

# ELECTING PROSECUTORS BASED ON THEIR CONVICTIONS

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*Prosecutors wield broad influence over criminal cases due to their power of prosecutorial discretion. In recent years, a growing number of prosecutors are exercising that discretion by crafting policies that deprioritize or decline prosecution of entire categories of crimes. Because most state and local jurisdictions in the United States elect their head prosecutor, policy-based prosecutorial discretion can even become an electoral strategy for voters who seek to express displeasure with certain categories of criminal laws.*

*Following the reversal of *Roe v. Wade* in 2022, criminalized abortion has become one such category of law in many states. The 2022 midterm elections demonstrated that there is great popular support for abortion access among the electorate in many jurisdictions including ones where the laws appear out of sync with those voters' preferences. In this uncertain environment, some prosecutors are leaning on their broad discretionary powers to decline prosecuting cases of abortion.*

*This Note uses the ordeal of Andrew Warren, a prosecutor in Florida who announced such a discretionary policy, to illustrate the promise and limitation of policy-based prosecutorial discretion. The Note argues that so long as we have prosecutorial elections, we should encourage or even demand candidates who articulate policies describing how they will exercise their power of discretion. This practice will give voters a genuine choice when choosing a prosecutor by evaluating the candidates' moral convictions as much as their criminal convictions.*

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## INTRODUCTION

On August 4, 2022, Florida Governor Ron DeSantis abruptly announced that he was suspending Andrew Warren, State Attorney for Hillsborough County, for neglect of duty and incompetence.<sup>1</sup> What was Mr. Warren's alleged malfeasance that led to this drastic measure by the Governor? Warren was one of many elected prosecutors around the country who publicly signed a pledge not to use their office to prosecute cases involving abortion and gender-affirming surgeries.<sup>2</sup> Warren—twice elected to State Attorney for Tampa Bay-centered Hillsborough County—fired back, suing Governor DeSantis for violating his First Amendment rights and exceeding the Governor's Constitutional authority.<sup>3</sup> The ongoing litigation sets up a show down between two elected officials, one representing all of Florida on a broad range of issues, the other representing a smaller portion of the state on the narrow issue of criminal justice.<sup>4</sup>

Just weeks before, on June 24, the United States Supreme Court overruled their prior cases protecting access to abortions in *Dobbs v. Jackson Women's Health Organization*.<sup>5</sup> This decision now leaves states free to regulate or outright criminalize abortions if they choose to do so.<sup>6</sup> Florida, for example, quickly passed a ban on all abortions after fifteen weeks' gestation.<sup>7</sup> The criminal penalty for performing an abortion after fifteen weeks' gestation without one of the listed exigencies is a class three felony, or a class two felony if the person receiving the abortion dies.<sup>8</sup> As many states rush to criminalize

<sup>1</sup> Press Release, Governor Ron DeSantis, Governor Ron DeSantis Suspends State Attorney Andrew Warren for Refusing to Enforce Florida Law (Aug. 4, 2022) <https://www.flgov.com/2022/08/04/governor-ron-desantis-suspends-state-attorney-andrew-warren-for-refusing-to-enforce-florida-law/> [<https://perma.cc/69L7-SFNF>].

<sup>2</sup> See *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [<https://perma.cc/V9NC-WKMV>] [hereinafter *Joint Statement*].

<sup>3</sup> Complaint at 26, *Warren v. DeSantis*, 631 F. Supp. 3d 1188 (N.D. Fla. 2022) (No. 4:22-cv-00302-RH-MAF).

<sup>4</sup> See *Ron DeSantis*, ON THE ISSUES, [https://www.ontheissues.org/Ron\\_DeSantis.htm](https://www.ontheissues.org/Ron_DeSantis.htm) [<https://perma.cc/SG3L-M5NJ>] (last visited Sept. 15, 2023).

<sup>5</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

<sup>6</sup> *Id.* at 2284.

<sup>7</sup> See FLA. STAT. § 390.0111 (2022).

<sup>8</sup> *Id.*

abortion, some elected prosecutors are finding it advantageous to take an affirmative stance against enforcing these laws.<sup>9</sup>

Prosecutors exercising broad discretion is not new. Recent years have seen the rise of the so-called “progressive prosecutor,” one who is elected on a platform of reform and restraint.<sup>10</sup> Although not without criticism, the broad power of prosecutorial discretion places the prosecutor in a unique role to effect change in the criminal legal system.<sup>11</sup> With forty-five states choosing their chief prosecutor in elections, many voters have the opportunity to speak with their ballots regarding their preferred criminal justice policies.<sup>12</sup> The change in abortion’s status and the vigorous public engagement over the issue, particularly in the 2022 election, makes it an exemplary issue to examine the role of policy in prosecutorial elections.

Although prosecutors are in charge of a narrower range of policies than lawmakers or statewide executives, a prosecutor advocating a clear stance on a criminal legal issue presents an à la carte opportunity for voters to express their preferences. To make that argument, Part I of this Note will discuss the rise of so-called “progressive prosecutors” and how they have leveraged their power of discretion towards achieving broad policies of reform. Part II will then describe the system of elected prosecutors present in most of the United States and how many elected prosecutors have—or have not—used the electoral process to advance a clear policy choice. Part III will pivot to specifically addressing the issue of abortion in the 2022 election, the first election following the *Dobbs* decision. Part IV will explore the range of potential criminal liability for abortion services. Finally, Part V will argue that, if prosecutors are to be chosen by popular vote, voters should expect them to utilize their power of discretion through clear policy messages that take full advantage of the peculiar electoral system present in the United States.

## I. A DIFFERENT KIND OF PROSECUTOR

King County, Washington District Attorney Dan Satterberg tells his new prosecutors, “discretion is your superpower.”<sup>13</sup> A new wave of prosecutors are discovering the utility of this superpower and applying it to broad categories of crimes.<sup>14</sup> Satterberg, for example, made a blanket policy not to criminally

<sup>9</sup> See generally *Joint Statement*, *supra* note 2.

<sup>10</sup> See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 152 (2019).

<sup>11</sup> See FAIR AND JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 3 (2018).

<sup>12</sup> CARISSA BYRNE HESSICK, THE PROSECUTORS & POLITICS PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS 4 (2020).

<sup>13</sup> Transcript of Podcast, *The Revolution in Prosecutors’ Offices*, BRENNAN CTR. FOR JUST. (Apr. 15, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/podcasts/revolution-prosecutors-offices> [https://perma.cc/3DZB-GGJQ].

<sup>14</sup> See FAIR AND JUST PROSECUTION, *supra* note 11, at 3.

prosecute anyone for possession of less than one gram of heroin, cocaine, or methamphetamine.<sup>15</sup> The money his department saved from not processing these claims—about \$3 million—allowed him to expand his diversion program for addiction counseling instead.<sup>16</sup>

Journalist Emily Bazelon examined the successes and challenges of several prominent reform-minded prosecutors in her 2019 book, *Charged*.<sup>17</sup> She used interviews and anecdotal cases to demonstrate the impact a reformer prosecutor can have on their local criminal legal system.<sup>18</sup> Although predating the Trump administration, President Trump's election made clear that because of barriers at the national level of politics and within the Department of Justice, localized reform was a more obtainable and effective goal for many criminal justice activists.<sup>19</sup> The reformers faced pushback from both entrenched interests and their own hungry-for-change activist base.<sup>20</sup> Despite this pushback and the apparent limitations of reform programs to lessen the crushing burdens on criminal defendants,<sup>21</sup> Bazelon concludes, “[t]he movement to elect a new kind of prosecutor is the most promising means of reform I see on the political landscape.”<sup>22</sup>

In contrast, Law Professor Jeffrey Bellin offers a limited criticism of the progressive prosecutor movement advocated for by Bazelon.<sup>23</sup> He is particularly critical of the suggestion that prosecutors reign over the criminal justice system like “kings of the courtroom.”<sup>24</sup> Professor Bellin asserts that prosecutors are not alone in ensuring that cases are brought with sufficient evidence, and other actors bear responsibilities including legislators, police, grand juries, trial juries, trial judges and appellate courts.<sup>25</sup> Professor Bellin is optimistic, however, about the potential for the prosecutorial power for leniency to be a beneficial check on the whims of other actors in the criminal justice system.<sup>26</sup> He sees the true benefit of prosecutorial reform as the power to protect the factually guilty from the runaway power of the state to excessively

<sup>15</sup> Transcript of Podcast, *supra* note 13.

<sup>16</sup> *Id.*

<sup>17</sup> See BAZELON, *supra* note 10, at 155.

<sup>18</sup> See *id.* at xxix (describing how the book will focus on two criminal cases throughout the criminal process and examining D.A.s and their offices).

<sup>19</sup> *Id.* at 153.

<sup>20</sup> *Id.* at 149.

<sup>21</sup> See, e.g., *id.* at 243–44.

<sup>22</sup> *Id.* at 296.

<sup>23</sup> Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL'Y REV. 218, 247 (2020).

<sup>24</sup> *Id.* at 220 (quoting *The Kings of the Courtroom*, ECONOMIST (Oct. 4, 2014), <https://www.economist.com/united-states/2014/10/04/the-kings-of-the-courtroom> [<https://perma.cc/RG7R-NQBE>]).

<sup>25</sup> *Id.* at 240.

<sup>26</sup> See *id.* at 235.

punish.<sup>27</sup> While voters can—and do—impose consequences on leniency applied in unpopular cases, policy-based leniency is consistent with the criminal justice system’s design and a critical tool to effect criminal justice reform.<sup>28</sup>

Some prosecutors have used discretion to decline to prosecute most or all cases of marijuana possession in jurisdictions where recreational cannabis remains illegal. For example, Baltimore City Attorney Marilyn Mosby initiated a program in 2019 that declined all marijuana-possession prosecutions, regardless of weight and the defendant’s criminal history.<sup>29</sup> Under this policy of discretion, all felony first-time distribution cases are referred to a diversion program.<sup>30</sup> This represented a huge shift in a city that had the fourth-highest rate of marijuana arrests, as well as the highest racial disparity between arrests of Black and White marijuana users.<sup>31</sup>

Other jurisdictions have been more restrained in their approach. In Harris County, Texas, home to Houston, District Attorney Kim Ogg directed her office to place all cases of misdemeanor marijuana possession into a diversion program prior to any charges being filed.<sup>32</sup> Marijuana users must sign a pledge to sign up for and complete an online class, and if they do so, will avoid any charge whatsoever.<sup>33</sup> As with the Baltimore program, one of the primary rationales is effective use of limited department resources.<sup>34</sup> Before this program was introduced, Harris County prosecuted more than 100,000 misdemeanor marijuana cases over ten years at a cost of more than \$200 million without any noticeable public benefit.<sup>35</sup>

Public opinion helps drive prosecutorial behavior, which can help shape policy in a way that more closely resembles the public’s desires. Twenty-three states, as well as the District of Columbia, Guam, the Northern Mariana Islands, and the U.S. Virgin Islands, have legalized marijuana for recreational use.<sup>36</sup> Even prosecutors with reputations for being hard-liners have supported legalization or decriminalization efforts, claiming marijuana prosecutions are a waste of law enforcement resources and legalization would divert money

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<sup>27</sup> *Id.* at 245.

<sup>28</sup> *Id.* at 246.

<sup>29</sup> MARILYN J. MOSBY, BALTIMORE CITY STATE’S ATTORNEY’S OFFICE, REFORMING A BROKEN SYSTEM: RETHINKING THE ROLE OF MARIJUANA PROSECUTIONS IN BALTIMORE CITY 13 (2019).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 8.

<sup>32</sup> KIM K. OGG, HARRIS COUNTY DISTRICT ATTORNEY’S OFFICE, MISDEMEANOR MARIJUANA DIVERSION PROGRAM 3 (2017).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.*

<sup>36</sup> *Legalization*, NORML, <https://norml.org/laws/legalization/> [<https://perma.cc/95NS-ZKNE>].

away from drug dealers to licit businesses.<sup>37</sup> In light of the growing public momentum, shifting state laws, and prosecutorial declination, President Biden announced a blanket pardon for all persons convicted of simple possession of marijuana under federal or District of Columbia laws.<sup>38</sup> He further urged all governors to follow suit and directed the Secretary of Health and Human Services and the Attorney General to reconsider marijuana's status as a Schedule I substance.<sup>39</sup>

Liberal or progressive causes are not the only ones advanced by policy-based prosecutorial discretion. Elected district attorneys in some Pennsylvania counties flatly refused to prosecute violations of the Pennsylvania Governor's indoor mask mandate during the COVID-19 pandemic.<sup>40</sup> When some governors made mask mandates illegal or even invoked laws prohibiting wearing masks at all, prosecutors again wielded their superpower of discretion to not enforce these laws.<sup>41</sup> Similarly, rural prosecutors in states that pass strict gun legislation have refused to prosecute many gun violations.<sup>42</sup> Often, the prosecutors do not even get the chance to use their discretion because

<sup>37</sup> See, e.g., *Campaign Ad Watch: Joe Deters Backs Pot Legalization Issue 3*, REPOSITORY (Oct. 27, 2015, 9:37 AM), <https://www.cantonrep.com/story/news/2015/10/27/campaign-ad-watch-joe-deters/33201758007/> [<https://perma.cc/RK9V-BTDG>].

<sup>38</sup> Press Release, Joseph R. Biden, President of the United States, Statement from President Biden on Marijuana Reform (Oct. 6, 2022).

<sup>39</sup> *Id.*

<sup>40</sup> Dylan Segelbaum, *York County District Attorney Won't Prosecute Citations Related to School Mask Mandate*, YORK DAILY REC. (Sept. 3, 2021, 3:59 PM), <https://www.ydr.com/story/news/local/2021/09/03/york-county-district-attorney-dave-sunday-will-not-prosecute-alleged-violations-mask-mandate-schools/5717124001> [<https://perma.cc/89FM-C494>]; WJAC Staff, *Blair County DA Says His Office Won't Criminally Prosecute School Mask Violators*, WJAC (Sept. 7, 2021, 3:41 PM), <https://wjactv.com/news/local/blair-county-da-says-his-office-wont-criminally-prosecute-school-mask-violators> [<https://perma.cc/927G-R7UH>]; WJAC Staff, *Clearfield Co. DA Says His Office Will Not Prosecute Those Who Violate School Mask Mandate*, WJAC (Sept. 8, 2021, 1:27 PM), <https://wjactv.com/news/local/clearfield-co-da-says-his-office-will-not-prosecute-those-who-violate-school-mask-mandate> [<https://perma.cc/M6LG-RNFU>].

<sup>41</sup> Meghan Mangrum, *Nashville DA Won't Prosecute Teachers for Requiring Masks as School Board Explores Legal Challenge to Executive Order*, TENNESSEAN, (Aug. 17, 2021, 3:05 PM), <https://www.tennessean.com/story/news/education/2021/08/17/nashville-da-wont-prosecute-teachers-requiring-masks-school-board-executive-order/8168060002/> [<https://perma.cc/K4CL-YNQ7>]; Jessie Higgins, *Commonwealth's Attorneys Pledge COVID Mask-Wearing Will Not be Prosecuted in Charlottesville or Albemarle Despite State Law that Bans Adults from Wearing Masks*, CHARLOTTESVILLE TOMORROW (June 29, 2021), <https://www.cvilletomorrow.org/commonwealths-attorneys-pledge-covid-mask-wearing-will-not-be-prosecuted-in-charlottesville-or-albemarle-despite-state-law-that-bans-adults-from-wearing-masks/> [<https://perma.cc/T565-R95U>].

<sup>42</sup> Todd Richmond, *Wis. DA Says He Won't Prosecute Some Gun Laws*, SAN DIEGO UNION-TRIB. (July 2, 2010, 12:23 PM), <https://www.sandiegouniontribune.com/sdut-wis-da-says-he-wont-prosecute-some-gun-laws-2010jul02-story.html> [<https://perma.cc/N6EA-E64P>].

another elected official, the county sheriff, exercises its own broad discretion to never bring any cases for prosecution.<sup>43</sup>

While policy-based prosecutorial discretion seems at the surface like a blanket refusal to prosecute certain criminal acts, in practice it is much more nuanced. Rachael Rollins, District Attorney for Suffolk County, Massachusetts, identified a list of fifteen common, low-level charges that she directed her office to presumptively dismiss.<sup>44</sup> The presumption could be overcome by holding charges subject to some condition or conditions placed on the defendant or filing the charges after obtaining a supervisor's permission.<sup>45</sup> This policy of presumptive nonenforcement is similar to the marijuana policies described above in which charges or diversionary programs may still be sought for certain degrees of possession or distribution. Many of Andrew Warren's policies that Governor DeSantis asserted were "blanket non-prosecution" policies proved, rather, to be "a presumption not to file charges for the listed offenses, but the policy explicitly provided that the presumption could be overcome by 'significant public safety concerns.'"<sup>46</sup> Regardless of such nuance, policy-based prosecutorial discretion is still derided by more people than just the governor of Florida.

Many of the policies described above drew similar criticism from both the left and right.<sup>47</sup> Critics argue that these policies of non-enforcement constitute dereliction of duty, effective nullification of duly passed laws, and an improper degradation of the separation of powers.<sup>48</sup> On individual cases, unchecked prosecutorial discretion can be used to enable civil rights violations

<sup>43</sup> Travis Dunn, *In "2nd Amendment Sanctuaries," Officials Refuse to Enforce New Gun Laws*, SALON (Apr. 9, 2019, 4:00 AM), [https://www.salon.com/2019/04/09/in-2nd-amendment-sanctuaries-officials-refuse-to-enforce-new-gun-laws\\_partner/](https://www.salon.com/2019/04/09/in-2nd-amendment-sanctuaries-officials-refuse-to-enforce-new-gun-laws_partner/) [<https://perma.cc/TQ5-LNFL>].

<sup>44</sup> RACHEL ROLLINS, SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE, THE RACHAEL ROLLINS POLICY MEMO C-1, C-3-C-9 (2019).

<sup>45</sup> *Id.*

<sup>46</sup> Warren v. DeSantis, No. 4:22-cv-302-RH-MAF, 2023 WL 345802, at \*1, \*5 (N.D. Fla. Jan. 20, 2023) (citation omitted), *appeal filed*. The court observed that, as an illustration of the presumptive nature of the policies, charges were filed by supervisory approval just days after implementing a policy of presumptively not charging when contact is initiated by bicycle stop. *Id.* at \*5.

<sup>47</sup> Richmond, *supra* note 42; Matt Dixon, *DeSantis Suspends State Attorney Who Vowed Not to Enforce Florida's New Abortion Law*, POLITICO (Aug. 4, 2022, 6:33 PM), <https://www.politico.com/news/2022/08/04/desantis-suspends-prosecutor-floridas-new-abortion-law-00049852> [<https://perma.cc/7W62-WBQD>].

<sup>48</sup> See Zack Smith & Charles "Cully" Stimson, *It's Not Just Rising Crime: Rogue Prosecutors Are a Huge Problem*, HERITAGE FOUND. (Feb. 7, 2022) <https://www.heritage.org/crime-and-justice/commentary/its-not-just-rising-crime-rogue-prosecutors-are-huge-problem> [<https://perma.cc/4VRM-HDMM>] ("[O]nce elected, rogue prosecutors don't seek individualized justice. That's part of the problem. They forget victims, coddle criminals, and usurp the role of the legislative branch of government by declining to prosecute entire categories of crimes. That is not prosecutorial discretion. That is prosecutorial usurpation and malpractice.").

such as refusal to prosecute persons who commit crimes against marginalized groups, such as undocumented immigrants.<sup>49</sup>

Criticism of policy-based discretion comes from the legislative branch as well. Illustrative of the tension prosecutorial discretion places on the separation of powers, many conservative state legislatures have introduced bills that would take discretion away from local prosecutors by requiring them to bring certain charges or providing mechanisms for their removal if they fail to do so.<sup>50</sup> Although many of these efforts have failed thus far, there is a clear tension between state and local politics concerning criminal justice and the extent to which voters get to choose which of these policies they prefer.<sup>51</sup> The nascent criminal law around abortion has accelerated this tension and led more state legislators to support bills restricting or punishing prosecutors' discretionary powers.<sup>52</sup> For many of these lawmakers, abortion is the taking of a life and failing to prosecute is like failing to prosecute for murder, which only raises the rhetorical stakes in this dispute.<sup>53</sup>

Despite these arguments, the Supreme Court has taken a very permissive stance regarding prosecutorial discretion.<sup>54</sup> Even in cases in which extremely broad discretion is applied as a matter of public policy, the Court is reticent to delve into the micromanagement of executive officers and how they delegate their limited resources.<sup>55</sup>

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the cases relationship to the Government's overall

<sup>49</sup> *Are There Limits to Prosecutorial Discretion?*, SOUTHERN POVERTY LAW CTR. (Jan. 1, 2003), <https://www.splcenter.org/fighting-hate/intelligence-report/2003/are-there-limits-prosecutorial-discretion> [<https://perma.cc/2PXX-Y4JD>].

<sup>50</sup> Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers> [<https://perma.cc/DFG5-6784>].

<sup>51</sup> *Id.*

<sup>52</sup> See Alice Miranda Ollstein & Megan Messerly, *Republicans Clash with Prosecutors Over Enforcement of Abortion Bans*, POLITICO (Feb. 12, 2023, 7:00 AM), <https://www.politico.com/news/2023/02/12/republicans-target-abortion-local-prosecutors-00082386> [<https://perma.cc/RX9R-ZM89>].

<sup>53</sup> *Id.*

<sup>54</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”). The only constitutional limit placed on prosecutorial discretion has been, historically, selective enforcement “‘deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’” See *id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

<sup>55</sup> *Wayte v. United States*, 470 U.S. 598, 607–08 (1985).

enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.<sup>56</sup>

Broad-based prosecutorial discretion is nothing new. As explained, elected prosecutors have already used their discretion on a policy level to temper or eliminate criminal penalties relating to various other politicized issues, including controlled substances, firearms, and COVID-19 policy. The following Part will demonstrate that the peculiar practice of electing prosecutors in the United States is predicated on an independence from other political offices and makes policy-based discretion an important facet of electoral accountability for prosecutors. As described in later Parts, the breadth of potential criminal exposure emerging around abortion access makes it an attractive topic for such discretion.

## II. PROSECUTORIAL ELECTIONS

Electing prosecutors is not a common exercise of democratic engagement; in fact, the United States is unique in its elections for local prosecutors.<sup>57</sup> Although the general term “prosecutor” has different meanings at different levels of court enforcement, the vast majority of states—forty-five out of fifty—elect prosecutors at the local level (usually by county or district), the level at which most felony crimes are tried.<sup>58</sup> Prosecutorial elections were not always part of American democratic norms. Rather, they came about as other appointed offices, such as state judges, became elected officials in the early 1800s.<sup>59</sup> One of the primary reasons many states moved away from appointed prosecutors and towards elected ones was a desire to curb the growing power of state governors and the patronage system that drove appointments.<sup>60</sup> The initial draft of New York’s 1846 Constitution specifically “singled out the district attorney as the one local officer whom the governor could not remove.”<sup>61</sup>

Prosecutorial elections were also a means for local communities to exert greater control over their own affairs and priorities.<sup>62</sup> Several states cited concerns that appointed prosecutors would not be as attuned to the concerns of their jurisdiction as a person chosen by that jurisdiction’s constituents.<sup>63</sup> Other states were concerned that prosecutors might neglect the concerns of

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<sup>56</sup> *Id.* at 607.

<sup>57</sup> Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548 (2020).

<sup>58</sup> *Id.* at 1549–50.

<sup>59</sup> Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

<sup>60</sup> *Id.* at 1551.

<sup>61</sup> *Id.* at 1555.

<sup>62</sup> *Id.* at 1558.

<sup>63</sup> *Id.* (citing concerns that the governor of Louisiana might appoint a man from New Orleans to preside over a remote parish elsewhere in the state).

counties with whom they are unfamiliar, and the local interests of justice might not be served.<sup>64</sup>

Ultimately, most criminal prosecution is a local issue even though it is defined by statewide laws.<sup>65</sup> Most criminal acts do not have wide-ranging effects beyond the area where they occur.<sup>66</sup> For example, a string of burglaries would be distressing for the community in which they occur but have little importance elsewhere in the state. The criminal statutes are generally passed on a statewide level into state criminal codes.<sup>67</sup> Laws are extremely broad and encompass an almost endless variety of conduct.<sup>68</sup> By passing broad laws, legislators rely on prosecutorial discretion to soften the effects of these general criminal laws.<sup>69</sup>

The incentive of lawmakers when passing broad criminal laws is to broaden the scope of conduct that is criminal to attempt to give the outcomes that their median voter wants to see—that is, producing criminal convictions.<sup>70</sup> Broad prosecutorial discretion allows lawmakers to continually increase the severity and breadth of the criminal code without bearing the risks of an overly punitive system.<sup>71</sup> With this backstop in place, lawmakers fear a guilty person falling through the cracks of their law more than a sympathetic defendant getting unfairly prosecuted because the prosecutor often bears the brunt of public outrage for failing to use their discretion.<sup>72</sup> The prosecutors' own interests compel them to play their part: "in any regime in which politically accountable prosecutors can pick their cases, their primary political incentive is to charge people the public wants charged."<sup>73</sup> Recognizing the potential of this incentive structure, reformist prosecutors are pleasing their local constituents and getting elected by not charging the people the public do not want charged.

The dueling concerns of local control and state executive authority are on full display in Florida. Governor DeSantis's order to remove Andrew Warren is not the first example of a Florida Governor intervening when a prosecutor's policy platforms clashed with the Governor's. In 2016, Aramis Ayala won election as State Attorney for the Orlando area and announced she

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<sup>64</sup> *Id.* at 1561 (noting concerns raised at the Illinois constitutional convention that circuit-level prosecutors would be unfamiliar with their jurisdictions or that criminals may not be prosecuted if the prosecutor was unfamiliar with the local circumstances).

<sup>65</sup> See Roland F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 826–28 (2020).

<sup>66</sup> *Id.* at 841.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 843.

<sup>69</sup> *Id.*

<sup>70</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530–31 (2001).

<sup>71</sup> *Id.* at 547.

<sup>72</sup> *Id.* at 548–49.

<sup>73</sup> *Id.* at 554.

would no longer seek death sentences in any cases.<sup>74</sup> In response, then Governor Rick Scott transferred several capital cases out of Ayala's office to other state's attorneys who would pursue the death penalty.<sup>75</sup> The Florida Supreme Court ruled that Scott's action was within the governor's power.<sup>76</sup> Warren's case represents an even more aggressive usurpation of local autonomy by the governor. If the rationale behind local prosecutors is to take unilateral authority away from governors and to ensure that prosecutors pursue local-policy priorities, DeSantis's order deprives the voters in Warren's district of the opportunity to express their assent (or dissent) by choosing whether to retain him.

The result of Warren's lawsuit against DeSantis was an unsatisfying one. In a lengthy opinion, District Court Judge Robert L. Hinkle concluded that Governor DeSantis violated the Florida Constitution and the First Amendment of the United States Constitution when he suspended Warren.<sup>77</sup> Despite these findings, Judge Hinkle also held that he lacked the power under the Eleventh Amendment to reinstate Warren based on a violation of state law and directed judgment in favor of DeSantis.<sup>78</sup>

In his opinion, Judge Hinkle emphasized the distinction between discretion and neglect.<sup>79</sup> Analyzing Warren's discretion policy concerning bicycle stops as one example, Judge Hinkle described how Warren and his office met with concerned community members, police departments, and academic researchers to identify racial disparities and correct for this problem.<sup>80</sup> The resulting policy was one that created a "presumption that charges would not be filed following an initial encounter with law enforcement solely for a bicycle or pedestrian violation."<sup>81</sup> This presumption was rebuttable, based on the circumstances and with supervisory approval.<sup>82</sup>

The bicycle policy is a textbook illustration of how policy-based discretion works on the ground. "By its plain terms, this was not a blanket nonprosecution policy."<sup>83</sup> Rather, "the policy worked in tandem with the always-applicable policy requiring the exercise of prosecutorial discretion at every stage of every case."<sup>84</sup> Judge Hinkle concluded his analysis of the facts with unabashed praise for Warren's policies: "[t]he record includes not a hint

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<sup>74</sup> Blakinger, *supra* note 50.

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

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

<sup>77</sup> Warren v. DeSantis, No. 4:22-cv-302-RH-MAF, 2023 WL 345802, at \*1 (N.D. Fla. Jan. 20, 2023), *appeal filed*.

<sup>78</sup> *Id.*

<sup>79</sup> *See id.* at \*1-2.

<sup>80</sup> *Id.* at \*4.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at \*5.

<sup>84</sup> *Id.*

of misconduct by Mr. Warren. So far as this record reflects, he was diligently and competently performing the job he was elected to perform, very much in the way he told voters he would perform it.”<sup>85</sup>

The district court nonetheless held that it was powerless to reinstate Warren no matter how wronged he had been. Even though the court found that DeSantis explicitly cited the prosecutorial discretion statements as his reason for the suspension, Judge Hinkle accepted the Governor’s assertion that he would have suspended Warren anyways for any one of several other contrived rationales not protected by the First Amendment.<sup>86</sup> Without a federal issue to decide, Judge Hinkle held that he could not reinstate a state official from the federal courts.<sup>87</sup> Warren has appealed this decision to the Eleventh Circuit.<sup>88</sup>

### III. CRIMINALIZATION OF ABORTION

In the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*,<sup>89</sup> many states quickly imposed new restrictions on abortion access or began to enforce old restrictions that remained on the books but were previously unenforceable.<sup>90</sup> As of June 19, 2023, twelve states are enforcing complete abortion bans.<sup>91</sup> Forty-three states prohibit abortion after a specified point in pregnancy, the majority of which use either viability or twenty-two weeks as that point.<sup>92</sup> Many states, in addition to banning abortion after a certain point, impose additional barriers, such as counseling, waiting periods, and provider and hospital requirements.<sup>93</sup>

In all states, including those with total bans, there are several activities that could subject abortion-seekers to potential criminal liability. Although medical providers are likely to be chilled by the threat of criminal or civil sanctions,<sup>94</sup> pregnant persons will continue to seek abortions. This Part will describe many of the existing and emerging laws that expose persons seeking abortion to criminal liability.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at \*15.

<sup>87</sup> *Id.* at \*21.

<sup>88</sup> Notice of Appeal, *Warren v. DeSantis*, No. 23-10459 (11th Cir. Feb. 14, 2023).

<sup>89</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>90</sup> Meg Cunningham, *Missouri’s New Abortion Law: No Exceptions for Rape, Incest, and Doctors May Face Charges*, KAN. CITY BEACON (Jun. 24, 2022), <https://kcbeacon.org/stories/2022/06/24/missouri-abortion-trigger-law/> [<https://perma.cc/RJR6-LSG3>] (noting Missouri is one of thirteen states that had trigger laws in place before *Dobbs*).

<sup>91</sup> *An Overview of Abortion Laws*, GUTTMACHER INST. <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> [<https://perma.cc/K8M5-JXVY>].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See David W. Chen, *A New Goal for Abortion Bills: Punish or Protect Doctors*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/us/abortion-bills-doctors.html> [<https://perma.cc/M2J2-ET46>].

Many pregnant persons utilize self-induced abortion methods, such as herbal remedies and pharmaceuticals.<sup>95</sup> Although out-of-clinic procedural abortions were notorious and stigmatized as “back-alley abortions” in the past, highly effective medications are now available to safely use outside the clinical setting.<sup>96</sup> Even in clinical settings, medication abortions are becoming the norm, and as of 2020, they account for 53 percent of all abortions.<sup>97</sup> This number is likely to rise when new data is released because the FDA-approved distribution of the medication, mifepristone, by mail during the COVID-19 pandemic.<sup>98</sup> Despite this increase in availability, many states impose a variety of restrictions on abortion pills, such as prohibitions on mailing, limitations on which healthcare providers can administer the medication, and requiring patients to be seen in person when the medication is administered.<sup>99</sup> Several states are already preparing restrictions on mailing this medication.<sup>100</sup> These restrictions create a conflict with federal law approving abortion medications through the Federal Drug Administration, which may preempt the state-imposed restrictions.<sup>101</sup> One of the manufacturers of mifepristone has already filed a lawsuit on those grounds seeking to invalidate or enjoin these dispensing restrictions.<sup>102</sup>

Even before *Dobbs*, many states criminalized self-induced abortions.<sup>103</sup> Seven states criminalized the practice explicitly,<sup>104</sup> while many more have “fetal harm” laws<sup>105</sup> or dormant abortion prohibitions<sup>106</sup> that could also criminalize a self-induced abortion.<sup>107</sup> In the new landscape without the

<sup>95</sup> FARAH DIAZ-TELLO ET AL., SIA LEGAL TEAM, ROE’S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL 3 (2017).

<sup>96</sup> *Id.*

<sup>97</sup> Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST. (Dec. 1, 2022), <https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions> [<https://perma.cc/AK-K4-KLNR>].

<sup>98</sup> Pam Belluck, *F.D.A. Will Allow Abortion Pills by Mail During the Pandemic*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/04/13/health/covid-abortion-pills-mailed.html> [<https://perma.cc/KM5V-S967>].

<sup>99</sup> Jones et al., *supra* note 97.

<sup>100</sup> Kate Zernike, *Abortion Pills, Once a Workaround, Are Now a Target*, N.Y. TIMES, <https://www.nytimes.com/2022/04/06/us/abortion-pills.html> [<https://perma.cc/B674-KTSM>] (June 15, 2022).

<sup>101</sup> Greer Donley et al., *Existing Federal Laws Could Protect Abortion Rights Even if Roe Is Overturned*, TIME (Jan. 24, 2022, 3:21 PM), <https://time.com/6141517/abortion-federal-law-preemption-roe-v-wade/> [<https://perma.cc/G255-8HGV>].

<sup>102</sup> Complaint at 5, GenBioPro, Inc., v. Sorsaia, No. 3:23-cv-00058 (S.D.W.Va. Jan. 25, 2023).

<sup>103</sup> DIAZ-TELLO ET AL., *supra* note 95, at 3–5.

<sup>104</sup> *Id.* at 8.

<sup>105</sup> *Id.* at 13.

<sup>106</sup> *Id.* at 17.

<sup>107</sup> *Id.* 7–8.

protections set out in *Roe v. Wade*, state bans or severe restrictions would prohibit self-induced abortions even further.

In order to avoid criminal liability, persons seeking abortions are increasingly likely to travel from jurisdictions that restrict the procedure to ones that do not.<sup>108</sup> Even prior to *Dobbs*, approximately 9 percent of persons receiving abortions traveled across state lines to do so.<sup>109</sup> Since the overturning of *Roe* and ensuing state restrictions, average travel time to obtain an abortion has more than tripled.<sup>110</sup> While the expense and personal logistics associated with travel can be a restriction on their own, some 35 percent of employers in the United States are now offering travel for abortion as part of their benefits package, with more planning to do so or considering such benefits in 2023.<sup>111</sup> Some states are considering measures that could also restrict such travel through civil penalties.<sup>112</sup> Although Justice Kavanaugh expressed skepticism that a state could restrict a person's right to travel for an abortion, no other member of the majority joined his concurrence.<sup>113</sup>

Abortion restrictions also affect medical procedures that are otherwise necessary for the health of a pregnant person. Induced miscarriage as treatment for ectopic pregnancy<sup>114</sup> is functionally indistinguishable from an elective medication abortion.<sup>115</sup> States that forbid abortion without making

<sup>108</sup> Isaac Maddow-Zimet & Kathryn Kost, *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care*, GUTTMACHER INST. (July 21, 2022), <https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across> [<https://perma.cc/A596-DG-BK>].

<sup>109</sup> *Id.* (patients traveled for a variety of reasons including geographic proximity to the nearest clinic and restrictive state laws).

<sup>110</sup> Deidre McPhillips, *Travel Time to Abortion Facilities Grew Significantly After Supreme Court Overturned Roe v. Wade*, CNN (Nov. 1, 2022, 11:08 AM), <https://www.cnn.com/2022/11/01/health/abortion-access-travel-time/index.html> [<https://perma.cc/8ELS-E NVQ>].

<sup>111</sup> Leah Shepherd, *Travel Benefits for Abortion Growing Quickly Among Employers*, SOC'Y FOR HUM. RES. MGMT. (Aug. 24, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/abortion-travel-benefits-grow.aspx> [<https://perma.cc/JF4B-LCQN>].

<sup>112</sup> *See, e.g.*, H.B. 1854, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022).

<sup>113</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring).

<sup>114</sup> An ectopic pregnancy "occurs when a fertilized egg grows outside of the uterus" usually in the fallopian tube. It is a potentially life-threatening emergency. *Ectopic Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/womens-health/faqs/ectopic-pregnancy> [<https://perma.cc/56NW-8S5H>] (last visited Sept. 19, 2023).

<sup>115</sup> Brittni Frederiksen et al., *Abortion Bans May Limit Essential Medications for Women with Chronic Conditions*, KAISER FAM. FOUND. (Nov. 17, 2022), <https://www.kff.org/womens-health-policy/issue-brief/abortion-bans-may-limit-essential-medications-for-women-with-chronic-conditions/> [<https://perma.cc/559A-VMF6>] (methotrexate is commonly used in treatment of both early-term pregnancy termination and ectopic pregnancy termination as well as chronic conditions such as some cancers, rheumatoid arthritis, eczema, and scleritis).

appropriate exceptions may make this emergency procedure unavailable.<sup>116</sup> Even with exceptions, the confusion around abortion bans can result in hesitation and delay of treatment.<sup>117</sup> Ectopic pregnancy, if untreated, is a potentially life-threatening condition.<sup>118</sup> Because of the very similar features between ectopic pregnancy treatment and abortion, many Catholic hospitals already will not treat patients for ectopic pregnancy, even to save the life of the mother.<sup>119</sup> The medication used to induce miscarriage in ectopic pregnancy, methotrexate, is not generally used in elective abortions.<sup>120</sup> Nevertheless, some Catholic hospitals perceive that it violates their church directives and refuse to provide it.<sup>121</sup>

Further, misoprostol, which is usually taken at home after a dose of mifepristone for medication abortion, is also used in the management of pregnancy loss also called miscarriage or spontaneous abortion.<sup>122</sup> Miscarriages that require surgical intervention are also similar to surgical management of pregnancy termination (abortion).<sup>123</sup> Depending on the age of the fetus, miscarriage management may involve a procedure that is identical to the procedure in a surgical abortion.<sup>124</sup> Persons suffering from pregnancy loss may have difficulty obtaining misoprostol for this condition in areas with strict prohibitions on abortion,<sup>125</sup> or they may face criminal suspicion and even prosecution over the origin of their miscarriage.<sup>126</sup> Even if not exposed to criminal liability, this scrutiny can be traumatizing for those experiencing this already difficult life event.<sup>127</sup>

Further complicating matters, a lawsuit in the Northern District of Texas threatens to rescind the FDA's approval of mifepristone.<sup>128</sup> In its reply brief,

<sup>116</sup> *Facts Are Important: Understanding Ectopic Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/understanding-ectopic-pregnancy> [<https://perma.cc/BP8R-QFN3>] (last visited Sept. 19, 2023).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Angel M. Foster et al., *Do Religious Restrictions Influence Ectopic Pregnancy Management? A National Qualitative Study*, 21 WOMEN'S HEALTH ISSUES 104, 108 (2011).

<sup>120</sup> *Id.* at 104.

<sup>121</sup> *Id.* at 108.

<sup>122</sup> Sarah Prager et al., *Pregnancy Loss (Miscarriage): Description of Management Techniques*, UPTODATE, <https://www.uptodate.com/contents/pregnancy-loss-miscarriage-description-of-management-techniques> [<https://perma.cc/HK4B-T2JX>] (July 6, 2023).

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

<sup>124</sup> *See id.*

<sup>125</sup> Frederiksen et al., *supra* note 115.

<sup>126</sup> *See* Robert Baldwin III, *Losing a Pregnancy Could Land You in Jail in Post-Roe America*, NPR (July 3, 2022, 5:27 AM), <https://www.npr.org/2022/07/03/1109015302/abortion-prosecuting-pregnancy-loss> [<https://perma.cc/PL3E-7Q62>].

<sup>127</sup> *Id.*

<sup>128</sup> Plaintiff's Brief in Support of Their Motion for Preliminary Injunction at 7, *All. for Hippocratic Med. v. FDA*, No. 2:22-cv-00223-Z, 2022 WL 17731380 (N.D. Tex. Jan. 18, 2022).

the FDA asserted that such a decision would “upend the status quo and the reliance interests of patients and doctors who depend on mifepristone, as well as businesses involved with mifepristone distribution.”<sup>129</sup> Writing as amici, medical experts have warned that such an injunction risks increased maternal mortality and other pregnancy-related complications, especially in communities of color.<sup>130</sup> Although Judge Matthew Kasmeryk issued an injunction rolling back the FDA approval of mifepristone, the Supreme Court stayed the effect of the injunction pending an appeal of the order to the Fifth Circuit and, if applicable, the Supreme Court.<sup>131</sup>

Even a temporary injunction, had one gone into effect, could have created great uncertainty around abortions for both medical and legal practitioners.<sup>132</sup> Abortion providers were preparing to divert patients to more invasive surgical abortions, which already pose longer wait times.<sup>133</sup> In the alternative, some providers are considering misoprostol-only medication abortions that are used in other countries, but not FDA approved in the United States.<sup>134</sup>

It is exactly this kind of legal ambiguity that makes prosecutorial policies of discretion not merely useful, but necessary. As described, the shifting legal landscape around medications delivered by mail, medications used off-label, or even the rights to travel, remains unsettled. An announced policy of non-enforcement by exercising prosecutorial discretion, such as the one made by Andrew Warren, provides citizens with a genuine alternative to inform the government of their preferences.

Assurances from a local prosecutor that they will not aggressively apply criminal abortion statutes to emergency ectopic pregnancy treatment can help medical providers perform lifesaving procedures without fear of criminal liability. Even with laws that provide exceptions for medical emergencies, opinions may differ on what counts as an emergency under the law. Prosecutors raising a presumption against criminal liability under the abortion laws would fulfill their function of tempering the broad laws passed by the legislature. Further, when a prosecutor is clear about their policies when running for office, they provide voters with an opportunity to express their preference

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<sup>129</sup> Defendants’ Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 1, *All. for Hippocratic Med. v. FDA*, No. 2:22-cv-00223-Z, 2023 WL 3011645 (N.D. Tex. Jan. 13, 2023).

<sup>130</sup> Brief of Amici Curiae Medical and Public Health Societies in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 4, *All. for Hippocratic Med. v. FDA*, No. 2:22-cv-00223-Z, 2023 WL 2974518 (N.D. Tex. Feb. 14, 2023).

<sup>131</sup> *Danco Laboratories, LLC v. All. For Hippocratic Med.*, 143 S. Ct. 1075, 1075 (2023) (mem.).

<sup>132</sup> See Brendan Pierson, *Explainer: How Recent Lawsuits Could Affect Access to Abortion Pills*, REUTERS (Mar. 15, 2023, 5:36 PM), <https://www.reuters.com/world/us/how-recent-lawsuits-could-affect-access-abortion-pills-2023-02-10/> [https://perma.cc/5SML-4PKL].

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

for local enforcement. As the next Part will explore, in the post-*Roe* environment, abortion is a salient issue for many voters.

#### IV. ABORTION AT THE BALLOT BOX

Abortion was a major motivating issue for voters in the 2022 midterm elections,<sup>135</sup> the first election without a constitutional protection for abortion since 1973. There was no national election that year, but many states had ballot initiatives increasing or decreasing abortion rights, and many candidates emphasized their stance on abortion in their campaigns. The results showed a clear preference among voters across the United States for keeping or expanding existing abortion access.

Five states had ballot initiatives to amend their state constitutions with regards to abortion.<sup>136</sup> Three states—Michigan, California, and Vermont—had initiatives to solidify the right to an abortion generally through state constitutional amendments.<sup>137</sup> While abortion was not prohibited in those states, Michigan’s proposal had more urgency because it would impact whether a 1931 abortion ban, which had lain dormant under *Roe*, could go back into effect.<sup>138</sup> In Kentucky, a ballot initiative proposed the opposite: a constitutional amendment that clearly denies any constitutional right to abortion in Kentucky.<sup>139</sup> Finally, Montana had an atypical initiative that would require healthcare providers to make lifesaving efforts for any infants “born-alive” during an abortion procedure and impose criminal penalties for providers who refuse.<sup>140</sup>

Voters resolved all five ballot initiatives in favor of reproductive rights.<sup>141</sup> The initiatives enshrining the right to reproductive freedom in state constitutions passed comfortably in Michigan, by 13.4 percentage points, and overwhelmingly in California and Vermont, by two-to-one and three-to-one margins, respectively.<sup>142</sup> In much more conservative Montana and Kentucky, the margins were thinner but still decisive, with each of their proposed

<sup>135</sup> Corina Knoll & Mitch Smith, *‘My Main, Core Issue’: Abortion Was the Driving Force for Many Voters*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/us/abortion-ballot-midterm-elections.html?searchResultPosition=3> [https://perma.cc/BFN8-33LM].

<sup>136</sup> Joshua Needelman, *Five States Have Abortion Referendums on the Ballot*, N.Y. TIMES (Nov. 8, 2022), <https://www.nytimes.com/2022/11/08/us/politics/abortion-ballot-state-referendums.html> [https://perma.cc/PL7Z-CTYA].

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Abortion on the Ballot*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-abortion.html?searchResultPosition=1> [https://perma.cc/DX4S-MKU E] (Dec. 20, 2022).

<sup>142</sup> *Id.*

restrictions failing by about 5 percentage points.<sup>143</sup> These results were consistent with the result of a special election in Kansas months earlier in which voters resoundingly rejected a constitutional amendment denying any right to abortion in that state, with enthusiasm for the issue of abortion driving abnormally high voter turnout.<sup>144</sup>

In Michigan, the urgency and enthusiasm for their initiative may have contributed to a widespread victory for Democratic politicians in that state, many of whom campaigned hard on abortion rights.<sup>145</sup> In addition to gaining control of the state legislature, the Governor, Secretary of State, and Attorney General all won on the backs of campaigns that emphasized the risk to abortion access in the state.<sup>146</sup> Perhaps because of the clear stakes with the dormant law coming back into effect and a ballot initiative to prevent that from happening, polls showed that abortion motivated voters in Michigan at exceptionally high rates.<sup>147</sup> Although Michigan demonstrates that abortion, as a standalone issue, can represent a clear picture of voter preferences when it is clearly at stake, in other states abortion was one of many competing concerns for voters.<sup>148</sup> While abortion likely tipped the balance in closely contested races, voters were much more concerned about economic issues, rendering their selections for statewide races, like governor or senator, less indicative of their abortion policy preferences.<sup>149</sup>

State attorneys general have a narrower role than a governor or legislator but are still very influential in legal matters and may be a more direct proxy

<sup>143</sup> *Id.*

<sup>144</sup> Mitch Smith & Katie Glueck, *Kansas Votes to Preserve Abortion Rights Protections in Its Constitution*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/us/kansas-abortion-rights-vote.html> [https://perma.cc/Y3HW-DN5Z].

<sup>145</sup> Alice Miranda Ollstein & Megan Messerly, *A Predicted 'Red Wave' Crashed Into Wall of Abortion Rights Support on Tuesday*, POLITICO, <https://www.politico.com/news/2022/11/09/abortion-votes-2022-election-results-00065983> [https://perma.cc/ZQ92-XTUX] (Nov. 9, 2022, 4:04 PM).

<sup>146</sup> Simon Schuster, *Behind Michigan Democrats' 'Once in a Generation' Midterm Win*, MICH. LIVE, <https://www.mlive.com/politics/2022/11/behind-michigan-democrats-once-in-a-generation-midterm-win.html> [https://perma.cc/74PC-RAJ6] (Nov. 11, 2022, 4:55 AM).

<sup>147</sup> See Knoll & Smith, *supra* note 135 (describing several republican voters who voted for the opposite party because of abortion preferences and Republican consultants noting it was the “one issue that made the biggest difference here, by far”); see also Schuster, *supra* note 146 (exit poll indicating that 43 percent of Michigan voters cited abortion as their top issue, while only 28 percent cited inflation as their main concern).

<sup>148</sup> Mary Radcliffe & Amelia Thomson-DeVeaux, *Abortion Was Always Going to Impact the Midterms*, FIVETHIRTYEIGHT (Nov. 17, 2022, 6:00 AM), <https://fivethirtyeight.com/features/abortion-was-always-going-to-impact-the-midterms/> [https://perma.cc/3GZ7-HRQE] (showing that although economic issues were more important in all states, Michigan had the highest rate of voters describing abortion as the most important issue determining their vote).

<sup>149</sup> *Id.*

for specific policy preferences, such as abortion.<sup>150</sup> Races for attorneys general included many who emphasized their stance on abortion rights. In Arizona, Kris Mayes switched parties to run as a Democrat and vowed not to prosecute healthcare providers under Arizona's existing dormant abortion ban, which is currently pending review by the Arizona Supreme Court.<sup>151</sup> Mayes narrowly won her election following a recount.<sup>152</sup>

Finally, officials charged with enforcing criminal laws at the local level—county sheriffs and district attorneys—also made non-enforcement of abortion restrictions part of their electoral platforms. Candidates for sheriff in Dane, Milwaukee, and Eau Claire Counties indicated that they would not use the limited resources of their offices to investigate abortion cases under Wisconsin's arcane 1948 abortion ban.<sup>153</sup> Similarly, candidates for district attorney in Maricopa County, Arizona (home of Phoenix), several populous counties in Texas, and Polk County, Iowa (home to Des Moines) all made public statements that they would not prosecute or otherwise devote their office's resources toward cases linked to abortion.<sup>154</sup> Prosecutors rode those pledges and other discretion-driven policies to electoral victory in Hays County,

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<sup>150</sup> Holly Bailey, *High-Profile Attorney General Races Pitted Abortion Against Crime*, WASH. POST, <https://www.washingtonpost.com/nation/2022/11/08/attorney-general-state-results/> [<https://perma.cc/XU7Y-4W9Z>] (Nov. 9, 2022, 12:43 PM).

<sup>151</sup> Odom Rithy, *Attorney General: Kris Mayes Wants to 'Depoliticize the Office,' Restore Voter Confidence*, CRONKITE NEWS (Oct. 12, 2022), <https://cronkitenews.azpbs.org/2022/10/12/arizona-attorney-general-kris-mayes-democrat-depoliticize-office/> [<https://perma.cc/9HVN-QPVF>].

<sup>152</sup> Jacques Billeaud, *Democrat Wins Arizona Attorney General Race After Recount*, ASSOCIATED PRESS (Dec. 29, 2022, 2:08 PM), <https://apnews.com/article/2022-midterm-elections-politics-phoenix-arizona-09aee9ff24cd2af5777a6d7ae140782b> [<https://perma.cc/YMZ8-EV6E>].

<sup>153</sup> Daniel Nichanian, *Your Guide to Local Elections Where Abortion is on the Line This Year*, BOLTS (July 14, 2022), <https://boltsmag.org/your-guide-to-local-elections-and-abortion-in-2022/> [<https://perma.cc/6PA2-MMUX>].

<sup>154</sup> *Id.*

Texas<sup>155</sup> and Polk County, Iowa.<sup>156</sup> Meanwhile, reformist prosecutor candidates fell short in Tarrant County, Texas<sup>157</sup> and Maricopa County, Arizona.<sup>158</sup>

Turning to Florida, Governor DeSantis decisively won reelection despite his high-profile antagonism towards abortion<sup>159</sup> and LGBTQ<sup>160</sup> rights. Voters also elected a supermajority of Republicans to the Florida Legislature.<sup>161</sup> Abortion, however, was not quite as animating an issue in Florida as in other elections. Florida Republicans consciously tempered their abortion stance by limiting their restriction to fifteen weeks' gestation, despite support from some lawmakers for a more severe ban.<sup>162</sup> With the 2022 election no longer pending, lawmakers quickly moved to pass a six-week abortion restriction in the subsequent legislative session.<sup>163</sup> In a county neighboring Andrew Warren's, the incumbent state attorney, Bruce Bartlett, won comfortably over a challenger promising not to enforce abortion laws, although it was the first time his office was contested in thirty years.<sup>164</sup>

<sup>155</sup> Anastasia Balzer-Barrera & Jaclyn Ramkissoon, *Texas Election: Democrat Kelly Higgins to Be Next Hays County District Attorney*, KXAN, <https://www.kxan.com/news/your-local-election-hq/texas-election-hays-county-votes-on-new-district-attorney/> [<https://perma.cc/P7D6-2UN9>] (Nov. 22, 2022, 12:52 PM).

<sup>156</sup> William Morris, *Kimberly Graham Elected Polk County Attorney, Turning Page After 30 Years of John Sarcone's Leadership*, DES MOINES REGISTER, <https://www.desmoinesregister.com/story/news/politics/elections/2022/11/09/kimberly-graham-elected-polk-county-attorney-in-30-years-jon-sarcone-election-2022/69609760007/> [<https://perma.cc/YSF7-9FCZ>] (Nov. 9, 2022, 10:44 AM).

<sup>157</sup> Kaley Johnson, *Republican Phil Sorrells Declares Victory in Tarrant County District Attorney Race*, FORT WORTH STAR-TELEGRAM, <https://www.star-telegram.com/news/politics-government/election/article268102897.html> [<https://perma.cc/BE4Z-47Q6>] (Nov. 9, 2022, 7:11 AM).

<sup>158</sup> Jimmy Jenkins, *Mitchell Declares Victory in the Maricopa County Attorney's Race; Gunnigle Concedes*, AZ CENTRAL, <https://www.azcentral.com/story/news/local/phoenix/2022/11/08/maricopa-county-attorney-election-results-rachel-mitchell-julie-gunnigle/10653197002/> [<https://perma.cc/3Z3S-YTW5>] (Nov. 15, 2022, 7:58 AM).

<sup>159</sup> Blake Hounshell, *DeSantis Is Showing Strength. He's Also Vulnerable on His Right Flank.*, N.Y. TIMES (Dec. 14, 2022), <https://www.nytimes.com/2022/12/14/us/politics/de-santis-2024-trump-abortion.html> [<https://perma.cc/782X-MP7M>].

<sup>160</sup> See *Human Rights Campaign on DeSantis's "Don't Say Gay or Trans" Law Going into Effect, Targeting LGBTQ+ Youth and Turning Back the Clock on Equality*, HUM. RTS. CAMPAIGN (June 30, 2022), <https://www.hrc.org/press-releases/human-rights-campaign-on-desantiss-dont-say-gay-or-trans-law-going-into-effect-targeting-lgbtq-youth-and-turning-back-the-clock-on-equality> [<https://perma.cc/B7X5-SWQW>].

<sup>161</sup> Hounshell, *supra* note 159.

<sup>162</sup> Patricia Mazzei, *DeSantis has Already Moved to Restrict Abortions in Florida.*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/us/florida-roe-abortion-access-desantis.html?searchResultPosition=6> [<https://perma.cc/3SZU-CZ3N>].

<sup>163</sup> Arek Sarkissian, *Florida Republicans Seek Ban on Abortions After 6 Weeks of Pregnancy*, POLITICO (Mar. 7, 2023, 5:10 PM), <https://www.politico.com/news/2023/03/07/florida-abortion-ban-6-week-bills-00085865> [<https://perma.cc/FU3B-8BW5>].

<sup>164</sup> Natalie Weber, *Incumbent Bruce Bartlett Wins Pinellas-Pasco State Attorney Race*, TAMPA BAY TIMES, <https://www.tampabay.com/news/florida-politics/elections/2022/11/08/pinellas-pasco-state-attorney-bartlett-miller-tampabay-election/> [<https://perma.cc/CRY7>].

Warren himself was not on the ballot in 2022, having handily won a second term in 2020, defeating his challenger by more than 6 percentage points.<sup>165</sup> Warren ran as an outsider seeking to reform the criminal justice system in Hillsborough County and was reelected by an even greater margin.<sup>166</sup> Colleagues and constituents invoked the local democratic values that seemingly justify electing prosecutors in the first place,<sup>167</sup> such as by waving signs asking, “[d]oes my vote not count?”<sup>168</sup> Other elected officials sounded an alarm about what they interpreted as an egregious overreach by the Governor. Tampa Mayor Jane Castor posted, “[r]emoving a duly elected official should be based on egregious actions—not political statements. In a free state, voters should choose their elected officials.”<sup>169</sup> Warren, for his part, opened his lawsuit’s statement of facts invoking the same principles: that he was elected and “re-elected after making and keeping numerous promises to voters about how he would perform the duties of the office he sought and to which he was twice elected.”<sup>170</sup>

These normative democratic values go directly to the heart of holding prosecutorial elections in the first place. Voters get the opportunity to express their preferences for officeholders at the local, state, and national levels. Andrew Warren, by articulating a clear policy platform, gave his local constituents a clear choice at the ballot box. The voters of Hillsborough County liked the policy he was offering and selected him with their votes—twice. As the final Part of this Note argues, broad, policy-based discretion articulated to voters makes prosecutorial elections a more meaningful expression of democracy.

#### V. SO LONG AS WE ELECT PROSECUTORS, WE SHOULD DEMAND CLEAR POLICY PLATFORMS

Although there are arguments against electing local prosecutors, which I address below, in most jurisdictions in the United States, voters choose their

-V4KW] (Nov. 8, 2022).

<sup>165</sup> *2020 General Election: Official Results*, HILLSBOROUGH CNTY., <https://enr.electionsfl.org/HIL/2772/Summary/> [<https://perma.cc/A8KP-GFUF>] (Nov. 13, 2020, 5:27 PM).

<sup>166</sup> *Who is Andrew Warren, Hillsborough State Attorney Suspended by DeSantis?*, 10 TAMPA BAY (Aug. 4, 2022, 7:01 PM), <https://www.wtsp.com/article/news/local/hillsborough-county/who-is-andrew-warren-florida-state-attorney-suspended/67-e6e3763e-8ad8-4597-a992-661d51c5bb76> [<https://perma.cc/R6PX-AL9A>].

<sup>167</sup> *See supra* Part II.

<sup>168</sup> Selene San Felice, *Florida Officials Speak Out After State Attorney Andrew Warren Suspended*, AXIOS TAMPA BAY (Aug. 5, 2022), <https://www.axios.com/local/tampa-bay/2022/08/05/florida-andrew-warren-response> [<https://perma.cc/ZP6N-2PU6>].

<sup>169</sup> *Id.*

<sup>170</sup> Complaint at 5–6, *Warren v. DeSantis*, No. 4:22-cv-302-RH-MAF, 2023 WL 345802 (N.D. Fla. Aug. 17, 2022) (No. 22CV00302).

prosecutors.<sup>171</sup> Furthermore, the broad discretion of these officeholders positions them well to actually represent the policy preferences of their constituents. While the progressive prosecutor movement is a relatively new phenomenon, I argue that more prosecutors across the political spectrum should run with a clear policy platform to give their voters a meaningful choice in this elected position.

Electing prosecutors is not necessarily a good thing. Scholars are skeptical that elections serve as a meaningful check on the broad powers of prosecutors because they fail to inform the public of the prosecutor's policies and practices, and they fail to inform prosecutors of the public's priorities.<sup>172</sup> One of the primary reasons for shallow voter feedback vis-à-vis prosecutors is that incumbents rarely face challengers, and even when they do, they rarely lose.<sup>173</sup> During the election cycle from 2014 through 2016, incumbents seeking reelection faced a challenger of any sort in only 25 percent of elections.<sup>174</sup> Even when there was no incumbent, almost half of open seat elections had only one option.<sup>175</sup> This factor, combined with the difficulty in challenging an incumbent from within a department, results in 95 percent of incumbents seeking reelection ultimately prevailing.<sup>176</sup>

The incumbency problem is solved when more prosecutor races are contested because it forces incumbents to defend their record, or at least offers an alternative policy platform. Seeing that there is a public appetite for change in the system, local advocacy groups and nationwide donors have begun contesting and winning in jurisdictions, including the deep south as well as large cities.<sup>177</sup> Absent an engaged electorate, many prosecutors run on bland, generalized campaigns of pursuing justice, punishing crimes, and aiding victims.<sup>178</sup> Further, while the number of races that are contested remains low, races in large and populous jurisdictions are much more likely to feature a genuine choice of candidates.<sup>179</sup> Because over half of the United States' population lives in only 147 prosecutor districts, there is great potential to impact

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

<sup>172</sup> Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 599–600 (2014).

<sup>173</sup> *Id.* at 600.

<sup>174</sup> HESSICK, *supra* note 12, at 6.

<sup>175</sup> *Id.*

<sup>176</sup> Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1103–04 (2017).

<sup>177</sup> See BAZELON, *supra* note 10, at 79–81.

<sup>178</sup> See, e.g., *Meet Paul Tucker*, PAUL TUCKER FOR ESSEX COUNTY DISTRICT ATTORNEY, <https://www.paultucker.org/about> [<https://perma.cc/9HSG-QPDB>] (last visited Sept. 23, 2023); see also *Experience and Urgency for Safer, More Supported Communities*, LEESA MANION FOR PROSECUTOR, <https://leesamanion.com/> [<https://perma.cc/GRN2-UUKC>] (last visited Sept. 23, 2023); *Meet Tim*, TIM CRUZ, <https://www.datimcruz.com/meet> [<https://perma.cc/63QB-HYG9>] (last visited Sept. 23, 2023).

<sup>179</sup> HESSICK, *supra* note 12, at 5.

a broad swath of the criminal justice system in relatively few targeted areas.<sup>180</sup> Bazelon found, in 2019, that despite electoral setbacks, around 12 percent of Americans lived in a jurisdiction with a prosecutor that she considered to be a reformer.<sup>181</sup>

The other concern with prosecutorial elections is that they make the office susceptible to the same venal political conflicts as other partisan positions.<sup>182</sup> Reflecting the politics of the time, researchers have found that from 1986 to 2006, during the steepest period of increasing incarceration, prosecutors imposed more and longer prison terms during election years.<sup>183</sup> While public opinion retreated from tough-on-crime sentiments in the early 2000s, this effect began to wane, indicating at least some electoral responsiveness from prosecutors.<sup>184</sup>

Other studies have found that, at least for elected legislators, moderate or reform stances on criminal justice do not result in negative elector consequences.<sup>185</sup> For prosecutors in particular, another study found that when presented with a hypothetical low-level offense, participants were more likely to support lenient prosecutors in elections, regardless of the prosecutor's partisan alignment.<sup>186</sup> Despite backlash in some areas, the continued success of reform prosecutors appears to show that the public is expressing this preference in elections where prosecutors are giving them such a choice.<sup>187</sup>

Access to abortion remains a popular issue. The recent elections show that it is also an electorally motivating issue.<sup>188</sup> When given a choice that either directly or indirectly invokes the right to abortion access, voters have chosen more access.<sup>189</sup> With the uncertainty around abortion becoming such a salient issue following the overturning of *Roe v. Wade*, the American people deserve to know how their elected prosecutors will prioritize enforcing changes in abortion law.

<sup>180</sup> *Id.*

<sup>181</sup> BAZELON, *supra* note 10, at 290.

<sup>182</sup> See Carissa Byrne Hessick & Nathan Pinnell, *Special Interests in Prosecutor Elections*, 19 OHIO ST. J. CRIM. L. 39, 39, 46–47 (2021); see also Ellis *supra* note 59, at 1565–66 (noting “it was not long before party politics began to influence criminal prosecutions”).

<sup>183</sup> See Chika O. Okafor, *Prosecutor Politics: The Impact of Election Cycles on Criminal Sentencing in the Era of Rising Incarceration 2* (Harvard Univ. Working Paper), <https://scholar.harvard.edu/files/okafor/files/prosecutorpolitics.pdf> [<https://perma.cc/A9H2-9STJ>].

<sup>184</sup> *Id.* at 39–42.

<sup>185</sup> See, e.g., Steven A. Krieger, *Do “Tough On Crime” Politicians Win More Elections? An Empirical Analysis of California State Legislators from 1992 to 2000*, 45 CREIGHTON L. REV. 131, 170–71 (2011).

<sup>186</sup> Michael J. Nelson & Taran Samarth, *Judging Prosecutors: Public Support for Prosecutorial Discretion*, 9 RSCH. & POL. 1, 5 (2022).

<sup>187</sup> See BAZELON, *supra* note 10, at 290.

<sup>188</sup> *Supra* Part IV.

<sup>189</sup> *Supra* Part IV.

Candidates for prosecutor offices should make clear policy statements on criminal issues that are important to voters. If most jurisdictions in the United States are to elect their prosecutors in contrast to the rest of the world,<sup>190</sup> then voters should have a clear choice of candidate values when casting their votes. Abortion is one of these key issues. Declining abortion prosecutions is one of several opportunities identified by the American Civil Liberties Union (ACLU) in their recruiting materials encouraging attorneys to run for prosecutor positions.<sup>191</sup> Similarly, voters have the opportunity to know whether their elected prosecutor will use the resources of its office to investigate and prosecute cases of abortion.

Andrew Warren, in Hillsborough County, Florida, exemplifies this dynamic. Voters elected Warren first in 2016, after he ran as a candidate of change and as a progressive reformer, ousting a longstanding incumbent along the way.<sup>192</sup> Although his initial electoral victory was narrow, he won reelection in 2020 much more handily, reflecting some voter affirmation after he had the chance to implement new policies.<sup>193</sup> When Governor Ron DeSantis removed Warren from office and installed an unelected interim prosecutor, he denied the voters of Hillsborough County their expressed electoral preference. As noted, one of the rationales underlying the switch to elected prosecutors in many states was to diminish the power of state governors and allow local jurisdictions to choose head prosecutors who were more in line with local values.<sup>194</sup>

Although Ron DeSantis had just comfortably won reelection himself, a governor stands for a broader set of policies than a local prosecutor. For example, the governor as chief executive has broad authority to impact schools and infrastructure as well as taxes and administrative agencies.<sup>195</sup> The local prosecutor, meanwhile, only has authority to enforce existing criminal laws within their local jurisdiction.<sup>196</sup> So long as voters choose their prosecutor, it is reasonable to expect candidates to give them a choice by announcing what

<sup>190</sup> See *supra* Part II.

<sup>191</sup> *Why Run for Locally Elected Prosecutor?*, ACLU (2019), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_prosecutor\\_two\\_pager.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_prosecutor_two_pager.pdf) [<https://perma.cc/4HM6-CD C4>].

<sup>192</sup> Dan Sullivan, *Andrew Warren Narrowly Defeats Mark Ober in Race for Hillsborough State Attorney*, TAMPA BAY TIMES (Nov. 8, 2016), <https://www.tampabay.com/news/politics/stateroundup/hillsborough-state-attorney-race-too-close-to-call-ober-slightly-trails/2302065/> [<https://perma.cc/5QC9-U4RE>].

<sup>193</sup> See *2020 General Election: Official Results*, HILLSBOROUGH CNTY., <https://enr.electionsfl.org/HIL/2772/Summary/> [<https://perma.cc/89MG-KF4R>] (Nov. 13, 2020, 5:27 PM).

<sup>194</sup> *Supra* Part IV.

<sup>195</sup> See *Governors: Power and Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors/powers-and-authority/> [<https://perma.cc/2YJV-69EN>] (last visited Sept. 23, 2023).

<sup>196</sup> *About FJP: Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> [<https://perma.cc/TNX7-36DB>] (last visited Sept. 23, 2023).

criminal enforcement they would prioritize and what they would choose to ignore. If an individual voter in Hillsborough County wishes to see a criminal justice policy preference reflected in their vote, they will be much more successful in carefully selecting their choice for state attorney than for governor.

As noted above, the more salient abortion was in a given election, the more profound the voter preference for preserving access to abortions. It is very likely that many Hillsborough County voters supported Andrew Warren's reform policies as state's attorney while also supporting Ron DeSantis for governor for any number of other policies that fall under the governor's portfolio.<sup>197</sup> Furthermore, DeSantis deliberately chose not to take an aggressive stance on abortion, which may be a factor in his outperformance of other Republican politicians in 2022.<sup>198</sup>

Having a public office that stands for such a narrow segment of public policy can also inform other elected officials of the priorities of their constituents. As seen in the case of marijuana legalization, elected prosecutors acted consistently with growing public sentiment that excessive criminal sanctions for marijuana possession were harming the community. They turned a policy of discretion and moderation into electoral success, while the national zeitgeist for marijuana reform continues to move toward legalization.<sup>199</sup> The ACLU leans heavily on the popularity of reform candidates while noting, "[e]lected prosecutors' opinions are also enormously influential to lawmakers, and their voice can make or break proposed criminal justice reforms."<sup>200</sup>

Like the criticisms of the reformist prosecutor movement generally, there are some critics who worry about prosecutors wading too far into the political realm. As already described, many legislators and others chafe at the idea of the "rogue prosecutor" nullifying duly passed laws. In addition, prosecutors, like other elected officials, run campaigns that require funding and attention to disseminate their message.<sup>201</sup> Whether it is courting endorsements or accepting donations from special interest groups, elected prosecutors have a

<sup>197</sup> *Compare 2020 General Election: Official Results*, *supra* note 193 (showing that Andrew Warren won his race for State Attorney by more than six points in 2020), *with 2022 General Election Official Results*, HILLSBOROUGH CNTY., <https://enr.electionsfl.org/HIL/Summary/3311/> [<https://perma.cc/8Y4T-5YRB>] (Nov. 18, 2022, 5:14 PM) (showing that Ron DeSantis won the 2022 race for governor by more than nine points in Hillsborough County).

<sup>198</sup> See Maggie Haberman et al., *A Culture Warrior Goes Quiet: DeSantis Dodges Questions on Abortion Plans*, N.Y. TIMES (July 12, 2022), <https://www.nytimes.com/2022/07/12/us/politics/desantis-florida-abortion.html> [<https://perma.cc/6Z7V-D42P>].

<sup>199</sup> See Press Release, Joseph R. Biden, *supra* note 38; see also Natalie Fertig et al., *Nearly Half of Americans to Reside in States Where Marijuana Is Legal*, POLITICO (Nov. 9, 2022, 3:09 PM), <https://www.politico.com/news/2022/11/09/half-americans-state-marijuana-legal-00065987> [<https://perma.cc/XU8T-CKPP>].

<sup>200</sup> *Why Run for Elected Prosecutor?*, *supra* note 191 (citing surveys showing 89 percent support for ending mass incarceration, 77 percent support for reducing racial bias, and 79 percent support for holding police accountable).

<sup>201</sup> See, e.g., Blakinger, *supra* note 50.

unique role that raises concerns not present in other kinds of elections.<sup>202</sup> In particular, real estate interests, sections of the legal community, political organizations, the bail bond industry, and law enforcement have motivation to favor either access to an incumbent prosecutor or preferred prosecutorial policies.<sup>203</sup> For example, there is concern that contributions from police unions would make a prosecutor more cautious to bring charges of police misconduct or that defense attorneys who make large donations can secure more favorable outcomes for their clients.<sup>204</sup> All of these groups make significant contributions to prosecutorial campaigns with politically motivated groups spending more in close elections and access-oriented groups spending more in races with more certainty.<sup>205</sup>

Other criticisms of progressive or reformist prosecutors come from the political left. The focus on electing progressive prosecutors misses the point for some reformers who are not particularly concerned with correcting what others might deem an unfair or overly punitive system.<sup>206</sup> Rather than devoting resources to a different kind of prosecutor who must still work within the existing system and all its inherent resistance to change, these activists argue that those resources and energy will be more impactful if they are put towards reforming the societal ills that lead to harm and avoiding the intervention of the criminal legal system.<sup>207</sup> They argue that the increases to already-bloated prosecutor office budgets that diversion programs and other reforms require would be better spent on programs that do not rely on the existing carceral system.<sup>208</sup>

Although there is some validity to these concerns, the fact that we have elected prosecutors demands that there be at least this minimum level of political posturing. Candidates must run a campaign with a clear platform and articulated policy positions to give their voters a meaningful choice. If there are not multiple candidates with differing messages, then jurisdictions might as well revert to a system where prosecutors are appointed and are answerable to a governor or oversight board rather than the voters.

Clearly articulated policy priorities give voters a transparent choice when they exercise their power to elect their local prosecutor. While some prosecutors avoid making general enforcement policies public to avoid the

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<sup>202</sup> Hessick & Pinnell, *supra* note 182, at 48–50.

<sup>203</sup> *Id.* at 50–56.

<sup>204</sup> *Id.* at 53, 57.

<sup>205</sup> *Id.* at 63. Access-oriented donors are “aimed at securing the time and influence of politicians in the creation of policy” as opposed to expressive donors whose contributions are an expression of their preferred candidate, party, or policy. *Id.* at 44–45.

<sup>206</sup> Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 HARBINGER 130, 132 (2022).

<sup>207</sup> *Id.* at 161–62.

<sup>208</sup> *Id.* at 165–66.

increased scrutiny from the public and special interests,<sup>209</sup> this scrutiny is exactly what voters should be performing when choosing a candidate. If each state attorney should merely “prosecute crimes as defined in [state] law, not . . . pick and choose which laws to enforce . . .,” then there really is no reason each locality should be bothered to elect their state attorney.<sup>210</sup>

Andrew Warren, for his part, points out that voters knew exactly what they were getting when they chose him as their prosecutor. In an interview with a local news station shortly after his removal he said, “I was elected on a platform of building a 21st-century criminal justice system. One that’s tough on the offenders we need to be tough on, one that believes in prevention and rehabilitation and reducing recidivism and fighting for victims. That’s exactly what we’ve done.”<sup>211</sup> Making good on the promise of America’s unique tradition of electing local prosecutors requires giving voters a clear choice when they cast their ballots. By making affirmative policy statements and running on a platform of reform and prosecutorial priorities, Warren gave Hillsborough County such a choice.

Other candidates for prosecutorial positions should follow Warren’s example and let voters know exactly what they will be choosing when they vote for prosecutor. Change and reform through electing a different kind of prosecutor requires that voters have a clear choice, meaning that elections are contested and candidates articulate their priorities. As the ACLU’s director of the Campaign for Smart Justice stated, “[p]rosecutors are the most powerful, unaccountable, and least transparent actors in the criminal justice system. This new effort seeks to not only rid our justice system of bad actors . . . but also to elevate and empower a new generation of prosecutors . . .”<sup>212</sup> He added, “the nation needs local prosecutors who will stand up to unjust federal initiatives and build a smarter and fairer criminal justice system.”<sup>213</sup>

#### CONCLUSION

Although the fall of *Roe v. Wade* means that the Federal Constitution no longer guarantees a right to an abortion, American voters have largely expressed a preference for abortion access. Prosecutors have broad authority to use their discretion and decide which crimes to prioritize prosecuting and which to largely ignore. Thanks to the uniquely American tradition of

<sup>209</sup> Hessick & Pinnell, *supra* note 182, at 49.

<sup>210</sup> Press Release, Governor Ron DeSantis, *supra* note 1.

<sup>211</sup> Mary O’Connell, *Andrew Warren Sits Down to Share His Side Following Suspension as State Attorney*, ABC ACTION NEWS WFTS TAMPA BAY, <https://www.abcactionnews.com/decodedc/politics/andrew-warren-sits-down-to-share-his-side-following-suspension-as-state-attorney> [https://perma.cc/APA4-QREJ] (Aug. 9, 2022, 2:30 AM).

<sup>212</sup> *ACLU Launches New Initiative to Overhaul Prosecutorial Practices*, ACLU (Apr. 26, 2017, 10:00 AM), <https://www.aclu.org/press-releases/aclu-launches-new-initiative-overhaul-prosecutorial-practices> [https://perma.cc/AFD8-8U2M].

<sup>213</sup> *Id.*

electing local prosecutors, voters have the opportunity to express their preferences for or against prosecutorial priorities, such as criminalized abortion. This mechanism only works if prosecutorial elections are both contested and have candidates that express clear policy priorities to give voters a meaningful choice. Although prosecutor elections for many years were a menial exercise of affirming the continued presence of an incumbent, the recent wave of reform-oriented prosecutors and their success in ousting incumbents shows that there is an appetite for genuine choice in the electorate. Candidates should express their policy positions clearly, and voters should demand such expressions if they are not available to ensure that the American experiment of locally elected prosecutors is a meaningful one.

Hillsborough County voters knew exactly who they were getting when they reelected Andrew Warren. He ran two campaigns promising reform efforts, and after delivering with policy-based discretion informed by community engagement, his margin of victory only grew. Reflecting the preferences of his local voters, Warren signed onto a pledge that would create a presumption against prosecution in cases relating to abortion. This pledge reflects not only the preference of voters across the country, but the confusion around rapidly shifting abortion laws. Although Governor DeSantis's removal was a blatantly unconstitutional interruption to the local democratic process, it catapulted this issue into the mainstream and the potential for voter engagement through policy-based prosecutorial discretion.