yet another from the state legislature or governor. A police commissioner must balance potentially conflicting requests from the mayor who exercises appointment and removal authority over commissioners, the city council and state legislature that fund the police department, and the federal program office that supplements those funds.

The same dynamic can occur at the federal level. For instance, an attorney general may receive conflicting messages from the President and Congress about enforcement priorities. But there, principal-diffusion has less of an effect

<sup>109</sup> See Gailmard, *supra* note 82, at 96 (describing the idea that “[o]ne should understand Congress as a principal and various bureaucrats as its agents” as “the central premise of thought on bureaucratic institutions based on principal-agent theory”).

<sup>110</sup> See Ouziel, *supra* note 28, at 1122 (exploring how congressional oversight and appropriations create sometimes perverse agency incentives in the context of federal drug enforcement).

<sup>111</sup> Although, across all states, local legislative bodies fund the lion’s share of municipal police department budgets—in fiscal year 2015, local governments comprised 86.7% of the total amount spent on police by state and local governments—state governments also contribute a portion of their funding, and in some jurisdictions local law enforcement budgets are dictated largely by the state legislature. See, e.g., Jack Brammer, *Budget Cuts Will Cripple Justice System, Allow ‘Horrific’ Crimes, Lawyers Tell Bevin*, LEXINGTON HERALD-LEADER (Sept. 27, 2017), <https://www.kentucky.com/news/politics-government/article175654781.html> [<https://perma.cc/H3JP-JM8C>] (discussing significant effects of announced state budget cuts on Kentucky’s fifty-seven commonwealth’s attorneys’ offices, which prosecute felony crimes).

<sup>112</sup> See CONGRESSIONAL BUDGET OFFICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS 12–23 (Mar. 2013), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/03-05-13federalgrantsonecol.pdf> (describing federal oversight of grants awarded to state governments); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 890–91 (2015) (discussing federal funding arrangements for local police departments).

<sup>113</sup> See *supra* Part II.A.2.

on responsiveness. First, as we have seen, federal criminal enforcement is already relatively less politically responsive, making principal-diffusion relatively less impactful.<sup>114</sup> Second, the diffusion exists at the same level of government—the same sovereign—allowing conflicts between principals to be worked out directly.<sup>115</sup> Not so at the local level; a police commissioner or district attorney will be forced to balance conflicting demands from different sovereigns alone. And given the differences between sovereigns in terms of both voting constituency and the factors that affect voter choice,<sup>116</sup> such conflicts are likely to arise more often. The battle between former Attorney General Jeff Sessions and mayors who declared their cities sanctuaries for undocumented immigrants is a particularly visible manifestation of this dynamic, but by no means is it unique.<sup>117</sup>

Then there is the second-order principal-agent relationship: that between the elected or politically appointed leaders of a criminal enforcement institution and those in their employ. The second-order principal-agent issues that arise are even more confounding. Whereas the first-order tensions are a result primarily of principal-diffusion among sovereigns and the conflicting political demands it places upon enforcement leaders, second-order tensions reflect foundational differences between how career enforcers and enforcement leaders see themselves. The following Subsections explore that divide.

## 2. Goals and Incentives

Broadly speaking, the goals of elected and appointed leaders in criminal enforcement and the goals of career criminal enforcers are generally aligned: all are to some degree motivated by a desire to serve the public and further the mission of enhancing public safety. But one need not dig far beneath that superficial alignment to see the makings of discord.

<sup>114</sup> See *supra* Part II.A.2.

<sup>115</sup> Indeed, this is what happens in the normal course through the federal budgeting process. See Ouziel, *supra* note 28, at 1129–39 (discussing how the DOJ’s appropriations request first goes through the White House, then Congress, and then is further refined through the hearing process).

<sup>116</sup> See *supra* Part II.A.2.

<sup>117</sup> See Nicole Rodriguez, *Trump Administration Wants to Arrest Mayors of ‘Sanctuary Cities,’* NEWSWEEK (Jan. 16, 2018), <https://www.newsweek.com/trump-administration-wants-arrest-mayors-sanctuary-cities-783010> [<https://perma.cc/9X9R-RQUD>] (documenting the DOJ’s warning to local officials that they could face criminal liability for ordering non-cooperation with federal immigration officers). The divergence between states and the federal government on the issue of marijuana legalization is another example. See Memorandum from Jefferson B. Sessions, III, Att’y Gen., U.S. Dep’t of Justice, to All U.S. Att’y’s (Jan. 4, 2018) [hereinafter Sessions Memorandum, Jan. 2018], <https://www.justice.gov/opa/press-release/file/1022196/download> (calling for federal prosecutors to prosecute marijuana-related crimes as they would any other federal crime).



The goals of elected and politically appointed criminal enforcement leaders will vary depending on the environmental context in which they operate. As public choice theory teaches, elected leaders—particularly those who are not term-limited, such as prosecutors or sheriffs—are primarily motivated by the desire to be reelected or campaign for a higher political office.<sup>118</sup> Appointed leaders in the federal criminal justice system—namely, the Attorney General and the ninety-four U.S. Attorneys who report to him or her—may be motivated by lucrative job prospects in the private sector (the so-called revolving door), other government service as lawyers, or political or judicial office.<sup>119</sup> Appointed local police commissioners tend to move from the leadership of one police department to another, a sort of interior revolving door.<sup>120</sup> Despite the variance between these end goals, they all tend to produce similar motivations for leaders in office: making a name for oneself through high-profile enforcement successes and delivering on a promised agenda.<sup>121</sup>

Career-level enforcers' goals can be somewhat different. As with leaders, career-level enforcers' goals vary depending on the environment. There is a greater revolving-door dynamic among prosecutors than among federal law enforcement agents and local police, more of whom remain in their positions until retirement.<sup>122</sup> And among prosecutors, the revolving-door dynamic var-

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<sup>118</sup> See Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 491 (1996) (citing ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28–30 (1957); MORRIS P. FLORINA, *REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES* 29–38 (1974)) (“[P]eople who hold elective office will always try to maximize their chance of reelection.”).

<sup>119</sup> See Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 278 (2002) (finding, in a study of subsequent employment of 274 U.S. Attorneys, that 60% went to private practice, 21% to judgeships, 9% to other government legal positions, 7% to elected office, and 2% to academia); see also Jennifer Nou, *Essay, Subdelegating Powers*, 117 COLUM. L. REV. 473, 478–79 & n.35 (2017) (observing the differences between elected leaders of Congress, who are motivated by job-retention, and federal agency heads, who are “tempted by the revolving door”).

<sup>120</sup> One commentator describes these commissioners as “an informal cadre of policing intellectuals, who move[] from city to city, sometimes running departments and sometimes working as consultants . . . .” Simone Weichselbaum, *The Rise and Fall of Anthony Batts*, MARSHALL PROJECT (July 10, 2015), <https://www.themarshallproject.org/2015/07/10/the-rise-and-fall-of-anthony-batts> [https://perma.cc/VZD8-YLUP].

<sup>121</sup> See Lochner, *supra* note 119, at 277–81 (observing that most U.S. Attorneys enter jobs with personal agendas, often shaped by both the DOJ’s priorities and a desire to maximize future employment opportunities); David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 517–18 (discussing such incentives for appointed and elected chief prosecutors).

<sup>122</sup> Based on 2008 data from the Bureau of Justice Statistics, only 7.4% of state and local law enforcement officers left their employ, and of this percentage, half were on account of resignation, and about a quarter on account of retirement. BRIAN A. REAVES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *HIRING AND RETENTION OF STATE AND LOCAL LAW ENFORCEMENT OFFICERS, 2008—STATISTICAL TABLES 6* (Oct. 2012), <https://www.bjs.gov/content/pub/pdf/hrslleo08st.pdf>. In contrast, data obtained by the Bureau of Justice Statistics in 2005 revealed that over 60% of large and medium size prosecutors’ offices, and 30% of small offices, reported problems in retaining prosecu-

ies: Assistant U.S. Attorneys (AUSAs) are more likely to move to the private sector than Assistant District Attorneys (ADAs); though even among AUSAs, these tendencies vary by geographic regions,<sup>123</sup> and the attrition rate has fallen over time.<sup>124</sup>

The goals and incentives of “careerist” enforcers (career enforcers who do not subsequently work in the private sector) diverge from their elected or politically appointed leaders. There is less pressure on careerists to conform to a politically driven agenda or to demonstrate quantifiable successes. To the contrary, careerists may be incentivized to seek out a more risk-averse, and perhaps less labor-intensive path (albeit one that maximizes compensation).<sup>125</sup> Careerists looking to do the bare minimum may be disinclined to execute on a new leader’s priorities, as any change in the status quo requires some amount of reorganizational effort.<sup>126</sup> And non-shirking careerists may find a new leader lacking in the requisite expertise or simply think of the leader (and the leader’s priorities) as transient.<sup>127</sup>

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tors. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005, at 3 (July 2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf>. Same-year data on retention rates among police and prosecutors is unavailable.

<sup>123</sup> Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 627 (2005) (finding, in an empirical study revealing geographic variation in attrition rates of AUSAs, that higher rates exist in cities with more lucrative private-sector employment); Charles D. Weisselberg & Su Li, *Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1254–56, 1259–60 (2011) (finding, in a 2010 study of 2,809 lawyers in white collar defense practices at the top 200 grossing firms in the United States, a substantial number of former AUSAs (comprising 67% of 700 firm partners with primarily white collar practices) and far lower numbers of former ADAs (comprising 10% of 700 firm partners with primarily white collar practices), with the greatest concentration of white collar practices—and former AUSAs—in New York, Washington, D.C., Chicago, San Francisco, and Los Angeles).

<sup>124</sup> See Lochner, *supra* note 119, at 282–83 (documenting and discussing a rise in “careerist” AUSAs, who stay in their posts rather than seek private-sector employment).

<sup>125</sup> See generally EDITH LINN, *ARREST DECISIONS: WHAT WORKS FOR THE OFFICER?* (2009) (discussing street officers’ practice of making arrests towards the end of a shift in order to generate overtime from the subsequent booking and court presentment procedures); Lochner, *supra* note 119, at 282–83 (discussing the shirking incentives for careerist AUSAs and perceptions by non-careerists of “deadwood” careerist prosecutors).

<sup>126</sup> See Wesley G. Skogan, *Why Reforms Fail*, 18 POLICING & SOC’Y 23, 26 (2008) (“There is also resistance to change when—and because—it requires that officers do many of their old jobs in new ways, and that they take on tasks that they never imagined would come their way.”).

<sup>127</sup> See Lochner, *supra* note 119, at 287 (finding, in a series of interviews with AUSAs and U.S. Attorneys, aversion among careerist AUSAs to following an agenda of any particular U.S. Attorney, who are often viewed as having relatively less prosecutorial expertise, or simply as transient leaders who will in time be replaced); Skogan, *supra* note 126, at 26 (“Enthusiasm by public officials and community activists for innovations in policing encourages its detractors within the force to dismiss reforms as ‘just politics.’ They see them as passing fads, something dreamed up by civilians for the police to do.”).

Career enforcers eyeing the exits—as noted, almost always prosecutors as opposed to law enforcement agents—have a strong disincentive to shirk. Yet when it comes to delivering on a leader’s request, ambitious career prosecutors may be no more so inclined than their careerist colleagues. The external market for line prosecutors values trial experience, coupled with evidence of diligence and aggressiveness.<sup>128</sup> Advancing the particular prosecutorial priorities of one’s leader is of little value—and in fact may be detrimental to one’s value if such priorities do not generate the type of experience most useful in the private sector.<sup>129</sup>

### 3. Motivation and Reform

For a variety of reasons, then, career enforcers—both those who stay and those who are soon to leave—have relatively little incentive to advance a leader’s political agenda. And when that agenda is reform-oriented, career enforcers have some motivation to resist it. This motivation arises from career enforcers’ sense of mission; the way they view the objects of reform; and the degree of deference they accord the status quo.

Like other bureaucrats, career enforcers see their mission as one separate and apart from politics—a mission that endures through shifting political winds.<sup>130</sup> In the field of criminal enforcement, where rule-of-law fidelity runs deep, this aversion to politics is something career enforcers wear as a badge of honor.<sup>131</sup> Career criminal enforcers view themselves as loyal not to their elect-

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<sup>128</sup> See Boylan & Long, *supra* note 123, at 627, 635–42 (arguing that statistically significant difference in trial rates of drug-trafficking cases in federal districts with higher private-sector salaries is evidence of AUSAs’ efforts in such districts to market themselves for employment in the private sector); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretexual Prosecution*, 105 COLUM. L. REV. 583, 607–08 (2005) (postulating that the private-sector market value of trial experience may cause AUSAs to charge harder-to-prove cases, as they are more likely to end in a trial rather than a guilty plea); Zaring, *supra* note 121, at 520 (citing evidence of how private sector employers market their own former federal prosecutors to prospective clients and stating: “[t]he right way to signal worth to private prospective employers may be, among enforcement officials, at least, aggressive pursuit of wrongdoing while in the public sector”).

<sup>129</sup> For instance, a chief prosecutor seeking to prioritize prosecutions of violent crimes and drug-trafficking may face resistance among prosecutors seeking to burnish their complex white-collar crime credentials. Likewise, a chief prosecutor seeking to generate greater numbers of indictments and convictions may face resistance among prosecutors looking to invest themselves in time-consuming, risk-prone trials.

<sup>130</sup> GRUBER, *supra* note 104, at 101–20, 113 (“Far from accepting democratically elected officials as legitimate agents of [bureaucratic] control[,] . . . [bureaucrats see] themselves as upholding democracy against the particularistic incursions of these individuals. In bureaucratic eyes, mayors, board members, and members of the city council are not elected leaders of the citizenry, but rather politicians. And politicians are surely not the people to uphold democracy.”).

<sup>131</sup> See, e.g., STUART A. SCHEINGOLD, *THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION* 56 (1991) (“[Police officers’] basic distrust of politics is rooted in the firmly

ed or politically appointed leaders, nor the political whims of the public, but to the law itself.

In line with this view, career criminal enforcers tend to see the objects of reform—namely, penalties and particular enforcement strategies—as necessary tools of their apolitical work. In their assessment, high penalties and reduced judicial sentencing discretion are needed to induce cooperation by accomplices and ensure uniform application of the law;<sup>132</sup> the prosecution of lower-level offenses is necessary to build cases up the culpability ladder;<sup>133</sup> and stop and frisk and other forms of order-maintenance policing are necessary to deter and disrupt open-air drug markets and illegal firearm possession (and attendant risks of violence).<sup>134</sup> Viewed through this lens, public pressure to reduce mandatory minimums and enlarge judicial sentencing discretion, to divert rather than prosecute minor drug possession, and to curb aggressive stop and frisk practices is a misguided politicization of apolitical enforcement tools. Career

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held belief that politics poses a dual threat to police professionalism. Politicians are seen as outsiders intent on pandering to the public or doing favors for the influential. . . . This congenital inclination of elected officials to curry favor is believed at the very least to interfere with even-handed law enforcement . . . . Second, politicians are perceived as amateurs who . . . simply do not understand law enforcement.”).

<sup>132</sup> See Letter from Robert Gay Guthrie, President, Nat’l Ass’n of Assistant U.S. Att’ys to Hon. Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice (Jan. 27, 2014), <https://www.naaua.org/site/index.php/resources/letters/41-jan-2014-letter-to-ag-on-mandatory-minimums/file> (expressing disagreement with the Attorney General’s decision to support legislation that weakens mandatory minimums); Letter from Nat’l Ass’n of U.S. Att’ys et al. to Hon. Charles E. Grassley, Chair, Comm. on the Judiciary & Hon. Dianne Feinstein, Ranking Member, Comm. on the Judiciary (Nov. 2, 2017), <https://www.naaua.org/site/index.php/resources/letters/143-nov-2017-letter-opposing-srca-2017/file> (opposing legislation that ultimately would become The First Step Act of 2018, Pub. L. 115-391, because “[t]he legislation undermines mandatory minimum penalties for drug trafficking and weakens the tools that law enforcement authorities need . . . [and] it will make it more difficult for law enforcement to pursue the most culpable drug dealers and secure their cooperation to pursue others”); see also U.S. SENTENCING COMM’N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, App’x G, G6–7 (May 27, 2010) [hereinafter Testimony of David Hiller] (capturing the testimony of David Hiller, National Vice President of the National Fraternal Order of Police, showing support for mandatory minimum sentencing).

<sup>133</sup> See Testimony of David Hiller, *supra* note 132, at G6 (arguing that mandatory minimums induce criminals to provide evidence against others involved in their criminal operations in exchange for reduced punishment); see also Joseph Goldstein, *Undercover Officers Ask Addicts to Buy Drugs, Snaring Them but Not Dealers*, N.Y. TIMES (Apr. 4, 2016), <https://www.nytimes.com/2016/04/05/nyregion/undercover-officers-ask-addicts-to-buy-drugs-snaring-them-but-not-dealers.html> [[https://perma.cc/WR9W-VRBN](https://perma.cc WR9W-VRBN)] (tracing divergence in views on the utility of “buy-and-bust” tactics between the New York City mayor and the Manhattan District Attorney on the one hand, and the NYPD Narcotics Division Chief on the other).

<sup>134</sup> See Daniel Bergner, *Is Stop-and-Frisk Worth It?*, THE ATLANTIC (Apr. 2014), <https://www.theatlantic.com/magazine/archive/2014/04/is-stop-and-frisk-worth-it/358644> [<https://perma.cc/T42D-XPM3>] (profiling two Newark police officers and their views on stop and frisk).

enforcers, most of whom began their careers well into the 1990s,<sup>135</sup> did not experience the political shift that created those tools<sup>136</sup>—and so they do not see them as the product of earlier political choices.<sup>137</sup> Moreover, those earlier choices are often depicted as technocratic policy making, masking the implicit political judgments such policy making entails.<sup>138</sup>

Interestingly, the stiff penalty regime birthed by those earlier political choices also met with some bureaucratic resistance at the time. Frank Bowman and Michael Heise's study of federal prosecutors' response to the Federal Sentencing Guidelines for drug offenses found an above-average use of discretionary tools that resulted in a systematic lowering of drug sentences in the 1990s, beginning five years after the Guidelines went into effect. They describe a world in which:

[P]rosecutors and judges have slipped the traces of the Guidelines *en masse*. Many regularly substitute their personal moral compass, or their pragmatic judgment of what is fitting in a particular case, for the judgment expressed by the guidelines. Many have reverted to local norms and legal folkways, establishing sentencing practices based on Guidelines rules but full of local idiosyncrasy. Some, like the U.S. Attorneys of the Mexican border districts, have consciously seceded from the Guidelines regime, declaring unilaterally that local conditions entitle them to disregard national law.<sup>139</sup>

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<sup>135</sup> The minimum service requirement for pension vesting for most state and local law enforcement agencies is twenty to twenty-five years, with the minimum qualifying age at fifty or fifty-five. REAVES, *supra* note 122, at 19. This means that officers retiring in 2018 after twenty-five years of service would have begun their careers in 1993. And given that hiring in state and local police departments has outpaced retirement, most officers employed today are not so close to retirement. *See id.* at 6, 16.

<sup>136</sup> FORMAN, *supra* note 69, at 125–50 (describing the rise of mandatory minimums and the use of order-maintenance policing in the late 1980s and early 1990s).

<sup>137</sup> *Id.* (discussing law enforcement voices in the 1980s and early 1990s who argued against the adoption of mandatory minimum penalties and other “tough on crime” tactics); MILLER, *supra* note 78, at 121–60 (framing investment in crime-reduction measures without co-equal investment in violence prevention measures as political choices).

<sup>138</sup> *See* Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 419–21, 428–31 (2018) (arguing that systems analysis, a decision-making technique that has driven American policy making in the postwar period, disguises implicit political choices in a technical cost-benefit analysis, using criminal justice policies adopted in New York City in the 1970s as an example).

<sup>139</sup> Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 IOWA L. REV. 477, 560 (2002). The authors found that federal prosecutors learned to use a variety of discretionary tools in resolving cases that served to lower the applicable Guidelines' penalties at sentencing. *Id.* at 559. The five-year delay between the beginning of the federal Guidelines regime and the observable penalty decline in drug cases was thus probably a function of (i) the time lapse between case resolution and

Similarly, as Issa-Kohler Hausmann has observed, felony drug arrests in New York *declined* in the years following the enactment of New York's famously draconian Rockefeller drug laws; the massive upswing in felony drug arrests and imprisonment many observers attribute to those laws did not in fact occur until a decade after the laws' enactment;<sup>140</sup> in the interim, New York police and prosecutors seem to have either ignored the laws or worked to subvert them. There is even more direct evidence of bureaucratic flouting by local prosecutors in response to three-strikes laws,<sup>141</sup> as well as by line officers to the community policing movement of the early 1990s.<sup>142</sup>

This brings us to the third factor motivating line enforcers' resistance to a leader's reform-oriented agenda: deference to the status quo, whatever it may be. Career enforcers came of professional age in the existing criminal enforcement space and have executed their duties within that space; and they see those duties, and that space, as worthy of continuation. In the language of social psychology, they exhibit *system justification*—a motivated rationalization of an existing political, economic, institutional, or other social arrangement as fair and legitimate.<sup>143</sup>

System justification builds on two related social-identity theories. The first, ego justification, emphasizes the tendency to validate, justify, and legitimate one's self in order to maintain a favorable self-image. The second, group justification, highlights the tendency to defend and justify the behaviors of the social group to which one belongs in order to maintain favorable images of one's own group. System justification in turn postulates that people who operate within a system will rationalize that system regardless of its epistemic mor-

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sentencing—cases already resolved at the time of the Guidelines' adoption were less amenable to discretionary reductions—and (ii) the time it took for prosecutors to learn the hidden discretionary pathways within the Guidelines system.

<sup>140</sup> Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in *THE NEW CRIMINAL JUSTICE THINKING* 246, 254–55 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

<sup>141</sup> See, e.g., James Austin et al., “Three Strikes and You’re Out”: The Implementation and Impact of Strike Laws 1, 8, 107 (Mar. 6, 2000) (unpublished manuscript), <https://www.ncjrs.gov/pdffiles1/nij/grants/181297.pdf> (finding, in a study of three-strikes laws in Washington State, California, and Georgia, little change in prosecution and sentencing patterns in all but two California counties, in part as a function of prosecutorial and judicial resistance to the new laws). See generally Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1253 (2011) (describing charging declinations arising out of prosecutors' disagreement with a law as an example of “prosecutorial nullification”).

<sup>142</sup> See, e.g., Todd J. Dicker, *Tension on the Thin Blue Line: Police Officer Resistance to Community-Oriented Policing*, 23 AM. J. CRIM. JUST. 59, 69–71 (1998) (finding that 54% of surveyed police officers thought community policing was just a public relations effort, 26% thought it merely a fad, and 12% believed it does not work).

<sup>143</sup> John T. Jost & Jojanneke van der Toorn, *System Justification Theory*, in *ENCYCLOPEDIA OF POWER* 649, 650 (Keith Dowding ed., 2011).

al value or even its personal benefits to them.<sup>144</sup> System justification is bolstered when it has the effect of validating one's own self-image or that of one's social group.<sup>145</sup>

Enforcement leaders, of course, can share career enforcers' fidelity to an apolitical mission, reluctance to forsake valuable enforcement tools, and support for the status quo. But among leaders, each of these tendencies will be far less pronounced. Elected and appointed leaders must always balance the mission of dispensing justice according to law with the mission of providing politically responsive criminal justice. In this vein, they will be more willing than career enforcers to consider the public ramifications of particular enforcement tools.

Leaders will also be more open than career enforcers to challenging the status quo. As system justification theory recognizes, people are members of more than one system. But defending one of these systems at the expense of another creates a psychological need to reduce cognitive dissonance among competing system justification motives.<sup>146</sup> Enforcement leaders are active participants of two systems: the criminal justice system they help lead, and the democratic system through which they were elected or appointed. Thus, to the extent these systems begin to diverge—as happens when voter preferences about criminal justice policy change—leaders must find ways to align them. This insight in part explains why enforcement leaders in recent years have framed criminal justice reform as a matter of system-preservation: for the criminal justice system to continue to function effectively, it must consider the costs—to the system—of tough-on-crime policies.<sup>147</sup>

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<sup>144</sup> John T. Jost & Mahzarin R. Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRITISH J. SOC. PSYCHOL. 1 (1994); John T. Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111, 121 (2002).

<sup>145</sup> See Jost & Hunyady, *supra* note 144, at 121 (stating that motives for ego justification and group justification may complement the motives for system justification). See generally Jost & Banaji, *supra* note 144.

<sup>146</sup> Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1149 (2006).

<sup>147</sup> See, e.g., Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations> [<https://perma.cc/8RHE-ERGB>] ("We need to keep taking steps to make sure people feel safe and secure in their homes and communities. And part of that means doing something about the lives being harmed, not helped, by a criminal justice system that doesn't serve the American people as well as it should."); Ryan Lizza, *Why Sally Yates Stood Up to Trump*, NEW YORKER (May 22, 2017), <https://www.newyorker.com/magazine/2017/05/29/why-sally-yates-stood-up-to-trump> [<https://perma.cc/YLH5-C8CB>] (Deputy Attorney General Loretta Lynch recalling, in response to Attorney General Holder's 2014 initiative to move away from draconian penalties in smaller federal drug cases, "[m]any senior Assistant U.S. Attorneys initially said, 'What is this? Are

These features of the criminal enforcement bureaucracy—principal-agent diffusion and a divergence between leaders and career enforcers in both goals and motivations—fuel a conceptual divide between leadership and the rank-and-file. It is a divide reflected in the literature on organizational culture in police and prosecutors' offices,<sup>148</sup> qualitative surveys of police and prosecutors' attitudes,<sup>149</sup> and anecdotal reports of reform-resistance among career enforcers.<sup>150</sup> And in a system in which leaders necessarily cede autonomy and discretion to those in their employ, it is a divide that ultimately stymies responsiveness to public demands for change.

### C. The Sovereign

On top of the relationships between voting constituencies and criminal enforcement leadership, and between that leadership and the rank-and-file, we must now add a third pivotal feature of our democracy and its effect on the criminal enforcement bureaucracy's responsiveness: federalism.

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you saying that I was doing something wrong for doing my job before?" and responding that the system would benefit by allocating prosecutorial resources according to greatest impact); James O'Neill, *A Question That Cries Out to Be Answered: New York City's Police Commissioner on the Killing of Jessica White and His Vision of Neighborhood Policing*, N.Y. DAILY NEWS (Oct. 12, 2016), <https://www.nydailynews.com/opinion/james-o-neill-question-cries-answered-article-1.2828533> [<https://perma.cc/EC94-U6JN>] (excerpting remarks delivered by New York City Police Commissioner James O'Neill linking improved police responsiveness to, and respect of, local communities with increased community cooperation in fighting crime).

<sup>148</sup> See generally CARTER, *supra* note 56 (documenting challenges of placing top-down constraints on line prosecutor decision making); REUSS-IANNI, *supra* note 56 (finding, in a two-year study of social organization in the New York City Police Department, significant distinctions in professional culture between management and line officers). The dearth of more recent empirical work in this area only further confirms the need for renewed scholarly attention to this divide. See generally *supra* Part I.

<sup>149</sup> MORIN ET AL., *supra* note 5, at 30–31 (showing differences between leadership and rank-and-file officers on measures such as pride and fulfillment in work, and weak support for leadership among rank-and-file, particularly in large departments). See generally BESIKI LUKA KUTATELADZE ET AL., PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE: ADVANCING PROSECUTORIAL EFFECTIVENESS AND FAIRNESS REPORT SERIES (Dec. 2018), <https://caj.fiu.edu/news/2018/prosecutorial-attitudes-perspectives-and-priorities-insights-from-the-inside/report-1.pdf> (finding, in a survey of local prosecutors from four offices with newly elected, reform-oriented leaders—in Chicago, Jacksonville, Milwaukee, and Tampa—attitudinal resistance among mid-level managers and line prosecutors to changes by leadership).

<sup>150</sup> Harry Bruinius, *More and More, Push for Police Reform Starts with the Chief*, CHRISTIAN SCI. MONITOR (Oct. 18, 2016), <https://www.csmonitor.com/USA/Politics/2016/1018/More-and-more-push-for-police-reform-starts-with-the-chief> [<https://perma.cc/83DG-ATYS>] (discussing resistance among rank-and-file police officers to police chiefs' efforts at reform); June Williams, *Seattle Cops Challenge Department of Justice*, COURTHOUSE NEWS (June 2, 2014), <https://www.courthousenews.com/seattle-cops-challenge-department-of-justice/> [<https://perma.cc/4Y98-J9SJ>] (recounting a legal challenge mounted by a group of over a hundred Seattle Police Department officers against a Seattle Police Department consent decree with the DOJ on the use of force reforms).



Among the arenas of state regulatory power, criminal enforcement gives rise to unique relationships between sovereigns. States enact criminal laws, but localities primarily enforce them. Congress has nearly co-extensive authority over criminal law, yet limited resources to effectuate it. Though federal and local enforcement authority can and often do overlap, such enforcement may be independent or coordinated, a function entirely of sovereigns' choices. At the same time, federal authorities have powers—through oversight, spending, and the Supremacy Clause—to mold state and local criminal enforcement, albeit within resource limits.

Each of these dynamics has effects on political responsiveness and, in turn, bureaucratic decision making. Subsection 1 considers the effects of allocations of lawmaking and enforcement authority,<sup>151</sup> while Subsection 2 considers the effects of inter-jurisdictional cooperation and oversight in criminal enforcement.<sup>152</sup>

### 1. Making Law

At the state level, criminal laws are made primarily by state legislatures.<sup>153</sup> Criminal enforcement, though, occurs almost entirely at the local level, by way of police and district attorneys. As discussed in Part II.A, public preferences on criminal justice are most clearly expressed at the local level.<sup>154</sup> This means that calls for change will be most clearly and audibly directed at local actors: the police and prosecutors who bring penal codes to life.

This can create internal tension within enforcement institutions. Line-level police and prosecutors envision themselves as law enforcers rather than policymakers.<sup>155</sup> They may be reluctant to engage in forbearance. And they may see themselves as guardians of the justice system, protecting it from political whim.<sup>156</sup> These dynamics played out visibly in the Philadelphia District Attorney's Office following the 2017 election of Larry Krasner, where line prosecutors bristled at new charging policies they perceived as too lenient.<sup>157</sup>

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<sup>151</sup> See *infra* notes 153–180 and accompanying text.

<sup>152</sup> See *infra* notes 181–208 and accompanying text.

<sup>153</sup> The exceptions are laws enacted by statewide referenda, a relatively rarely-used method of penal lawmaking.

<sup>154</sup> See *supra* Part II.A.

<sup>155</sup> See *supra* notes 130–136 and accompanying text.

<sup>156</sup> See *supra* notes 130–136 and accompanying text.

<sup>157</sup> See Chris Palmer, *Philly DA Larry Krasner Is Changing the Way His Office Prosecutes Killers. Not Everyone Agrees*, PHILA. INQUIRER (Apr. 4, 2018), <http://www.philly.com/philly/news/crime/philadelphia-district-attorney-larry-krasner-homicide-prosecutions-lifers-anthony-voci-2018-0404.html> [<https://perma.cc/VW7M-6FW3>] (discussing internal resistance among line prosecutors to Krasner's policy of refraining from charging mandatory penalty-carrying homicide crimes in cases involving homicide in order to allow for lower sentences).

They have also manifested in police rank-and-file resistance to a variety of initiatives, from diversionary programs to categorical prosecutorial declinations.<sup>158</sup>

It can also create tensions with state-level actors accountable to different political constituencies. Those tensions have occasionally risen to the surface, as when governors or state attorneys general have sought to remove jurisdiction over certain cases from local prosecutors whom they believe are not duly enforcing the state's laws.<sup>159</sup> In fact, most states provide the governor and attorney general with broad authority to intervene in local prosecutors' cases, or to usurp or reassign local prosecutors' jurisdiction.<sup>160</sup> This authority has historically been exercised sparingly.<sup>161</sup> But it may become increasingly prevalent in states where voters' criminal justice preferences are markedly divergent, and

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<sup>158</sup> MELISSA REULAND & JASON CHENEY, POLICE EXEC. RESEARCH FORUM, ENHANCING SUCCESS OF POLICE-BASED DIVERSION PROGRAMS FOR PEOPLE WITH MENTAL ILLNESS 12 (May 2005), <https://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=495> [<https://perma.cc/3YC5-QZZY>] (discussing "difficulties obtaining officer buy-in and trust" reported by some police departments attempting to implement diversionary programs for the mentally ill); JENNIFER A. TALLON ET AL., CTR. FOR COURT INNOVATION, CREATING OFF-RAMPS: A NATIONAL REVIEW OF POLICE-LED DIVERSION PROGRAMS 54, 56 (2018), [https://www.courtinnovation.org/sites/default/files/media/document/2018/Creating\\_Off\\_Ramps.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2018/Creating_Off_Ramps.pdf) (discussing line officer resistance to a misdemeanor diversion program in Durham County, North Carolina in part because, according to an Assistant Chief of Police, "[g]iving people a pass is not the norm for this group [i.e., police] culture anywhere in the country"); Shaila Dewan, *A Growing Chorus of Big City Prosecutors Says No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html> [<https://perma.cc/5VRX-6EWB>] ("Police departments and unions have sometimes put up resistance to these broad uses of prosecutor discretion [to cease charging marijuana possession cases], saying they defy the intent of lawmakers."). For examples of bureaucratic resistance to increases in penal severity, see generally *supra* notes 139 & 141 and accompanying text.

<sup>159</sup> See, e.g., *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017) (upholding the Governor's authority to reassign all death-eligible cases from a local elected prosecutor who announced her intention not to seek the death penalty in any case); *Williams v. State*, 184 So. 3d 908, 917 (Miss. 2014) (holding an Attorney General's attempt to usurp prosecutorial authority over a homicide case that the local district attorney declined to prosecute to be unauthorized under the law, where the Governor did not direct the Attorney General to intervene); *Johnson v. Pataki*, 691 N.E.2d 1002, 1007 (N.Y. 1997) (upholding the Governor's broad authority to reassign a death-eligible case from Bronx District Attorney Robert Johnson based on the Governor's belief that Johnson "was a threat to faithful execution of the death penalty law").

<sup>160</sup> See WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.3(e) (4th ed. 2019) ("[M]ost states allow the Attorney General to intervene in a local prosecution. About half the states give the Attorney General broad authority to intervene on his own initiative, while some others allow intervention only at the direction or request of another official."); Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 551–56 (2011) (surveying broad grants of statutory or constitutional authority to state attorneys general to intervene in local prosecutions); Tyler Quinn Yeagain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110–26 (2018) (fifty-state survey finding varying degrees of power among state officials to usurp jurisdiction from local district attorneys).

<sup>161</sup> See Barkow, *supra* note 160, at 550–56 (discussing rare invocation by most attorneys general of their broad grants of criminal prosecutorial power).

that divergence begins to manifest in locally elected prosecutors' exercise of enforcement discretion. In Pennsylvania, for example, the legislature recently expanded the State Attorney General's jurisdiction to prosecute cases charging violations of the state's firearms laws, tellingly limiting the jurisdictional expansion to the city of Philadelphia for two years only—effectively curtailing the discretion of District Attorney Krasner for the duration of his current term.<sup>162</sup>

At the federal level, lawmaking and enforcement are not separated across sovereigns. But federal criminal law is vast,<sup>163</sup> enforcement resources relatively limited,<sup>164</sup> and enforcement discretion largely unconstrained by public safety imperatives.<sup>165</sup> As a result, the real “makers” of federal criminal law have long been congressional appropriations committees and DOJ leadership. The former determine which DOJ components to fund, at what levels, and for what purposes,<sup>166</sup> while the latter sets prosecutorial priorities and, more critically, shapes how congressional appropriations committees perceive enforcement needs.<sup>167</sup>

Although this method of federal criminal “lawmaking” is not separated across sovereigns, it is still separated, to a degree, between Washington and the districts. When DOJ leaders stray from the enforcement status quo—whether to increase or decrease penal severity, or to focus on a new set of priorities—line prosecutors and agents in field offices can be slow to execute those changes. Attorney General John Ashcroft's 2003 directive to prosecutors to charge the highest penalty-generating readily provable offense met with uneven implementation,<sup>168</sup> as did Attorney General Eric Holder's 2013 directive to refrain from charging mandatory penalty-carrying offenses in certain categories

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<sup>162</sup> See H.B. 1614, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, THE INTERCEPT (July 8, 2019), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [<https://perma.cc/DBG4-LWPX>]. Attorney General Shapiro, a Democrat, has since been under pressure to renounce the law and the power it grants him. Akela Lacy, *Pennsylvania Attorney General Josh Shapiro Will Support Repeal of Controversial Law Stripping Larry Krasner of Authority*, THE INTERCEPT (July 12, 2019), <https://theintercept.com/2019/07/12/josh-shapiro-larry-krasner-pennsylvania-repeal-hb-1614/> [<https://perma.cc/92PG-NULU>].

<sup>163</sup> Richman, *supra* note 101, at 81–91 (documenting the expansion of federal criminal law over the past century).

<sup>164</sup> *Id.*

<sup>165</sup> See Richman & Stuntz, *supra* note 128, at 599–618 (arguing that local prosecutors' heightening political accountability relative to their federal counterparts comparatively diminishes their charging discretion).

<sup>166</sup> See Richman, *supra* note 50, at 793–99 (discussing the influence of congressional appropriations on DOJ priorities).

<sup>167</sup> Ouziel, *supra* note 28; Richman, *supra* note 50, at 793–99.

<sup>168</sup> See Richman, *supra* note 19, at 2067–68 (suggesting that the Ashcroft Memorandum had little to no effect on line prosecutors' behavior).

of cases.<sup>169</sup> More than shirking but less than sabotage,<sup>170</sup> these reactions by line prosecutors in the districts to Main Justice directives are a form of bureaucratic shoulder-shrugging—an almost reflexive disinterest in the goals and aspirations of transient, politically-oriented leadership.<sup>171</sup> (This contrasts with the sort of prosecutions directly overseen by political appointees at Main Justice, which can, though do not always, ebb and flow in sync with administration changeover.)<sup>172</sup>

Of course, shoulder-shrugging may not always come to pass, as recent reports from the border would seem to indicate.<sup>173</sup> But career immigration enforcement agents' apparent eagerness (or at least willingness) to implement a new immigration enforcement policy may be explained, at least in part, by

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<sup>169</sup> See OFFICE OF THE INSPECTOR GEN., *supra* note 32, at 11–14 (finding that twenty-one percent of districts did not update their local policies in accordance with Attorney General Holder's directive); Stephanie Holmes Didwania, (How Much) Do Mandatory Minimums Matter? 17–18, 23–24 (Jan. 2020) (unpublished manuscript) (on file with author) (in empirical study of effects of Holder directive, finding directive resulted in 40% reduction in the number of defendants facing a mandatory minimum among those eligible, with over one-third of potentially eligible defendants charged with a mandatory penalty-carrying offense).

<sup>170</sup> See JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 22 (1997) (conceptualizing “shirking” as motivated by either leisure-seeking or political disagreement, and “sabotage” as working in order to deliberately undermine the policy goals of the principal).

<sup>171</sup> See *supra* Part II.B.2.

<sup>172</sup> See Kitty Calavita, *The Struggle for Racial Justice: The Personal, the Political, and . . . the Economic*, 44 LAW & SOC'Y REV. 495, 499 (2010) (noting a decrease in federal civil rights prosecutions under the Bush Administration as compared to the Clinton Administration); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 48 (2012) (noting a rise in federal civil rights prosecutions under the Obama Administration); Ben Protess et al., *Trump Administration Spares Corporate Wrongoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html> [<https://perma.cc/CM7R-KKWL>] (reporting a seventy-two percent decline in corporate penalties assessed from federal corporate prosecutions under the Trump Administration).

<sup>173</sup> See Exec. Order No. 13,768: Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017), <https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/> [<https://perma.cc/G3AR-KQTA>] (“The purpose of this order is to direct executive departments and agencies . . . to employ all lawful means to enforce the immigration laws of the United States.”); U.S. IMMIGRATION & CUSTOMS ENF'T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 1–2, <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> (revealing a thirty percent increase in administrative arrests by U.S. Immigration and Customs Enforcement (ICE) in fiscal year 2017, following President Trump's January 25, 2017, Executive Order and a Department of Homeland Security (DHS) February 20, 2017, memorandum implementing the Executive Order). *But see* U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH, <https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-monthly-apps-sector-area-fy2018.pdf> (documenting illegal alien apprehensions by U.S. Border Patrol from fiscal years 2000 to 2018, and reporting a twenty-five percent *decline* in total apprehensions between fiscal years 2016 and 2017, from 415,816 apprehensions between September 2015 and September 2016, to 310,531 apprehensions between September 2016 and September 2017, followed by an increase in fiscal year 2018, to 404,142 apprehensions).

their agency's comparatively narrower mission, as well as its institutional placement (within DHS, not the DOJ).<sup>174</sup> Notably, while arrests and removals of undocumented immigrants rose substantially in fiscal year 2017, criminal immigration *prosecutions*—that is, criminal cases initiated by federal prosecutors for violations of immigration law—fell by 2% over the same period and comprised a smaller percentage of all federal criminal cases.<sup>175</sup> This decline in criminal filing occurred despite Attorney General Sessions' directive to prioritize immigration cases.<sup>176</sup> Even after the announcement of a “zero-tolerance” policy for illegal border crossings following a surge in illegal border crossings in the first quarter of 2018,<sup>177</sup> the reaction by prosecutors in border districts has been mixed.<sup>178</sup> This trend has persisted as both border apprehensions and immigration prosecutions continued at a heightened pace through the remainder of 2018.<sup>179</sup> What's more, there has been virtually no change in the ratio of prosecutions to border apprehensions, which has hovered at around 1:3 over the last twenty years.<sup>180</sup> There are, it appears, two stories of bureaucracy relat-

<sup>174</sup> See *History*, U.S. IMMIGRATION & CUSTOMS ENF'T (Mar. 4, 2019), <https://www.ice.gov/history> [<https://perma.cc/8VSS-MYLH>] (explaining that ICE's stated mission is to “promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration”).

<sup>175</sup> See *U.S. District Courts: Judicial Business 2017*, U.S. COURTS, <http://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2017> [<https://perma.cc/NCX6-6UZ2>] (“Criminal filings for defendants charged with [felony and Class A misdemeanor] immigration offenses fell 2 percent to 20,438 and accounted for 27 percent of criminal filings. This was the lowest total since 2007.”). Petty immigration offenses—most commonly, illegal entry—fell by twenty-two percent in 2017. Compare *Judicial Business 2016 Tables*, U.S. COURTS tbl.M-2, [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_m2\\_0930.2016.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_m2_0930.2016.pdf) (reporting 47,962 petty immigration offenses between September 2015 and September 2016), with *Judicial Business 2017 Tables*, U.S. COURTS tbl.M-2 [hereinafter *Judicial Business 2017 Tables*], [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_m2\\_0930.2017.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_m2_0930.2017.pdf) (reporting 37,151 petty immigration offenses between September 2016 and September 2017).

<sup>176</sup> See Memorandum from Jefferson B. Sessions, III, Att’y Gen., U.S. Dep’t of Justice, to All Fed. Prosecutors (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download>.

<sup>177</sup> See Memorandum from Jefferson B. Sessions, III, Att’y Gen., U.S. Dep’t of Justice, to All Fed. Prosecutors Along the Southwest Border (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

<sup>178</sup> See “Zero Tolerance” at the Border: Rhetoric vs. Reality, TRAC IMMIGRATION (July 24, 2018), <http://trac.syr.edu/immigration/reports/520/#f4> [<https://perma.cc/NB8H-7WG3>] (tabulating a forty-five percent rise in prosecutions arising from border apprehensions between March and May 2018, but showing vast differences among the five southwest border districts, with the only significant increase confined to the Southern District of Texas).

<sup>179</sup> Compare *Judicial Business 2017 Tables*, *supra* note 175, at tbl.M-2, with *Judicial Business 2018 Tables*, U.S. COURTS tbl.M-2 [hereinafter *Judicial Business 2018 Tables*], [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_m2\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_m2_0930.2018.pdf) (documenting a 215% rise in petty immigration prosecutions in 2018, with by far the biggest rise in prosecutions occurring in the Southern District of Texas).

<sup>180</sup> See TRAC IMMIGRATION, *supra* note 178, at fig.1 (showing that criminal prosecutions have accounted for around one third of all Border Patrol apprehensions in the past twenty years); see also

ed to changing immigration priorities set at the political level—one of acquiescence or perhaps even encouragement, the other of resistance or, more simply, disregard.

In sum, the division of criminal lawmaking and enforcement power at the state level, and the allocation of criminal enforcement authority at the federal level, are structural features that tend to enable, and may even exacerbate, resistance to political change.

## 2. Cooperation and Oversight

Nearly complete overlap between state and federal criminal law,<sup>181</sup> coupled with the limited yet potent reach of federal criminal enforcement power,<sup>182</sup> has, over the last half-century, spawned both inter-jurisdictional cooperation and oversight.<sup>183</sup> But in moments of political transition on criminal justice preferences, each of these features of criminal federalism can disrupt emerging local political consensus. They can function, in effect, as escape valves from the pressures of democracy.

Consider cooperation. When criminal justice preferences are well-settled among local constituencies, federal intervention in local criminal enforcement functions as a form of aid-in-kind, helping localities to better implement majoritarian constituent preferences.<sup>184</sup> When those preferences begin to shift, the shifts manifest less overtly in the federal electoral sphere, creating divergence between state and federal laws, or between local and federal enforcement policies, or both.<sup>185</sup> In this environment, local enforcers can turn to federal enforcers to avoid executing reforms with which they disagree.

This is precisely what took place in the early years of medical marijuana legalization. In a number of states that legalized the use and distribution of marijuana for medical purposes, local law enforcement, municipal leaders, and civic leaders asked federal prosecutors and drug enforcement agents to warn marijuana dispensaries that their actions were in violation of federal law. Federal enforcers complied with these requests, sending warning letters to nearly two thousand dispensaries in four states advising that the dispensaries should

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U.S. BORDER PATROL, TOTAL ILLEGAL ALIEN APPREHENSIONS BY MONTH, *supra* note 173 (documenting 404,142 apprehensions in fiscal year 2018); *Judicial Business 2018 Tables*, *supra* note 179, at tbls.M-2 & D-3 (documenting a total of 103,367 prosecutions for felony and misdemeanor illegal entry or reentry offenses).

<sup>181</sup> Richman, *supra* note 101, at 81, 91–96.

<sup>182</sup> See Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236 (2014) (discussing the sources of federal relative to state and local criminal enforcement power).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See *supra* Part II.A.2 (discussing the relative non-responsiveness of federal politics to local criminal justice preferences).

cease distributing marijuana and that failure to do so could result in federal prosecution.<sup>186</sup> Most dispensaries that received such warnings closed in response, but those that did not were in some instances subjected to fairly robust federal prosecution and civil forfeiture—again, largely at the behest of local enforcement officials.<sup>187</sup> By 2013, after Colorado and Washington legalized marijuana for recreational purposes, the Obama Administration finally adopted a policy of encouraging greater restraint in the enforcement of federal marijuana prohibitions in states where the drug was legal.<sup>188</sup> Known as the “Cole Memorandum,” the directive hardly provoked a sea change in federal marijuana enforcement,<sup>189</sup> nor was that its design.<sup>190</sup> In this respect, Attorney General Sessions’ January 2018 rescission of the Cole Memorandum was enforcement

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<sup>186</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-1, STATE MARIJUANA LEGALIZATION: DOJ SHOULD DOCUMENT ITS APPROACH TO MONITORING THE EFFECTS OF LEGALIZATION 34 (2015) [hereinafter STATE MARIJUANA LEGALIZATION], <https://www.gao.gov/assets/680/674464.pdf>.

<sup>187</sup> *Id.* at 34–35 & n.52 (describing a coordinated campaign by California’s four U.S. Attorneys offices (USAOs) to crack down on medical marijuana dispensaries, which included twenty-six civil forfeiture actions and warranted searches of over one hundred dispensaries in the Central District of California alone).

<sup>188</sup> See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to All U.S. Att’y’s (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; see also Mike Riggs, *Obama’s War on Pot*, THE NATION (Oct. 30, 2013), <https://www.thenation.com/article/obamas-war-pot/> [<https://perma.cc/K9FJ-H78D>] (discussing the evolution of the Obama Administration’s marijuana enforcement in face of rising legalization at the state level).

<sup>189</sup> See STATE MARIJUANA LEGALIZATION, *supra* note 186, at 35–37 (discussing limited effects of policy change). This is borne out by the numbers. In Colorado, for example, the 2013 Main Justice directive produced no detectable change in the number of federal marijuana prosecutions: federal prosecutors brought an average of eleven marijuana cases in the three years preceding the directive, and eleven in the three years following it. Compare *U.S. District Courts: Judicial Business 2010 Tables*, U.S. COURTS tbl.D-3 [hereinafter *Judicial Business 2010 Tables*], [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D03D9Sep10.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/D03D9Sep10.pdf), *U.S. District Courts: Judicial Business 2011 Tables*, U.S. COURTS tbl.D-3 [hereinafter *Judicial Business 2011 Tables*], [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D03D9Sep11.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/D03D9Sep11.pdf), and *U.S. District Courts: Judicial Business 2012 Tables*, U.S. COURTS tbl.D-3 [hereinafter *Judicial Business 2012 Tables*], [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D03D9Sep12.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/D03D9Sep12.pdf), with *U.S. District Courts: Judicial Business 2014 Tables*, U.S. COURTS tbl.D-3 [hereinafter *Judicial Business 2014 Tables*], [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/D03D9Sep14.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/D03D9Sep14.pdf), *U.S. District Courts: Judicial Business 2015 Tables*, U.S. COURTS tbl.D-3 [hereinafter *Judicial Business 2015 Tables*], [https://www.uscourts.gov/sites/default/files/data\\_tables/D03D9Sep15.pdf](https://www.uscourts.gov/sites/default/files/data_tables/D03D9Sep15.pdf), and *U.S. District Courts: Judicial Business 2016 Tables*, U.S. COURTS tbl.D-3 [hereinafter *Judicial Business 2016 Tables*], [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_d3\\_0930.2016.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2016.pdf). The state of Washington saw a twenty-six percent decline in the number of marijuana cases brought during that same time period—from an average of eighty-six to an average of sixty-three cases. Compare *Judicial Business 2010 Tables*, *supra*, at tbl.D-3, *Judicial Business 2011 Tables*, *supra*, at tbl.D-3, and *Judicial Business 2012 Tables*, *supra*, at tbl.D-3, with *Judicial Business 2014 Tables*, *supra*, at tbl.D-3, *Judicial Business 2015 Tables*, *supra*, at tbl.D-3, and *Judicial Business 2016 Tables*, *supra*, at tbl.D-3.

<sup>190</sup> See STATE MARIJUANA LEGALIZATION, *supra* note 186, at 10–11 (observing similarities between the Cole Memorandum and prior DOJ guidance on marijuana enforcement).

theatre.<sup>191</sup> Most federal prosecutors have, and will continue to, enforce marijuana laws in line with resource constraints and local priorities, as identified through communication and collaboration with local law enforcement.<sup>192</sup>

Federal oversight of local criminal justice bureaucracies plays an even more complicated role in transitional moments. Like cooperation, oversight can function as an escape valve of sorts, relieving local political pressure on bureaucracies. But at the same time, it can also fuel political transitions.

This is what has happened with policing. At a time of increasing public attention to police misuse of force and racial disparities in the numbers of police-citizen interactions, the DOJ's investigations of local police departments for individual or systemic violations of federal constitutional or statutory law<sup>193</sup> can take political pressure off of local officials by outsourcing both the investigation of these problems and prescriptions for their cure.<sup>194</sup> At the same time, by further revealing and publicizing the extent of these problems, pattern and practice investigations can turn up the temperature on an already volatile political issue. And, if a resolution to the investigation (whether by agreement or consent decree) is either not forthcoming or proves ultimately ineffective, the pressure on local political figures rises.

<sup>191</sup> See Sessions Memorandum, Jan. 2018, *supra* note 117.

<sup>192</sup> See Press Release, U.S. Dep't of Justice, U.S. Attorney Bob Troyer Issues Statement Regarding Marijuana Prosecutions in Colorado (Jan. 4, 2018), <https://www.justice.gov/usao-co/pr/us-attorney-bob-troyer-issues-statement-regarding-marijuana-prosecutions-colorado> [<https://perma.cc/72K6-A9ZH>] (“The United States Attorney’s Office in Colorado *has already been guided* by these principles [of federal prosecution as reiterated in Sessions’ rescission of the Cole Memorandum] in marijuana prosecutions . . . . We will, consistent with the Attorney General’s latest guidance, *continue to take this approach* in all of our work with our law enforcement partners throughout Colorado.”) (emphasis added); Memorandum from Billy J. Williams, U.S. Att’y for the Dist. of Or. (May 18, 2018) [hereinafter Memorandum from Billy J. Williams], [http://media.oregonlive.com/marijuana/other/2018/05/18/USAOR-Marijuana%20Enforcement%20Priorities-Final%20\(1\).pdf](http://media.oregonlive.com/marijuana/other/2018/05/18/USAOR-Marijuana%20Enforcement%20Priorities-Final%20(1).pdf) (describing priorities for federal marijuana prosecution post-Cole Memorandum that are nearly identical to those in the Cole Memorandum).

<sup>193</sup> See 18 U.S.C. § 242 (2018) (making it a criminal offense for any person acting under color of any law to willfully deprive a person “of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”); 42 U.S.C. § 14141 (2018) (giving the DOJ authority to initiate a civil action against any governmental authority demonstrating a “pattern or practice of conduct . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States”).

<sup>194</sup> See, e.g., Jeffrey Toobin, *Police Reform: Does Anything Work?*, NEW YORKER (May 12, 2015), <https://www.newyorker.com/news/daily-comment/what-should-police-reform-look-like> [<https://perma.cc/CN44-XGWQ>] (describing Baltimore mayor Stephanie Rawlings-Blake’s political calculus in requesting a federal audit of Baltimore Police Department and recommendations for reform); Simone Weichselbaum, *The Problems with Policing the Police*, TIME (2019), <http://time.com/police-shootings-justice-department-civil-rights-investigations/> [<https://perma.cc/NLH2-GG6K>] (noting requests by the mayors of Phoenix, Arizona and Cleveland, Ohio for federal investigation and oversight of the Maricopa County Sheriff’s Office and the Cleveland Police Department, respectively).



In this way, increased federal investigation and oversight of local police departments during the Obama Administration<sup>195</sup> contributed to a cascading political dynamic: growing public attention to, and concern about, civil rights violations within local police departments;<sup>196</sup> growing dissatisfaction with a lack of progress in this area (notwithstanding the increase in federal intervention and oversight);<sup>197</sup> and, in turn, growing political pressure on local officials to make their police departments more accountable.<sup>198</sup> It seems also to have mobilized the Fraternal Order of Police to change this political dynamic, by supporting a Presidential candidate who promised to the rank-and-file that he would be “on your side 1,000 percent . . . .”<sup>199</sup>

A similar dynamic has emerged at the intersection of criminal law and immigration, where federal attempts to control local enforcement of federal immigration laws have heightened political attention to those issues. The mostly successful federal challenge to Arizona’s “Support Our Law Enforcement

<sup>195</sup> See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 *FORDHAM L. REV.* 3189, 3228–35 (2014); Sheryl Gay Stolberg & Timothy Williams, *Obama Races to Overhaul Police in Baltimore and Chicago Before Trump Era*, N.Y. *TIMES* (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/police-racial-bias-baltimore-chicago-obama-trump.html> [<https://perma.cc/M9EH-VQPP>].

<sup>196</sup> Stephen Rushin & Griffin Edwards, *De-Policing*, 102 *CORNELL L. REV.* 721, 753 (2017) (“[P]ublic § 14141 investigations are destabilizing incidents within targeted communities that expose the affected police departments to added public distrust and negative interactions.”); see Weichselbaum, *supra* note 194 (observing how pattern and practice investigations have “raised public expectations” on police reform). This is not to say that federal intervention was the primary driver of increased public attention to policing problems, but rather that the federal reports and consent decrees issued have given the public both a deeper understanding of the scope of those problems, and the impetus to fix them.

<sup>197</sup> See Toobin, *supra* note 194 (describing growing public frustration with the seeming inability of both federal and local officials to fix intractable policing problems); Weichselbaum, *supra* note 194 (“[A]s the Obama administration has ratcheted up its oversight of state and local law-enforcement agencies . . . questions about the effectiveness of those interventions have also been on the rise.”).

<sup>198</sup> For instance, a scathing DOJ report on the Ferguson, Missouri Police Department forced the resignations of the city’s city manager and police chief. See generally CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf). Following the release of the DOJ’s report on the Chicago Police Department and a video of a police shooting of teenager Laquan McDonald, Mayor Rahm Emanuel announced he would not seek a third term, a decision many people attribute to the political pressure on him arising from those incidents. See Alex Kotlowitz, *What the Trial of Laquan McDonald’s Killer Means for the Future of Chicago*, *NEW YORKER* (Sept. 11, 2018), <https://www.newyorker.com/news/dispatch/what-the-jason-van-dyke-murder-trial-means-for-the-future-of-chicago> [<https://perma.cc/X4HW-SS3N>].

<sup>199</sup> See Michael Zoorob, *Blue Endorsements Matter: How the Fraternal Order of Police Contributed to Donald Trump’s Victory*, *PS: POL. SCI. & POL.* 1, 2, 5–6 (Nov. 23, 2018) (finding a statistically significant association between the shift in GOP vote share from 2012 to 2016 in counties with large Fraternal Order of Police (FOP) presence and the FOP’s enthusiastic endorsement of Donald Trump in the 2016 U.S. presidential election as compared to its non-endorsement in the 2012 U.S. presidential election, and finding greater levels of political engagement by police officers in 2016 as compared to 2012).

and Safe Neighborhoods Act,”<sup>200</sup> in which the Supreme Court struck down Arizona’s attempt to criminally prosecute undocumented immigrants under state law,<sup>201</sup> crystalized the role of the federal government—and thus the importance of national-level elections—in setting immigration policy. This clash between sovereigns (a number of states had passed similar laws, struck down in line with the Supreme Court’s decision) promptly moved from the courts to the political arena, where immigration policy took center stage in the next Presidential election.<sup>202</sup> Likewise, the federal government’s attempts—under both the Obama and Trump Administrations—to secure local law enforcement cooperation in the apprehension of undocumented immigrants with criminal records,<sup>203</sup> has in turn made willingness to refuse cooperation with federal immigration authorities a pivotal issue in a number of municipal elections.<sup>204</sup>

Finally, federal courts are beginning to play a greater role in systemic police oversight, as distinguished from the retail oversight of adjudicating habeas petitions arising from state prosecutions and suppression motions in federal

<sup>200</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>201</sup> *Arizona v. United States*, 567 U.S. 387 (2012).

<sup>202</sup> See James G. Gimpel, *Immigration Policy Opinion and the 2016 Presidential Vote*, CTR. FOR IMMIGRATION STUD. (Dec. 4, 2017), <https://cis.org/sites/default/files/2017-12/gimpel-2016-vote.pdf> (concluding, based on an analysis of voter surveys, candidate messaging, and media coverage, that “immigration played an unusually prominent role in the 2016 election, one that issues do not regularly play in presidential contests”).

<sup>203</sup> See Jerry Markon, *DHS Deportation Program Meets with Resistance*, WASH. POST (Aug. 3, 2015), [https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9\\_story.html?utm\\_term=.0ac09a494f75](https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html?utm_term=.0ac09a494f75) [<https://perma.cc/CB3W-FXZA>] (describing a “revolt” by many municipalities against DHS programs designed to obtain cooperation by local law enforcement in arresting and deporting illegal aliens with criminal records).

<sup>204</sup> See Dominic Fracassa, *Alioto Feeling Heat from Fellow Candidates for Sanctuary Ballot Proposal*, S.F. CHRON. (May 11, 2018), <https://www.sfchronicle.com/bayarea/article/Todd-Rufo-head-of-SF-s-economic-development-12907725.php> [<https://perma.cc/BP63-BXQK>] (describing how one mayoral candidate’s proposal to cooperate with federal immigration authorities in the arrest and deportation of violent felons became a lightning rod in the mayoral campaign); Sarah Ihlefeld et al., *ABQ Mayoral Candidates Offer Contrasting Solutions*, N.M. NEWS PORT (Nov. 13, 2017), <https://www.newmexiconewsport.com/abq-mayoral-candidates-offer-contrasting-solutions/> [<https://perma.cc/3BUL-LD96>] (discussing mayoral candidates’ competing views on “key issues,” among them whether to declare Albuquerque a sanctuary city); Joshua Stewart, *Sanctuary Lawsuit Helps Define Where County Supervisor Candidates Stand on Immigration*, SAN DIEGO UNION-TRIB. (Apr. 12, 2018), <http://www.sandiegouniontribune.com/news/politics/sd-me-immigration-stance-20180413-story.html> [<https://perma.cc/C4YY-PG3D>] (describing the San Diego county Board of Supervisors’ “looming decision” about whether to join the federal government in its lawsuit challenging California laws that limit local police cooperation with federal immigration officials as “a litmus test for candidates running in this year’s election for the Board of Supervisors”). For a list of the more than three hundred municipalities identifying as “sanctuary cities,” see Bryan Griffith & Jessica M. Vaughan, *Map: Sanctuary Cities, Counties, and States*, CTR. FOR IMMIGRATION STUD. (Apr. 16, 2019), <https://cis.org/Map-Sanctuary-Cities-Counties-and-States> [<https://perma.cc/QW4T-YBA8>].

criminal cases involving local police. In at least two recent examples, federal courts in New York City and Philadelphia were called on to assess the constitutionality of police stop and frisk practices on a systemic level, by way of class actions filed on behalf of aggrieved citizens.<sup>205</sup> As with other instances of federal oversight over local law enforcement, these cases made local policing practices more politically salient. Following the case filings and the media attention generated from them, mayoral elections in both cities focused heavily on the candidates' positions on stop and frisk—with the ultimately victorious candidates campaigning heavily on vows to reform their police departments' practices.<sup>206</sup> In New York, political pressure precipitated by the class action also generated immediate response by local leaders: the city council passed new police oversight legislation, and the police department began taking steps to reduce police stops.<sup>207</sup> The political fallout from these lawsuits may ultimately have had a greater impact on police stop and frisk practices than the judicial decrees issued in the cases themselves.<sup>208</sup>

<sup>205</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *Bailey v. City of Philadelphia*, CV No. 08-3249, 2009 WL 10700082 (E.D. Pa. May 26, 2009).

<sup>206</sup> See Barbaro & Chen, *supra* note 89; Dwyer, *supra* note 89; Anna Orso, *Jim Kenney Wins: Here's Where the New Mayor Stands on Pot, Policing and 5 Other Topics*, BILLY PENN (Nov. 3, 2015), <https://billypenn.com/2015/11/03/jim-kenney-wins-heres-where-the-probable-new-mayor-stands-on-pot-policing-and-5-other-topics> [<https://perma.cc/VE9J-CJLY>] (describing Mayor Kenney's vow to end the Philadelphia Police Department's stop and frisk practices as "one of the pillars of [his] campaign").

<sup>207</sup> J. David Goodman, *City Council Votes to Increase Oversight of New York Police*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/27/nyregion/new-york-city-council-votes-to-increase-oversight-of-police-dept.html> [<https://perma.cc/KF9B-PWGY>] (reporting passage of the Community Safety Act that would, among other things, create an independent inspector general to monitor NYPD policies and practices and make it easier for plaintiffs to sue the NYPD for bias-based profiling); Wendy Ruderman, *Number of Frisks Fell in '12, Police Data Show*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/nyregion/number-of-frisks-fell-in-12-police-data-show.html> [<https://perma.cc/9A4H-482X>] (reporting that "[a]fter criticism from a federal judge last spring and widening political protests," new police officer stop and frisk training was instituted, resulting in a thirty-four percent decrease in stops in the last three quarters of 2012 compared to the same period in 2011).

<sup>208</sup> In New York, stops and frisks plummeted in 2012, before the trial court's August 2013 decision and ruling in the case. See *Floyd*, 959 F. Supp. 2d 540; Ruderman, *supra* note 207. In Philadelphia, a consent decree had little initial effect on the number of illegal stops and frisks; only after the election of a new mayor (who had campaigned heavily on eliminating illegal stop and frisk practices) and his appointment of a new police commissioner did the police department make marked progress. See Plaintiffs' Ninth Report to Court and Monitor on Stop and Frisk Practices: Fourth Amendment Issues at 1, 3, *Bailey*, 2009 WL 10700082 (C.A. No. 10-5952), [https://www.aclupa.org/sites/default/files/field\\_documents/bailey\\_ninth\\_report\\_11-20-18\\_.pdf](https://www.aclupa.org/sites/default/files/field_documents/bailey_ninth_report_11-20-18_.pdf) (recounting slow reductions in numbers of illegal stops and frisks, from half of all stops in the two quarters before the consent decree conducted without reasonable suspicion to approximately 40% in the years following, and then, following the new administration's adoption of internal compliance measures in early 2016, a 35% decrease in stops overall, with a quarter of stops conducted without reasonable suspicion).

### III. MANAGING TRANSITIONAL MOMENTS IN A BLENDED SYSTEM

The foregoing is an account of tension: between shifting public preferences on criminal justice, the political structures through which those preferences are channeled, the goals and interests of politically accountable enforcement leaders and career-level enforcers, and the divergent roles and constituencies of different sovereigns within the criminal justice arena. These tensions help explain, in part, why the first decades of the 21st century have seen a palpable shift in public preferences on criminal justice coupled with relatively limited changes to criminal enforcement on the ground.

I say in part; it is true, to be sure, that public preferences have not shifted nearly as far as necessary to generate substantial reductions in the U.S. prison population, nearly half of which is comprised of violent offenders.<sup>209</sup> But reductions in penal populations are not, and should not be, our only metric for successful reform. Other metrics, more closely tied to shifting public preferences—for instance, the frequency and nature of police/citizen contact, the number of low-level, non-violent drug offenders prosecuted or imprisoned for mandatory terms, or the number of non-violent, indigent defendants required to post cash bail—are also important indicators of a criminal justice system's health. And unlike the public shifts required to substantially reduce prison populations, much of the public already supports, by large measures, reforms to street policing, drug enforcement, and cash bail.<sup>210</sup> The failure to accomplish genuine reductions in penal populations is one story worth telling.<sup>211</sup> The slow pace at which other, more popular criminal justice reforms have taken root within enforcement institutions is a different story, one in which the tension between democracy and bureaucracy plays an important and under-studied role.

That tension, in turn, raises an important normative question. What is the ideal role of enforcement institutions at moments of political transition in criminal justice? Is the foregoing account a story of democratic subversion? Or is it something else—something more nuanced, and perhaps even desirable in some respects? This Part considers these questions, arguing that the very features of enforcement bureaucracies that depress change at moments of political transition can, properly leveraged, advance democratic ideals of participation and deliberation.

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<sup>209</sup> See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/JEP2-W3Z4>] (showing that nearly one million people, or forty-two percent of the total number of prisoners in federal and state prisons and local jails, are incarcerated for a crime of violence).

<sup>210</sup> See *supra* note 5 and accompanying text.

<sup>211</sup> See generally GOTTSCHALK, *supra* note 17; O'HEAR, *supra* note 17; PFAFF, *supra* note 7.

### A. *Balancing Responsiveness and Resistance*

Imagining the ideal role of enforcement institutions at moments of political transition begs an antecedent question as to the ideal role of the public. More specifically: to what extent do we wish the enforcement bureaucracy to be entirely responsive to political shifts, particularly as those shifts manifest in election outcomes?

The foregoing exploration into criminal justice “publics” and voter choice should at least give us pause before demanding full political responsiveness from the enforcement bureaucracy.<sup>212</sup> Yes, defining crimes and their punishment is an intensely normative task that is, in theory, best suited to the community and its politically accountable leaders.<sup>213</sup> But as we have seen, concepts of community and political accountability in criminal justice are not so easily realized. Criminal justice “communities” are malleable, in constant flux and realignment.<sup>214</sup> Criminal justice preferences are not easily interpreted through voter choice,<sup>215</sup> particularly at the state and national levels where penal laws are enacted.<sup>216</sup> The democracy of the electoral sphere, even in (and perhaps especially in) moments of political transition, does not clearly translate the many nuances and varieties of public preferences on criminal justice.

At the same time, there are significant drawbacks to ceding too much power to entrenched institutional interests to set the enforcement agenda. Given that the enforcement status quo is inevitably the product of political choices made at an earlier time, bureaucratic resistance among law enforcement is not quite the apolitical ideal its practitioners might believe it to be.<sup>217</sup> Moreover, as participants in a system, enforcers are handicapped by a natural tendency to justify it.<sup>218</sup> Add to this a reflexive resistance to public influence<sup>219</sup> exacerbated by the presence of multiple sovereigns answering to different constituencies in a given criminal enforcement space,<sup>220</sup> and the capacity of enforcement bureaucracies to engage in neutral, informed, and responsive decision making seems limited at best.

There are, in short, inherent limits to both the public’s and the enforcement bureaucracy’s capacities to craft a reasoned, publicly supported criminal enforcement agenda. And so perhaps the tensions explored here are features,

<sup>212</sup> See *supra* Part II.A.

<sup>213</sup> See generally BIBAS, *supra* note 19.

<sup>214</sup> See *supra* Part II.A.1.

<sup>215</sup> See *supra* Part II.A.2.

<sup>216</sup> See *supra* Part II.A.2.

<sup>217</sup> See *supra* notes 135–137 and accompanying text.

<sup>218</sup> See *supra* notes 143–147 and accompanying text.

<sup>219</sup> See *supra* Parts II.B & C.1.

<sup>220</sup> See *supra* Part II.C.2.

rather than bugs, of the democracy/bureaucracy relationship. These features insulate criminal enforcement from the hazards of conflicting, muddled, and unstable popular sentiment, while at the same time protecting the system from unbridled enforcer discretion.

There are also, counterintuitively, features of bureaucratic resistance in the criminal enforcement space that amplify rather than suppress public participation in criminal justice. For instance, bureaucratic resistance demands that elected leaders not only advance a criminal enforcement agenda approved by a majority of voters, but that they convince the professional enforcement apparatus of the benefits of such an agenda. The push and pull that ensues in that process demands and sustains greater public investment, both to ensure that the elected leader presses the agenda, and that she succeeds in operationalizing it. Thus, in jurisdictions that have elected more progressive prosecutors, community and civil society groups are taking a more active role in evaluating the extent of progress on promised reforms.<sup>221</sup> Likewise, cooperation between enforcement institutions across different jurisdictions and sovereigns may help shield enforcers, to some degree, from the accounting of their constituents; but federalism can also, as we have seen, help propel particular criminal enforcement issues to the political fore, giving those issues greater visibility and purchase in the public sphere. Further, criminal enforcers report to multiple principals across different jurisdictions. This dynamic guards against too much control by any single political constituency, giving voice to a greater diversity of viewpoints. Under this conception, the enforcement bureaucracy plays neither the role of democracy-subversive<sup>222</sup> nor democracy-booster.<sup>223</sup> It is less definitive, and, perhaps, more malleable.

<sup>221</sup> In Chicago, for instance, groups instrumental in Kim Foxx's election have kept close tabs on her progress, attending and reporting on bail hearings, sentencing, and initial presentments. See EVALUATION OF KIM FOXX'S FIRST YEAR IN OFFICE, *supra* note 30. The same is happening in Suffolk county, Massachusetts, following the election of District Attorney Rachael Rollins. Walter Wuthmann, *Rachael Rollins, 100 Days in: What Has Changed, and What Hasn't, Under the Reformer DA*, WBUR NEWS (Apr. 12, 2019), <https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days> [https://perma.cc/3T5P-H3GG]. In Philadelphia, the American Civil Liberties Union (ACLU) has taken an active role in monitoring progress on cash bail reform. See Letter from Mary Catherine Roper, Deputy Legal Dir., ACLU of Pa., & Nyssa Taylor, Criminal Justice Policy Council, ACLU of Pa., to Hon. Sheila Woods-Skipper, President J., First Judicial Dist. & Hon. Marsha H. Neifield, President J., Phila. Mun. Court (Sept. 11, 2018), [https://www.aclupa.org/sites/default/files/field\\_documents/a\\_letter\\_to\\_fjd\\_regarding\\_bail\\_9.11.2018\\_0.pdf](https://www.aclupa.org/sites/default/files/field_documents/a_letter_to_fjd_regarding_bail_9.11.2018_0.pdf) (detailing findings, following the ACLU's observation of 650 arraignments in Philadelphia, and observations of other community groups, that reduction in use of cash bail as promised by the newly elected District Attorney was not being implemented by municipal court judges).

<sup>222</sup> See generally BIBAS, *supra* note 19.

<sup>223</sup> See Daniel C. Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 25, at 40, 40–75 (describing a form of democratic accountability arising from networked criminal enforcement institutions and the dispersion of enforcement au-

The question that remains, then, is the extent to which we might leverage this role to generate more reasoned, legitimate criminal enforcement. Here, I draw on concepts of deliberative democracy.<sup>224</sup> As the foregoing analysis has demonstrated, elections, even at the local level, are a necessary but insufficient mechanism of translating the diverse, complicated, and unstable viewpoints that characterize public preferences on criminal justice.<sup>225</sup> The rise in recent years of extra-electoral citizen involvement in criminal justice—through social justice movements,<sup>226</sup> citizen lobbying,<sup>227</sup> and community intervention in processes such as bail<sup>228</sup> and police stops<sup>229</sup>—is in many ways a response to that void. Although these mechanisms of citizen involvement have benefits, they also have significant limitations. Among them is the limited capacity of contestation and agonism from without enforcement bureaucracies to engender systemic change within them.<sup>230</sup> As the foregoing analysis has shown, shifts in

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thority amongst sovereigns). As the foregoing analysis has shown, though, intra- and inter-institutional mechanisms of accountability can easily veer into mechanisms of democratic resistance, particularly at moments of political transition, depending on the extent to which those institutional buffers either translate or subvert democratic values and public preferences.

<sup>224</sup> See DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS, at ix (James Bohman & William Rehg eds., 1997) (“Broadly defined, *deliberative democracy* refers to the idea that legitimate lawmaking issues from the public deliberation of citizens. As a normative account of legitimacy, deliberative democracy evokes ideals of rational legislation, participatory politics, and civic self-governance. In short, it presents an ideal of political autonomy based on the practical reasoning of citizens.”). On deliberative democracy as a process of consensus-seeking, see Gerald J. Postema, *Public Practical Reason: Political Practice*, in THEORY AND PRACTICE: NOMOS XXXVII, at 345, 352–61 (Ian Shapiro & Judith Wagner DeCew eds., 1995); as a process of compromise, see Gerald F. Gaus, *Reason, Justification, and Consensus: Why Democracy Can't Have It All*, in DELIBERATIVE DEMOCRACY, *supra*, at 205, 231–36.

<sup>225</sup> See *supra* Part II.A; see also Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) (“Democracy refers to a certain relationship between persons and their government. Democracy is achieved when those who are subject to law believe that they are also potential authors of law. Elections and other mechanisms that we ordinarily associate with democratic decision making are simply institutions designed to maximize the likelihood that this relationship obtains.”).

<sup>226</sup> See, e.g., *A Vision for Black Lives: Policy Demands for Black Power, Freedom & Justice*, THE MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org> [<https://perma.cc/Z5LW-MSNJ>].

<sup>227</sup> See Alan Blinder & Shaila Dewan, *The Real People Who Lobbied for Justice Reform: A Son, a Widow, an Expectant Mother*, N.Y. TIMES (Dec. 12, 2018), <https://www.nytimes.com/2018/12/12/us/criminal-justice-reform-lobbying-family.html> [<https://perma.cc/Z92Q-YNH4>] (describing lobbying efforts of citizen groups such as Families Against Mandatory Minimums and #Cut50).

<sup>228</sup> See Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 606–11 (2017) (describing a community’s decision to post bail for an individual as an act that nullifies the discretionary decisions made by members of the criminal legal system).

<sup>229</sup> See Simonson, *supra* note 22, at 407–13 (explaining the practice of copwatching, by which community members observe police behavior, as a means to increase police accountability).

<sup>230</sup> See John S. Dryzek, *Deliberative Democracy in Divided Societies: Alternatives to Agonism and Analgesia*, 33 POL. THEORY 218, 221 (2005) (observing that agonistic theory of democracy—which conceives of democracy as the process of vibrant, confrontational clashes between different positions and identities—“has no obvious place for collective decision making and resolution of social

enforcement on the ground ultimately require the assent not only of citizens, but also of enforcement leaders and line enforcers.

Assent to change is a process, and the enforcement bureaucracy plays a critical role in it. The collective discretionary decisions of front-line enforcers, over time, calibrate how shifts in public preferences manifest in shifts in criminal law-on-the-ground. That calibration should be a deliberative process, one in which both citizens and front-line enforcers take part.

What might such a process look like? The following Section offers a tentative sketch.

### *B. The Enforcement Bureaucracy and the Deliberative Ideal*

This Section proposes three typologies of mechanisms to increase deliberation and communication between the enforcement bureaucracy and the public, as well as between enforcement leaders and career enforcers: mechanisms constructed around (1) hearing and responding to public preferences;<sup>231</sup> (2) hearing and responding to career enforcers;<sup>232</sup> and (3) aligning the interests of enforcement leaders, career enforcers, and the public.<sup>233</sup>

#### 1. Hearing and Responding to Public Preferences

Deliberative mechanisms would ideally open a dialogue between the enforcement bureaucracy and the various communities of interest that comprise the criminal justice public.<sup>234</sup> This would enable enforcement institutions to hear a fuller, more diverse composition of public preferences, outside the muddled messaging of elections or the intense passions of social movements. Greater use of issue-specific polling, for instance, would cut through the noise of issue-proliferation and bypass the contortions of partisanship and negative partisanship. More robust use of commissions and advisory councils could better reflect the multiple communities of interest that comprise the criminal justice “public”—community groups, special interest groups (victims, families of those arrested or incarcerated, educators, and the like)—and importantly, could open a direct line of dialogue between those groups and the groups that comprise the enforcement bureaucracy.

Stakeholder dialogues, in fact, have already proven successful in helping public officials craft more broadly supported criminal justice policies. In Ore-

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problems,” which are requisites for actual governance as opposed to “further contestation”). For further discussion, see *supra* notes 43–46 and accompanying text.

<sup>231</sup> See *infra* notes 234–246.

<sup>232</sup> See *infra* notes 247–258.

<sup>233</sup> See *infra* notes 259–271.

<sup>234</sup> See *supra* Part I.A.



gon, for instance, the U.S. Attorney used this approach to help guide the exercise of federal enforcement discretion of marijuana once it had been legalized by statewide referendum.<sup>235</sup> A day-long summit convened more than 130 people representing a variety of institutional interests and stakeholders, and aired a diversity of views—and yet the participants were able to reach agreement on a number of principles to guide both state regulation and federal enforcement discretion.<sup>236</sup> In New York City, Mayor Bill de Blasio has formed a task force comprised of a variety of stakeholders to help reduce the population of New Yorkers in city jails and ultimately close Rikers Island.<sup>237</sup> In comparison to the Mayor's mixed record on policing reform—where he has made scant efforts to bring together stakeholders<sup>238</sup>—he has demonstrated concrete successes in his promised efforts to reduce city jail populations.<sup>239</sup> And in Chicago, former Mayor Rahm Emanuel has attributed success in the city's most recent police reform efforts to a deliberative reform process, in which community stakeholders and focus groups of rank-and-file police officers have participated, along with Police Department leadership (in addition to the Illinois Attorney General and a federal judge, for reforms arising from a federal consent decree).<sup>240</sup>

<sup>235</sup> See Memorandum from Billy J. Williams, *supra* note 192.

<sup>236</sup> *Id.*

<sup>237</sup> See Press Release, Office of the Mayor, Mayor de Blasio Announces “Smaller, Safer, Fairer: A Roadmap to Closing Rikers Island” (June 22, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/427-17/mayor-de-blasio-smaller-safer-fairer—roadmap-closing-rikers-island> [<https://perma.cc/ML3Y-DG8D>]; see also *Implementation Task Force, CITY OF N.Y.*, <https://rikers.cityofnewyork.us/implementation-task-force/> [<https://perma.cc/TLL7-NQTE>] (listing the members of the task force).

<sup>238</sup> See Jarrett Murphy, *Bill de Blasio's Police Reform Agenda Has Achieved Much and Disappointed Many*, CITYLIMITS.ORG (Oct. 16, 2017), <https://citylimits.org/2017/10/16/bill-de-blosios-police-reform-agenda-has-achieved-much-and-disappointed-many/> [<https://perma.cc/98G5-ZLJ6>] (chronicling de Blasio's campaign promises on police reform, his achievements relative to his promises, and the intense push-back from rank-and-file police officers, the police commissioner, and policing reform advocates).

<sup>239</sup> In the first year since the announcement of the plan and task force to reduce jail populations and close Rikers, New York City has achieved a twelve percent decline in its jail population. See *In One Year Since the City Announced Its Plan to Close Rikers Island . . .*, NYC CRIMINAL JUSTICE, [https://rikers.wpengine.com/wp-content/uploads/June\\_July\\_Progress\\_Report\\_FINAL.jpg](https://rikers.wpengine.com/wp-content/uploads/June_July_Progress_Report_FINAL.jpg) [<https://perma.cc/EA4V-6ZL6>].

<sup>240</sup> See Rahm Emanuel, *Why Chicago Leads on Police Reform*, N.Y. TIMES (May 8, 2019), <https://www.nytimes.com/2019/05/08/opinion/rahm-emanuel-chicago-police-reform.html> [<https://perma.cc/Y567-3SEH>]. The community and rank-and-file officer engagement process leading up to the Chicago consent decree was robust: fourteen community roundtables involving one thousand participants—in addition to smaller group conversations and written feedback by community members—all facilitated and reported on by experts at the Institute for Policy and Civic Engagement at the University of Illinois at Chicago, and thirteen focus groups involving 170 randomly selected police officers—in addition to written comments open to the department at large—all facilitated and reported on by former police chiefs-turned-executive fellows at the Police Foundation, a think tank dedicated to improving policing through evidence-based innovation. See INST. FOR POLICY & CIVIC ENGAGEMENT, CONSENT DECREE COMMUNITY ENGAGEMENT 4–6 (2018) [hereinafter CONSENT DECREE COMMUNITY ENGAGEMENT], <http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/07/IPCE-Community->

Successful dialogic processes must be designed to generate genuine rather than perfunctory participation. Research into formalized community-police meetings conducted by the Chicago Police Board, for instance, has demonstrated that processes intended to generate dialogue can themselves be loci of bureaucratic resistance, further reinforcing rather than reforming the status quo.<sup>241</sup> Elected and appointed leaders (mayors, chief prosecutors, and police commissioners) must therefore take care to design processes that generate genuine dialogue rather than occasions for each side simply to revert to defensive scripts.<sup>242</sup> For instance, the Chicago Police Board's public community meetings were designed to permit any citizen to voice complaints or concerns.<sup>243</sup> The process was thus constructed around citizen complaints for past enforcement action or inaction, and invited sporadic, unaccountable participation by both sides—that is, various community members could (and did) enter and leave the discussion, and police representatives had no mandate or directive to respond and propose concrete reforms.<sup>244</sup>

A more productive process, such as that used to generate a federal consent decree between the Chicago Police Department and the Illinois Attorney General, would be constructed around generating consensus-based, forward-looking reforms. It would have defined parameters for participation, draw on experts to facilitate deliberation using evidence-based practices, and make participants and facilitators accountable for producing concrete reform pro-

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Engagement-Report\_Final.pdf; POLICE FOUND., OPINIONS OF OFFICERS OF THE CHICAGO POLICE DEPARTMENT ON THE UPCOMING CONSENT DECREE: A REPORT TO THE STATE OF ILLINOIS OFFICE OF THE ATTORNEY GENERAL 6–7 (2018) [hereinafter OPINIONS OF CHICAGO POLICE OFFICERS], <http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/07/Opinions-of-Officers-of-the-Chicago-Police-Department-on-the-Upcoming-Consent-Decree-Final.pdf>.

<sup>241</sup> See Tony Cheng, *Input Without Influence: The Silence and Scripts of Police and Community Relations*, SOC. PROBS. 2, 7–14 (2019), <https://doi.org/10.1093/socpro/spz007> [<https://perma.cc/GU3D-LA77>] (finding, in a study of transcripts of seven years of Chicago Police Board's public community meetings, from 2009 to 2016, that the police superintendent or the deputy superintendent most often responded to citizen complaints with silence, or, when dialogue did occur, that both citizens and police reverted to scripts—stylized narratives based on generalized understandings previously formed).

<sup>242</sup> See *id.*

<sup>243</sup> See *id.* at 6; see also *Public Meetings of the Police Board*, CITY OF CHI., [https://www.chicago.gov/city/en/depts/cpb/provdrs/public\\_meetings.html](https://www.chicago.gov/city/en/depts/cpb/provdrs/public_meetings.html) [<https://perma.cc/WUA4-79M2>] (providing a description of the public and police role at the Board's monthly public meetings: “[m]embers of the public are invited to attend and are welcome to address questions or comments to the Board,” and “[t]he Superintendent of Police (or his designee) and the Chief Administrator of the Civilian Office of Police Accountability (or her designee) will be at the meetings”).

<sup>244</sup> See Cheng, *supra* note 241, at 14 & 15 fig.2 (observing that many members of the public who came to speak at meetings were “one-timers,” not returning to subsequent meetings); see also *Public Meetings of the Police Board*, *supra* note 243.

posals.<sup>245</sup> And in fora with entrenched distrust between communities and enforcers, a successful process might jettison direct dialogue in favor of separate feedback processes, which can collectively communicate community and enforcer perspectives without precipitating each group's reversion to scripts.<sup>246</sup>

## 2. Hearing and Responding to Career Enforcers

We can also imagine means of managing and even leveraging internal resistance within enforcement institutions at transitional moments in ways that enhance democracy. The reformist prosecutors who have had the most trouble advancing public demands for change are those who enlarge the distance between themselves and the career enforcers they lead, whether by isolating themselves from their employees, firing (or forcing the resignations of) a good portion of them, or both.<sup>247</sup> Likewise, the reformist police commissioners who have had the most trouble translating new policies through the rank-and-file are those perceived as out of touch with the interests and concerns of beat

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<sup>245</sup> See CONSENT DECREE COMMUNITY ENGAGEMENT, *supra* note 240, at 8–10 (describing facilitator expertise and methodology); OPINIONS OF CHICAGO POLICE OFFICERS, *supra* note 240, at 6–7 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS., CTRS. FOR DISEASE CONTROL & PREVENTION, GAINING CONSENSUS AMONG STAKEHOLDERS THROUGH THE NOMINAL GROUP TECHNIQUE (2018), <https://www.cdc.gov/healthyyouth/evaluation/pdf/brief7.pdf>) (describing the overall methodology and the use of Nominal Group Technique to generate consensus).

<sup>246</sup> This was, in fact, the approach of the community and officer engagement initiative leading up to the adoption of the Chicago Police Department's consent decree: community members and police officers had separate feedback sessions, which were then each publicly reported in detail and considered in the formulation of the consent decree. See CONSENT DECREE COMMUNITY ENGAGEMENT, *supra* note 240; OPINIONS OF CHICAGO POLICE OFFICERS, *supra* note 240.

<sup>247</sup> See Keri Blakinger, *High Turnover Continues at Harris County DA's Office*, HOUS. CHRON. (Apr. 18, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/High-turnover-continues-at-Harris-County-DA-s-13779505.php> [<https://perma.cc/P9HD-EYMA>] (describing low morale and lack of leadership in office of newly elected top prosecutor for Harris County, Texas, following firing and forced resignations of forty prosecutors and subsequent high turnover); Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration?reload=true&reload=true> [<https://perma.cc/4U8C-F4Y5>] (describing the firings and forced resignations of thirty-one prosecutors following the election of Larry Krasner as the Philadelphia District Attorney, and a tense office culture in which new hires and longtime employees are at odds); Doyle Murphy, *Elected as a Progressive Reformer, Kim Gardner's First 21 Months Have Featured Chaos and Conflict*, RIVERFRONT TIMES (Sept. 12, 2018), <https://www.riverfronttimes.com/stlouis/kim-gardner-was-elected-as-a-progressive-reformer-but-her-first-21-months-have-featured-chaos-and-conflict/Content?oid=24218560> [<https://perma.cc/74Y6-BZAB>] (describing, in a profile of newly elected top prosecutor for St. Louis, Missouri, firings, forced resignations, and new policies developed with former campaign aides behind closed doors); Palmer, *supra* note 157 (describing Philadelphia District Attorney Larry Krasner's revamping of his office's homicide policies without consultation with line homicide prosecutors, and in one instance pushing out a prosecutor who disagreed with how Krasner's deputy directed her to handle a case).

cops.<sup>248</sup> The leaders who appear to make the greatest efforts to translate voters' desires into policies end up alienating the professionals through whom polices get implemented, while those more attendant to the enforcement bureaucracy end up alienating the voters who elected them.<sup>249</sup>

The divide between leaders and enforcers need not lead inexorably to these results. In fact, it could lead to greater public and bureaucratic participation in setting the enforcement agenda. Here, too, dialogic pathways are critical. Career enforcers should be represented in the multi-stakeholder commissions discussed above (and by career enforcers, I mean not just supervisors and sergeants, but most critically line prosecutors and patrol officers). Such representation will help communicate public preferences, and the reasons for those preferences, directly to those in the position to advance them through the daily exercise of enforcement discretion. A dialogue between career enforcers and the public they serve may also help erode the tendency towards system justification. Participation in the process itself will give career enforcers, like their leaders, dual citizenship: they will be active participants not just in the criminal justice system, but also the democratic system of governance. More practically, being forced to articulate to a public audience of diverse interests and commitments the precise reasons an existing practice is necessary or beneficial will force enforcers to grapple with the practice's continuing use. It may also help enforcers see that practice less as an apolitical enforcement tool, and more as a product of earlier political choices.

By the same token, dialogic pathways do, and should, run in two directions. Career enforcers' views are in some respects biased by their motivations, interests, and internal justifications, but their views are also deeply informed by professional experience and expertise lacking among the lay public. Just as career enforcers can stand to learn from lay stakeholders, so, too, can lay stakeholders learn from enforcers. Such a dialogue can further enrich the deliberative process necessary for reasoned policy making in a democracy.

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<sup>248</sup> See, e.g., Weichselbaum, *supra* note 120 (describing reform-minded former Baltimore police commissioner's "lack [of] street cred with the cops under his command" and positing that this may have led to his firing).

<sup>249</sup> See Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx> [<https://perma.cc/WT6T-CDB6>] (describing the tensions between Cook County State's Attorney Kim Foxx and some area police chiefs, police union officials, and judges on the one hand, and progressive organizers who helped her win election on the other); Azi Paybarah, *What Bill Bratton Changed in 990 Days at the NYPD*, POLITICO (Sept. 16, 2016), <https://www.politico.com/states/new-york/city-hall/story/2016/09/what-bill-bratton-changed-in-990-days-at-the-nypd-105552> [<https://perma.cc/MR8Y-W2J2>] (describing how NYC Mayor de Blasio's decision to appoint as police commissioner William Bratton, who first operationalized the now widely criticized zero-tolerance policing model, disappointed many of the groups who worked to elect him).

Another dialogic pathway lies in the internal lines of authority. Leaders elected or appointed on a reform platform should take care to elevate career servants to senior-level advisory positions alongside newcomers from the outside. Such a move sends a message to the office that career servants, and their opinions, are valued.<sup>250</sup> It also opens a line of communication between new leaders and office or department employees. Leaders can learn from aides how their policy changes are being received, and aides can help leaders in turn market those changes to the office.<sup>251</sup> Other means of giving career servants voice and agency in a transition—such as commissioning surveys, or setting up committees comprised of new and veteran servants—can also fuel buy-in and thereby catalyze change.<sup>252</sup> The procedural justice literature over the last few years has accumulated evidence of the positive effect of enhancing procedural justice *within* police departments: when officers feel they have voice and are treated fairly, and that department leadership is accountable and transparent, they are more inclined to disseminate those values externally to the communities they police.<sup>253</sup>

Of course, some organizations require radical change. But achieving radical change is different from achieving radical disruption. One can hardly fire one's way to reform. For one thing, it can backfire; just ask former New Orle-

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<sup>250</sup> Kim Foxx, for instance, rattled career prosecutors in her office by the appointment of a leadership team devoid of a single office veteran. See Bogira, *supra* note 249 (“The veterans had heard Foxx criticize the office and its practices during her campaign—and after she won the primary, they’d had nine months to stew about the approaching regime change. The staff wasn’t calmed when Foxx named her executive team. None of the seven had worked a day in the office.”).

<sup>251</sup> Bill Bratton did this when he was brought in to turn around the New York City Police Department in the 1990s, and his success was attributed to his ability to achieve buy-in from the rank-and-file. See W. Chan Kim & Renee Mauborgne, *Tipping Point Leadership*, HARV. BUS. REV. (Apr. 2003), <https://hbr.org/2003/04/tipping-point-leadership> [<https://perma.cc/6GHG-2CN4>]. That he did not tackle the very different problems facing the same police department in the second decade of the 21st century says less about his leadership style and more about his individual commitment to the reforms being sought. See Paybarah, *supra* note 249 (“Bratton took [progressive police reformers’] plans, smiled, and spent the next 990 days either watering down the proposals or flat-out opposing them.”).

<sup>252</sup> In Chicago, for instance, State’s Attorney Kim Foxx brought in an outside consultant to conduct an anonymous survey of career prosecutors’ views on the office and suggestions for improvement. Interestingly, once asked for their opinion, office veterans—initially wary of Foxx and disposed against change—acknowledged the need for change and showed interest in learning about alternative approaches. See Bogira, *supra* note 249. The simple act of giving them voice encouraged career prosecutors to consider why change might be good, and how it could be achieved. See *id.*

<sup>253</sup> See, e.g., Ben Bradford et al., *Why Do ‘The Law’ Comply? Procedural Justice, Group Identification and Officer Motivation in Police Organizations*, 11 EUR. J. CRIM. 110 (2014); Rick Trinkner et al., *Justice from Within: The Relations Between a Procedurally Just Organizational Climate and Police Organizational Efficiency, Endorsement of Democratic Policing, and Officer Well-Being*, 22 PSYCHOL. PUB. POL’Y & L. 158, 167 (2016) (“Officers were more likely to endorse a community model of policing incorporating procedurally just tactics and reject excessive use of force to the extent that they believed their organization treated them fairly.”).

ans District Attorney Eddie Jordan.<sup>254</sup> But even for those elected prosecutors who demonstrate greater savvy in handling large-scale dismissals, the downsides are manifest: poor morale among those who remain and a dearth of experience, particularly at the upper ranks.<sup>255</sup> Outside large cities, replenishing legal talent is hard to do. And dismissals are not even an option in institutions where career servants have civil service or union-negotiated protection, as is the case in most police departments and even some district attorneys' offices.

What's more, radical disruption can have cascading and counter-productive effects. As the foregoing analysis makes clear, local law enforcement institutions are not silos; they are embedded in a network of inter- and intra-jurisdictional relationships. Office stalwarts pushed out by a newly elected leader are therefore likely to end up at a neighboring enforcement institution, where they bring the very orientation deemed objectionable at their home institution. Indeed, this is precisely what has happened to a number of the ADAs pushed out by Philadelphia's new District Attorney, Larry Krasner.<sup>256</sup> And as new reformist leaders come to power, the rank-and-file, having observed regime change in other jurisdictions, are beginning to take proactive steps to shore up their power against an agenda they perceive as threatening.<sup>257</sup> These efforts, if successful, can end up impeding the very reforms voters seek.<sup>258</sup>

<sup>254</sup> See Gwen Filosa & Laura Maggi, *DA Eddie Jordan Resigns*, NEW ORLEANS TIMES-PICAYUNE (Oct. 30, 2007), [https://web.archive.org/web/20180616200259/http://blog.nola.com/times-picayune/2007/10/sources\\_talks\\_underway\\_for\\_jor.html](https://web.archive.org/web/20180616200259/http://blog.nola.com/times-picayune/2007/10/sources_talks_underway_for_jor.html) [<https://perma.cc/Q5G4-BNEU>] (describing the once reform-touting DA's fall from grace, after firing fifty-six ADAs, which, on top of triggering a successful suit by the ousted prosecutors for racial discrimination, "had the effect of stripping the office of institutional knowledge and experienced talent, throwing its daily management into confusion and setting off a trend of poor working conditions and chronic turnover"). Jordan's resulting inability to successfully prosecute violent crime ultimately led to the election of a more tough-on-crime prosecutor.

<sup>255</sup> See *supra* note 247 and accompanying text.

<sup>256</sup> See Ryan Briggs, *Year of Uncertainty Sees Top Philly DA Staffers Flee to AG Shapiro*, CITY & STATE PA. (Jan. 18, 2018), <https://www.cityandstatepa.com/content/year-uncertainty-sees-top-philly-da-staffers-flee-ag-shapiro> [<https://perma.cc/R53M-CQDE>] (reporting that nearly half of the dismissed ADAs from the Philadelphia District Attorney's Office have taken positions at the State Attorney General's Office).

<sup>257</sup> See Tony Messenger, *St. Louis County Prosecutors Seek to Join Police Union Before Wesley Bell Takes Over*, ST. LOUIS POST-DISPATCH (Dec. 16, 2018), [https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis-county-prosecutors-seek-to-join-police-union/article\\_f489d57d-a6a2-5a95-a4c2-44dab7d73767.html](https://www.stltoday.com/news/local/columns/tony-messenger/messenger-st-louis-county-prosecutors-seek-to-join-police-union/article_f489d57d-a6a2-5a95-a4c2-44dab7d73767.html) [<https://perma.cc/ZEU5-D4DE>] (describing efforts by ADAs in St. Louis County, Missouri, to join the police union following the defeat of long-time Prosecuting Attorney Bob McCulloch, who was heavily backed by the police union in his fight against the ultimately victorious reformist prosecutor Wesley Bell).

<sup>258</sup> See *id.* (discussing how prosecutors' membership in police unions creates a conflict when prosecutors investigate police). The St. Louis County Prosecuting Attorney race was widely seen as a referendum on McCulloch's position vis-à-vis prosecution of police use of force, including most famously with his decision not to charge Darren Wilson in the death of Michael Brown in Ferguson, Missouri. See Joel Currier, *Wesley Bell Ousts Longtime St. Louis County Prosecuting Attorney*, ST.

All of this is not to say that reformist leaders should slow-walk change to appease resistant subordinates. It is simply to suggest that durable reform requires, among other things, curbing resistance in the first place. That process, and all the difficult dialogic work it entails, can end up enhancing communal and bureaucratic participation in criminal enforcement.

### 3. Aligning Interests

Finally, we should imagine mechanisms that better align the interests and motivations of career enforcers with those of enforcement leaders, and with the public.<sup>259</sup> One such mechanism is performance evaluation. Elsewhere I have discussed at length how performance measures can impact the exercise of enforcement discretion.<sup>260</sup> For leaders seeking to shift line enforcers' exercise of discretion, then, performance measures can be a far more effective tool than persuasion on the merits. A key reason for the explosion of citizen stops and frisks in New York during the early 2000s—between 2002 and 2010, stops increased sixfold, from just under 100,000 to over 600,000—was the use of per-precinct stops as a new evaluative metric for precinct captains.<sup>261</sup> This, in turn, put intense pressure on patrol officers to make more stops.<sup>262</sup> Changing the performance measure to something more aligned with public demands likely reduced the frequency of stops: once the police department began linking pre-

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LOUIS POST-DISPATCH (Aug. 8, 2018), [https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article\\_5b2134b8-f204-5e20-9572-e59cacbb0aed.html](https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article_5b2134b8-f204-5e20-9572-e59cacbb0aed.html) [<https://perma.cc/8XXJ-K7A3>] (“Ferguson defined this election’ . . . [Bell] ran for the prosecutor’s job on a reform platform and pledged to put a new face on criminal justice in St. Louis County. McCulloch’s opponents, particularly in the Brown case, had portrayed him as too friendly to law enforcement, given his family ties to police.”).

<sup>259</sup> See generally *supra* Part II.B.2.

<sup>260</sup> See Ouziel, *supra* note 28 (discussing how federal criminal enforcement agencies, such as the U.S. Drug Enforcement Administration and USAOs, are evaluated by Congress in large part on the basis of numbers of arrests, indictments, and convictions, and how this steers enforcement to lower-hanging fruit).

<sup>261</sup> See Chris Smith, *The Controversial Crime-Fighting Program That Changed Big-City Policing Forever*, N.Y. MAG. (Oct. 2018), <http://nymag.com/intelligencer/2018/03/the-crime-fighting-program-that-changed-new-york-forever.html> [<https://perma.cc/G83K-5QMH>].

<sup>262</sup> See First Report of the Independent Monitor at 64, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 1:08CV01034), <http://nypdmonitor.org/wp-content/uploads/2015/08/MonitorsFirstReport-AsFiledInFloydDocket.pdf> (“In many meetings with NYPD officials and officers at every rank and from many different units, the Department has acknowledged, as the court found, that an excessive focus on ‘numbers’ led to the overuse and misuse of ‘stop, question and frisk.’ This emphasis was included in the evaluation of officers as part of periodic reviews and in less formal ways. The push for more and more stops (along with other enforcement activities) was ingrained in the expectations of supervisors at every level and of officers on the street. The result was less focus on the lawfulness and effectiveness of individual stops and more on increasing the number of stops.”).

cinct captain performance evaluation to quality (legality and efficacy of stops) rather than quantity, the number of stops plummeted.<sup>263</sup>

Performance measures are by no means a failsafe tool for modulating enforcement discretion. They will not necessarily be impactful among line enforcers whose long-term interests lie in the private sector, an arena with its own performance measures that enforcement leaders are powerless to change.<sup>264</sup> More critically, internal performance measures can be circumscribed by competing external (that is, public) measures. As the New York City Police Department's use of stop and frisk declined, crime continued to decline, as well.<sup>265</sup> Had crime risen, Department leadership likely would have felt pressure to resume aggressive use of stop and frisk, a tactic that had coincided with the reduction in the city's crime rate.<sup>266</sup>

It is external performance pressures, for example, that have most likely limited the internal bail reform directives by some elected prosecutors.<sup>267</sup> Although these prosecutors campaigned on a promise to reduce the use of cash bail and have directed subordinates to recommend that courts release low-risk defendants on their own recognizance, such recommendations can easily be offered half-heartedly, or not at all.<sup>268</sup> This is not entirely surprising given that

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<sup>263</sup> See *Annual Stop-and-Frisk Numbers*, N.Y. CIVIL LIBERTIES UNION [hereinafter NYCLU STOP-AND-FRISK NUMBERS], <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/TP86-WE3Y>] (compiling and summarizing NYPD's data on its stops and frisks from 2002 to the first half of 2019); Letter from Raymond W. Kelly, N.Y.C. Police Comm'r, to Hon. Christine Quinn, Speaker, N.Y.C. Council (May 16, 2012), [https://archive.nytimes.com/www.nytimes.com/interactive/2012/05/17/nyregion/17stopandfrisk.html?\\_r=0](https://archive.nytimes.com/www.nytimes.com/interactive/2012/05/17/nyregion/17stopandfrisk.html?_r=0) [<https://perma.cc/4EJU-VYM5>] (outlining changes to the Department's stop and frisk program, including ongoing precinct captain audits of stop and frisk worksheets (reports by patrol officers detailing the circumstances of each stop made) for compliance with department guidelines, followed by Chief of Department review of worksheets prior to meetings with precinct Captains to ensure quality).

<sup>264</sup> See *supra* notes 122–129 and accompanying text.

<sup>265</sup> Compare NYCLU STOP-AND-FRISK NUMBERS, *supra* note 263 (reporting a steep decline in stops and frisks between 2011 and 2019), with N.Y.C. POLICE DEP'T, SEVEN MAJOR FELONY OFFENSES [hereinafter SEVEN MAJOR FELONY OFFENSES], [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/historical-crime-data/seven-major-felony-offenses-2000-2017.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2017.pdf) (reporting an overall decline in seven major categories of felony offenses between 2000 and 2017).

<sup>266</sup> See NYCLU STOP-AND-FRISK NUMBERS, *supra* note 263 (reporting a steep decline in stops and frisks between 2011 and 2019); SEVEN MAJOR FELONY OFFENSES, *supra* note 265 (reporting an overall decline in seven major categories of felony offenses between 2000 and 2017).

<sup>267</sup> See *supra* note 30 and accompanying text.

<sup>268</sup> See Ouss & Stevenson, *supra* note 30, at 19–20 (among defendants eligible under District Attorney's policy for release on their own recognizance (ROR), finding that District Attorney's office representative requested ROR for just 7% of eligible defendants; requested monetary conditions for release for 19% of eligible defendants; and declined to make any recommendation on conditions of release for 70% of eligible defendants); see also Bogira, *supra* note 249 (“[Kim Foxx had] heard that in bond court, when judges would testily ask prosecutors why they were recommending an I-bond, the prosecutors would sometimes respond, ‘Because it’s our new policy.’ She wished they’d instead tell the judge they were recommending an I-bond because an I-bond was appropriate.”).



such recommendations offer line prosecutors little upside. When a new internal performance metric (“reduce bond recommendations in certain cases”) comes up against a more foundational, enduring external metric (“keep the community safe”), long-term professional preservation pushes prosecutors towards the latter. For line prosecutors, who bear the primary burden of their decisions on bail recommendations in a given case, misjudgment resulting in a defendant’s pre-trial detention is less risky than misjudgment resulting in additional crimes.<sup>269</sup>

The contrast between Chicago State’s Attorney Kim Foxx’s success at reducing low-level shoplifting cases and her relatively greater struggle to generate change in bail outcomes is a ready illustration of both the impact of performance measurement and the challenges it poses.<sup>270</sup> Foxx’s initiative to curb prosecutions of low-level shoplifting cases was successful in part because compliance with her directive was easy for supervisors to ensure and measure—charging instruments alleging less than \$1,000 in losses had to charge misdemeanors rather than felonies<sup>271</sup>—and in part because the policy itself accorded with line prosecutors’ self-interest in focusing on higher-level cases. But her initiative to reduce cash bail has proven more difficult to execute. This is in part because line prosecutors’ compliance is hard to ensure and measure—prosecutors can make arguments in bail hearings with varying levels of enthusiasm, and the ultimate bail decision rests with the judicial officer—and because, as discussed above, asking for a defendant to be released without bail is not always in line prosecutors’ self-interest.

All of this is not to say that external metrics such as crime reduction and community safety are wrong; of course, they are not. Rather, it is to invite a discussion about the tradeoffs some desired changes require—of career enforcers, politically accountable leaders, and ultimately, the public itself. In this

<sup>269</sup> See Carol Felsenthal, *Kim Foxx Wants to Tell You a Story*, CHI. MAG. (Dec. 10, 2018), <http://www.chicagomag.com/Chicago-Magazine/January-2019/Kim-Foxx-Wants-to-Tell-You-a-Story/> [<https://perma.cc/H2XB-6XT3>] (observing Foxx’s frustration with the challenge of implementing promises on bail reform: “[y]ou get Willie Horton and then everybody is afraid to let someone out”).

<sup>270</sup> See DEFENSE ATTORNEYS REPORT ON KIM FOXX’S PROGRESS, *supra* note 30 (describing mixed success with reducing cash bonds); EVALUATION OF KIM FOXX’S FIRST YEAR IN OFFICE, *supra* note 30 (describing Foxx’s successes in reducing overcharging and challenges in implementing bail reform). Compare COOK COUNTY STATE’S ATTORNEY 2017 DATA REPORT (2018), [https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao\\_2017\\_data\\_report\\_180220.pdf](https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao_2017_data_report_180220.pdf) (showing 1,883 felony retail theft cases filed in 2017, the first year in which the new policy applied), with COOK COUNTY STATE’S ATTORNEY 2016 DATA REPORT (2d ed. 2018), [https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao\\_2016\\_baseline\\_data\\_report.pdf](https://www.cookcountystatesattorney.org/sites/default/files/files/documents/ccsao_2016_baseline_data_report.pdf) (showing 3,602 felony retail theft cases filed in 2016).

<sup>271</sup> See Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHIC. TRIB. (Dec. 15, 2016), <https://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html> [<https://perma.cc/LUY9-R4TA>].

way, performance measures open another avenue of dialogue between the public and the enforcement bureaucracy. Enforcement leaders can and should articulate publicly the metrics they will use to evaluate line enforcers' performance; and members of the public can and should reflect on the extent of their willingness to shift their own evaluative metrics, too.

## CONCLUSION

The first decades of the 21st century have seen a palpable shift in public preferences on criminal justice coupled with relatively limited change in the administration of criminal justice on the ground. Existing scholarship, largely reflective of an increasingly outdated political economy of criminal justice, tells us little about this paradox. This Article has sought to fill that gap, exploring how a mix of institutional and political arrangements alternatively enables and impedes changes in enforcement on the ground. The political structures through which public preferences on criminal justice are channeled; the goals and interests of politically accountable enforcement leaders and career-level enforcers; and the effects of multiple sovereigns in a given criminal enforcement space collectively complicate the translation of changing public preferences down through the enforcement bureaucracy.

But the very features that complicate translation of changing preferences also open new pathways for enhancing greater participation in criminal justice administration. Conflicts between sovereigns in a given criminal enforcement space can bring greater public attention to and engagement with the issues fueling the conflict. The hard work of convincing enforcement professionals of the value of change necessarily requires greater public engagement outside the electoral process. Giving greater voice and participation to career enforcers in setting enforcement policy invites them to examine more critically the choices they make, and to see those choices as products of earlier political movements.

Elected and appointed leaders should imagine mechanisms for greater engagement by both career enforcers and the public in setting criminal enforcement priorities and practices. Such mechanisms should be designed to encourage stakeholders—community leaders and representatives, those affected by crime and its enforcement, career enforcers, and enforcement leaders—to participate in and deliberate on the exercise of enforcement discretion, and to ensure that agreed-upon reforms are implemented and executed. With thought, engagement, deliberation, and care, changing public preferences can be refined and translated into changed enforcement on the ground.

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