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Eucalyptus Foundation Endowed Chair, University of California College of the Law, San Francisco (formerly UC Hastings College of the Law). Portions of this article were included in a paper prepared for a conference on "Presidential Administration and Political Polarization" at the George Mason University Scalia Law School's C. Boyden Gray Center for the Study of the Administrative State. I thank the Gray Center and the UC Law SF Academic Dean for generous support. For helpful comments on earlier drafts, I thank Jon Abel, Ming Hsu Chen, Keith Hand, Aaron Nielson, Dave Owen, Reuel Schiller, Jodi Short, and Chris Walker, as well as participants in the Gray Center conference, the Ohio State Law School faculty colloquium, a panel discussion on Prosecutorial Nonenforcement hosted by the University of Wisconsin Law School State Democracy Research Initiative, and the Markelloquium criminal law workshop hosted by New York Law School. Justine Chang, Jillian Guernsey, Hannibal Huntley, and Rahil Maharaj provided superb research assistance; Vince Moyer and the UC Law SF library staff offered invaluable help chasing down sources; and the editors of the Georgia Law Review performed excellent editing and cite-checking. The author is solely responsible for the views expressed and for any mistakes

FAITHFUL EXECUTION IN THE FIFTY STATES

Zachary S. Price[*]

Amid heightened political conflict over criminal-justice policy, norms surrounding prosecutorial discretion have shifted rapidly. Under the prior mainstream approach, prosecutors exercised broad charging discretion, but generally did so tacitly and in case-by-case fashion out of deference to statutory law's primacy. Under an emerging alternative approach, associated for the moment with progressive politics, prosecutors categorically and transparently suspend enforcement of laws they consider unjust or unwise. The federal government under President Obama employed this theory in high-profile policies relating to marijuana crimes, as well as immigration and the Affordable Care Act. More recently, a number of self-described "progressive prosecutors" have employed the same theory at the local level to nullify state laws forbidding theft, shoplifting, drug possession, prostitution, and other crimes on social-justice grounds.

Although these developments have provoked heated public debate, most discussion to date has presumed incorrectly that a generalized model of prosecutorial discretion applies nationwide. In fact, far from prescribing a common model of prosecutorial authority, the laws of the federal government and

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the fifty states vary widely with respect to the degree of enforcement discretion they presume and the degree of autonomy they afford to local prosecutors.

Some states forbid categorical nonenforcement altogether, while others afford near total autonomy to locally elected prosecutors. Most states fall somewhere in between. These varied laws—and not generalized abstractions about the rule of law, criminal justice policy, the proper prosecutorial function, or even the proper degree of local policy-making autonomy—should govern whether categorical nonenforcement is lawful in a particular jurisdiction. Refocusing debate on these varied state arrangements would not only give proper effect to governing positive laws, but also lower the stakes in each particular controversy. At the same time, it might help build greater capacity to enforce state constitutional law in other areas, helping to stabilize state government amid increasingly turbulent politics.

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I. INTRODUCTION

Prosecutorial discretion has become a political battleground. For decades, if not longer, an uneasy equilibrium prevailed: though exercising enormous discretion in practice and even recognizing an obligation to forego charges in some cases in "the interests of justice,"[1] prosecutors nonetheless presented themselves as humble servants of the public will reflected in legislation. Within the space of roughly ten years, this model has eroded, giving way to a different model, associated for the moment with progressive politics and criminal-justice reform, in which prosecutors actively reshape the operative law in their jurisdictions by openly suspending enforcement of disfavored statutes. Employed at the federal level in high-profile policies relating to marijuana regulation, as well as immigration and the Affordable Care Act, this model has since become one hallmark of the self-described "progressive prosecutors" who have won office in local jurisdictions across the country. Among other reforms, such prosecutors have announced policies suspending enforcement of laws forbidding drug possession, petty theft, shoplifting, prostitution, and other crimes.

This approach to prosecutorial authority, which I will call "categorical nonenforcement," has sparked a heated, nationwide controversy, with some celebrating the shift and others decrying it as an invitation to lawlessness.[2] Yet this debate has been remarkably disconnected from the actual law governing the question. In fact, far from prescribing a common model of prosecutorial authority, as much commentary has presumed,[3] the

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[1] STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION AND DEF. FUNCTION § 3-3.9(b) Commentary (AM. BAR ASS'N. 1993).

[2] *See, e.g.*, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 296 (2019) ("The movement to elect a new kind of prosecutor is the most promising means of reform I see on the political landscape."); CHARLES D. STIMSON & ZACK SMITH, HERITAGE FOUND., "PROGRESSIVE" PROSECUTORS SABOTAGE THE RULE OF LAW, RAISE CRIME RATES, AND IGNORE VICTIMS 2 (2020) ("The so-called progressive prosecutor movement—or, as we refer to it, the 'rogue prosecutor' movement—upends the traditional and customary role of the prosecutor in American society with short-term and potentially long-term disastrous consequences on a number of levels.").

[3] *See, e.g.*, W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 244–46, 255 (2021) (defending categorical nonenforcement by elected prosecutors who disclosed their plans); Thomas Hogan, *Prosecutorial Indiscretion*, CITY J. (June 22, 2021), https://www.city-journal.org/progressive-prosecutors-abuse-prosecutorial-discretion (arguing

laws of the federal government and the fifty states vary widely with respect to the degree of enforcement discretion they presume and the degree of autonomy they afford to local prosecutors.

At the federal level, although enforcement discretion is central to federal criminal law and other areas of regulation, separation-of-powers provisions including the President's constitutional duty to "take Care that the Laws be faithfully executed"[4] place important limits on prosecutorial nonenforcement.[5] States, too, nearly

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that prosecutors are generally obligated to exercise discretion case by case and not "negate the legislative process by simply declaring that an entire class of crimes will go unpunished"); Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 712 (2020) (seeking to "craft" a generalized "normative vision of the prosecutor's role"); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 608–09 (2020) (critiquing general separation-of-powers objections to reform prosecutors); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 806 (2020) (advancing a general theory of the prosecutorial role based on fiduciary duty); STIMSON & SMITH, *supra* note 2, at 29 (faulting progressive prosecutors for categorical nonenforcement); BAZELON, *supra* note 2, at 297–99 (offering a positive account of the progressive prosecution movement); William H. Simon, *The Organization of Prosecutorial Discretion*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 175, 175 (Maximo Langer & David Alan Sklansky, eds., 2017) (advocating a new understanding of prosecutorial discretion based on "post-bureaucratic or experimentalist" models of "judgment and organization"); Andrew McCarthy, *The Progressive Prosecutor Project*, COMMENT. (Mar. 2020), https://www.commentary.org/articles/andrew-mccarthy/the-progressive-prosecutor-project/ ("If the weighing of the merits of prosecution based on the facts of individual cases morphs into a programmatic decision not to prosecute various categories of crime, it becomes an executive veto of the community's right to define and punish penal offenses through its legislative representatives."). For further discussion of perspectives on categorical nonenforcement, see *infra* Part II.

[4] U.S. CONST. art. II, § 3.

[5] For my own defense of this conclusion, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 769 (2014) [hereinafter Price, *Enforcement Discretion*]. *See also, e.g.*, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1757 (2016) (faulting an executive branch legal opinion for "effectively creat[ing] a presumption of good faith even with respect to categorical exercises of enforcement discretion—i.e., those exercises of enforcement discretion that are most likely to conflict with a good-faith interpretation of the underlying statute"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85 (2013) ("[T]he deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty."). For some contrary perspectives, see, for example, ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 192–93 (2020) (arguing that in immigration law, if not also in other areas, the President does not act as Congress's faithful agent but instead "Congress and the Executive act as co-principals"); Peter M. Shane,

uniformly impose obligations of faithful execution on their governors, suggesting that state law likewise forbids categorical nonenforcement of state laws. Yet nearly every state also provides for locally elected prosecutors, thus creating at least the possibility of varied prosecutorial approaches in keeping with local preferences, and state laws vary widely in the degree of authority and autonomy they afford to such prosecutors. Whether categorical nonenforcement is permissible in any given jurisdiction should turn on these features of state positive law and not generalized abstractions or federally-derived assumptions about separation of powers.

In fact, the fifty states can be placed along a spectrum with respect to their relative hostility to categorical nonenforcement by local prosecutors. At one extreme, Massachusetts's constitution

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Faithful Nonexecution, 29 CORNELL J.L. & PUB. POL'Y 405, 407 (2019) (arguing that "virtually all domestic peacetime law enforcement discretion that the executive branch possesses is rooted in statutes, not the Constitution"); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 494 (2017) (proposing that "the dividing line between traditional administrative enforcement proceedings and those that can potentially result in a deprivation of physical liberty can offer a workable and well-founded constitutional limiting principle—with categorical prosecutorial discretion power being permissible only in the latter context"); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1035 (2013) (arguing that presidential control of agency enforcement efforts should "be expanded and institutionalized"). For other general analysis of the question with respect to federal separation of powers, see, for example, Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1549 (2018) (suggesting that "the choice between discretionary nonenforcement, which courts cannot touch, and categorical nonenforcement, which they can, is not binary"); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1519–20 (2018) (observing that although "[s]ome nonenforcement . . . is often beneficial and, in any event, inevitable," it also "can raise troubling questions"); Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1137 (2016) (discussing oversight challenges with respect to agency enforcement); Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 74 (2015) (arguing that "when the IRS is inevitably going to be engaging in tax law nonenforcement, categorical nonenforcement may actually help legitimate the nonenforcement"); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1198 (2014) (discussing the problem that "modern presidents can usurp authority by both action and inaction"); Michael Sant' Ambrogio, *The Extra-legislative Veto*, 102 GEO. L.J. 351, 354 (2014) (discussing "decisions not to enforce the law, decisions not to implement the law, and decisions not to defend the law" as examples of an "extra-legislative veto [that] comprises a variety of practices used by presidents to check or weaken statutory mandates outside the legislative process").

forbids "suspending . . . the execution of the laws;"[6] California's constitution obligates the state Attorney General to "to see that the laws of the State are uniformly and adequately enforced;"[7] and North Dakota's Supreme Court has held that local prosecutors "may not effectively repeal a law by failing to prosecute a class of offenses."[8] Laws in these states and others like them are at odds with presuming any categorical nonenforcement power at all, let alone one vested in locally elected officials. By contrast, at the other end of the spectrum, both heavily Republican Mississippi[9] and heavily Democratic Illinois[10] limit centralized oversight of local prosecutors in ways that effectively guarantee broad local nonenforcement power. Mississippi, in particular, allows state-level officials only to assist in local prosecutions; under its law, "[i]ntervention of the attorney general into the independent discretion of a local district attorney regarding whether or not to prosecute a criminal case constitutes an impermissible diminution of the statutory power of the district attorney."[11] As a practical matter, such autonomy makes local categorical nonenforcement possible, even if it does not specifically authorize it.

In between these extremes are a variety of intermediate choices. Some states grant state-level officials broad authority to override local prosecutorial choices but impose no duty to exercise this authority in any particular circumstances—an arrangement that effectively leaves categorical nonenforcement to a political tug-of-war between local and state-level officials.[12] Others allow state-level officials to supersede local prosecutors, but only in limited

[6] MASS. CONST. pt. I, art. XX.

[7] CAL. CONST. art. V, § 13.

[8] Olsen v. Koppy, 593 N.W.2d 762, 767 (N.D. 1999).

[9] *See* MISS. CODE ANN. § 25-31-11(1) ("It shall be the duty of the district attorney to represent the state in all matters coming before the grand juries of the counties within his district and to appear in the circuit courts and prosecute for the state in his district all criminal prosecutions and all civil cases in which the state or any county within his district may be interested.").

[10] *See* 55 ILL. COMP. STAT. ANN. 5/3-9005(a)(1) ("The duty of each State's Attorney shall be . . . [t]o commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for the county, in which the people of the State or county may be concerned."); Cnty. of Cook *ex rel.* Rifkin v. Bear Stearns & Co., 831 N.E.2d 563, 570 (Ill. 2005) (rejecting arguments that the legislature could "reduce a State's Attorney's constitutionally derived power to direct the legal affairs of the county").

[11] Williams v. State, 184 So. 3d 908, 913 (Miss. 2014).

[12] *See infra* section IV.D.

circumstances.[13] Such institutional arrangements afford local prosecutors greater freedom to adopt categorical nonenforcement policies, but only within certain limits.

This Article documents this variation in state laws, offering a rough typology of different approaches to faithful execution of criminal laws in the fifty states. It argues that these varied positive laws—and, again, not generalized abstractions about the rule of law, criminal justice policy, the proper prosecutorial function, or even the proper degree of local policy-making autonomy, as most commentary to date has presumed[14]—should govern whether categorical nonenforcement violates some duty of faithful execution on the part of local prosecutors or state officials. Just as the proper extent of federal prosecutorial discretion presents a question of federal separation of powers, so, too, does the extent of local prosecutorial discretion present a question of state and local positive law. Going forward, debates over categorical nonenforcement's legality should focus on the particular laws governing the question in a particular jurisdiction, without presuming any uniform nationwide understanding of faithful execution.

Attending to governing state laws and constitutional provisions in this way could help resolve heated current debates over prosecutorial authority in a more grounded and dispassionate matter. Doing so, moreover, could help forestall unintended consequences of current prosecutorial approaches. Though associated for the moment with progressive politics and criminal-justice reform, broad theories of prosecutorial discretion can enable law-enforcement officials to pursue any number of policy aims. Theories employed today to relax prohibitions on marijuana, prostitution, and petty theft can be used tomorrow to eliminate gun controls, voter protections, or public-health requirements, not to mention federal pollution limits, consumer protections, or banking regulations. Already, one conservative local prosecutor announced that he would not pursue domestic-violence offenses involving same-sex couples.[15] Others have disclaimed enforcement of gun-

[13] *See infra* section IV.E.

[14] *See supra* note 3; *infra* section II.D.

[15] *See* Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823, 832–33 (2020) ("[O]ne Tennessee prosecutor announced to participants at

control laws,[16] and numerous local officials indicated that they would not enforce mask mandates and other public-health measures aimed at curbing the recent coronavirus pandemic.[17]

In any given state, such local policies should stand or fall together, but by the same token upholding categorical nonenforcement in one jurisdiction need not mean blessing it in others, much less with respect to federal law enforcement. On the contrary, the United States's federalist constitutional structure should enable variation not only with respect to particular policies and approaches to criminal justice, but also with respect to institutional arrangements and understandings of prosecutorial discretion. Attending to the varied laws that actually govern this question could help lower the stakes in any particular controversy over prosecutorial policy.

Although this article's contribution is primarily descriptive—it documents variations in state positive law with the aim of giving these varied laws greater effect—it also contributes to an important and growing literature highlighting variations in state law and their relevance to debates over federal law and appropriate nationwide institutional understandings.[18] Prosecutorial discretion

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a Bible conference in 2018 that he would not enforce state laws against domestic partner violence in cases involving same-sex couples.").

[16] *See, e.g.*, Bethany Blankley, *Report: 61 Percent of U.S. Counties Now "Second Amendment Sanctuaries,"* HIGHLAND CNTY. PRESS (July 5, 2021), https://highlandcountypress.com/Content/In-The-News/In-The-News/Article/Report-61-percent-of-U-S-counties-now-Second-Amendment-sanctuaries-/2/20/69827 ("The majority of all U.S. counties have been designated as Second Amendment sanctuaries."); David Gutman, *Washington Voters Said Yes to Tough New Gun Law; At Least 13 County Sheriffs Say No to Enforcing It*, SEATTLE TIMES (Feb. 10, 2019), https://www.seattletimes.com/seattle-news/politics/voters-said-yes-to-tough-new-gun-law-at-least-12-county-sheriffs-say-they-wont-enforce-it/ ("In at least 13 mostly rural counties across Washington, from the Pacific Coast to the eastern wheat fields, county sheriffs have publicly pledged not to enforce the new law, known as Initiative 1639, citing their personal opposition to it.").

[17] *See, e.g.*, Teo Armus, *"Don't Be a Sheep": Sheriffs Rebel Against New Statewide Mask Requirements*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/nation/2020/06/26/sheriffs-mask-covid/ ("Hours after Gov. Jay Inslee (D) ordered Washington state residents to cover their faces in public, a Republican sheriff in a rural swath of the state suggested they should be doing no such thing.").

[18] *See, e.g.*, Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385, 386 [hereinafter Seifter *Extra-Judicial Capacity*] (discussing weak extra-judicial enforcement of state constitutional requirements); JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 8 (2021) (discussing the variation in

is hardly the only area characterized by high-stakes political conflict and weak attention to governing state positive law; other inter-branch conflicts at the state level have involved similarly abstract debates and extra-legal political maneuvering.[19] For that very reason, however, encouraging a more grounded analysis in this important area could carry the broader benefit of encouraging greater attention to state positive law in other areas.

As a preliminary point regarding scope, I limit my survey of the fifty states' laws in this Article to statutes and constitutional provisions governing local prosecutorial authority and responsibility.[20] Though aimed partly at giving the project manageable scope, this limitation also reflects the particular importance and complexity of questions surrounding local prosecutorial discretion. Local election of prosecutors distinguishes them from state-level civil or administrative officials, not to mention federal prosecutors and executive officers. Nevertheless, norms surrounding local prosecutorial discretion have tended to shape understandings of enforcement discretion at other levels of

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state constitutions' structural provisions); Daniel E. Walters, *Decoding Nondelegation after* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417, 421 (2022) (analyzing state court decisions limiting legislative delegation); Joseph Postell & Randolph J. May, *The Myth of the State Nondelegation Doctrines*, 74 ADMIN. L. REV. 263, 266 (2022) (addressing the likely impact of a strengthened federal non-delegation doctrine by "exploring how the nondelegation doctrine functions in the states and what implications might reasonably be drawn from examination of the state cases"); Daniel Ortner, *The End of Deference: How States (and Territories and Tribes) Are Leading a (Sometimes Quiet) Revolution Against Administrative Deference Doctrines* (Ctr. for the Study of the Admin. State, Working Paper No. 21-30, 2020) (surveying state deference doctrines); Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 233 (2020) (discussing the "federalism dimensions" of debates over qualified immunity); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 384 (2017) (discussing historical decisions by state courts regarding legislative delegation). For a survey of state laws regarding local prosecutors conducted nearly a century ago, see generally Earl H. De Long & Newman F. Baker, *The Prosecuting Attorney: Provisions of Law Organizing the Office*, 23 J. CRIM. L. & CRIMINOLOGY 926 (1933).

[19] *See* Seifter, *Extra-Judicial Capacity*, *supra* note 18, at 389 (providing examples); *see also* Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1217 (2019) [hereinafter Seifter, *Judging Power Plays*] ("[I]f the national branches are playing constitutional hardball, the states are playing hand grenades.").

[20] I also focus on prosecutors with full criminal prosecutorial authority, rather than the municipal prosecutors that some states allow to pursue minor offenses. *See* Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391, 414 (2022) (discussing municipal prosecutors).

government too.[21] Highlighting the variation in standards of faithful execution for local prosecutors should complicate such inferences, opening the door to a more varied understanding of enforcement responsibility in other settings, even if I save for another day a detailed look at state-level civil and administrative enforcement.[22]

As a further preliminary caveat, I do not mean to take any position here on broader policy debates surrounding criminal justice. The progressive-prosecutor movement has had varied features in different jurisdictions, including, among other things, increased attention to police abuses, retrospective review of convictions, and efforts to reduce racial biases and inequities in criminal justice. I focus here only on one technique employed by some (but by no means all) self-described progressive prosecutors: the overt and deliberate nonenforcement of particular laws with respect to entire categories of offenders. American criminal justice has many problems, including excessive scope and severity, but questions about prosecutorial discretion, again, arise across different policy domains with differing political alignments. The choice to pursue criminal-justice reform through nonenforcement thus risks normalizing a governing technique that could easily justify quite different policy programs in the future. Furthermore, as just noted, understandings of prosecutorial power have shaped conceptions of executive authority even outside of criminal law. I explore questions of prosecutorial authority here with an interest in illuminating those broader questions.

The Article proceeds as follows. Part II offers a conceptual typology of different potential approaches to prosecutorial discretion. It also documents the sudden and unexpected rise of more categorical approaches and discusses the political shifts that generated this trend. Finally, it notes the need for dispassionate analysis given prosecutorial discretion's potential use to achieve a range of policy goals. Part III then addresses ways in which state arrangements differ systematically from federal examples that have

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[21] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) (deeming administrative nonenforcement decisions unreviewable based in part on an analogy to "the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch").

[22] For a recent survey of state laws regarding agency independence, see Miriam Seifter, *Understanding State Agency Independence*, 117 MICH. L. REV. 1537, 1551–60 (2019).

received greater scholarly attention. Although all fifty states follow some version of separation of powers, most differ from the federal government in two key respects: they have "unbundled" executive branches composed of multiple state-level officials and they also have locally elected prosecutors. These differences mean that neither federal examples nor theories of federal separation of powers apply readily to state-level debates. At the same time, these common features of state governance carry conflicting implications with respect to local prosecutorial nonenforcement authority. For that reason, generalized theories about such authority are flawed.

Part IV turns to a fifty-state survey. It groups states into six rough categories based on the degree of latitude they afford to local prosecutors to adopt categorical nonenforcement policies. Part V, finally, highlights both the practical importance of the jurisdiction-specific analysis I urge here, and the troubling implications for state-level constitutionalism reflected in the existing nationalized conversation over prosecutorial discretion. The Article closes with a brief conclusion summarizing the argument and urging a debate over this and other questions centered on positive law rather than generalized abstractions and policy aims.

II. MOUNTING CONTROVERSY OVER PROSECUTORIAL DISCRETION

Prosecutorial discretion is central to the operation of criminal justice at every level in the United States today. As scholars have long lamented, criminal codes in the United States tend to cover more conduct, and punish it more harshly, than true democratic preferences would likely support.[23] This overbreadth makes at least some degree of prosecutorial discretion inevitable: given resource

[23] *See, e.g.*, STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE xx (2012) ("One cannot assume that current laws are harsh because that is what the public really wants; these laws often result from a warped, dysfunctional political process."); DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 15–16 (2007) (discussing political factors that generate excessive criminal punishment); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005) ("[O]verbroad and unnecessary federal crimes . . . exist and persist, at least in part, because of weaknesses in the political process."); Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 169 (2003) (presenting evidence that "current American criminal codes are in serious trouble").

limitations and practical obstacles, enforcement officials could not possibly prosecute every offense to the fullest extent.[24]

Criminal law's overbreadth, moreover, may be self-reinforcing. Because legislatures anticipate that prosecutors will exercise discretion, they may enact overbroad laws, counting on prosecutors to limit enforcement to truly culpable cases.[25] Legislatures may even set penalties at deliberately elevated levels to facilitate the pervasive (though much criticized) practice of plea bargaining.[26] In other words, to give prosecutors leverage to obtain plea bargains, legislatures may deliberately set punishments high and enact multiple overlapping offenses.[27] To the extent laws impose a "trial penalty" in this fashion, the "sticker price" for proscribed conduct reflected in the letter of the law may diverge systematically from the "market price" desired by legislators and (hopefully) imposed in

[24] *See, e.g.*, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008) ("Resource constraints as well as prudence dictate the conclusion that the federal criminal law cannot be applied in its full rigor.").

[25] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) [hereinafter Stuntz, *Pathological Politics of Criminal Law*] ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long."); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 6 (2011) [hereinafter STUNTZ, COLLAPSE] (discussing how "American criminal law delegates power to the prosecutors who enforce it"); *see also, e.g.*, Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 634 (2005) (discussing the concern that "most legislatures no longer use their criminal law codification power to promote broad and useful change, but have become 'offense factories' churning out more and more narrow, unnecessary, and often counterproductive new offenses"). For my own prior discussion of these dynamics, see Zachary S. Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 911 (2004). For some doubts about the overbreadth of state criminal codes and the one-way politics of criminal law, see Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007); *see also* Darryl K. Brown, *Prosecutorial Discretion*, 6 OHIO ST. J. CRIM. L. 453, 461–63 (2009) [hereinafter Brown, *Prosecutorial Discretion*] (distinguishing between overcriminalization involving outdated laws as opposed to unduly severe penalties or redundant offenses and arguing that the second and third types create the most serious risks of prosecutorial abuse).

[26] For a comprehensive recent critique of plea bargaining, see CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

[27] *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1125–27 (2011) (discussing distortions in the plea-bargaining market); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2467 (2004) ("[T]here are many structural impediments that distort bargaining in various cases."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911 (1992) (discussing how the plea bargaining system "leads predictably to innocent defendants being offered (and taking) the same deals as guilty ones").

actual practice.[28] In short, in Kate Stith's apt phrase, "both prosecutorial and sentencing discretion are inevitable because of the broad reach of [criminal] proscriptions and the severity of authorized punishments."[29]

This legal structure is unattractive in important respects. Not only does it render more conduct illegal than true public preferences would support; it also may enable biased or arbitrary enforcement, as prosecutors or enforcement officials inevitably end up treating comparable cases differently. Nevertheless, the legal structure's implications for prosecutors' self-understanding are not obvious. Although the breadth of their discretion might suggest that enforcement is entirely optional, prosecutors are in principle executive officials: their job is to apply the law, not make it, which suggests they should subordinate their own discretion to affirmative enactments prescribing conduct rules for society. Balancing these competing imperatives—the inevitability and desirability of discretionary enforcement under current conditions, on the one hand, and the formal limitations on prosecutors' institutional role as executive officials, on the other—is the core normative challenge in evaluating the scope of prosecutorial discretion.

From that point of view, we might imagine a variety of different approaches to prosecutorial discretion—a variety of ways, in other words, of navigating the tension just described. After offering a conceptual account of these potential approaches in section A below, section B briefly responds to some generalized arguments that categorical nonenforcement is no different from more conventional forms of prosecutorial discretion. Section C then documents the sudden and unexpected emergence of broad theories of prosecutorial discretion at both the federal and state levels, and section D highlights the politics driving this trend and the resulting distortions it has produced in debates over categorical nonenforcement policies.

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[28] *Cf.* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 48 (2017) ("[C]rackdowns may depart from, and indeed confound, legislative expectations.").

[29] Stith, *supra* note 24, at 1423 (alteration in original); *see also* Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 499 (2020) ("In a world of expansive criminal law and limited resources, not every prosecutable case can or should be charged.").

A. A CONCEPTUAL ACCOUNT OF ENFORCEMENT DISCRETION

As a conceptual matter, we can identify a spectrum of potential approaches to prosecutorial enforcement. In effect, exercising nonenforcement discretion broadly or narrowly may strip force from underlying substantive conduct rules to a greater or lesser degree. Broader or narrower approaches to exercising discretion therefore entail greater or lesser degrees of legislative or prosecutorial primacy in determining on-the-ground conduct rules. Of course, prosecutors could also reshape the governing law by exercising discretion on entirely disreputable grounds; they might, for example, discriminate against one race or another, ignore crimes whose victims belong to a particular group, or allow political cronies and allies to commit crimes with impunity. But even holding aside such approaches (all of which would violate the constitutional requirement of equal protection of the laws), prosecutors with uncorrupt, public-regarding motives might still adopt a range of attitudes toward the laws they are charged with enforcing.

As represented below in Figure 1, the options along this spectrum include the following:

1. Comprehensive enforcement: Prosecutors might seek to fully enforce every substantive law by punishing every known violation to the maximum extent. Although in most jurisdictions this objective will be practically impossible, it could nonetheless constitute a normative ideal, and legislatures have purported to required it with respect to certain laws.[30]

2. Case-by-case nonenforcement: Prosecutors might recognize that full enforcement of every law in every case is impossible and inappropriate, but nonetheless limit themselves to declining enforcement in particular cases for case-specific reasons.

[30] *See, e.g.*, CAL. PENAL CODE § 836(c)(1) (West 2013) (requiring arrest whenever an officer has probable cause to believe someone is violating a domestic-violence restraining order); FLA. STAT. ANN. § 741.2901(2) (West 1991) (directing that "criminal prosecution shall be the favored method of enforcing compliance with injunctions for protection against domestic violence" and requiring that "[t]he state attorney in each circuit shall adopt a pro-prosecution policy for acts of domestic violence"); *cf.* 29 U.S.C. § 482(b) (requiring the Secretary of Labor to bring civil enforcement actions for certain legal violations).

3. Internal priorities: Prosecutors might go beyond such case-by-case nonenforcement by establishing internal guidelines about how recurrent types of cases should generally be treated within a particular office or jurisdiction. More concretely, prosecutors might establish an internal policy that certain offenses (jaywalking or low-level marijuana possession, for example) are low priorities for use of enforcement resources, while others (rape, murder, or human trafficking, for instance) are high priorities.

4. Announced priorities: Next up the chain, prosecutors might publicly disclose their internal priorities, while nonetheless making clear that the priorities are only that—priorities—and not ironclad guarantees about how particular cases will be handled.

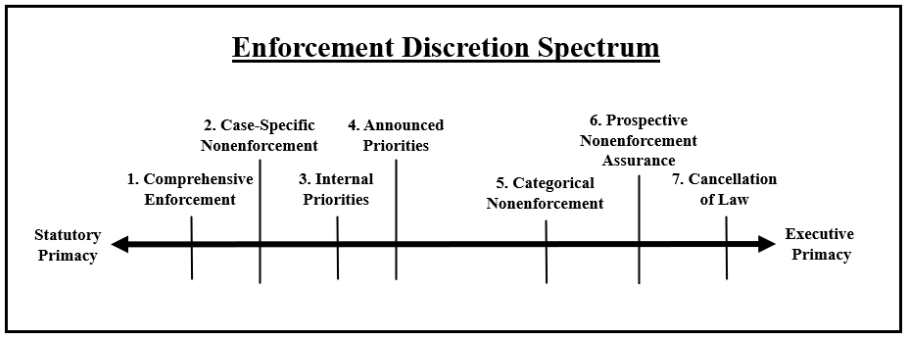
5. Categorical nonenforcement: Prosecutors might go still further by indicating not only that a particular crime is a low priority for enforcement, but also that it categorically will not be prosecuted (or at least will not be prosecuted outside of exceptional circumstances).

6. Prospective nonenforcement: Still further, prosecutors might effectively encourage or authorize illegal conduct by providing prospective assurances that those who engage in it will face no repercussions. This approach resembles categorical nonenforcement and overlaps with it, but might entail providing more determinate guarantees, either individually or across the board, that future conduct will be treated as if it were lawful.

7. Cancellation of legal obligations: Finally, prosecutors might presume authority not just to establish a policy or guarantee of nonenforcement, but also to declare proscribed conduct affirmatively lawful. Historically, the power to eliminate legal obligations through

executive action was known as the "suspending" or "dispensing" power, depending on whether it was exercised generally or only with respect to a particular party. English monarchs once held these powers, but they were generally repudiated in the Glorious Revolution of 1689 and ever since have been excluded from Anglo-American understandings of executive power.[31]

Figure 1



In defining prosecutors' roles and responsibilities, jurisdictions might choose to draw the line at different points along this spectrum.[32] As I have argued elsewhere, the U.S. Constitution is best understood to confer only case-specific discretion (option two) as a matter of default executive authority, though at least internal priority-setting (option three), if not also public announcement of those priorities (option four), is inevitable in areas like federal criminal law where the law's scope vastly exceeds the government's actual enforcement capacity.[33] Nevertheless, absent explicit

[31] *See, e.g.*, MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 115–17 (2020) (discussing historical exercise and repudiation of these powers); SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 93–94 (2015) (discussing the American constitutional tradition's rejection of executive suspending and dispensing powers).

[32] *Cf.* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1250–51 (2011) (assessing the validity of "prosecutorial nullification," meaning a deliberate choice not to press provable charges, by positing a "spectrum" of prosecutorial approaches from "full enforcement" to "complete discretion").

[33] Price, *Enforcement Discretion*, *supra* note 5, at 704–06.

statutory authorization, federal enforcement officials lack authority to categorically suspend enforcement of substantive laws, prospectively license violations, or eliminate legal obligations (options five to seven).[34] To the extent state and local prosecutors are executive officials subject to comparable duties of faithful execution, the same limitations should govern their conduct, yet particular states might choose instead to adopt a different understanding, or at least to locate authority over enforcement choices in different officers.[35]

For the moment, as reflected in Figure 1, the key point is simply that moving down this spectrum of possibilities brings enforcement policy into greater and greater conflict with substantive laws. To greater and greater degrees, these different understandings make prosecutorial decisions, rather than legislative ones, the key determinant of permitted conduct within the jurisdiction.[36] That is particularly true insofar as regulated parties are almost certain to rely on categorical or prospective nonenforcement assurances, even if those assurances do not formally change the underlying law, and indeed even if other actors, like police, retain some ability to enforce criminal laws through non-prosecutorial means like arrest.[37]

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[34] *Id*.

[35] *See infra* section III.B.

[36] Some other scholars have noted this problem with categorical policies. *See, e.g.*, Fairfax, *supra* note 32, at 1274 (discussing how nonenforcement based on disagreement with statutory policy "frustrates legislative prerogative"); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1684–85, 1685 n.137 (2010) (distinguishing "equitable" non-prosecution based on the facts of a particular case from the "blanket decision *not* to enforce a particular statute," which "is tantamount to relegislation"); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 875 (observing that "a prosecutor who categorically refuses to enforce a particular law . . . may contradict the legislative expectation that the law, at least sometimes, may be implemented," but also indicating that in general "the legislature anticipates that prosecutors will determine whom to prosecute, with whom to plea bargain, and what sentences to propose"); Aaron L. Nielson, *The Policing of Prosecutors: More Lessons from Administrative Law?*, 123 DICK. L. REV. 713, 718 (2019) ("[P]rosecutorial discretion is both useful and potentially dangerous.").

[37] Justin Murray has astutely observed that mechanisms of "residual criminalization" like continued line-level prosecution, police arrest powers, and social sanctions may continue to give effect to criminal laws despite a prosecutor's nonenforcement policy. *See* Murray, *supra* note 20, at 17–18. In many contexts, however, determined prosecutors may be able to limit even such residual effects of criminal prohibitions: a prosecutor with control over subordinates can prevent continued prosecution; police will often discontinue arrests if doing

Entrepreneurs, after all, have opened entire businesses based on federal assurances of marijuana nonenforcement; gun sellers and purchasers might well do the same based on local promises not to apply federal or state law.[38] Disrupting such reliance down the road may then appear unfair or even unjust, complicating any political effort to vindicate legal prohibitions after the fact through retrospective enforcement.[39] Accordingly, even if prosecutors remain legally free to enforce laws against offenders who foolishly rely on past nonenforcement assurances, any real-world effort to do so may be practically or politically challenging.[40]

As an abstract matter, therefore, more categorical, transparent, and determinate nonenforcement presents an increasing challenge to the rule of law, if by the rule of law one means the governance of society by conduct rules established through either legislation or an express delegation of lawmaking power.[41]

B. DISTINGUISHING CASE-BY-CASE AND CATEGORICAL NONENFORCEMENT

Contrary to the analysis just offered, some proponents of broad

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so is unlikely to yield prosecution (particularly if prosecutors refuse to bring charges for resisting arrests based on unprosecuted crimes); and social sanctions may have limited deterrent effect on individuals who are independently motivated to engage in offenses and know from a prosecutor's policies that they may do so with impunity.

[38] *See, e.g.*, *Legal Marijuana Industry Had Banner Year in 2018 with $10B Worth of Investments*," NBC NEWS (Dec. 27, 2018, 9:18 AM), https://www.nbcnews.com/news/us-news/legal-marijuana-industry-had-banner-year-2018-10b-worth-investments-n952256 (reporting on massive growth in marijuana industry). For discussion of federal marijuana nonenforcement policies, see *infra* notes 50–51 and accompanying text.

[39] For my analysis of this reliance problem in the federal context, see generally Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017).

[40] *See id.* at 1022 ("[A]ssertive use of nonenforcement policy, particularly in areas of political contestation such as marijuana, immigration, gun control, or environmental protection, may amount to playing chicken with subsequent administrations, daring them to disrupt the practical reliance interests that have built up around the outgoing administration's policy.").

[41] For my prior discussion of the conflicting implications of rule-of-law values for enforcement discretion, see Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments Over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 251–57 (2016); *see also* Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 195–96 (2016) (arguing that prosecutorial discretion is consistent with the rule of law insofar as prosecutors "cannot determine the duties to which individuals are subject").

prosecutorial policy-making deny any difference between case-by-case nonenforcement and more generalized exercises of discretion.[42] It is certainly true that if legislatures have enacted harsh substantive laws against a backdrop of presumed enforcement discretion, then prosecutors will inevitably hold broad authority to pick and choose cases and charges in carrying out their enforcement functions. Even as to accepted and generally enforced conduct rules, furthermore, enforcement discretion may be an essential safety valve against injustice in particular cases.[43]

Nevertheless, case-by-case discretion's inevitability does not by itself support taking the further step of announcing a prosecutor's priorities or categorically or prospectively suspending enforcement of particular laws. Those actions undermine the substantive law's primacy to a greater degree, effectively supplanting the legislature's primary role in establishing conduct rules. After all, to the extent that criminal laws are overly harsh, prosecutors might moderate their on-the-ground impact in ways that stop short of overt categorical or prospective nonenforcement. Indeed, even if prosecutors chose to make public their priorities and their rationales for particular declination decisions, they might do so retrospectively by providing explanations for past decisions without guaranteeing anything for the future.[44] For all these reasons, the lesser power to forgo prosecution in particular cases or according to internal priorities does not imply the greater power to formally or

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[42] *See, e.g.*, Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/ (indicating that "prosecutors refusing to prosecute entire classes of crimes[] . . . is simply a different application of the standard discretion afforded to prosecutors to decide which cases they will pursue"); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 4–5 (2019) [hereinafter Davis, *Reimagining Prosecution*] (defending reform prosecutors' nonenforcement policies as beneficial exercises of prosecutors' established charging discretion); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1174–76 (2005) (advocating adoption of "public and enforceable criteria for the exercise of prosecutorial discretion" even though doing so "would enable violation of some laws").

[43] *See, e.g.*, Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 370 (2010) ("By their nature, rules cannot capture every subtlety, which is why various actors need discretion to tailor their application of the law.").

[44] *See* Roth, *supra* note 29, at 487, 489 (discussing tradeoffs involved in disclosing declination decisions and distinguishing such decisions from "ex ante decisions about entire categories of cases that the prosecutor will not pursue").

functionally excuse violations of particular laws across the board.[45]

Some have also pointed to racial and other disparities in criminal-justice outcomes as justifications for more transparent and categorical restrictions on enforcement.[46] Such disparities, however, might also be addressed in other ways, such as through strengthened prohibitions on selective enforcement.[47] Even if prosecutors employed enforcement discretion to mitigate those disparities, moreover, they might do so through internal guidance rather than announced categorical policies.[48] Again, moving down

[45] Much the same distinction between indeterminate and categorical nonenforcement underlies federal administrative-law decisions holding that putatively non-binding policies have the force and effect of law, and thus require notice-and-comment procedures, if the agency understands and applies them too rigidly. *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251–53 (D.C. Cir. 2014) (discussing the distinction between binding regulations and non-binding policies and noting that one key factor is "whether the agency has applied the guidance as if it were binding on regulated parties"); *see generally* Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1047 (2000) (arguing that an agency output should constitute a policy, as opposed to a regulation, only if the agency "treat[s] the document as tentative and prospective, without present binding effect on private persons, and . . . keep[s] an open mind and [is] prepared to reconsider the policy as individual cases arise"); *cf.* Jodi L. Short, *The Politics of Regulatory Enforcement and Compliance: Theorizing and Operationalizing Political Influences*, 15 REGUL. & GOVERNANCE 653, 656 (2021) (discussing political influences on regulatory enforcement).

[46] *See, e.g.*, Davis, *Reimagining Prosecution*, *supra* note 42, at 5 ("[J]ust as the power and discretion of prosecutors have contributed to mass incarceration and racial disparities in the criminal justice system, that same power and discretion may be used to institute reforms to correct these injustices."); K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 287 (2014) (advocating categorical nonenforcement of misdemeanors when enforcement produces racial disparities or when courts are too overburdened to provide fair process).

[47] *See, e.g.*, Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 449 (2009) (discussing possible reforms to equal protection doctrine to address enforcement inequities); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. C.R.L.J. 219, 303 (2009) ("Current doctrine makes it very difficult for either victims or defendants to complain about inequalities in the use of prosecutorial discretion and the investigatory discretion of police."); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (advocating the "use of racial impact studies in prosecution offices to advance the responsible, nondiscriminatory exercise of prosecutorial discretion").

[48] *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 631 (1984) (discussing how the "acoustic separation" between tough formal prohibitions and lenient enforcement may signal community disapproval and foster deterrence without harsh applications against offenders); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 186–96 (2008) (discussing "internal" and "external" forms of transparency within prosecutor's offices).

the spectrum from internal guidance to overt policy—from option three above to option four, five, or six—is an additional step that weakens legislative primacy and thus requires additional justification.

Ultimately, the extent of prosecutorial power to alter or mitigate the law is a matter of institutional authority, and the extent of prosecutorial discretion in a given jurisdiction raises important questions of relative institutional power—questions about legislative authority relative to the executive branch, for one thing, and additionally, in most states, about state-level officials' authority relative to local prosecutors.[49] Whether categorical or prospective nonenforcement is permissible in a given jurisdiction does not follow ineluctably from the mere fact that prosecutors hold discretion in particular cases, nor even from the presumed distortions in the political process generating harsh criminal laws. Determining the validity of nonenforcement requires formal analysis of governing legal provisions and institutional arrangements.

C. CATEGORICAL NONENFORCEMENT'S SUDDEN AND UNEXPECTED RISE

Whatever their academic interest, these questions of institutional authority have lately gained practical urgency due to the sudden and unexpected spread of categorical nonenforcement policies across the United States. The trend appears to have begun, or at least first gained salience, at the federal level. At the least, several high-profile Obama Administration policies employed broad theories of prosecutorial discretion to reshape key areas of law. In a series of policy statements addressing state-level legalization of marijuana, the Administration issued explicit enforcement policies assigning low priority to certain federal marijuana crimes.[50] Though

[49] For further discussion of this point, see *infra* Part III. For a general discussion of states' internal "subfederal" division of governing authority, see generally Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177 (2018). For doubts about the value of subfederal local criminal lawmaking, see generally Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119 (2022).

[50] *See* Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, *Guidance Regarding Marijuana Related Financial Crimes* (Feb. 14, 2014) (assigning low priority to enforcement of certain marijuana-related financial crimes); Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, *Guidance Regarding Marijuana Enforcement* (Aug.

initially hedged in ways designed to avoid any determinate assurance of nonenforcement, these policies hardened over time into a de facto categorical guarantee, helping produce a multi-billion-dollar marijuana industry operating freely in multiple states in open violation of federal law.[51] Around the same time, the Administration also announced policies relating to immigration and the Affordable Care Act that employed parallel theories of enforcement discretion in the civil and administrative spheres.[52]

In the years since these federal policies were adopted, controversies over enforcement discretion have shifted principally to the state and local levels.[53] Beginning in roughly 2014, a wave of self-described "progressive" prosecutors won elections in jurisdictions including Ann Arbor, Austin, Baltimore, Brooklyn, Corpus Christi, Boston, Dallas, Manhattan, Philadelphia, San

29, 2013) (listing enforcement priorities and assigning low priority to state-authorized marijuana possession and distribution outside those priorities); Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011) (explaining that earlier guidance did not shield large-scale growing operations from prosecution); Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009) (identifying federal enforcement priorities relating to marijuana and indicating that federal prosecutors generally "should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana").

[51] For my discussion of this development, see Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, *in* MARIJUANA FEDERALISM: UNCLE SAM & MARY JANE 123, 128 (Jonathan Adler, ed., 2020).

[52] For further description and analysis of the Affordable Care Act examples, see Price, *Enforcement Discretion*, *supra* note 5, at 750–54; *see also* Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1721–25 (2016). For the Administration's description and legal defense of the immigration programs, see The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Ops. Off. Legal Couns. 1–2 (Nov. 19, 2014); *see also*, *e.g.*, Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 353 (2017) (discussing immigration policies as examples of presidential control over administration); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 110 (2015) (advancing "a 'two-principals' model of immigration policymaking").

[53] For my discussion of recent federal developments, see Zachary S. Price, *Federal Nonenforcement at a Crossroads*, 78 N.Y.U. ANN. SURV. OF AM. LAW 205 (2023) [hereinafter Price, *Federal Nonenforcement at a Crossroads*].

Francisco, Shreveport, and St. Louis.[54] To varying degrees, these prosecutors broke with conventional "tough-on-crime" approaches to law enforcement.[55] Among other things, many promised greater accountability for police abuses, greater attention to racial biases and disparities, less punitive approaches to certain offenses, less reflexive harshness in sentencing recommendations, and retrospective review of potentially flawed convictions.[56] In addition, some, but not all, embraced nonenforcement as a policy tool.

To give a few examples: Brooklyn District Attorney Kenneth Thompson adopted a policy in 2014 that low-level marijuana possession would no longer be prosecuted (at least outside of exceptional circumstances).[57] Philadelphia District Attorney Larry Krasner adopted a policy in 2018 of declining, outside of "extraordinary circumstances," any charges for marijuana possession or prostitution, while generally diverting certain other offenses, including marijuana distribution and possession of a firearm without a permit, to non-criminal resolution.[58] Before taking office in January 2019, Boston-area District Attorney Rachael Rollins campaigned on a promise to generally decline criminal charges for fifteen crimes, including shoplifting, larceny

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[54] *See, e.g.*, Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 195–200 (discussing electoral results and observing that "[t]he progressive prosecutor movement began in earnest in 2015"); Justin Murray, *Book Review*, 69 J. LEGAL EDUC. 824, 833 (2020) (reviewing BAZELON, *supra* note 2, and discussing the emergence since 2015 of "reformist prosecutors" who "hope to see a major reduction in prosecutions and criminal penalties for low-level criminal offenses, a redirection of scarce enforcement resources toward solving violent crimes, and fairer procedures used to pursue cases that remain on the prosecution track").

[55] For accounts of these elections, see, for example, David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 667–668 (2017); Davis, *Reimagining Prosecution*, *supra* note 42, at 6–15; and BAZELON, *supra* note 2, at 86–87. For discussion of the complex interplay of democratic and bureaucratic forces shaping current reform efforts, see generally Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523 (2020).

[56] *See* Sklansky, *supra* note 55, at 648–49 (describing the candidates' policy platforms in various district attorney races).

[57] *See id.* at 652 (describing new policies).

[58] Memorandum from Dist. Att'y Larry Krasner to Assistant Dist. Attorneys (Feb. 15, 2018), https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html#document/p1; *see* Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018) (describing new policies outlined in a memo circulated to staff).

below $250, drug possession, and receipt of stolen property.[59]

During his campaign that same year, San Francisco District Attorney Chesa Boudin pledged not to prosecute "quality of life" crimes "such as public camping, offering or soliciting sex, public urination, [and] blocking a sidewalk."[60] In Austin, Texas, the District Attorney elected in November 2020, campaigned on forbearing from prosecuting the possession or sale of any controlled substance in small amounts,[61] and the District Attorney in Dallas announced in 2019 that he would not prosecute certain thefts and marijuana offenses.[62] In 2021, the prosecutor's office in Washtenaw County, Michigan (the jurisdiction including Ann Arbor), announced that it would no longer prosecute offenses relating to consensual sex work.[63] In January 2022, the newly elected Manhattan District Attorney released a policy of declining to prosecute crimes including marijuana misdemeanors, subway turnstile jumping, some trespassing, driving without a license, interfering with arrest (unless the interference is "significantly physical[]"), and resisting arrest for any offense subject to the non-prosecution policy.[64] And in the summer of 2022, following the

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[59] *Charges To Be Declined*, ROLLINS 4 DA, https://web.archive.org/web/20220602170102/https://rollins4da.com/policy/charges-to-be-declined/. In office, Rollins adopted a policy based on this pledge that established strong presumptions of non-prosecution for these offenses but provided greater detail about circumstances in which prosecution could be warranted. *See* SUFFOLK CNTY. DIST. ATT'Y'S OFF., THE RACHAEL ROLLINS POLICY MEMO app. C (Mar. 2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf.

[60] Phil Matier, *What's the Answer to Quality-of-Life Crimes in SF. DA Candidates Give Answers*, S.F. CHRON. (Oct. 26, 2019), https://www.sfchronicle.com/local-politics/article/What-s-the-answer-to-quality-of-life-crimes-in-14563426.php.

[61] Michael Barajas, *José Garza Redefines "Progressive Prosecutor,"* TEX. OBSERVER (Nov. 2, 2020) https://www.texasobserver.org/jose-garza-redefines-progressive-prosecutor/.

[62] Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren't Happy*, TEX. TRIB. (May 21, 2019, 12:00 AM), https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/.

[63] WASHTENAW CNTY., OFF. OF THE PROSECUTING ATT'Y, POLICY DIRECTIVE 2021-08: POLICY REGARDING SEX WORK (Jan. 14, 2021), https://www.washtenaw.org/DocumentCenter/View/19157/Sex-Work-Policy.

[64] Memorandum to All Staff from Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of New York (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf. Although the official version of the policy indicated that the office "will not prosecute" these crimes unless the defendant is simultaneously charged with a felony,

Supreme Court's overruling of past decisions recognizing a constitutional right to abortion,[65] a number of local prosecutors drew controversy by pledging not to enforce state-wide abortion restrictions within their jurisdictions.[66]

In effect, local nonenforcement policies like these employ at the state and local level the same conception of enforcement discretion embodied in the Obama Administration's marijuana policies and other nonenforcement initiatives. Just as the Obama Administration claimed authority to openly decline enforcement with respect to broad categories of offenses,[67] these local prosecutors have claimed power to publicly disclaim any application of specified laws within their jurisdictions. At any rate, all these policies reflect assertions of relatively broad theories of prosecutorial discretion—option five (categorical nonenforcement) on the typology sketched above in Part I, section A, if not also option six or seven (prospective nonenforcement or cancellation of legal obligations).

Of course, on some level, broad exercises of prosecutorial discretion are nothing new. As discussed earlier, the structure of modern criminal law typically presumes extensive enforcement discretion, and many prosecutors in recent years would have tacitly assigned low priority to some offenses that contemporary reform prosecutors are overtly declining to enforce. At the least, many prosecutors likely would have declined to prosecute in many sympathetic cases. In addition, there are past examples of desuetude, meaning the near-total nonenforcement of outdated

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the version released during the new District Attorney's campaign pledged that he would not prosecute these offenses "under any circumstances." *Alvin Bragg: Day 1 Memo*, ALVIN BRAGG, https://web.archive.org/web/20220615072451/https://www.alvinbragg.com/day-one.

[65] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (holding that the U.S. Constitution does not guarantee a right to abortion).

[66] *See* FAIR AND JUST PROSECUTION, JOINT STATEMENT FROM ELECTED PROSECUTORS https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf (providing a letter signed by local prosecutors pledging not to prosecute abortion offenses); *see also* Casey Tolan, *Some Big-City District Attorneys Vow Not to Prosecute Abortion Cases, Setting Up Legal Clashes in Red States*, CNN (June 30, 2022, 4:00 AM), https://www.cnn.com/2022/06/29/us/district-attorneys-abortion-prosecutions-invs/index.html ("More than a third of the district attorneys representing the 25 most populous counties in states that have banned or are set to ban abortion have publicly vowed not to prosecute abortion cases.").

[67] *See supra* notes 50–52 and accompanying text.

offenses such as adultery or sodomy,[68] and historically some nonenforcement patterns—most notably the general neglect of African American criminal victimization under Jim Crow,[69] as well as historical non-prosecution of domestic violence and other abuses of women[70]—appeared quite systematic and odious.[71]

Nevertheless, the examples just described from progressive prosecutors appear novel, at least as compared to the recent past, insofar as they involve public announcement of policies that categorically foreclose prosecution of specified offenses.[72] Within a

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[68] *See, e.g.*, Brown, *Prosecutorial Discretion*, *supra* note 25, at 453 ("If every law were enforced vigorously, there would be public backlash. But the outrageous laws largely lie in desuetude, for familiar reasons."); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49–50 (advocating desuetude rationale for invalidating sodomy prosecution); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63–64 (1961) (advocating a desuetude defense for outdated prohibitions). Official guidelines in Washington state expressly contemplate nonenforcement of "antiquated" laws. WASH. REV. CODE ANN. § 9.94A.411(b)(i)–(iv) (West 2022).

[69] *See, e.g.*, STUNTZ, COLLAPSE, *supra* note 25, at 230 (characterizing the "failure to protect [certain] black crime victims" as one "form[] of discriminatory justice" that "plagued the Jim Crow South"). Darryl Brown has speculated that mechanisms for private prosecution declined following the Civil War in part to enable the "selective underenforcement" of criminal laws in accordance with "the preferences of local white majorities." Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 872–73 (2018).

[70] *See generally* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287 (2016) (discussing historic underenforcement of laws protecting women from violence).

[71] In a more attractive historical example, some local prosecutors appear to have declined to enforce segregation laws during the Civil Rights Movement of the 1960s. *See* HESSICK, *supra* note 26, at 204–05 (quoting a local prosecutor in Virginia who recalled a predecessor's refusal to prosecute segregation offenses). Such laws, however, may have been unconstitutional under Supreme Court precedent by the time local prosecutors openly took such steps. *See id.* at 205 (recording the local prosecutor's statement that she did not know why the predecessor declined enforcement and offering that "he thought it was an unconstitutional law" as one possible explanation).

[72] *See, e.g.*, Murray, *supra* note 3, at 176–77 (observing that some "prosecutors are beginning to stretch their power beyond mine-run resource-driven nonenforcement and one-off ex post declinations in 'anomalous cases' of factual guilt" and are instead embracing "categorical prospective negation of law based on per se or as applied opposition to that law"); Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1392 (2002) ("State prosecutors tend to have few written charging policies . . . .").

As an indication of past practice, an article published in 1930 reported survey results indicating that many local prosecutors "nullified" unpopular laws by generally declining to

short period of time, a trend towards broader theories of prosecutorial authority—theories that shift the balance of power away from legislatures and towards prosecutors when it comes to setting on-the-ground criminal policy—has gained traction from coast to coast, at all levels of government.

D. SHIFTING POLITICS OF CRIME—AND RESULTING DISTORTIONS IN DEBATE

What explains this sudden spread of categorical nonenforcement? Although the Obama Administration's initiatives were in part workarounds for the polarized and gridlocked federal legislative process,[73] the trend at the local level likely reflects recent shifts in the politics surrounding crime.

For decades, if not longer, an electoral preference for "tough on crime" measures appeared to be an iron law of American politics. Voters consistently favored severity over lenience and deterrence over mercy, producing what William Stuntz called the "pathological politics of criminal law."[74] Many scholars credited these political

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pursue violations of them, but the prosecutors' responses gave no indication that they engaged in such nonenforcement as a matter of announced policy. *See* Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POLI. SCI. Q. 347, 348 (1930) ("The fact is that . . . nullification . . . is a widespread and seemingly accepted process of government."). Another article from 1933 described various prosecutors' informal charging practices, some of which reflected frankly racist or misogynistic assumptions; it also noted that some prosecutors deliberately avoided prosecuting alcohol offenses and other vice crimes. But even these prosecutors appear not to have presumed authority to openly suspend all enforcement of disfavored crimes. *See* Newman F. Baker, *The Prosecutor—Initiation of Prosecution*, 23 AM. INST. CRIM. L. & CRIMINOLOGY 770, 773–75 (1933) (describing approaches to vice enforcement that made "no attempt to suppress but only to control" by prosecuting occasionally or focusing on the "worst" or most flagrant offenses). Half a century later, Joan Jacoby's study of American prosecutors noted different approaches to enforcement, including use of diversion for some offenders and adoption of internal policies to guideline-level discretion, but again she noted no widespread use of overt nonenforcement pledges to reshape the locally operative law in contested areas. *See* JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY xxii–xxiii, 201–205 (1980) (outlining various approaches implemented by prosecutors).

[73] For my discussion of this point, see Price, *Enforcement Discretion*, *supra* note 5, at 686–88.

[74] *See* Stuntz, *Pathological Politics of Criminal Law*, *supra* note 25, at 509 ("Voters demand harsh treatment of criminals; politicians respond with tougher sentences . . . and more criminal prohibitions."); *see also* Daniel C. Richman & William J. Stuntz, *Al Capone's*

incentives with generating, or at least powerfully reinforcing, the overbreadth and severity in federal and state criminal law discussed earlier.[75] While legislators could curry favor with a tough-on-crime electorate by enacting harsh and punitive laws, they could count on prosecutors to exercise discretion to mitigate those laws in practical operation, thereby sparing legislators full accountability for their enactments.[76] Prosecutorial discretion thus apparently fueled a self-reinforcing cycle: discretionary enforcement enabled enactment and perpetuation of broad and harsh laws, while broad and harsh laws further expanded the degree of discretion exercised by prosecutors.

During this tough-on-crime era, academic arguments for more expansive and deliberate use of prosecutorial discretion gained no traction.[77] Some even doubted whether prosecutors ever would meaningfully tie their own hands with nonenforcement policies, given both the political incentives to appear tough on crime and the institutional incentives to preserve their own power.[78]

In the past decade, however, these political dynamics shifted. Far

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Revenge: An Essay on the Political Economy of Pretextual Prosecution, 105 COLUM. L. REV. 583, 585 (2005) ("Criminal charges are . . . a means by which prosecutors send signals to . . . the voters to whom they are ultimately responsible."); *cf.* Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1954–55 (2019) (attributing criminal law's severity to notions of "criminal law exceptionalism").

[75] *See supra* note 23 and accompanying text.

[76] *See* Stuntz, *Pathological Politics of Criminal Law*, *supra* note 25, at 510 ("[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators . . . .").

[77] *See, e.g.*, Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 3, at 263 (characterizing "transparency about prosecution priorities" as "an objective with a long history of academic advocacy"); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 8 (2007) ("Although numerous scholars in the legal academy have criticized the unchecked exercise of prosecutorial discretion, with a few exceptions, public criticism of prosecutors has been almost entirely absent." (footnotes omitted)); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3–4 (1971) (discussing use of "internal policy guides governing the exercise of prosecutorial discretion to help strike . . . a balance" between competing needs for "certainty, consistency, and an absence of arbitrariness on the one hand," and "flexibility, sensitivity, and adaptability on the other").

[78] *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 912 (2009) ("[T]he problem with making prosecutorial decisions more transparent is that the politics of crime might push those guidelines in a decidedly antidefendant direction.").

from showing uniform support for harsh criminal-justice measures, some recent polls have shown significant public support for reforms including reductions in punishment and increased accountability for law enforcement abuses.[79] At the same time, a bipartisan coalition linking progressives with libertarians and some religious conservatives has emerged to advance criminal-justice reforms.[80] Reflecting these political shifts, legislatures and administrative bodies at both the state and federal levels have enacted reforms to reduce sentences and even release some prisoners.[81] Even some state electorates have adopted significant reforms. In California, for example, voters approved a ballot measure downgrading felony offenses for drug possession and theft of up to $950 in goods to misdemeanors.[82] Meanwhile, large protests against police abuses, particularly in the summer of 2020 following the killing of the unarmed suspect George Floyd in police custody in Minneapolis, suggested widespread support for reforms.[83] Reform prosecutors

[79] *See, e.g.*, 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 (discussing evidence of voters' support for reform); *see also* PEW RSCH. CTR., AMERICA'S CHANGING DRUG POLICY LANDSCAPE 2 (Apr. 2, 2014), https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/04-02-14-Drug-Policy-Release.pdf (reporting results of a poll finding strong support for a treatment-based approach to illegal drug use); PEW RSCH. CTR., MAJORITY OF PUBLIC FAVORS GIVING CIVILIANS THE POWER TO SUE POLICE OFFICERS FOR MISCONDUCT 1, 4, 9–11 (July 9, 2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/07/PP_2020.07.09_Qualified-Immunity_FINAL.pdf (reporting the results of a poll finding strong public support for police reforms and for allowing suits against police officers).

[80] *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 4 (2017) (describing bipartisan reform coalitions).

[81] *See, e.g.*, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered section of 18 U.S.C., 21 U.S.C. & 34 U.S.C.) (changing sentencing durations, expanding early release programs, and providing for certain resentencing petitions); *see* PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE 140–42 (2018) (discussing recent criminal-justice reforms at the federal and state level); PFAFF, *supra* note 80, at 108–09 (discussing recent sentencing reforms and emerging trends).

[82] *Proposition 47: The Safe Neighborhoods and Schools Act*, CAL. JUD. BRANCH, https://www.courts.ca.gov/prop47.htm (last visited Sept. 17, 2022).

[83] *See, e.g.*, Cleve R. Wootson Jr. & Scott Clement, *Concern Over Crime is Growing—But Americans Don't Just Want More Police, Post-ABC Poll Shows*, WASH. POST (July 2, 2021, 6:00 AM), https://www.washingtonpost.com/politics/poll-crime-police-

thus won office, and asserted broad authority to mitigate criminal laws through categorical nonenforcement, within a political context of shifting attitudes toward crime, particularly in progressive circles.[84]

This shift may or may not prove durable. Some recent election results, including the 2022 recall of San Francisco District Attorney Chesa Boudin, suggest a possible backlash and return to tough-on-crime politics.[85] In any event, even if current trends persist, there is no inevitability to the current association between categorical nonenforcement and progressive politics. On the contrary, prosecutors in different jurisdictions within a state could employ broad understandings of prosecutorial discretion to achieve any number of policy aims. While progressive prosecutors today might excuse narcotics or quality-of-life crimes, others in the future might employ categorical nonenforcement to nullify police regulations, gun-control laws, pollution restrictions, public-health protections, or any number of other laws. There are already examples: as noted, one conservative prosecutor in Tennessee announced a policy of not

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discrimination/2021/07/01/85be64b6-da79-11eb-9bbb-37c30dcf9363_story.html (discussing polling results and the prospects for continued "progress on the police reforms that gained momentum after George Floyd was murdered by a Minneapolis police officer").

[84] *See, e.g.*, Tim Arango, *"A Tsunami of Change": How Protests Fueled a New Crop of Prosecutors*, N.Y. TIMES, (Nov. 17, 2021), https://www.nytimes.com/2020/12/08/us/george-gascon-la-county-district-attorney.html (cataloging the election victories of reform prosecutors across states and major cities following the 2020 protests).

[85] *See* Zusha Elinson & Christine Mai-Duc, *San Francisco District Attorney Chesa Boudin Recalled by Voters*, WALL ST. J. (June 8, 2022, 2:09 PM), https://www.wsj.com/articles/san-francisco-district-attorney-chesa-boudin-faces-recall-election-11654603200 (describing Boudin's recall as "a blow to the progressive prosecutors movement"); *see also* Kim Parker & Kiley Hurst, *Growing Share of Americans Say They Want More Spending on Police in Their Area*, PEW RSCH. CTR. (Oct. 26, 2021), https://www.pewresearch.org/fact-tank/2021/10/26/growing-share-of-americans-say-they-want-more-spending-on-police-in-their-area/ ("Amid mounting public concern about violent crime in the United States, Americans' attitudes about police funding in their own community have shifted significantly."). Rebecca Goldstein has argued to the contrary that, given differing attitudes toward crime in different age cohorts, "electoral input into criminal-justice policy is likely to produce reforms in the future, as the current cohort of young voters slowly replaces the current cohort of older voters." Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446, 479 (2019). For a related argument that budget pressures during the post-2008 financial crisis helped stimulate criminal-justice reform as a cost-saving measure, see HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 11 (2015); *see also* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 585 (2012) (identifying a cost-saving approach of "rehabilitation pragmatism").

pursuing domestic-violence offenses involving same-sex couples;[86] some jurisdictions have disclaimed enforcement of gun-control laws;[87] and during the coronavirus pandemic, some local officials publicly refused to enforce statewide mask mandates and other public-health measures.[88]

Furthermore, to the extent current public opinion does support mitigating criminal laws, channeling such pressures into prosecutorial policies could prove counter-productive insofar as it weakens pressure on legislatures to enact more durable legal changes.[89] Even worse, if such policies provoke a backlash, legislatures might end up strengthening enforcement standards across the board instead of adjusting substantive laws in particular areas to accord better with public preferences.[90]

For all these reasons, categorical nonenforcement's permissibility requires a dispassionate analysis centered on governing institutional arrangements rather than immediate policy aims. Public commentary, however, has often subsumed questions about prosecutorial authority within debates over criminal-justice policy: Those supporting reform have defended prosecutorial leniency on policy grounds,[91] while critics, including Trump

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[86] *See* Wright, *supra* note 15, at 832–33 (recounting this example).

[87] *See, e.g.*, Blankley, *supra* note 16 (discussing refusals to enforce gun laws); Gutman, *supra* note 16 (describing sheriffs in Washington who publicly refused to enforce the state's new gun regulation).

[88] *See, e.g.*, Armus, *supra* note 17 (describing sheriffs who refused to enforce COVID-19 mask mandates).

[89] *See* Stuntz, *The Pathological Politics of Criminal Law*, *supra* note 25, at 591 (discussing the challenge of repealing unenforced laws that "once represented community norms but no longer do").

[90] *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1547, 1585–87 (2020) (discussing the possibility that more contested prosecutor elections could lead to harsher prosecutorial policies); Bellin, *supra* note 3, at 710–11 (discussing political developments such as "crime spik[ing]" that could "undo progressive prosecutors' work"); *cf.* Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 790 (2020) (raising concerns that tools employed by progressive prosecutors may be "just as likely to exacerbate racial inequalities in our criminal justice system").

[91] *See, e.g.*, Cristine Soto DeBerry, *California's Progressive Prosecutors Are Enhancing Safety Through Reform*, S.F. CHRON. (Mar. 9, 2021), https://www.sfchronicle.com/opinion/openforum/article/California-s-progressive-prosecutors-are-16010360.php (defending California progressive prosecutors' policies as accomplishing needed criminal justice reforms); Young, *supra* note 42 ("[P]rosecutors refusing to prosecute

Administration Attorney General William Barr, have attacked categorical policies for undermining public safety and the rule of law.[92]

Likewise, although scholars have debated at length the separation-of-powers questions surrounding federal nonenforcement, analysis of local prosecutorial discretion has often either presumed a common model nationwide or advanced generic theories for when nonenforcement policies are valid.[93] As noted, several scholars have advanced generalized theories supporting the expanded use of prosecutorial discretion.[94] One more nuanced account suggests that locally elected prosecutors may nullify particular state laws if they disclose their plans during the election campaign and avoid negative externalities on those outside the jurisdiction and on dissenters within it.[95] Another recent article proposes a model weighing relative responsibility to state and local constituencies arising from the source of local law-enforcement

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entire classes of crimes . . . is simply a different application of the standard discretion afforded to prosecutors to decide which cases they will pursue.").

[92] *See, e.g.*, William P. Barr, Att'y Gen., U.S. Dep't of Just., *Remarks at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference*, (Aug. 12, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th (arguing that prosecutors who "have been announcing their refusal to enforce broad swathes of the criminal law" will lead to "[m]ore crime; more victims").

[93] *See supra* note 3 and accompanying text.

[94] *See, e.g.*, Fairfax, *supra* note 32, at 1243 (discussing "prosecutorial nullification"); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 787 (2012) (advocating "prosecutorial decriminalization"); Bellin, *supra* note 3, at 707 (advocating "a conceptualization of the American prosecutor as a caretaker for the criminal justice system"); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1203 (2020) (proposing a "'servant-of-the-law' theory of prosecutorial behavior"); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 477 (2016) (emphasizing the "mediating" and "boundary-blurring" character of the prosecutor's role); David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, *in* PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 276 (Maximo Langer & David Alan Sklansky, eds., 2017) (discussing implications for democratic accountability of prosecutors' boundary-blurring function); Daniel C. Richman, *Accounting for Prosecutors*, *in id.* at 40 (discussing prosecutors' role in liberal democratic societies). An important exception, discussed further below, is Wright, *supra* note 15, at 837, who recognizes that "[t]here is no single prosecutorial tradition that encompasses all of the many ways that prosecutors respond to their different institutional environments and distinctive threats to local public safety."

[95] Murray, *supra* note 3, at 255.

funding, among other factors.[96] Even these more fine-grained theories, however, do not adequately recognize the relevant variation in formal governing law.

In fact, as we shall see, the fifty states differ markedly both from the federal government and from each other on questions of prosecutorial autonomy, and their differences do not track current political divides over criminal justice (or anything else). Categorical nonenforcement's legitimacy should turn on these differences and not on any general policy aim or theory of the prosecutorial function. The next two Parts support this claim by first documenting, in Part III, the general differences between the federal government and the states, and then canvassing, in Part IV, the wide variation among the fifty states themselves with respect to prosecutorial authority.

III. THE FIFTY STATES COMPARED TO THE FEDERAL GOVERNMENT

To begin with the general differences between state and federal law, nearly all states differ structurally from the federal government in at least two ways that complicate applying federal principles to state examples: (1) nearly all have multiple elected state-wide executive officials, and (2) nearly all have locally elected prosecutors. The federal separation of powers is thus an imperfect model for the states, but at the same time these common structural features of state constitutions themselves do not support clear alternative conclusions. On the contrary, these general features of state constitutions support competing inferences that undermine efforts to generalize across all fifty states.

A. GENERAL FEDERAL-STATE DIFFERENCES AND THEIR HISTORY

I have argued elsewhere that key features of the U.S. Constitution, particularly the Take Care Clause's mandate that the President ensure faithful execution of federal laws, preclude prospective or categorical nonenforcement policies at the federal level without statutory authorization.[97] Like the federal constitution, all fifty states prescribe some version of separation of

[96] Wright, *supra* note 15, at 857.

[97] *See* Price, *Enforcement Discretion*, *supra* note 5, 688–89 (addressing the Take Care Clause's significance for prosecutorial nonenforcement).

powers with distinct legislative, executive, and judicial branches, and all but one require the state's governor to ensure faithful execution of the laws, just as the U.S. Constitution does with respect to the U.S. President.[98] Without more, these parallels might suggest that equivalent limitations on nonenforcement should apply at the state and federal levels. Yet most state constitutions differ from the federal constitution in at least two ways that complicate any such inference.

First, many states provide for the separate election of an attorney general and other state-wide executive officials in addition to the governor.[99] Most states thus have "unbundled" executives, as one leading account puts it: their executive branches include multiple distinct offices with separate electoral mandates, offices that are sometimes even occupied simultaneously by political rivals.[100] By contrast, although scholars debate the degree to which Congress may insulate federal executive officers from presidential direction, the federal executive branch is in principle "unitary": the President alone holds an electoral mandate, and all executive officials are subject to some degree of presidential supervision, if not outright control.[101]

Indeed, in the federal context, many understand the Take Care Clause to guarantee some degree of presidential control over other

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[98] *See* Kevin S. Marshall, *Free Enterprise and the Rule of Law: The Political Economy of Executive Discretion (Efficiency Implications of Regulatory Enforcement Strategies)*, 1 WM. & MARY BUS. L. REV. 235, 239–40 & n.11 (2010) (collecting sources).

[99] *See* Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100, 2104 & n.10 (2015) ("[A]lmost all state attorneys general are elected politicians.").

[100] *See, e.g.*, Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1386 (2008) (defining an "unbundled executive" as "a plural executive regime in which discrete authority is taken from the president and given exclusively to a directly elected executive official" and noting that "this basic structure is an existing feature of legions of state and local governments in the United States"); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 (2006) (discussing the "divided executive" found in many state governments).

[101] For my own overview of schools of thought on this point, see Zachary S. Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491, 500–04 (2021). For a discussion comparing the unitary federal executive branch with plural state executives, see SUTTON, *supra* note 18, at 147–51.

executive officials' performance of their duties,[102] though some argue instead that Article II's vesting of "the Executive Power" in the President guarantees presidential control of the executive branch.[103] State constitutions' Take Care Clauses might likewise afford ultimate authority over law enforcement to state governors; some state courts, in fact, have so held.[104] But separate election of other state officials at least raises the question of whether those officials are properly subject to gubernatorial control in performing their duties—a question that different states' constitutional provisions, statutes, and court decisions might resolve differently.

Second, and even more importantly, nearly every state provides further for separate election of local prosecutors, typically at the county level.[105] This feature of American criminal justice is unique; no other country has elected local prosecutors.[106] What is more, no state had this structure at the time of the founding; all, instead, provided for appointed prosecutors (and often some degree of private prosecution), though who appointed prosecutors varied from state to state.[107] Provisions for locally elected prosecutors, along with elected judges in many states, swept the nation in the mid-

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[102] *See, e.g.*, MCCONNELL, *supra* note 31, at 114 ("The Vesting and Take Care Clauses make clear that all discretion imparted to executive branch officers is ultimately subject to the control of the centralized office of the President.").

[103] *See, e.g.*, PRAKASH, *supra* note 31, at 84–85 (advancing this view).

[104] *See, e.g.*, People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981) (holding, based on provisions of the California constitution including a requirement that the governor "see that the law is faithfully executed," that "if a conflict between the Governor and the Attorney General develops over the faithful execution of the laws of this state, the Governor retains the 'supreme executive power' to determine the public interest; the Attorney General may act only 'subject to the powers' of the Governor").

[105] *See* Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 n.3 (2012) (canvassing states). As discussed below, see *infra* Part IV, the exceptions are Alaska, Connecticut, Delaware, New Jersey, and Rhode Island. In addition, Hawaii, Montana, and North Dakota allow counties to choose between electing and appointing local prosecutors, but in each state most counties elect prosecutors and in any event those who are appointed are selected by local officials and thus obtain office through a local democratic process. For discussion of these states' arrangements, see Hessick & Morse, *supra* note 90, at 1551–52.

[106] *See* Ellis, *supra* note 105, at 1530 ("The United States is the only country in the world where citizens elect prosecutors.").

[107] *See id.* at 1536, 1537 (describing the various officials historically responsible for appointing prosecutors in different states).

nineteenth century as a Jacksonian populist reform.[108] Mississippi led the way in 1832, with Ohio following close behind in 1833.[109] More states followed in the 1840s and 1850s, until "[b]y the outbreak of the Civil War, twenty-five of thirty-four states had adopted elected prosecutors, and all but four would soon follow."[110] After the Civil War, every newly admitted state provided for elected prosecutors.[111]

Accordingly, while the federal executive branch has retained its unitary constitutional structure across the centuries, state constitutions have evolved in ways that complicate straightforward inferences about enforcement responsibility from gubernatorial duties of faithful execution. Instead, provisions for local election of prosecutors may support competing inferences. On the one hand, why provide for locally accountable prosecutors if not to ensure enforcement in accordance with local preferences? On the other hand, why provide for state-wide legislative authority if local prosecutors may annul state-wide laws in particular jurisdictions? In effect, reliance on locally accountable enforcement officials makes nonenforcement a matter of subsidiarity as well as separation of powers in state governance, but broadened nonenforcement authority is not necessarily the only or most convincing inference from this structure.

The history surrounding adoption of local prosecution also carries contradictory lessons. As Michael Ellis documents in his study of elected prosecutors' rise, reformers hoped to establish greater accountability to the people, yet limiting centralized patronage and weakening gubernatorial power seem to have been more salient motivations than ensuring nonenforcement of locally disfavored state laws.[112] Indeed, although official prosecutors at the time were beginning to acquire exclusive authority over charging decisions,[113] the broad expansion of criminal codes and resulting

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[108] *See id.* (detailing voter dissatisfaction with the appointment process); JACOBY, *supra* note 72 , at 19–28 (summarizing the shift from appointed to elected status of prosecutors).

[109] Ellis, *supra* note 105, at 1540, 1543.

[110] *Id.* at 1568; *see also id.* at 1569 (providing a chronology for the adoption of elected local prosecutors by states admitted to the Union before the Civil War).

[111] *Id.* at 1568.

[112] *See id.* at 1550 ("In many states, supporters of elected district attorneys believed popular election would distance the office from patronage politics.").

[113] *See id.* at 1533 ("[T]he decision to elect prosecutors was all the more important because

rise in prosecutorial discretion still lay in the future at the time of these initial reforms.[114] In Massachusetts debates, one reformer even defended electing prosecutors on the grounds that their duties were essentially ministerial and thus easily subject to popular oversight.[115]

In the event, reformers' hopes proved naïve and prosecutorial elections often made the positions more political rather than less, at least in big cities with powerful political machines.[116] In some cases, that process of politicization seems to have led to deliberate nonenforcement. In the New York City of Tammany Hall days, for example, prosecutors regularly suppressed, or "pigeon-holed," politically inconvenient indictments, and liquor laws that were unpopular with local constituencies were systematically disregarded.[117] As Bruce Green and Rebecca Roiphe have discussed, however, this politicization generated a new push in the Progressive Era to professionalize large prosecutors' offices.[118] Among other things, reformers of this era "sought to replace political cronies with disinterested experts who applied the law to facts rather than basing their decisions on impermissible personal, partisan, or

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of the increased discretion that prosecutors gained over the charging and prosecution of crime during the middle of the nineteenth century." (citing Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 580 (1984))).

[114] For my account of this history, see Price, *Enforcement Discretion*, *supra* note 5, at 742–46; *see also, e.g.*, GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA, 111–14 (2003) (examining the historical roles of prosecutors and judges in plea bargaining).

[115] *See* Ellis, *supra* note 105, at 1552–53 ("One supporter claimed that the district attorney 'is an office which the freedom and violence of popular elections do not greatly harm. There are certain specific duties to do for a compensation, and if these are well done, it does not much signify what a minority or what anybody thinks of him.'" (quoting 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION OF THE COMMONWEALTH OF MASSACHUSETTS 805 (Boston, White & Potter 1853) (statement of Del. Rufus Choate))).

[116] *See id.* at 1565 (describing the influence of party politics on criminal justice in large cities like New York and Philadelphia).

[117] *See id.* (describing this practice of New York City prosecutors).

[118] *See* Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 721 (2020) (describing the Progressive Era criminal justice reform movement's interest in professionalizing criminal justice).

political considerations."[119]

This model of "disinterested and independent prosecutorial professionalism" came to be "widely accepted, if not taken for granted."[120] At present, it is effectively the "mainstream" approach that today's progressives hope to dislodge.[121] Yet this restrained, professionalized approach to prosecutorial discretion formed the backdrop against which state legislatures enacted most existing criminal laws, undermining any inference that legislatures necessarily intended to confer categorical nonenforcement authority by doing so. Thus, even if local prosecutor elections justify some tailoring of general laws to local preferences, this feature of state law does not by itself justify adopting the specific tailoring method of overt, categorical nonenforcement.

B. RESULTING PROBLEMS FOR GENERALIZED THEORIES OF PROSECUTORIAL DISCRETION

State-law provisions for locally elected prosecutors, then, do not necessarily support the expansive nonenforcement powers claimed by some locally elected prosecutors today. At the same time, these provisions, like unbundled state executives, preclude any straightforward translation of federal principles to state and local governance, necessitating a closer look at applicable state constitutions and laws.

At the federal level, contrary to my own analysis of the President's duty of faithful execution, some have argued that federal law supports broader executive authority to reshape

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[119] *Id*. Less attractively, Progressive Era reformers "also rejected nineteenth-century notions of free will and personal responsibility, believing instead that biology and environment shaped individuals' conduct." *Id.*

[120] *Id.* at 722.

[121] *See* Price, *Enforcement Discretion*, *supra* note 5, at 746–48 (discussing the development of modern prosecutorial discretion). The 1993 American Bar Association publication quoted at the start of this Article helpfully articulates the current "mainstream" view: "The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the 'letter of the law,' but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion." STANDARDS FOR CRIM. JUST. PROSECUTION FUNCTION AND DEF. FUNCTION § 3-3.9(b) Commentary (AM. BAR ASS'N. 1993).

effective legal obligations in some or all areas.[122] As I have argued elsewhere, such claims overlook key features of the federal constitutional design, particularly the President's duty of faithful execution, and they risk inviting a troubling executive unilateralism.[123] More to the point here, this view effectively collapses the spectrum of enforcement approaches addressed earlier: it presumes that either Congress or the Constitution authorizes categorical policies simply by enabling discretionary enforcement. In fact, Congress, like state legislatures, may well have intended to delegate only the power to set general priorities (option three or four on the typology above), and not the power to offer categorical and prospective nonenforcement assurances.

In any event, whatever this argument's force with respect to federal law, it does not readily translate to state governing structures. In states with unbundled executives, any gubernatorial power to shape the law's on-the-ground meaning is shared with other officials, complicating any argument that responsibility for faithful execution should entail power to reshape the law to match a perceived electoral mandate. If anything, such constitutional structures seem designed to reinforce executive subservience to law by creating multiple possible checks on officials seeking to evade legal restraints or pursue political aims at odds with statutory directives.[124]

Furthermore, once again, any implicit conferral of law-adjusting power on prosecutors might properly extend only to priority-setting policies, not categorical enforcement forbearance or outright cancellation of legal obligations. After all, as just discussed, much of the expansion of state criminal codes occurred in an era of professionalized, ostensibly apolitical law enforcement. Against that backdrop, state legislatures likely expected that prosecutors

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[122] *See, e.g.*, COX & RODRÍGUEZ, *supra* note 5, at 3–4 (arguing that federal law empowers the President to broadly shape immigration policy); Shane, *supra* note 5, at 410, 413 (arguing that the scope of federal prosecutorial discretion in any given area is a question of statutory law).

[123] For my critique of this view, see generally Zachary Price, *A Brilliant but Unsettling Vision of Separation of Powers*, NOTICE & COMMENT BLOG, YALE J. REGUL. (Mar. 26, 2021), https://www.yalejreg.com/nc/the-president-and-immigration-law-02/, and Price, *Federal Nonenforcement at a Crossroads*, *supra* note 53.

[124] *Cf.* Marshall, *supra* note 100, at 2468 ("[B]y insulating the Attorney General's legal authority from gubernatorial control, the divided executive protects against executive branch overreaching by dedicating an executive officer to uphold the rule of law.").

would set sensible priorities and abjure prosecution in inappropriate cases but not that they would take the further step of overriding legislative conduct rules altogether. State legislatures, in other words, likely assumed that prosecutors would exercise options two and three from my initial typology, without proceeding down the spectrum to options four to seven. This problem undermines arguments in both federal and state contexts[125] that legislatures' role in creating broad prosecutorial discretion necessarily implies unrestricted authority to employ such discretion in whatever manner prosecutors choose.

Finally, even if state legislatures did intend to confer categorical nonenforcement authority, they might well have expected that state-level officials, rather than local district attorneys, would exercise this power. For that matter, they might have expected that state-level officials would override any categorical policy adopted by local prosecutors. Accordingly, the strength of any inference that local prosecutors may disclaim enforcement of state-wide laws requires examining, as I shall do shortly, what institutional arrangements the various states have adopted, including any provisions in state law for state-level override of local prosecutorial choices. The question cannot be answered in the abstract.

Related problems attend efforts to generalize a nationwide model of local prosecutorial authority from the mere fact of local prosecutor elections. In a thoughtful article, W. Kerrel Murray proposes that categorical nonenforcement policies—what he calls "populist prosecutorial nullification"—should be permissible if prosecutors campaigned on them ahead of time and sought to avoid spillover effects on other jurisdictions and burdens on non-supporters within the jurisdiction itself.[126] Murray defends this proposal based in part on normative democratic theory and the value of effectuating local preferences in government policy.[127] He also invokes local juries' historic role in nullifying disfavored laws, arguing that this historic jury practice supports giving prosecutors parallel authority today

[125] *See, e.g.*, COX & RODRÍGUEZ, *supra* note 5 (advocating broad nonenforcement authority in federal immigration law); Luna, *supra* note 94, at 791–92 (advocating the same for criminal law generally).

[126] *See* Murray, *supra* note 3, at 209–10, 214–16 (defending populist prosecutorial nullification on these grounds).

[127] *See id.* at 205–08 (discussing the value of local democratic self-governance).

given the ubiquity of plea bargains and infrequency of jury trials.[128] Whatever the force of these points, they are at best reasons to interpret operative state laws one way or another, to the extent doing so is textually possible; they cannot justify disregarding state legal and constitutional arrangements altogether.[129]

In contrast to Murray and others offering generalized theories of prosecutorial discretion, Ronald Wright has argued powerfully for a variable understanding of local prosecutorial authority.[130] "A uniform theory of declinations," he argues, "does not work well for all the varied state and local prosecutor offices in the United States."[131] Wright, however, substitutes for such generalized inferences a multifaceted and indeterminate functional analysis focused on balancing prosecutors' competing political allegiances.[132] In his view, local prosecutors should think of themselves as owing duties both to the state-wide electorate that enacted the laws they enforce and to the local electorate that put them in office.[133] What relative weight to give these competing duties should properly turn, Wright argues, not only on state laws and constitutional provisions, but also on such factors as prosecutors' funding sources (whether state or local), the degree of local home rule allowed by state law, and whether particular crimes have "concentrated local effects."[134]

Much as Murray's twin lodestars of jury practice and subsidiarity might properly inform interpretation of otherwise ambiguous laws, these varied factors might properly inform prosecutors' sense of their responsibilities at the margins—and in fact we shall see that some states' arrangements may invite reliance on such functional considerations. Yet we should turn to such nebulous factors only after exhausting applicable positive laws and any natural

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[128] *See id.* at 208–09 ("When prosecutors nullify not unilaterally, but consistent with a reasonably ascertainable popular will, they act as a conduit for the wholesale achievement of what the same population might otherwise have done retail through jury control of the law. This is populist prosecutorial nullification: a hydraulic descendant of strong juries.").

[129] Murray himself acknowledges that states ultimately hold the capacity "to overrule and control [their] localities." *Id.* at 242–44.

[130] *See* Wright, *supra* note 15, at 837 ("There is no single prosecutorial tradition that encompasses all of the many ways that prosecutors respond to their different institutional environments and distinctive threats to local public safety.").

[131] *Id.* at 840–41.

[132] *See id.* at 857 (summarizing relevant considerations).

[133] *See id.* at 841 ("Within this framework, state criminal prosecutors occupy a conflicted position, reaching across two levels of government.").

[134] *See id.* at 854 (discussing these considerations).

inferences to be drawn from them. To the extent state law directly answers questions regarding either the scope of prosecutors' discretion or who within the state government has final say over that question, taking state constitutional law seriously requires giving effect to those answers. Indeed, doing so itself has a strong democratic pedigree, given that many state constitutions have been subject to repeated popular revision over time.[135]

In sum, most state governments differ from the federal government in at least two respects that bear importantly on questions of prosecutorial authority—the unbundling of their executive branches and their provisions for locally elected prosecutors. These differences preclude generalizing from federal-law principles to state and local examples (and vice versa). Yet these features of state government and the history behind them also do not yield clear general implications for local prosecutorial authority. Determining whether local prosecutors have categorical nonenforcement power requires a more granular look at the fifty states' laws governing local prosecutorial autonomy.

IV. THE FIFTY STATES COMPARED TO EACH OTHER

I turn, then, to a survey of the fifty states' laws on local prosecutors. As noted at the outset, my analysis focuses solely on whether local prosecutors should presume authority to adopt explicit, publicly communicated policies that suspend enforcement of a given law either across the board or with such minor caveats as to amount to the same thing. This practice, which I call "categorical nonenforcement," but which others have called "prosecutorial nullification" or "prosecutorial decriminalization," among other things,[136] was once rare but has become increasingly common, principally among prosecutors with a self-described progressive bent.

My state-law survey moves quickly at a high level; it focuses on key provisions of each state's constitution and statutes that govern overall prosecutorial autonomy and discretion, as well as controlling interpretations of those laws by state high courts and attorneys

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[135] *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 866 (2021) ("[S]tate constitutions have been drafted, replaced, and amended in response to national historical developments.").

[136] *See supra* note 94.

general.[137] It likewise focuses solely on the power to initiate criminal

[137] I focus on these types of laws because they bear most directly on whether local prosecutors hold legal authority to adopt categorical nonenforcement policies. State laws also vary with respect to the oaths they require of local prosecutors. In a handful of states, local prosecutors must swear not only that they will support the state and federal constitutions, but also that they will "support" the "laws" of the state. *Compare, e.g.*, ARIZ. REV. STAT. ANN. § 38-231 (requiring oath or affirmation that "I will support the Constitution of the United States and the Constitution and laws of the State of Arizona"), N.M. CONST. art. XX, § 1 (requiring oath or affirmation that the office-holder "will support the constitution of the United States and the constitution and laws of this state"), *and* TEX. CONST. art. XVI, § 1 (requiring oath or affirmation that the officeholder "will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State"), *with* CAL. CONST. art. XX, § 3 (requiring oath or affirmation that the officeholder "will support and defend" and "bear true faith and allegiance to" the U.S. and California constitutions and that he or she "will well and faithfully discharge the duties" of the office), *and* 55 ILL. COMP. STAT. ANN. 5/3-9001 (requiring oath or affirmation from local prosecutor that "I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of state's attorney according to the best of my ability"). Any inference that these oaths preclude categorical nonenforcement seems weak, however, if other features of state law point toward such a power. On the whole, these oaths seem oriented toward upholding state government in general rather than every specific prohibition. From that point of view, local prosecutorial discretion could even be part of the laws that local prosecutors in these states are swearing to uphold.

States also provide varied mechanisms for removing malfeasant prosecutors. *See generally* Timothy D. Lanzendorfer, Note, *When Local Elected Officials Behave Badly: An Analysis and Recommendation to Empower State Intervention*, 82 OHIO ST. L.J. 653, 659 (2021) (surveying such mechanisms). I do not address here the most common removal mechanisms, namely impeachment and recall. Impeachment is rarely used and typically requires a legislative judgment that serious misconduct occurred, while recall serves mainly to reinforce electoral control over elected local officials. I likewise do not address provisions in many states' laws providing for removal of local prosecutors through criminal or quasi-criminal proceedings establishing corruption or significant misconduct. In principle, provisions of this sort permitting removal based on "willful or corrupt misconduct in office," *e.g.*, CAL. GOV'T CODE § 3060; IDAHO CODE ANN. § 19-4101, or "[h]abitual or willful neglect of duty," OKLA. STAT. ANN. tit. 22, § 1181; *see also, e.g.*, TENN. CODE ANN. § 8-47-101 (allowing removal through judicial process of a local official who "knowingly or willfully neglect[s] to perform any duty enjoined upon such officer by any of the laws of the state"); S.D. CODIFIED LAWS § 3-17-6 (same based on, among other things, "misconduct, malfeasance, [or] nonfeasance"), might permit removal of officials who decline to enforce laws, but determining whether nonenforcement amounted to qualifying "misconduct" or "neglect of duty" would depend on interpreting the other laws and structural principles addressed throughout this Article. *See, e.g.*, See Krasner v. Ward, No. 563 M.D. 2022, slip op. at 38–40 (Commonwealth Ct. of Pa. Dec. 29, 2022), *available at* https://www.pacourts.us/assets/opinions/Commonwealth/out/563MD22_1-12-23.pdf?cb=1 (holding that alleged lenient policies by a Pennsylvania District Attorney did not constitute "misbehavior in office" that could provide a basis for impeachment).

charges in trial courts, not on appeals from convictions (in some states, the state Attorney General handles appeals even though local prosecutors have authority over initial charges[138]). In addition, I hold aside special cases like conflicts of interest addressed in state ethics laws, as well as laws empowering state-level officials to prosecute specific crimes.[139] Finally, I focus on the scope of prosecutors' own duties and authorities under governing law, not whether those duties are judicially enforceable.[140]

In short, my analysis is not necessarily exhaustive in every respect and does not resolve every potential interpretive question; it aims more to start a conversation than to provide the final word. It is also necessarily provisional: controversies over nonenforcement are already yielding efforts to revise state laws in some

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More relevant here are provisions in some states that empower executive officials, such as the state governor, to remove local prosecutors. Some such mechanisms do not support any clear inference regarding the extent of local nonenforcement discretion, as they require either specific forms of malfeasance or else particular procedural steps such as indictment for felony that limit their application. *See, e.g.*, OHIO CONST. art. II, § 38 (requiring that laws be "passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any misconduct involving moral turpitude or for other cause provided by law"); OHIO REV. CODE ANN. § 3.16(B) (providing for removal proceedings against local officials following indictment for a felony). A few such provisions, however, may shed some light on the extent of local prosecutorial authority and are accordingly addressed as relevant in the text and footnotes below. *See, e.g.*, FLA. CONST. art. IV, § 7 (allowing the governor to suspend local officers, subject to reinstatement by the state Senate, "for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony"); MICH. CONST. art. V, § 10 (allowing the governor to "remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial"); WIS. STAT. ANN. § 17.06 ("A district attorney may be removed by the governor, for cause."); *infra* note 276 (discussing the limitations that Mississippi places on a governor's authority to remove a district attorney).

[138] *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 560–61 (2011) ("Almost all states give the attorney general authority over appeals in the state's highest court.").

[139] For an overview of such laws, see *id.* at 545–50.

[140] With respect to federal law, I have argued that while courts may invalidate particularly determinate nonenforcement guarantees, the federal executive's responsibility for faithful execution is best understood as a form of non-justiciable political question. *See* Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1571 (2016). Federal officials' obligations are nonetheless real, and the same may be true for state and local officials.

jurisdictions.[141] Nevertheless, even with these caveats and limitations, the survey suffices to document significant differences between states with respect to local categorical nonenforcement's validity. The following discussion canvasses the states by providing a rough typology of state laws, summarized in Figure 2, proceeding generally from those least amenable to permitting such nonenforcement to those most amenable to it.

[141] *See* Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150, 151–52 (discussing legislative proposals to preempt local prosecutors authority to make "blanket declination of certain charges," but noting that only one such proposal had passed as of spring 2021); Tolan, *supra* note 66 ("[A] Texas state representative has said he plans to introduce a bill during the state's legislative session next year to allow district attorneys in neighboring counties to file charges if a local DA declines to prosecute an abortion case.").

Figure 2
Rough Categorization of States*

States with Express Bans on Enforcement Suspension	Arkansas, Hawaii, Indiana, Maryland, Massachusetts, Nebraska, New Hampshire, North Carolina, Oregon, Virginia, Vermont, West Virginia
States with Affirmative Enforcement Duties for State-Level Officials	California, Florida, New Jersey, North Dakota
States with Centralized Law Enforcement Responsibility	Alabama, Alaska, Arizona, Delaware, Montana, (New Hampshire), Rhode Island, South Carolina, Utah, (Vermont), Washington
States with Broad Centralized Supersession Powers	Colorado, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, (Maryland), (Massachusetts), Michigan, Minnesota, New Mexico, New York, Ohio, Oklahoma, (Oregon), South Dakota, (Virginia), Wisconsin
States that Require Non-Executive Approval for Supersession	Connecticut, Louisiana, Missouri, Pennsylvania, Tennessee, Wyoming
States with Specific Limits on Centralized Supersession	(Arkansas), (Hawaii), Illinois, (Indiana), Mississippi, Nevada, (North Carolina), Texas, (West Virginia)

**States in parentheses fall more squarely in the category for states with express bans on enforcement suspension.*

A. STATES WITH EXPLICIT BANS ON ENFORCEMENT SUSPENSION

The constitutions of seven states—Hawaii, Maryland, Massachusetts, New Hampshire, North Carolina, Vermont, and Virginia—include provisions that bar not only executive suspensions of law but also suspensions of the law's "execution."[142] Constitutions in another three states—Arkansas, Indiana, and Oregon—include anti-suspension provisions that do not refer specifically to law execution, but nevertheless employ language that seems designed to reach beyond the letter of the law to its practical effect. Indiana's constitution provides that "[t]he operation of the laws shall never be suspended, except by the authority of the General Assembly."[143] Oregon's constitution includes an equivalent

[142] Massachusetts's constitution provides that "[t]he power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." MASS. CONST. pt. I, art. XX. The New Hampshire constitution includes identical language, N.H. CONST., pt. I, art. XXIX, and Vermont's and Hawaii's include closely similar clauses. *See* VT. CONST. ch. 1, art. XV ("The power of suspending laws, or the execution of laws, ought never to be exercised but by the Legislature, or by authority derived from it, to be exercised in such particular cases, as this constitution, or the Legislature shall provide for."); HAW. CONST. art. I, § 15 ("The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe."). North Carolina's constitution directs that "[a]ll power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised," N.C. CONST. art. I, § 7, and Virginia's includes a nearly identical provision. VA. CONST. art. I, § 7 ("That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."); *see also id.* art. IV, § 15 ("No private corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall a general law's operation be suspended for the benefit of any private corporation, association, or individual."); 14-900 Op. Att'y Gen. 1 (2014), 2014 WL 5406299, at *1–2 (concluding that "the Governor must enforce valid, duly enacted laws unless the power to delay or suspend enforcement is granted by statute or by the law's enactment clause" because "[i]gnoring or failing to implement a duly adopted regulation or statute has the same practical effect as actively issuing a directive suspending the enforcement of such law"); *cf.* Howell v. McAuliffe, 788 S.E.2d 706, 722 (Va. 2016) (rejecting categorical exercise of clemency as inconsistent with state prohibition on executive suspensions of law). Maryland's constitution states that "no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed." MD. CONST. art IX.

[143] IND. CONST. art. I, § 26.

prohibition,[144] and Arkansas's states that "[n]o power of suspending or setting aside the law or laws of the State, shall ever be exercised, except by the General Assembly."[145]

These provisions, particularly those that refer specifically to the law's execution, should preclude categorical nonenforcement. Indeed, it is hard to see what else would constitute suspending the execution of the laws, as distinct from suspending the law itself. These provisions, furthermore, are framed generally; they limit such suspension power to the legislature alone.[146] They thus seem equally applicable to state and local enforcement officials, and their express treatment of the question would seem to override any more speculative inference of nonenforcement authority from separate provisions for local election of prosecutors. For example, although

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[144] *See* OR. CONST. art. I, §22 ("The operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly."). Providing a potential mechanism for enforcing this obligation, Oregon's constitution provides for gubernatorial removal of prosecuting attorneys "upon the Joint resolution of the Legislative Assembly, in which Two Thirds of the members elected to each house shall concur, for incompetency, Corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution." *Id.* art. VII, § 20.

[145] ARK. CONST. art. II, § 12.

[146] Reinforcing this inference in Massachusetts, a statute permits a majority of the state's Supreme Judicial Court to remove a local prosecutor "if in their judgment the public good so requires," MASS. GEN. LAWS ANN. ch. 211, § 4, and in 1922 the court applied this statute to remove a District Attorney based in part on his alleged failure to prosecute crimes despite sufficient evidence to secure convictions. *See* Att'y Gen. v. Pelletier, 134 N.E. 407, 413, 434–35 (Mass. 1922) (discussing examples of non-prosecution but not finding all the relevant allegations proven). *But cf.* Commonwealth v. Webber, No. SJ-2019-0366, 2019 WL 4263308, at *1 (Mass. Sept. 9, 2019) ("In the context of criminal prosecutions, the executive power affords prosecutors wide discretion in deciding whether to prosecute a particular defendant, and that discretion is exclusive to them." (internal quotation marks and citation omitted)). For a general discussion of Massachusetts separation-of-powers law as it pertains to non-prosecution, see John E. Foster, *Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511, 2522–29 (2019).

Hawaii[147] and North Carolina[148] vest prosecutorial authority in elected district attorneys with considerable legal autonomy from state-level officials, these states' anti-suspension provisions appear to preclude understanding this autonomy to include a power to adopt categorical nonenforcement policies.[149]

Another ten states (Alabama, Delaware, Kentucky, Louisiana, Maine, Ohio, Pennsylvania, South Carolina, South Dakota, and Texas) have constitutional provisions banning executive suspensions of law, without express reference to execution of the laws.[150] In my view, the U.S. Constitution's requirement of faithful

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[147] Hawaii places local prosecutors "under the authority of the attorney general," HAW. REV. STAT. ANN. § 46-1.5(17), yet the Hawaii Supreme Court has held that this statutory scheme "cannot sensibly be construed as a reservation of power [to the Attorney General] to usurp, at his sole discretion, the functions of the public prosecutor." Amemiya v. Sapienza, 629 P.2d 1126, 1129 (Haw. 1981). Accordingly, the court indicated that the state Attorney General could displace a local prosecutor only, "for example, where the public prosecutor has refused to act and such refusal amounts to a serious dereliction of duty on his part, or where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act . . . ." *Id.*

[148] The North Carolina Supreme Court has held that, under North Carolina law, "the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State" and that the Attorney General lacks independent power to prosecute crimes. State v. Camacho, 406 S.E.2d 868, 871 (N.C. 1991); *see also* State v. Diaz-Tomas, 382 N.C. 640, 646 (2022) ("Prosecution of criminal offenses is the 'sole and exclusive responsibility' of the duly elected district attorneys of the state." (quoting *In re* Spivey, 480 S.E.2d 693, 696 (1997))); N.C. CONST. art. IV, § 18 ("The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district . . . ."); N.C. GEN. STAT. ANN. § 7A-61 (2017) ("The district attorney shall prepare the trial dockets, prosecute in a timely manner in the name of the State all criminal actions and infractions requiring prosecution in the superior and district courts of the district attorney's prosecutorial district and advise the officers of justice in the district attorney' district."); *id.* § 114-2(4) (granting state Attorney General the authority to "consult with and advise the prosecutors, when requested by them"); *id.* § 114-11.6 (establishing a Special Prosecution Division within the Attorney General's Office whose attorneys are "available to prosecute or assist in the prosecution of criminal cases when requested to do so by a district attorney and the Attorney General approves").

[149] *Cf.* Ruggles v. Yagong, 353 P.3d 953, 960 (Haw. 2015) (holding that state-wide marijuana prohibitions preempted local ordinance deeming marijuana enforcement the "lowest priority" for local law enforcement). As discussed below, Indiana, West Virginia, and Arkansas have analogous legal structures too. *See infra* section IV.F.

[150] ALA. CONST. art. I § 21 ("[N]o power of suspending laws shall be exercised except by the legislature"); *id.* art. IV § 108 ("The operation of a general law shall not be suspended for the benefit of any individual, private corporation, or association; nor shall any individual, private corporation or association be exempted from the operation of any general law except as in

execution—a requirement generally understood to prohibit suspensions of law[151]—should bar categorical suspensions of enforcement by federal officials.[152] The same inference may well follow from state anti-suspension provisions, or at least fall within the range of valid interpretive inferences available to state courts and other interpreters. Nevertheless, provisions for locally elected prosecutors complicate this inference in the state context, for all the reasons discussed earlier.

Finally, two other states, Nebraska and West Virginia, despite lacking any anti-suspension clause in their constitutions, impose obligations on local prosecutors at odds with presuming categorical nonenforcement power. Nebraska law requires local county attorneys to prosecute when they possess "sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor."[153] The state then backstops this obligation by providing the state Attorney General with equivalent powers of prosecution, thus enabling that official to step in whenever a county attorney fails to pursue certain crimes.[154] West Virginia's statute is

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this article otherwise provided."); DEL. CONST., art. I, § 10 ("No power of suspending laws shall be exercised but by authority of the General Assembly."); KY. CONST. § 15 ("No power to suspend laws shall be exercised unless by the General Assembly or its authority."); LA. CONST. art. III, § 20 ("Only the legislature may suspend a law . . . ."); ME. CONST. art. I, § 13 ("The laws shall not be suspended but by the Legislature or its authority."); OHIO CONST. art. I, § 18 ("No power of suspending laws shall ever be exercised, except by the General Assembly."); PA. CONST. art. I, § 12 ("No power of suspending laws shall be exercised unless by the Legislature or by its authority.); S.C. CONST. art. I, § 7 ("The power to suspend the laws shall be exercised only by the General Assembly or by its authority in particular cases expressly provided for by it."); S.D. CONST. art. VI, § 21 ("No power of suspending laws shall be exercised, unless by the Legislature or its authority."); TEX. CONST. art. I, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

[151] *See, e.g.*, PRAKASH, *supra* note 31, at 93–94.

[152] Price, *Enforcement Discretion*, *supra* note 5, at 689; *see also* Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2187 (2019) (advancing an account of the historical meaning of "faithful execution" that "offer[s] some support for the argument against systematic executive discretion to effectively 'suspend' laws through an assertion of categorical prosecutorial discretion").

[153] NEB. REV. STAT. § 23-1201(1) (2021). Nebraska law also permits private parties to petition for removal of county officers based on "habitual or willful neglect of duty," among other things, *id.* §§ 23-2001, 23-2002, and it allows courts to compel prosecution if they are "not satisfied" with a prosecutor's reasons for declining to press charges. *Id.* § 29-1606.

[154] *Id.* §§ 84-203, 84-204; *see also* State v. Douglas, 349 N.W.2d 870, 891 (Neb. 1984) ("Although § 84–205 provides that the Attorney General shall have the same powers and

less emphatic: it obligates the local prosecutor only to "institute and prosecute all necessary and proper proceedings against the offender" whenever "the prosecuting attorney has information of the violation of any penal law committed within the county."[155] West Virginia, moreover, allows the Attorney General to appear in local criminal proceedings only "on the written request of the governor."[156] The state's highest court, however, has interpreted these statutes to impose on the local prosecuting attorney "a nondiscretionary obligation to institute criminal proceedings against persons whom the prosecutor has reason to believe have violated a criminal statute."[157]

In practice, local prosecutors in these states may well lack the capacity to pursue every provable legal violation. These statutory obligations, in other words, may often be obeyed in the breach. Even so, this obligatory conception of prosecutorial authority should preclude presuming authority to overtly suspend prosecution of some category of offenses. Thus, in Nebraska and West Virginia, as well as in other states with express bans on suspending execution of laws, state law appears to foreclose categorical nonenforcement policies.

B. STATES WITH AFFIRMATIVE DUTIES ON STATE-LEVEL OFFICIALS TO ENSURE ENFORCEMENT

In another set of states, local categorical nonenforcement power seems equally unlawful because officials hold specific duties to ensure that state laws are given meaningful effect.

The California constitution, for example, not only obligates the

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prerogatives in each of the several counties of the state as the county attorneys have in their respective counties, the affirmative duty to prosecute all criminal matters is specifically placed upon the county attorney."). Barkow reports evidence from interviews that this power is used very rarely (or was used rarely as of 2011), see Barkow, *supra* note 138, at 552, but any such practice does not alter the availability of this authority if a particular Attorney General decided that broader intervention was necessary.

[155] W. VA. CODE § 7-4-1 (2021).

[156] *Id.* § 5-3-2.

[157] State *ex rel.* Bailey v. Facemire, 413 S.E.2d 183, 187 (W. Va. 1991); *see also* State *ex rel.* Ginsberg v. Naum, 318 S.E.2d 454, 455–56 (W. Va. 1984) ("'Shall' [in the statute] is mandatory and makes it a prosecutor's non-discretionary duty to institute proceedings against persons when he has information giving him probable cause to believe that any penal law has been violated.").

governor to "see that the law is faithfully executed," but also assigns to the separately elected state Attorney General "the duty . . . to see that the laws of the State are uniformly and adequately enforced."[158] It further grants the Attorney General supervisory authority over local district attorneys, and even provides that "[w]henever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney."[159] Added to the state constitution by ballot proposition in 1934, this provision aimed to "make[] possible the coordination of county law enforcement agencies and provide[] the necessary supervision to insure that result."[160] According to the official statement supporting the amendment—signed by then-District Attorney Earl Warren, the future California Attorney General, California Governor, and Chief Justice of the United States[161]—the prior system of local prosecutorial autonomy made sense "when our population was small, our colonies separated by wilderness, when there were no repeating firearms and when the fastest mode of transportation was the horse and buggy," but it had proven to be "inadequate" to the "complex society" of 1934.[162] Lamenting that "[t]he vast majority of felonies committed in this country go down into history as unsolved crimes," the statement urged adoption of the measure to "make [the Attorney General] responsible for the uniform and adequate enforcement of law throughout the State."[163]

In keeping with these goals, California Attorney General (and future Governor) Edmund G. Brown indicated in a 1952 opinion that the "will of the people as expressed in [the state constitution] would be defeated" if local prosecutors could neglect enforcement of

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[158] CAL. CONST. art. V, § 13. I have addressed California law at greater length in Zachary Price, *Blanket Nonenforcement Policies Are Unconstitutional in California*, SCOCABLOG (Feb. 2, 2022), http://scocablog.com/616-2/.

[159] CAL. CONST. art. V, § 13.

[160] Cal. Prop. 4, Initiative Const. Amend., Argument in Favor of Initiative Proposition No. 4 (1934) [hereinafter Cal. Prop. 4], http://repository.uchastings.edu/ca_ballot_props/319.

[161] *See Earl Warren,* OYEZ, https://www.oyez.org/justices/earl_warren (last visited Sept. 17, 2022) (describing Earl Warren's roles as Attorney General of California, Governor of California, and as Chief Justice of the United States).

[162] Cal. Prop. 4, *supra* note 160.

[163] *Id.*

state laws.[164] The opinion explained: "[A] general system of law enforcement in this state was initiated by the people in the adoption of [this constitutional provision] which makes it the duty of the Attorney General to see that the laws of this state are uniformly and adequately enforced in every county of the state."[165] For their part, California courts have observed that although the state constitution "'does not contemplate absolute control and direction' of the officials subject to the Attorney General's supervision,"[166] it does aim "to ease the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law enforcement agencies and providing the necessary supervision by the Attorney General over them."[167] As a state appellate court has put it, the "provision was intended to ensure that the laws of the state are enforced rather than to insulate criminal defendants from enforcement of the laws . . . . [I]t confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case."[168] In light of the California Attorney General's supervisory authority, the state supreme court has even observed that "it is difficult to imagine how a district attorney's enforcement of state law could be characterized as creating local policy."[169]

In short, although California's constitutional structure grants considerable authority to locally elected prosecutors,[170] that power exists only as a default. As reflected in the state constitution and reinforced by various state statutes, the Attorney General holds not

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[164] 20 EDMUND G. BROWN, OPS. ATT'Y GEN. CAL. 234, 237 (Warren L. Hanna ed., 1953).

[165] *Id.* at 236.

[166] Brewster v. Shasta Cnty., 275 F.3d 803, 809 (9th Cir. 2001) (quoting People v. Brophy, 120 P.2d 946, 953 (Cal. Ct. App. 1942)).

[167] Pitts v. Cnty. of Kern, 949 P.2d 920, 931 n.4 (Cal. 1998).

[168] People v. Honig, 55 Cal. Rptr. 2d 555, 595 (Cal. Ct. App. 1996).

[169] *Pitts*, 949 P.2d at 933; *cf.* Abbott Lab'ys v. Super. Ct. of Orange Cnty., 467 P.3d 184, 193 (Cal. 2020) (discussing the legislature's authority to structure district attorneys' authority, indicating that district attorneys act "in a state rather than a local capacity" when "prosecut[ing] criminal violations of state law," and noting "the Attorney General's constitutional role as California's chief law enforcement officer").

[170] *See* CAL. CONST. art. XI, § 1(b) ("The Legislature shall provide for . . . an elected district attorney . . . in each county."); CAL. GOV'T CODE § 26500 (1980) ("The district attorney is the public prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses."). The ballot proposition's sponsors noted that their amendment would not "curtail[] the right of local self government." Cal. Prop. 4, *supra* note 160.

only the power but also the duty to step in when local prosecutors are failing to ensure "adequate[]" enforcement of state laws on par with other jurisdictions.[171]

In New Jersey, state law similarly obligates the state Attorney General to "maintain a general supervision over . . . county prosecutors with a view to obtaining effective and uniform

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[171] CAL. CONST. art. V, § 13; *see also* CAL. PENAL CODE § 923(a) (2012) ("Whenever the Attorney General considers that the public interest requires, he or she may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of those matters of a criminal nature that he or she desires to submit to it."); CAL. GOV'T CODE § 12550 (2021) ("The Attorney General has direct supervision over the district attorneys of the several counties of the state . . . . When the Attorney General deems it advisable or necessary in the public interest, or when directed to do so by the Governor, the Attorney General shall assist any district attorney in the discharge of the district attorney's duties, and may, if deemed necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction."); *id.* § 12524 ("The Attorney General may . . . call into conference the district attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this state, or such of them as the Attorney General deems advisable, for the purpose of discussing the duties of their respective offices, with the view of uniform and adequate enforcement of the laws of this state as contemplated by Section 13 of Article V of the Constitution of this state."). Some recent biannual reports by the California Attorney General emphasized this responsibility to ensure uniform enforcement of state laws. *See, e.g.*, CAL. DEP'T JUST. OFF. ATT'Y GEN., *Biennial Report: Major Activities in 2015–2016* 1, 2 ("As chief law officer of California, the Attorney General is responsible for ensuring that state laws are uniformly and adequately enforced. The Attorney General carries out this constitutional responsibility through the programs of the Department of Justice.").

One might read the California constitution's language to allow the Attorney General to determine what level of enforcement state-wide is adequate (including potentially no enforcement at all). *Cf. Honig*, 55 Cal. Rptr. 2d at 595 ("The only limitations [on Attorney General prosecution of local cases] are that the action be within the superior court's jurisdiction, and that the Attorney General be of the opinion that any law of the state is not being adequately enforced in any county."). But the language more naturally suggests, as the 1952 Attorney General opinion indicates, that the Attorney General must strive to give all state laws at least some effect. *See* BROWN, *supra* note 164, at 236. To be sure, California Attorneys General may have rarely exercised their power to supplant local prosecutorial choices. *See* Barkow, *supra* note 138, at 552 ("[E]ven with this broad constitutional mandate, the [Attorney General] in California limits herself to post-conviction proceedings, benefits fraud, and complex white collar and high-tech crimes."); Sean McCoy & Brandon V. Stracener, *The Attorney General's Supervisory Power: Theory and Reality*, SCOCAblog (Sept. 16, 2019), http://scocablog.com/the-attorney-generals-supervisory-power-theory-and-reality/ ("The attorney general does supersede district attorneys, and local prosecutors do get conflicted out. But those occur rarely."). Nevertheless, the state's legal structure rebuts, by its plain terms, any assumption that local prosecutors may categorically suspend enforcement of locally disfavored state laws. Local district attorneys may exercise such authority only insofar as the Attorney General neglects his or her own duty to override it.

enforcement of the criminal laws throughout the State."[172] Though New Jersey's local prosecutors are not elected—the Governor appoints them to five-year terms with the state Senate's advice and consent[173]—they do hold a constitutionally prescribed office with primary responsibility for local law enforcement.[174] The Attorney General, however, may independently initiate prosecution in any case or may take any case away from the county attorney;[175] the Attorney General may even assume the county prosecutor's responsibilities in total if requested to do so by the Governor, a grand jury, or certain local officials.[176] Thus, although the state supreme court has said "[t]here is no ordinary chain of command between the attorney general and the county prosecutors,"[177] state law obligates the Attorney General to ensure "effective and uniform enforcement" of state laws and empowers that official (as well as the Governor) to take over prosecutorial responsibilities when local prosecutors fail to undertake such enforcement.[178] Much as in California, this legal structure seems at odds with any authority on local prosecutors' part to categorically suspend enforcement of any given state law.[179]

For its part, Florida appears to have arrived at a similar legal

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[172] N.J. STAT. ANN. § 52:17B-103 (1970).

[173] N.J. CONST. art. VII, § 2, ¶ 1.

[174] *See* Yurick v. State, 875 A.2d 898, 903 (N.J. 2005) (indicating that "the county prosecutor is constitutionally created and statutorily endowed with powers that arm him or her to perform wide ranging duties," including responsibility "for the prosecution of crimes committed in the county").

[175] *See* N.J. STAT. ANN. § 52:17B-107 (2019) ("Whenever in the opinion of the Attorney General the interests of the State will be furthered by so doing, the Attorney General may (a) supersede a county prosecutor in any investigation, criminal action or proceeding, (b) participate in any investigation, criminal action or proceeding, or (c) initiate any investigation, criminal action or proceeding.").

[176] *See id.* § 52:17B-106 ("Whenever requested in writing by the Governor, the Attorney General shall, and whenever requested in writing by a grand jury or the board of chosen freeholders of a county or the assignment judge of the superior court for the county, the Attorney General may supersede the county prosecutor for the purpose of prosecuting all of the criminal business of the State in said county, intervene in any investigation, criminal action, or proceeding instituted by the county prosecutor . . . .").

[177] Morss v. Forbes, 132 A.2d 1, 17 (N.J. 1957).

[178] *See Yurick*, 875 A.2d at 903 (discussing these provisions and how they interact).

[179] New Jersey courts have in fact required state-wide charging guidelines with respect to charges under certain statutes. *See* Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087, 1094–97 (2005) (discussing the history of these guidelines).

understanding through judicial construction. Although Florida's state constitution provides that a state attorney elected in each judicial district "shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law,"[180] a 1986 amendment provides for an appointed "statewide prosecutor" with "concurrent jurisdiction with the state attorneys to prosecute violations" that occurred in or affected multiple judicial circuits.[181] In addition, as in many other states, the Governor holds "supreme executive power," as well as the duty to "take care that the laws be faithfully executed."[182] In a 2017 decision, the Florida Supreme Court upheld the Governor's authority to transfer all death-eligible cases away from a state attorney who announced a blanket policy against seeking the death penalty.[183] It based this result on the constitutional provisions just mentioned as well as a statutory power to transfer cases from one state attorney to another when "the ends of justice would be best served" by the transfer.[184]

In the course of its reasoning, furthermore, the Florida Supreme Court rejected any notion that state attorneys could adopt blanket nonenforcement policies in the first place. "[E]xercising discretion," the majority reasoned, "demands an individualized determination 'exercised according to the exigency of the case, upon a consideration of the attending circumstances.'"[185] Accordingly, the state attorney's "blanket refusal to seek the death penalty in any eligible case, including a case that 'absolutely deserve[s] [the] death penalty' does not reflect an exercise of prosecutorial discretion; it embodies, at best, a misunderstanding of Florida law."[186] Florida's Supreme Court thus not only rejected any notion that local prosecutors hold categorical nonenforcement power, but also interpreted state law to grant the governor the power, if not also the duty, to override any such policies by transferring cases away from prosecutors who adopt

[180] FLA. CONST. art. V, § 17.

[181] *Id.* art. IV, § 4(b).

[182] *Id.* art. IV, § 1.

[183] Ayala v. Scott, 224 So. 3d 755, 759 (Fla. 2017).

[184] *Id.* at 757; *see also* FLA. STAT. § 27.14(1) (establishing the governor's power to reassign state attorneys).

[185] *Ayala*, 224 So. 3d at 759 (quoting Barber v. State, 5 Fla. 199, 206 (Fla. 1853) (Thompson, J., concurring)).

[186] *Id.*

them.[187]

Finally, the North Dakota Supreme Court has held that the duties of North Dakota state's attorneys "must be performed regardless of public sentiment about enforcing certain laws" and that "a state's attorney may not effectively repeal a law by failing to prosecute a class of offenses."[188] North Dakota law, moreover, provides means of enforcing this duty: courts may appoint special prosecutors in appropriate cases,[189] and the state attorney general may investigate local crimes and charge the resulting expenses to the county state's attorney's funds, "to the end that the laws of the state shall be enforced therein and all violators thereof brought to trial."[190] The state Attorney General may do so whenever he or she "deems it necessary for the successful enforcement of the laws of the state in such county" or when requested by the county board of commissioners or by twenty-five county taxpayers.[191] In addition, a local court may request that the Attorney General take charge of a case or appoint an attorney to do so if the local "state's attorney has refused or neglected to perform" any criminal enforcement responsibilities.[192] Overall, this statutory structure seems designed,

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[187] A much older decision upheld gubernatorial removal of a law-enforcement official for "neglect of duty" based on evidence that the official "knowingly permit[ted] gambling and prefer[red] no charges therefor." State *ex rel.* Hardee v. Allen, 172 So. 222, 224 (Fla. 1937); *see also* FLA. CONST. art. IV, § 7 (allowing the governor to suspend local officers, subject to reinstatement by the state Senate, "for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony"); *cf.* Israel v. Desantis, 269 So. 3d 491, 493 (Fla. 2019) (upholding suspension of local sheriff for "neglect of duty and incompetence" based on his failure to prevent two mass shootings). Employing the same legal theory, the Florida Governor recently removed a local prosecutor based on his "blanket refusal" to enforce certain state laws. *See* STATE OF FLA., EXEC. ORD. NO. 22-176 (Aug. 4, 2022), https://www.flgov.com/wp-content/uploads/2022/08/Executive-Order-22-176.pdf (ordering the removal of a state attorney).

[188] Olsen v. Koppy, 593 N.W.2d 762, 767 (N.D. 1999).

[189] State *ex rel.* Clyde v. Lauder, 90 N.W. 564, 569 (N.D. 1902) (holding that "it is the province of the court to determine the ultimate question whether [a particular] case shall be prosecuted or dismissed" and "it is optional with the court to direct either the state's attorney or another attorney appointed by the court to file an information and bring the case to trial").

[190] N.D. CENT. CODE ANN. § 54-12-03 (2021).

[191] *Id.*; *see also id.* § 54-12-02 ("The attorney general and the attorney general's assistants are authorized to institute and prosecute all cases in which the state is a party, whenever in their judgment it would be for the best interests of the state so to do.").

[192] *Id.* § 11-16-06; *see also id.* § 11-16-01 (describing duties of state's attorneys as "the public prosecutor").

like California's, Florida's, and New Jersey's, to ensure that one way or another the state's laws "shall be enforced" and "all violators . . . brought to trial."[193]

C. STATES WITH CENTRALIZED LAW ENFORCEMENT RESPONSIBILITY

States in a third group impose no specific enforcement obligation on state or local officials, but have nonetheless centralized control over criminal prosecution to such a degree that broad nonenforcement power, at least at the local level, is implausible.

Three states—Alaska, Delaware, and Rhode Island—not only lack locally elected prosecutors but also vest all power of criminal prosecution specifically in a state-wide official (the state Attorney General in Alaska[194] and Rhode Island[195], and a state prosecutor appointed by the Attorney General in Delaware[196]). In Alaska, the state Attorney General has exercised a statutory power to appoint local district attorneys who then serve at the Attorney General's pleasure and subject to his or her supervision.[197] Rhode Island's

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[193] *Id.* § 54-12-03.

[194] *See* ALASKA STAT. ANN. § 44.23.020(b)(4) (2022) (directing that the state Attorney General shall "prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution").

[195] *See* 42 R.I. GEN. LAWS. ANN. § 42-9-4(a) (2022) ("The attorney general shall draw and present all informations and indictments, or other legal or equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute them to final judgment and execution.").

[196] *See* DEL. CODE. ANN. tit. 29, § 2505(c) (2021) ("The Attorney General may appoint . . . a lawyer resident in this State who shall be designated as the State Prosecutor and who shall serve on a full-time basis under the direct control of the Attorney General."); *see also id.* § 2504(6) (granting the Attorney General the power to "have charge of all criminal proceedings as prior to January 1, 1969").

[197] *See* ALASKA STAT. ANN. § 44.17.040 (2022) ("The principal executive officer of each department may establish necessary subordinate positions, make appointments to these positions, and remove persons appointed within the limitations of appropriations and subject to state personnel laws. Each person appointed to a subordinate position established by the principal executive officer is under the supervision, direction, and control of the officer."); *see also* State v. Breeze, 873 P.2d 627, 633 (Alaska Ct. App. 1994) (discussing the Attorney General's power to appoint and supervise prosecutors); Press Release, State of Alaska Dept. of Law, *Anchorage District Attorney John Novak to Retire; Deputy District Attorney Brittany Dunlop Named as Successor* (Apr. 16, 2020),

Attorney General appears to directly control all criminal prosecution in the state,[198] and in Delaware, the Criminal Division of the state's Department of Justice includes an office for each of the state's three counties, each of which is led by a County Prosecutor appointed by the Attorney General who reports to the State's Attorney.[199]

The degree of centralized control over prosecution in each of these states makes it implausible to claim that local prosecutors (to the extent they even exist) hold any independent power of categorical nonenforcement.[200] State-wide prosecutors, by contrast, might claim such authority, but these states also impose statutory mandates on the relevant officials that indicate no such power and may be at odds with presuming one.[201]

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http://law.alaska.gov/press/releases/2020/041620-AnchorageDA.html (announcing appointment of district attorney by state Attorney General).

[198] *See About Our Office*, STATE OF R.I. (Oct. 19, 2021), http://www.riag.ri.gov/home/OurOffice.php ("[T]he Attorney General is responsible for both criminal and civil legal matters on behalf of Rhode Islanders. Our Office prosecutes all felony criminal cases and misdemeanor appeals, as well as misdemeanor cases brought by state law enforcement agencies.").

[199] *See Criminal Division*, DEL. DEPT. OF JUST., https://attorneygeneral.delaware.gov/criminal/ (last visited Jan. 3, 2023) (providing an overview of the Criminal Division's duties and divisions).

[200] *See* Tyler Quinn Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 113 (2018) (observing that in Alaska, Delaware, and Rhode Island "[a]ny local prosecutors . . . serve at the will of the statewide officer, and enjoy no statutorily-guaranteed discretion at all"); *cf.* Goldrosen, *supra* note 141, at 153 (arguing that recent bills proposed in some states to grant state-level officials authority to prosecute particular offenses amount to "remov[ing]" local discretion because they would "convey to district attorneys that, while they might have the legal authority to decline prosecution, the attorney general will swoop in to prosecute"); CAROL J. DEFRANCES, PROSECUTORS IN STATE COURTS, 2001 at 2 ("In Alaska, Delaware, and Rhode Island criminal prosecution was the primary responsibility of the State's Attorney General."); *see also, e.g.*, State v. Rollins, 359 A.2d 315, 318 (R.I. 1976) ("It is well settled in this state that the Attorney General is the only state official vested with prosecutorial discretion." (citing Rogers v. Hill, 48 A. 670, 671 (R.I. 1901))).

[201] For Alaska, see ALASKA STAT. ANN. § 44.23.020(b)(4) (2022) ("The attorney general shall . . . prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution."); *Breeze*, 873 P.2d at 633 ("[T]he attorney general has the power and duty under [this statute] to ensure that state law violations are investigated and prosecuted."). *But cf.* Pub. Def. Agency v. Super. Ct., Third Jud. Dist., 534 P.2d 947, 950 (Alaska 1975) ("The authority to proceed under [this statute] does not . . . empower the court to order the Attorney

Several other states—Alabama, Arizona, Montana, New Hampshire, South Carolina, Utah, and Vermont—provide for locally elected prosecutors, but subject them to plenary supervision by state-level officials. In Alabama, although elected local district attorneys have primary prosecutorial authority,[202] the elected state "Attorney General, either in person or by one of his or her assistants, at any time he or she deems proper, either before or after indictment, may superintend and direct the prosecution of any criminal case in any of the courts of this state."[203] Similarly, Arizona provides that the state Attorney General not only "[e]xercise[s] supervisory powers over county attorneys of the several counties in matters pertaining to that office," but also may, at the Governor's direction or "if deemed necessary by the attorney general," directly "prosecute and defend any proceeding in a state court . . . in which [the] state . . . is a party."[204]

Although Montana's constitution provides only for elected state-wide officials including an Attorney General,[205] the state has established local elected or appointed county attorneys by statute.[206] The state Attorney General holds statutory authority "to exercise supervisory powers over county attorneys," including "the power to order and direct county attorneys in all matters pertaining to the duties of their office."[207] When so directed by the Attorney General, the county attorneys must "promptly institute and diligently

General to prosecute any particular contempt for non-support."). For Delaware, see DEL. CODE. ANN. tit. 29, § 2505(c) (2021) ("The State Prosecutor shall be responsible for the prosecution of all criminal matters and shall have such powers and duties as the Attorney General shall designate."). For Rhode Island, see 42 R.I. GEN. LAWS. ANN. § 42-9-4(a) (2022) ("The attorney general shall draw and present all informations and indictments, or other legal or equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute them to final judgment and execution.").

[202] *See* ALA. CONST. art. VI, § 160(a) (establishing office of elected district attorney); ALA. CODE § 12-17-184 (2022) ("It is the duty of every district attorney and assistant district attorney, within the circuit, county, or other territory for which he or she is elected or appointed . . . (2) To draw up all indictments and to prosecute all indictable offenses.").

[203] ALA. CODE § 36-15-14 (2022). The same statute further provides: "The district attorney prosecuting in such court, upon request, shall assist and act in connection with the Attorney General or his or her assistant in such case." *Id.*

[204] ARIZ. REV. STAT. ANN. § 41-193(A)(2), (4) (2021).

[205] MONT. CONST. art. VI, § 1(1).

[206] *See* MONT. CODE ANN. § 7-4-2712 (2021) (establishing the duties of county attorneys); *see also id.* § 7-4-2203 (providing for the election or appointment of one county attorney); *id.* § 7-4-2205 (establishing terms in office for county officers listed in §7-4-2203).

[207] *Id.* § 2-15-501(5).

prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding."[208] In New Hampshire, although the state Attorney General holds exclusive authority to prosecute crimes punishable by death or life imprisonment,[209] elected county prosecutors otherwise hold authority to prosecute state crimes.[210] They do so, however, under the "direction" or even "control" of the Attorney General,[211] who "shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state."[212]

South Carolina's constitution provides that "[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record."[213] The state constitution also obligates the Attorney General to "assist and represent the Governor" in carrying out the Governor's responsibility to ensure faithful execution of the laws.[214] Although the state's constitution and laws also provide for locally elected "solicitors" who prosecute crimes in each judicial circuit,[215] the state Supreme Court has understood these provisions to signify

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[208] *Id.* The same provision also empowers the governor to direct the state Attorney General to assist in local prosecutions or prosecute local cases. *Id.* § 2-15-501(6).

[209] *See* N.H. REV. STAT. ANN. § 7:6 (2022) ("The attorney general shall act as attorney for the state . . . in the prosecution of persons accused of crimes punishable with death or imprisonment for life.").

[210] *See id.* (directing that "with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state").

[211] *See id.* § 7:11 ("[Any] officer or person, in the enforcement of [any criminal law], shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same."); *id.* § 7:34 ("The county attorney of each county shall be under the direction of the attorney general . . . .").

[212] *Id.* § 7:6.

[213] S.C. CONST. art. V, § 24.

[214] *Id.* art. IV, § 15.

[215] *See id.* art. V, § 24 ("[I]n each judicial circuit a solicitor shall be elected by the electors thereof."); S.C. CODE ANN. § 1-7-320 (2022) ("Solicitors shall perform the duty of the Attorney General and give their counsel and advice to the Governor and other State officers, in matters of public concern, whenever they shall be, by them, required to do so; and they shall assist the Attorney General, or each other, in all suits of prosecution in behalf of this State when directed so to do by the Governor or called upon by the Attorney General."); *id.* § 1-7-100 (requiring the state Attorney General to appear with solicitors in grand jury proceedings for capital cases and allowing the Attorney General to appear and assume "direction and management" in "trial[s] of any cause in which the State is a party or interested").

that "the Attorney General has the constitutional duty to supervise all criminal prosecutions and ensure all laws be faithfully executed, as well as the statutory duty to direct the state solicitors, including the ability to assign solicitors to assist in matters outside of their respective judicial circuits."[216]

In Utah, the Attorney General must "exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of the district and county attorneys' offices."[217] This supervisory authority, moreover, specifically includes the power to require status reports on pending matters and to "review investigation results de novo and file criminal charges, if warranted, in any case involving a first degree felony" if the local prosecutor declined to press charges despite a law enforcement agency's submission of "investigation results" to the prosecutor.[218] In Vermont, similarly, local elected State's Attorneys have authority to prosecute offenses in their jurisdiction,[219] but the state Attorney General exercises "the general supervision of criminal prosecutions" and must assist local prosecutions "when, in his or her judgment, the interests of the State require it."[220] In addition, the Attorney General must appear for the state in homicide cases and

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[216] State v. Harrison, 854 S.E.2d 468, 471 (S.C. 2021); *cf.* Hampton v. Haley, 743 S.E.2d 258, 262 (S.C. 2013) (noting that "the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the legislature" and accordingly that, "while non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power").

[217] *See* UTAH CODE ANN. § 67-5-1(1)(f) (2022); *see also* UTAH CONST. art. VIII, § 16 (providing for the establishment of elected local prosecutors with "primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah"); UTAH CODE ANN. §§ 17-18a-201–204 (2022) (establishing local elected public prosecutors and their duties)

[218] *See* UTAH CODE ANN. § 67-5-1(2)(a)–(b)(i)(A) (2022) (requiring, as a predicate to such prosecutions by the Attorney General, that, "after consultation with the county attorney or district attorney of the jurisdiction where the incident occurred, the attorney general reasonably believes action by the attorney general would not interfere with an ongoing investigation or prosecution by the county attorney or district attorney of the jurisdiction where the incident occurred"); *see also id.* § 67-5-1(1)(h) (requiring the state Attorney General, "when required by the public service or directed by the governor, assist any county, district, or city attorney in the discharge of county, district, or city attorney's duties"). In addition, private taxpayers may petition for removal of local officials based on "high crimes and misdemeanors or malfeasance in office." *Id.* §§ 77-6-1, 77-6-2.

[219] *See* VT. STAT. ANN. tit. 24, § 361(a) (2022) ("A State's Attorney shall prosecute for offenses committed within his or her county . . . .").

[220] *Id.* tit. 3, § 153(a).

may do so in any other criminal case "when, in his or her judgment, the interests of the State so require,"[221] and in general, "[t]he Attorney General may represent the State in all civil and criminal matters as at common law and as allowed by statute," exercising "the same authority throughout the State as a State's Attorney."[222] The Vermont Supreme Court has held that the Attorney General is free to independently pursue criminal charges even when a State's Attorney exercises his or her "broad discretion" not to pursue the same offense.[223]

Finally, Washington is something of an intermediate case. Its constitution and laws established elected county prosecuting attorneys,[224] and court decisions limit the legislature's authority to redefine prosecuting attorneys' functions or transfer them to other officials.[225] The state constitution, however, obligates the governor to "see that the laws are faithfully executed[,]"[226] and a state statute obligates the Attorney General, upon the Governor's request, to "investigate violations of the criminal laws within this state."[227] This statute provides that "[i]f, after such investigation, the attorney general believes that the criminal laws are improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations

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[221] *Id.* tit. 3, § 157.

[222] *Id.* tit. 3, § 152.

[223] *See* Off. of State's Att'y Windsor Cnty. v. Off. of Att'y Gen., 409 A.2d 599, 601–02 (Vt. 1979) ("The institution of criminal proceedings by the Attorney General was not a supersedure of the State's Attorney's decision but rather a valid exercise of equal authority granted to the Attorney General . . . .").

[224] *See* WASH. REV. CODE ANN. § 36.27.020 (2022) (establishing duties of prosecuting attorneys); requiring that members of the county office of prosecuting attorney be qualified electors); *see also id.* § 36.27.005 (defining office of prosecuting attorney); WASH. CONST. art. XI, § 5 (requiring the legislature to provide for election of prosecuting attorneys and other county officers).

[225] *See* State *ex rel.* Banks v. Drummond, 385 P.3d 769, 782–83 (Wash. 2016) (indicating that a state statute allowing reassignment of certain prosecuting attorney functions would be unconstitutional); *see also* State v. Rice, 279 P.3d 849, 859 (Wash. 2012) ("Without broad charging discretion, a prosecuting attorney would cease to be a 'prosecuting attorney' as intended by the state constitution."); State *ex rel.* Johnston v. Melton, 73 P.2d 1334, 1338 (Wash. 1937) ("The people have a constitutional right to elect the persons who shall perform the county governmental functions.").

[226] WASH. CONST. art. III, § 5.

[227] WASH. REV. CODE ANN. § 43.10.090 (2022); *see also* WASH. CONST. art. III, § 21 ("The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law.").

of such criminal laws, either generally or with regard to a specific offense or class of offenses," then the Attorney General must direct the prosecuting attorney to take any steps the Attorney General considers "necessary and proper"; the Attorney General may even take over the prosecution if the attorney fails to follow such directions.[228] Thus, although the extent of legislative authority to allocate prosecutorial functions appears to be politically contested at the moment,[229] existing law seems designed to ensure that state-level officials will give effect to state laws if local prosecutors categorically suspend their enforcement.[230]

The provisions for centralized control of law enforcement in all these states seem to preclude inferring that local prosecutors hold categorical nonenforcement power. A Washington statute makes this inference explicit by providing specifically for a state takeover if the local prosecutor "has failed or neglected" to pursue "a specific offense or class of offenses,"[231] and Utah's statutory scheme likewise seems designed to ensure that at least any first degree felonies are taken seriously.[232] For their part, New Hampshire and Vermont foreclose this inference with constitutional provisions forbidding categorical suspension of the laws' execution,[233] and the South Carolina Supreme Court has suggested that its state constitution

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[228] WASH. REV. CODE ANN. § 43.10.090 (2022). In addition, another statute grants the Attorney General "concurrent authority and power with the prosecuting attorneys to investigate crimes and initiate and conduct prosecutions upon the request of or with the concurrence of" the governor, the local prosecuting attorney, or a committee overseeing an intelligence unit. *Id.* § 43.10.232.

[229] The state recently established a state-level office to investigate certain police crimes. *Id.* § 43.102.030 (authorizing a new "office of independent investigations" to "[c]onduct fair, thorough, transparent, and competent investigations of police use of force and other incidents involving law enforcement as authorized in this chapter"). This legal change appears to have been controversial. *See, e.g.*, Maya Leshikar, *Bill to Create Civilian Office to Investigate Lethal Force, Serious Injuries by Police Advances in Washington Legislature*, SEATTLE TIMES: LOC. POL. (Mar. 21, 2021, 6:00 AM), https://www.seattletimes.com/seattle-news/politics/bill-to-create-civilian-office-to-investigate-lethal-force-serious-injuries-by-police-advances-in-washington-legislature/ (discussing earlier proposals to establish independent state-level investigation and prosecution of police shootings).

[230] *Cf.* State *ex rel.* Hamilton v. Super. Ct., 101 P.2d 588, 590 (Wash. 1940) (discussing this statute as an aspect of the Attorneys General's supervisory control over prosecuting attorneys).

[231] WASH. REV. CODE ANN. § 43.10.090 (2022).

[232] UTAH CODE ANN. § 67-5-1(1) (2022).

[233] *See supra* note 142 and accompanying text.

does the same.[234] The remaining states, Montana and Washington, might leave open the possibility of state-level, rather than local, nonenforcement policies, but laws or decisions in each state cast some doubt on any such authority.[235]

It is true that, despite such provisions for centralized control, local prosecutors may enjoy considerable autonomy in practice. As a practical matter, state-level officials may have limited enforcement capacity, and in a 2011 study of hierarchical relationships between state and local prosecutors, Rachel Barkow found that state-level officials in many states rarely intervened in local prosecution.[236] As concerns the states addressed here, Barkow reported that state Attorneys General in Alabama and (to a lesser degree) Arizona regularly prosecuted local crimes, but state-level officials in Montana, New Hampshire, and Washington did not.[237]

As a more recent student note observes, however, state officials' hands-off attitude at the time of Barkow's study might have reflected "an implicitly-agreed upon set of mutual expectations: state officials expect that local prosecutors will vigorously enforce the laws passed by the state legislatures, and local prosecutors expect that, in all but the rarest cases, their discretion will not be superseded."[238] To the extent recent examples and reform successes have disrupted these expectations, the "cooperative relationship" Barkow documented in most states[239] might give way to more adversarial relationships in at least some jurisdictions. In any event, even if state-level officials in these states rarely use their powers of direction and control, the state's choice to grant such

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[234] State v. Harrison, 854 S.E.2d 468, 471 (S.C. 2021) ("[T]he Attorney General has the constitutional duty to supervise all criminal prosecutions and ensure all laws be faithfully executed . . . .").

[235] *See* Mont.Power Co. v. Mont. Dep't of Pub. Serv. Regul., 709 P.2d 995, 1002 (Mont. 1985) ("[I]t is the duty of the Attorney General to institute and prosecute all actions or proceedings necessary for the enforcement of the regulation of utilities . . . ."); WASH. REV. CODE ANN. § 43.10.090 (2022) (providing for state takeover of prosecution if a local prosecutor has "failed or neglected" to pursue "a specific offense or class of offenses").

[236] Barkow, *supra* note 138, at 555, 559–60, 567–69.

[237] *See id.* at 555, 559, 567–69 (noting the states' officials' levels of prosecutorial activity).

[238] Yeargain, *supra* note 200, at 109; *see also* Ouziel, *supra* note 55, at 565–66 (suggesting that though state-level officials' power to intervene in local prosecutions "has historically been exercised sparingly[,] . . . it may become increasingly prevalent in states where voters' criminal justice preferences are markedly divergent, and that divergence begins to manifest in locally elected prosecutors' exercise of enforcement discretion").

[239] Barkow, *supra* note 138, at 560.

powers makes clear that those officials are the primary vessels of state prosecutorial discretion; local prosecutors may engage in categorical nonenforcement only at their sufferance.

D. STATES WITH BROAD CENTRALIZED SUPERSESSION POWERS

A fourth, substantial group of states provides state officials, typically the Attorney General or Governor, with broad power to displace local prosecutors' choices, but without imposing any duty on them to do so. These states' laws are ambiguous: they could support competing and uncertain inferences about the extent of any local nonenforcement power.

Some states in this category allow the state Attorney General to take over local prosecutions in his or her discretion.[240] Others obligate the state Attorney General to take over particular matters when requested by the Governor, thus effectively vesting the

[240] *See* N.M. STAT. ANN. § 8-5-2(B) (2022) ("[T]he attorney general shall . . . prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor."); *id.* § 8-5-3 (providing that, "upon the failure or refusal of any district attorney to act in any criminal or civil case or matter in which the county, state or any department thereof is a party or has an interest, the attorney general be, and he is hereby, authorized to act on behalf of said county, state or any department thereof, if after a thorough investigation, such action is ascertained to be advisable by the attorney general" and further providing that the Attorney General must initiate such an investigation if directed to do so by the Governor); *id.* § 36-1-18(A)(1) ("Each district attorney shall . . . prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested."); S.D. CODIFIED LAWS § 1-11-1(2) (2022) (establishing the state Attorney General's duty, "[w]hen requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested"); *id.* § 7-16-9 ("The state's attorney shall appear in all courts of his county and prosecute and defend on behalf of the state or his county all actions or proceedings, civil or criminal, in which the state or county is interested or a party."); ME. REV. STAT. ANN. tit. 5, § 199 (2022) ("The Attorney General [who is appointed by the legislature] may, in the Attorney General's discretion, act in place of or with the district attorneys, or any of them, in instituting and conducting prosecutions for crime, and is invested, for that purpose, with all the rights, powers and privileges of each and all of them."); *id.* tit. 30-A, § 283 (establishing prosecutorial duties of local district attorneys); *see also id.* tit. 30-A, § 257(3) (allowing majority of the Maine Supreme Court to remove a district attorney who "is not performing the duties of office faithfully and efficiently" if the court majority "finds in consequence that removal from office is necessary in the public interest").

Governor, rather than the Attorney General, with discretion to supplant local enforcement choices.[241] Idaho law, for example, vests

[241] *See* COLO. REV. STAT. ANN. § 24-31-101(1)(b) (2022) (obligating the state Attorney General to "appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor"); *id.* § 20-1-102(1)(a) ("Every district attorney shall appear in behalf of the state and the several counties of his or her district . . . [i]n all indictments, actions, and proceedings which may be pending in the district court in any county within his district wherein the state or the people thereof or any county of his district may be a party . . . ."); People *ex rel.* Tooley v. Dist. Ct. In & For Second Jud. Dist., 549 P.2d 774, 776 (Colo. 1976) (en banc) ("[I]n the absence of a command from the governor or the general assembly, the attorney general is not authorized to prosecute criminal actions."); People *ex rel.* Losavio v. Gentry, 606 P.2d 57, 62 (Colo. 1980) ("Except as otherwise provided for by statute, the district attorney is the sole authority charged with performing [various prosecutorial] duties and he may not be supplanted in his duties by any other authority."); GA. CONST. art. V, § 3, ¶ IV ("The Attorney General . . . shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor . . . ."); *id.* art. VI, § 8, ¶ I (establishing elected district attorneys for each judicial circuit and providing that "[i]t shall be the duty of the district attorney to represent the state in all criminal cases in the superior court of such district attorney's circuit and in all cases appealed from the superior court and the juvenile courts of that circuit to the Supreme Court and the Court of Appeals and to perform such other duties as shall be required by law"); O.C.G.A. § 15-18-6 (2022) (listing the district attorneys' duties including the duty to "prosecute all indictable offenses"); *id.* § 45-15-3(3) ("It is the duty of the Attorney General . . . [w]hen required to do so by the Governor, to participate in, on behalf of the state, all criminal actions in any court of competent jurisdiction when the district attorney thereof is being prosecuted, and all other criminal or civil actions to which the state is a party . . . ."); *id.* § 45-15-35 ("The Governor shall have the power to direct the Department of Law, through the Attorney General as head thereof, to institute and prosecute in the name of the state such matters, proceedings, and litigations as he shall deem to be in the best interest of the people of the state."); MINN. STAT. ANN. § 8.01 (2022) (allowing the Attorney General to appear in local criminal cases at the local county attorney's request and further providing that "[w]henever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney"); State *ex rel.* Graham v. Klumpp, 536 N.W.2d 613, 616 (Minn. 1995) (interpreting this statute as a "directive mandating that the attorney general prosecute [when requested by the governor] if a person is charged with an indictable offense"); MINN. STAT. ANN. § 388.051(3) (2022) (establishing the county attorneys' duty to "prosecute felonies, including the drawing of indictments found by the grand jury, and, to the extent prescribed by law, gross misdemeanors, misdemeanors, petty misdemeanors, and violations of municipal ordinances, charter provisions and rules or regulations"); N.Y. EXEC. LAW § 63 (McKinney 2022) (obligating the state Attorney General, "[w]henever required by the governor, [to] attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement"); People v. Viviani, 169 N.E.3d 224, 231 (N.Y. 2021) (rejecting law providing for criminal prosecutions by an

"the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, . . . in the sheriff and prosecuting attorney of each of the several counties," but allows the Governor to displace that authority and transfer prosecutorial responsibility to the state Attorney General "[w]hen in the judgment of the governor the penal laws of this state are not being enforced as written, in any county, or counties, in this state."[242] Some other states allow or require the Attorney General to take action upon request, but vest this requesting power in other bodies or officials besides the governor, including in some instances local officials, courts, or the state legislature (or one house of it).[243]

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appointed special prosecutor instead of local district attorneys but distinguishing laws "involv[ing] a delegation of prosecutorial authority to one of the elected constitutional offices responsible for conducting criminal prosecutions—the District Attorney or the Attorney General"); Johnson v. Pataki, 691 N.E.2d 1002, 1003, 1006 (N.Y. 1997) (rejecting arguments that the constitutional status of the local prosecutor's office guaranteed him "a 'zone of independence' based on a delegation to him of exclusive authority to prosecute crimes" in his jurisdiction and holding instead that the state constitution leaves "the delineation of law enforcement functions" to the legislature); OHIO REV. CODE ANN. § 109.02 (West 2022) ("Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime."); *id.* § 2939.10 ("In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly, or which a special prosecutor is required by [an organized crime statute] to investigate and prosecute, the attorney general or the special prosecutor, respectively, shall have and exercise any or all rights, privileges, and powers of prosecuting attorneys . . . ."); *id.* § 2939.17 (providing for the convening of a grand jury at the Attorney General's request "[w]henever the governor or general assembly directs the attorney general to conduct any investigation or prosecution"); *id.* § 309.08 ("The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party [except with respect to cases assigned specifically by listed statutes to another official]."); Mootispaw v. Eckstein, 667 N.E.2d 1197, 1199 (Ohio 1996) ("A prosecuting attorney will not be compelled to prosecute a complaint except when the failure to prosecute constitutes an abuse of discretion."); OR. REV. STAT. ANN. § 180.070 (West 2022) ("The Attorney General may, when directed to do so by the Governor, take full charge of any investigation or prosecution of violation of law in which the circuit court has jurisdiction.").

[242] IDAHO CODE ANN. § 31-2227(1), (3) (West 2022). Though Virginia's constitution prohibits any suspension of state law's "execution," it similarly vests prosecutorial authority in local Commonwealth Attorneys, VA. CODE ANN. § 15.2-1627(B) (West 2022), but apparently allows the state Attorney General to prosecute local cases when "specifically requested by the Governor to do so." *Id.* § 2.2-511(A) ("Unless specifically requested by the Governor to do so, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit courts of the Commonwealth except [in specified types of cases].").

[243] *See* IOWA CODE ANN. § 13.2(1)(a), (b), (g) (West 2022) (making it the duty of the state

Attorney General to "[s]upervise county attorneys in all matters pertaining to the duties of their offices" and to "[p]rosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general's judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly"); KAN. STAT. ANN. § 75-702 (West 2022) ("The attorney general shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in [any state lower court] or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested . . . ."); KY. REV. STAT. ANN. § 15.200(1) (2022) ("Whenever requested in writing by: (a) The Governor; (b) The President of the Senate or Speaker of the House of Representatives of the General Assembly; (c) Any of the courts or grand juries of the Commonwealth; or (d) A sheriff, mayor, or majority of a city legislative body; stating that his or her participation in a given case is desirable to effect the administration of justice and the proper enforcement of the laws of the Commonwealth, the Attorney General may intervene, participate in, or direct any investigation or criminal action, or portions thereof, within the Commonwealth of Kentucky necessary to enforce the laws of the Commonwealth."); *id.* § 15.205 (allowing the state Attorney General to direct another Commonwealth attorney or county attorney to prosecute in such instances); *id.* § 15.220 (generally limiting the state Attorney General's authority "to deprive prosecuting attorneys of any of their authority in respect to criminal prosecutions, or relieve them from any of their duties to enforce the criminal laws of the Commonwealth"); OKLA. STAT. ANN. tit. 74, § 18b(A)(3) (West 2022) (requiring the state Attorney General "to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested"); *id.* tit. 19, § 215.4 ("The district attorney, assistant district attorneys, or special assistant district attorneys authorized by [another statute], shall appear in all trial courts and prosecute all actions for crime committed in the district . . . ."); MICH. COMP. LAWS ANN. § 14.28 (West 2022) ("[T]he attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested."); *id.* § 49.153 ("The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested."); Fieger v. Cox, 734 N.W.2d 602, 612 (Mich. Ct. App. 2007) (noting that the state "Attorney General possesses all the powers of a [local] prosecuting attorney unless that power has been specifically withdrawn by the Legislature" and that "prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings"); People v. Karalla, 192 N.W.2d 676, 677, 679 (Mich. App. Ct. 1971) (rejecting the argument that the state Attorney General "lacks the power to initiate a prosecution" and may only "intervene in proceedings"); Mich. Att'y Gen. Op. No. 5336 (1978) ("[T]he duty to prosecute is not absolute but rests in the sound discretion of a prosecuting attorney."); WIS. STAT. ANN. § 165.25(1m) (2021) (requiring the state department of justice, "[i]f requested by the governor or either house of the legislature . . . [to] prosecute or defend in any court or before any officer, any cause or matter, civil or criminal,

In some of these states, applicable laws appear to presume that local prosecutors should be giving effect to state statutes. For example, by allowing supersession by the state Attorney General only when "the penal laws . . . are not being enforced as written," Idaho law implies that state criminal laws should be so enforced.[244] Likewise, state laws that allow legislatures to direct supersession of local prosecutions seem designed to ensure that prosecutors give effect to legislative policies, even if prosecutors would prefer to nullify the legislature's enactments. On the other hand, Minnesota

in which the state or the people of this state may be interested"); *id.* § 978.05(1) (assigning authority to prosecute certain crimes to local district attorneys); *see also id.* § 17.06(3) ("A district attorney may be removed by the governor, for cause."). One state in this category, Michigan, empowers its governor to "remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial". MICH. CONST. art. V, § 10. An enterprising governor could conceivably interpret categorical nonenforcement as "gross neglect of duty" for purposes of this removal power, but I am aware of no case in which a governor did so. Local prosecutors in Kentucky can also be removed from office if convicted of "misfeasance or malfeasance in office, or willful neglect in the discharge of official duties." KY. REV. STAT. ANN. § 61.170(1) (2022).

[244] IDAHO CODE ANN. § 31-2227(3) (West 2022). Other states with such provisions fall more squarely within the category addressed in section A by virtue of having constitutional provisions that expressly or impliedly ban enforcement suspensions. *See supra* note 142 and accompanying text; *see also* MASS. GEN. LAWS ANN. ch. 12, § 27 (West 2022) ("District attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases. They may interchange official duties."); Commonwealth v. Kozlowsky, 131 N.E. 207, 211 (Mass. 1921) (interpreting this statute to recognize "the right of the Attorney General to be present and exercise his authority whenever his public duty seems to him to require it," including in grand jury proceedings); MD. CONST. art. V, § 3 (requiring the state Attorney General to prosecute criminal cases when "the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct [those cases] to be investigated, commenced and prosecuted or defended" and further requiring the state Attorney General to aid local state's attorneys "in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions" when required to do so "by the General Assembly by law or joint resolution, or by the Governor"); OR. REV. STAT. ANN. § 180.070 (West 2022) ("The Attorney General may, when directed to do so by the Governor, take full charge of any investigation or prosecution of violation of law in which the circuit court has jurisdiction."). However Attorneys General should understand their supersession responsibility in these states, the anti-suspension provisions in these states' constitutions appear to render categorical nonenforcement impermissible, for reasons discussed earlier. *See* discussion *supra* section IV.A.

law requires the state Attorney General to take over prosecutions at the governor's request, but a statute also obligates local county attorneys to "adopt written guidelines governing the county attorney's charging and plea negotiation policies and practices," including "the factors that are considered in making charging decisions and formulating plea agreements."[245] Although this statutory directive does not specifically contemplate categorical nonenforcement policies, its mandate to adopt and disclose general charging practices might suggest that such policies are permissible, at least insofar as the governor declines to override them.

On the whole, none of these states meaningfully limits the grounds for overriding local prosecutorial choices. But neither do any of them, including even Idaho, impose any affirmative duty on other officials to intervene, even if local prosecutors have chosen to categorically suspend enforcement of particular laws. Accordingly, the extent of local prosecutorial nonenforcement authority in these states may depend in practice on discretionary choices by state-level officials, and evolving practice or judicial construction might resolve questions about the scope of such authority in varied ways. Insofar as state laws carry ambiguous or competing implications, moreover, functional considerations of the sort Murray and Wright emphasize might properly factor into the resolution of such questions.[246]

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[245] MINN. STAT. ANN. § 388.051(3) (West 2022).

[246] Murray, *supra* note 3, at 212–13; Wright, *supra* note 15, at 840–41. Two states in this category, Colorado and Michigan, also provide for judicial review of non-prosecution decisions. *See* COLO. REV. STAT. ANN. § 16-5-209 (West 2022) (allowing a court to order prosecution if the local prosecutor's explanation for a declination is "arbitrary or capricious and without reasonable excuse"); MICH. COMP. LAWS ANN. § 767.41 (West 2022) (allowing the court to direct prosecution if it is "not satisfied" with the local prosecutor's explanation for certain non-prosecution decisions). In practice, however, courts have applied these standards very deferentially, leaving principal responsibility for enforcement decisions to executive officials. *See, e.g.*, People v. Storlie, 327 P.3d 243, 247 & n.2 (Colo. 2014) (emphasizing the deferential standard); Sandoval v. Farish, 675 P.2d 300, 302 (Colo. 1984) ("A district attorney has broad discretion in determining what criminal charges should be prosecuted."); Genesee Cnty. Prosecutor v. Genesee Cir. Judge, 215 N.W.2d 145, 147 (Mich. 1974) (emphasizing that the judge may "not properly substitute his judgment for that of the . . . prosecuting attorney as if he were . . . acting in a supervisory capacity with respect to the prosecuting attorney"). *But cf.* Kuppinger v. Larimer, Case No. 2021CV30633 (Colo. D. Ct. of Larimer Cnty., Jan. 24, 2022) (finding abuse of discretion and appointing special prosecutor because the district attorney refused to prosecute unless a third party accepted a criminal charge).

E. STATES THAT REQUIRE NON-EXECUTIVE APPROVAL FOR SUPERSESSION

Tipping more sharply in the direction of local prosecutorial autonomy, some other states specifically protect local prosecutors' autonomy by requiring approval from a court or local official for any displacement of the local prosecutor.

Although Pennsylvania's legislature recently adopted temporary statutory amendments conferring authority to prosecute certain gun crimes on the state Attorney General,[247] its laws generally limit state-level interference with local prosecutorial choices. Outside of specified categories of offenses, the Pennsylvania Attorney General may pursue criminal charges in place of a district attorney only if the Attorney General petitions the district court and "establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion."[248] As a practical matter, by providing only a "narrowly

[247] H.B. 1614, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); *see also* Ouziel, *supra* note 55, at 566 & n.162 (discussing this legal change).

[248] 71 PA. STAT. AND CONSOL. STAT. ANN. § 732-205(a) (West 2022). The chief judge in the jurisdiction may request the Attorney General to consider seeking supersession, but the Attorney General must choose to act on the request. *See id.* § 732-205(a)(5) ("If the Attorney General agrees that the case is a proper one for intervention, he shall file a petition with the court and proceed as provided in paragraph (4)."). Pennsylvania law does allow private prosecution in the district attorney's place with court approval if "any district attorney . . . shall neglect or refuse to prosecute, in due form of law, any criminal charge, regularly returned to him, or to the court of the proper county." *Id.* § 7710; *see also id.* § 1409 (allowing a court to permit private counsel to prosecute in the district attorney's place if the "district attorney shall neglect or refuse to prosecute in due form of law any criminal charge regularly returned to the district attorney or to the court"). In addition, private complainants may petition the court to review the prosecutor's initial refusal to pursue charges at all. 234 PA. CODE RULE 506. Courts, however, have understood this provision to permit reversal of policy-based non-prosecution only "if the private complainant demonstrates that the disapproval decision amounted to bad faith, occurred due to fraud, or was unconstitutional." *In re* Ajaj, No. 55 MAP 2021, 2023 WL 308130, at *11 (Pa. Jan. 19, 2023) (emphasizing the need to afford "proper deference to the discretionary decision of the prosecutor—a member of the executive branch of the Commonwealth's government"); *see also* Commonwealth v. Michaliga, 947 A.2d 786, 792 (Pa. Super. Ct. 2008) (likewise allowing such disapproval only if the complainant "demonstrate[s] [that] the district attorney's decision amounted to bad faith, fraud or unconstitutionality" (quoting *In re* Wilson, 879 A.2d 199, 215 (Pa. Super. Ct. 2005) (en banc))); *In re* Priv. Crim. Complaints of Rafferty, 969 A.2d 578, 581–82 (Pa. Super. Ct. 2009) (same). Accordingly, despite these provisions for private prosecution, Pennsylvania law appears to strongly protect local district attorneys' initial charging discretion. Furthermore, even if

circumscribed power to supersede a district attorney,"[249] this statutory arrangement grants the district attorney considerable space to adopt nonenforcement policies.[250] In effect, no one but the Attorney General may override the district attorney's choices, and the Attorney General may do so only if a court agrees not only that the district attorney has failed to prosecute, but also that such failure constitutes an "abuse of discretion"—a standard that seems designed to require more than mere "failure or refusal" to pursue particular crimes.[251]

In Tennessee, too, elected local district attorneys generally have authority to prosecute crimes within their district, subject to limited mechanisms for court-approved displacement. The state-wide Attorney General, who is appointed by the Tennessee Supreme Court, generally has authority to prosecute a criminal offense only if the district Attorney General has a conflict of interest[252] or

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private prosecutors could press charges in the district attorney's place, this procedural option might only reinforce the inference from other statutes that the local district attorney may lawfully decide not to pursue charges even when they are sufficiently well-supported to enable private prosecution.

[249] Carter v. City of Phila., 181 F.3d 339, 353 (3d Cir. 1999) (noting the state of "Pennsylvania's consciously and deliberately designed autonomous role for its district attorneys").

[250] *See, e.g.*, Commonwealth v. Mulholland, 702 A.2d 1027, 1037 (Pa. 1997) (reversing a court's sua sponte substitution of the Attorney General for the district attorney because "the attorney general may intervene in criminal prosecutions only in accordance with provisions enumerated by the legislature"); Commonwealth v. Carsia, 517 A.2d 956, 958 (Pa. 1986) (rejecting the state attorney general's authority to prosecute case and holding that the attorney general's prosecutorial authority is "now strictly a matter of legislative designation and enumeration"); *see also* Commonwealth v. Mayfield, 247 A.3d 1002, 1003 (Pa. 2021) (discussing limited statutory mechanisms for replacement of local district attorney by state attorney general and holding specifically that no state statute "authorizes trial courts to deputize private attorneys to represent the Commonwealth in criminal matters"). *But see In re Ajaj*, 2023 WL 308130, at *16 n.6 (Wecht, J., concurring in part) (observing that the court "may have spoken a bit too broadly" in *Mayfield* because some Pennsylvania statutes do "authorize courts to appoint private attorneys to handle criminal prosecutions").

[251] 71 PA. STAT. AND CONST. STAT. ANN. § 732-205(a) (West 2022). The Pennsylvania General Assembly recently initiated impeachment proceedings against the District Attorney for Philadelphia based in part on his lenient approach to prosecution, but in a decision now on appeal a lower state court held that much of the alleged conduct did not constitute a valid basis for impeachment. *See* Krasner v. Ward, No. 563 M.D. 2022, slip op. at 38–40 (Commonwealth Ct. of Pa. Dec. 29, 2022), *available at* https://www.pacourts.us/assets/opinions/Commonwealth/out/563MD22_1-12-23.pdf?cb=1.

[252] *See, e.g.*, TENN. CODE ANN. § 8-6-112(a)(2) (West 2022) (empowering the state's Attorney

requests the state Attorney General's help.[253] Although the Tennessee Constitution empowers the court to appoint a special prosecutor "[i]n all cases where the Attorney for any district fails or refuses to attend and prosecute according to law,"[254] a statute limits the grounds for such appointments to circumstances in which "the district Attorney General fails to attend the circuit or criminal court, or is disqualified from acting, or if there is a vacancy in the office[.]"[255] According to a Tennessee court, "one of these three situations must occur before a judicial appointment is appropriate."[256] The Tennessee Supreme Court, moreover, has emphasized the breadth of the district Attorney General's unreviewable discretion,[257] and it has further held that because the district Attorney General is "an elected constitutional officer," the state legislature "cannot enact laws which impede the inherent discretion and responsibilities of the office of district attorney general."[258] Tennessee thus appears to give local elected prosecutors effectively absolute discretion to determine whether state laws are enforced within their jurisdictions—a power they might use to adopt categorical nonenforcement policies without anyone else in state government holding power to countermand them.

Louisiana allows the state Attorney General to prosecute crimes in place of locally elected district attorneys, but it allows no other state official to do so, and it allows even the state Attorney General to prosecute local cases only if requested by the district attorney or else "for cause, when authorized by the court which would have

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General to initiate criminal prosecutions of certain state officials when the district Attorney General has "a personal, financial or political conflict of interest").

[253] *See id.* § 8-7-106(b)(4) (listing the circumstances in which the state's Attorney General may initiate a prosecution with the consent of the district attorney). This statute also allows the district Attorney General to transfer a case to another district Attorney General or certain other officials. *Id.*; *see also* State v. Finch, 465 S.W.3d 584, 596 (Tenn. Crim. App. 2013) (upholding this provision against a state constitutional challenge), *overruled on other grounds by* State v. Menke, 590 S.W.3d 455 (Tenn. 2019).

[254] TENN. CONST. art. VI, § 5.

[255] TENN. CODE ANN. § 8-7-106(a)(1) (West 2022).

[256] Quillen v. Crockett, 928 S.W.2d 47, 51 (Tenn. Crim. App. 1995).

[257] *See* Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1978) ("He or she is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense.").

[258] State v. Superior Oil, Inc., 875 S.W.2d 658, 660, 661 (Tenn. 1994).

original jurisdiction and subject to judicial review."[259] Similarly, Wyoming law allows the state-wide Attorney General to prosecute particular crimes when the local elected district or county attorney fails to act, but apparently only if the Attorney General does so "at the request of the board of county commissioners of the county involved or of the district judge of the judicial district involved."[260] Missouri appears to allow the state Attorney General to sign indictments in place of the local prosecutor only with court approval.[261] Outside of that circumstance, Missouri law generally requires only that the Attorney General "assist" local prosecutors when directed to do so by the Governor; it does not otherwise contemplate supersession of the local prosecutors' authorities.[262]

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[259] LA. CONST. art. IV, § 8; *see also id.* art. V, § 26 ("Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district . . . ."); State v. Neyrey, 341 So. 2d 319, 322 (La. 1976) ("[T]he intent of the Constitutional Convention delegates was definitely to restrict the Attorney General's power to institute criminal proceedings.").

[260] WYO. STAT. ANN. § 9-1-603(c) (2022); *see also id.* § 9-1-801 (establishing the office of district attorney); *id.* § 9-1-804(a)(i) ("[E]ach district attorney has exclusive jurisdiction to . . . [a]ct as prosecutor for the state in all felony, misdemeanor and juvenile court proceedings arising in the counties in his district, and prosecute such cases in the district courts and courts of limited jurisdiction or in other counties upon a change of venue."). Wyoming law also provides that the Attorney General "shall . . ., upon direction of the governor, investigate any matter in any county of the state in which the county, state or any agency thereof may be interested." *Id.* § 9-1-603(c). Following such investigation, the Attorney General must submit a report and "may take such other action as he deems appropriate," *id.*, but it is not clear that criminal prosecution in the place of the local district attorney falls within the category of "other action" contemplated by this statute. *Cf.* Wyo. Op. Att'ys Gen. 72 (1983) (concluding that because a statute provided for referral of parental-rights termination cases to local prosecutors, the Attorney General could represent the state in such cases only "at the request of the board of county commissioners or of the district judge" and if the local prosecutor "fail[ed] or refuse[d] to act in a termination of parental rights action"). Another statute allows a local court to appoint a substitute prosecutor if the district attorney "refuses to act in a prosecution," WYO. STAT. ANN. § 9-1-805 (2022), but whether this authority extends to initial charging decisions appears unclear, and in any event the Wyoming Supreme Court has emphasized that the court exercising this authority "cannot compel prosecution" but can only appoint a substitute prosecutor. *In re* Padget, 678 P.2d 870, 874 (Wyo. 1984).

[261] *See* MO. ANN. STAT. § 27.030 (2022) ("[W]hen so directed by the trial court, [the Attorney General] may sign indictments in lieu of the prosecuting attorney."). Missouri law also gives the Attorney General a concurrent duty to enforce certain gambling laws. *Id.* § 27.105.

[262] *See id.* § 27.030 ("When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries . . . ."); *id.* § 56.060 ("Each prosecuting attorney shall commence and prosecute all civil and criminal actions in the

Finally, although Connecticut's local state's attorneys are not elected—they are appointed by a commission composed of the chief state's attorney and six appointees (two of whom must be judges) nominated by the Governor and confirmed by the general assembly[263]—state law insulates their judgments as well from override by superior officials. The chief state's attorney generally cannot appear in local state courts without the local state's attorney's permission,[264] and to intervene in a particular investigation or prosecution, the chief state's attorney must "find[] by clear and convincing evidence, misconduct, conflict of interest or malfeasance of a state's attorney"; if the state's attorney objects, moreover, the chief state's attorney must persuade the appointing commission to allow the intervention.[265]

The legal structures in all these states support a strong inference that local prosecutors have broad authority over the scope and degree of enforcement in their jurisdiction. To be sure, these arrangements do not affirmatively authorize local categorical nonenforcement. Nevertheless, the legal autonomy they afford to local prosecutors strongly reinforces the inference from local election or appointment that local, rather than state-wide, preferences should dictate the law's on-the-ground effect in the prosecutor's jurisdiction. As a practical matter, at any rate, these arrangements enable local prosecutors to adopt nonenforcement policies that state-level officials can displace only under narrow circumstances.

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prosecuting attorney's county in which the county or state is concerned . . . ."); *id.* § 56.450 ("The circuit attorney of the city of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction."); *Ex parte* Howell, 200 S.W. 65, 71 (Mo. 1918) (rejecting arguments that Missouri law "authorize[s] the Governor to override by his direction the will of the people, whether exercised wisely or not, in their selection of an officer to prosecute offenders against the law" and holding that "[t]he province of this statute is to afford assistance to the prosecuting attorney, and not to usurp his power").

[263] *See* CONN. GEN. STAT. ANN. § 51-275(a) (West 2022) ("There is established a Criminal Justice Commission which shall be composed of the Chief State's Attorney and six members nominated by the Governor and appointed by the General Assembly . . . .").

[264] *See id.* § 51-277(d)(2) ("The Chief State's Attorney may, with the prior consent of the state's attorney for the judicial district, appear in court to represent the state.").

[265] *Id.* § 51-277(d)(3).

F. STATES WITH SPECIFIC LIMITS ON CENTRALIZED SUPERSESSION

A last group of states limits state-level officials' authority over local prosecution still more sharply or even eliminates it altogether. Here, too, state law supports a strong inference of de facto local nonenforcement power, even if state law does not specifically provide for it.

In Nevada, a statute grants the Attorney General "supervisory powers" over district attorneys as well as the authority to "take exclusive charge of and conduct any prosecution in any court of this State for a violation of any law of this State, when in his or her opinion it is necessary, or when requested to do so by the Governor."[266] According to the state supreme court, however, this language "contemplates a pending prosecution, since a 'prosecution' does not exist until a charge has been filed."[267] The court thus concluded that it would impermissibly "usurp the function of the district attorney" to interpret this statute to allow the Attorney General to displace the local prosecutor's initial charging discretion[268]—an interpretation that would seem to leave the Attorney General powerless to override even categorical nonenforcement policies by the local district attorney.

In Texas, "[a]bsent the consent and deputization order of a local prosecutor or the request of a district or county attorney for assistance, the Attorney General has no authority to independently prosecute criminal cases in trial courts."[269] As a general matter, prosecutorial authority resides exclusively in local elected county and district attorneys, who in consequence hold near-total autonomy in exercising their charging discretion.[270] Local

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[266] NEV. REV. STAT. ANN. § 228.120 (West 2022).

[267] Ryan v. Eighth Jud. Dist. Ct. In & For Clark Cnty., 503 P.2d 842, 844 (Nev. 1972).

[268] *Id.*

[269] State v. Stephens, No. PD-1032-20, No. PD-1033-20, 2021 WL 5917198, at *10 (Tex. Crim. App. Dec. 15, 2021).

[270] *See* TEX. CONST. art. IV, § 22 (establishing the office of the Attorney General); *id.* art. V, § 21 (establishing the offices of district and county attorneys); TEX. CODE CRIM. PROC. ANN. art. 2.01 ("Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely . . . . It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done."); Saldano v. State, 70 S.W.3d 873, 880 (Tex. Crim. App. 2002) (indicating that the state constitution "gives

prosecutors in Texas thus appear to have substantial autonomy in exercising their charging discretion.[271]

In Mississippi, too, state law vests autonomous responsibility for local criminal prosecutions in elected district attorneys.[272] Its laws obligate the Attorney General to "assist the district attorney there in the discharge of his duties" if "required [to do so] by the public service or when directed by the Governor, in writing."[273] But the Mississippi Supreme Court has emphasized that "[t]he operative

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the county attorneys and district attorneys authority to represent the State in criminal cases" and "authorizes the legislature to give the attorney general duties which, presumably, could include criminal prosecution," but that current law "gives the Attorney General of Texas no general authority to initiate a prosecution"); Landers v. State, 256 S.W.3d 295, 303–04 (Tex. Crim. App. 2008) ("The office of a district attorney is constitutionally created and protected; thus, the district attorney's authority 'cannot be abridged or taken away.'"); *cf.* Brady v. Brooks, 89 S.W. 1052, 1056 (Tex. 1905) (holding that the legislature may confer prosecutorial duties on the state Attorney General so long as it does "not take away from the county attorneys as much of their duties as practically to destroy their office").

[271] *See, e.g.*, Taylor v. Gately, 870 S.W.2d 204, 204–05 (Tex. Ct. App. 1994) ("Discretion is a necessary ingredient in the determination of whether the requisites for accepting and filing a criminal complaint have been met."); Tex. Op. Att'y's Gen., JC–0042 (1999) (indicating that "[a] county attorney's constitutional and statutory duty to prosecute criminal cases in his or her county traditionally provides the prosecutor broad discretion to determine not to prosecute an offense," but nonetheless deeming it unlawful to condition non-prosecution on a contribution to a public or private organization). A Texas statute allows a judge to appoint a substitute prosecutor "[w]henever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of the attorney's office, or in any instance where there is no attorney for the state." TEX. CODE CRIM. PROC. ANN. art. 2.07 (West 2019). This statute, however, does not appear applicable when the local prosecutor is present and qualified to proceed but simply declining to prosecute. *See, e.g.*, Tex. Op. Att'y's Gen. H–324 (1974) (concluding that "it is only when both the district and county attorneys are unable to serve that the district court may exercise the authority conferred on it by" this statute and that there is "no attorney for the state" in the sense required by the statute only when "the office is vacant"); State Bd. of Dental Exam'rs v. Bickham, 203 S.W.2d 563, 566 (Tex. Civ. App. 1947) ("Nor may the State be represented in the district or inferior courts by any person other than the county or district attorney, unless such officer joins therein."); Haywood v. State, 344 S.W.3d 454, 461 (Tex. App. 2011) (emphasizing "four circumstances" in which substitute appointment is valid). Another statute allows private parties to petition for removal of local officials, but only on specified grounds including "official misconduct." TEX. LOC. GOV'T CODE ANN. §§ 87.011–87.013 (West 2022).

[272] *See* MISS. CODE. ANN. § 25-31-11 (West 2019) ("It shall be the duty of the district attorney to represent the state in all matters coming before the grand juries of the counties within his district and to appear in the circuit courts and prosecute for the state in his district all criminal prosecutions and all civil cases in which the state or any county within his district may be interested . . . .").

[273] *Id.* § 7-5-53 (West 1988).

word in Section 7–5–53 is but one: *assist*."[274] In the Mississippi Supreme Court's view, "[i]ntervention of the attorney general into the independent discretion of a local district attorney regarding whether or not to prosecute a criminal case constitutes an impermissible diminution of the statutory power of the district attorney."[275] Thus, Mississippi district attorneys generally appear to have autonomous discretion over prosecution within their jurisdictions, discretion they could conceivably employ to adopt categorical policies.[276]

In Illinois, state law generally empowers the state Attorney General only to "consult with and advise" local state's attorneys and to "attend the trial of any party accused of crime, and assist in the prosecution," when the Attorney General judges "the interest of the people of the State [to] require[] it."[277] In combination with constitutional and statutory provisions establishing the office of state's attorney,[278] this statutory language appears to limit the Attorney General's power to override state's attorneys' prosecutorial judgments.[279] The Illinois Supreme Court has

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[274] Williams v. State, 184 So. 3d 908, 914 (Miss. 2014).

[275] *Id.* at 913; *see also* Moore v. State, 309 So. 3d 7, 11 (Miss. Ct. App. 2020) (indicating that the state Attorney General is not "the district attorney's 'boss'").

[276] *Cf. Williams*, 184 So. 3d at 915 (holding that state law "does not authorize the intervention of the attorney general into a matter statutorily relegated to the discretion of a local district attorney where that official has decided not to prosecute and, in fact, objects to the involvement of the attorney general"). Reinforcing the district attorney's autonomy, the Governor may remove Mississippi district attorneys for "[k]nowingly or wilfully failing, neglecting, or refusing to perform any of the duties" of the office, but only through a process requiring a removal election and other steps. MISS. CODE. ANN. §§ 25-5-5, 25-5-7, 25-5-23, 25-5-27 (West 2019).

[277] 15 ILL. COMP. STAT. ANN. 205/4 (West 2010). This same statute authorizes the Attorney General to prosecute certain election law offenses independently if the local state's attorney fails to act on a request to do so from the Attorney General. *Id.* This specification carries a negative inference that the Attorney General otherwise lacks such independent prosecutorial power.

[278] *See* ILL. CONST. art. VI, § 19 ("A State's attorney shall be elected in each county . . . ."); 55 ILL. COMP. STAT. ANN. 5/3-9005(1) (West 2022) ("The duty of each State's Attorney shall be . . . [t]o commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for the county, in which the people of the State or county may be concerned.").

[279] In addition to referring only to "assist[ing]" prosecution, the statute establishing the Attorney General's powers specifically authorizes the Attorney General to prosecute certain election law offenses independently if the local state's attorney fails to act on a request to do

nonetheless held that the Attorney General retains certain common law powers, including the authority to initiate and prosecute criminal charges so long as the responsible state's attorney does not object.[280] If the state's attorney objects, case authority appears to recognize the state's attorney's authority as paramount, thus potentially affording autonomous power to establish nonenforcement policies within the jurisdiction.[281]

Finally, Arkansas, West Virginia, and Indiana are peculiar cases. In Arkansas, local prosecuting attorneys must "commence and prosecute all criminal actions in which the state or any county in [their] district may be concerned."[282] The state Attorney General generally appears to play no role in initiating criminal charges or overseeing local prosecuting attorneys' decisions.[283] Local prosecuting attorneys' discretion might thus be effectively

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so from the Attorney General. 15 ILL. COMP. STAT. ANN. 205/4 (West 2022). This specification would seem to carry a negative implication that the Attorney General otherwise lacks such independent prosecutorial power.

[280] *See, e.g.*, People v. Buffalo Confectionery Co., 401 N.E.2d 546, 549 (Ill. 1980) (discussing the "common law powers and duties of the Attorney General," indicating that those powers "include the initiation and prosecution of litigation on behalf of the People," and holding that the Attorney General could exercise this power in the case at hand because the state's attorney not only did not object but also "obvious[ly] acquiesce[ed]"); People v. Roberts, 389 N.E.2d 596, 599 (Ill. App. Ct. 1979) ("[A]bsent objection by the state's attorney, the attorney general may discharge all the powers of the state's attorney at all stages in a prosecution.").

[281] *See, e.g.*, Cnty. of Cook *ex rel.* Rifkin v. Bear Stearns & Co., 831 N.E.2d 563, 570 (Ill. 2005) (rejecting arguments that the legislature could "reduce a State's Attorney's constitutionally derived power to direct the legal affairs of the county"); Cunningham v. Atchison, No. 5-11-0069, 2012 WL 7070069, at *3 (Ill. App. Ct. Mar. 14, 2012) ("The Attorney General lacks the power to take exclusive charge of the prosecution of those cases over which the State's Attorney shares authority."); People v. Dasaky, 709 N.E.2d 635, 640 (Ill. App. Ct. 1999) ("The Attorney General lacks the power to take exclusive charge of the prosecution of those cases over which the State's Attorney shares authority."); 520 Mich. Ave. Assocs., Ltd. v. Devine, 433 F.3d 961, 964 (7th Cir. 2006) ("The Attorney General does speak for the State of Illinois but cannot direct the prosecution activities of the 102 States' Attorneys."); Bargo v. Pritzker, No. 21-3117, 2022 WL 269100, at *2 (C.D. Ill. Jan. 28, 2022) ("[T]he Attorney General lacks the power to take exclusive charge of the prosecution of those cases over which the State's Attorney shares authority, unless a statute so provides."); Dixon v. Raoul, No. 18-cv-08369, 2020 WL 2836766, at *4 (N.D. Ill. May 31, 2020) ("[I]n areas of concurrent prosecutorial authority, the Attorney General may only exercise prosecutorial power if the relevant State's Attorney does not object."); *cf.* People v. Mulcahey, 365 N.E.2d 1013, 1016 (Ill. App. Ct. 1977) ("[T]he State's Attorney has discretion in choosing which offense should be prosecuted.").

[282] ARK. CODE ANN. § 16-21-103 (West 2022).

[283] *See id.* § 25-16-702 (outlining the Attorney General's duties).

autonomous and plenary,[284] but Arkansas's unusually broad anti-suspending clause suggests such authority does not extend to categorical suspensions of enforcement.[285] Similarly, in West Virginia, although the state Attorney General generally lacks power to prosecute criminal cases independently at the trial level,[286] the state statute discussed earlier appears to obligate local prosecutors to pursue provable violations.[287]

As for Indiana, its local prosecuting attorneys, whose office (unlike the state Attorney General's) is established by the Indiana Constitution,[288] hold statutory authority, "within their respective

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[284] *See* Smith v. Simes, 430 S.W.3d 690, 697 (Ark. 2013) (discussing prosecuting attorneys' discretion over charges).

[285] *See* ARK. CONST. art. I, § 12 ("No power of suspending or setting aside the law or laws of the State, shall be exercised, except by the General Assembly."); *see also supra* section IV.A.

[286] *See* State *ex rel.* Morrisey v. W. Va. Off. of Disciplinary Couns., 764 S.E.2d 769, 792 (W. Va. 2014) (concluding that the "common law criminal prosecutorial authority of the Attorney General was abolished" by state law and rejecting arguments that the local prosecuting attorney could appoint the Attorney General as a special prosecutor); State v. Ehrlick, 64 S.E. 935, 937 (W. Va. 1909) ("There would be no individual responsibility, if the powers of the Attorney General and prosecuting attorney were coextensive and concurrent. The one would be no more responsible than the other for the nonenforcement of the laws."). *But see Morrisey*, 764 S.E.2d at 789 (rejecting language in *Ehrlick* suggesting that the Attorney General could prosecute independently in a case of "nonaction" by the local prosecutor and emphasizing instead that "absent statutory authority, a prosecutor cannot invade the duties of the Attorney General, and the Attorney General cannot encroach upon the duties of the prosecutor"); Gardner v. Kanawha Cnty. Comm'n, No. 2:17-cv-03934, 2020 WL 4573824, at *3 (S.D.W. Va. Aug. 7, 2020) ("In West Virginia, the AG is without authority to replace a prosecuting attorney . . . . The West Virginia AG also cannot supersede a prosecuting attorney's decisions generally . . . ."); W. VA. CODE ANN. § 5-3-2 (West 2022) (indicating that the state Attorney General, among other duties, shall "consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office"). A West Virginia statute does provide that the Attorney General "shall appear in any cause in which the state is interested that is pending in any other court in the state [besides the state supreme court], on the written request of the governor, and when such appearance is entered he shall take charge of and have control of such cause," *id.* § 5-3-2, but in light of *Morrisey* and *Gardner*, the category of "cause[s]" covered by this provision may not encompass criminal prosecutions, and in any event the provision would apply only to a cause that is already "pending," not one that the Attorney General would need to independently initiate.

[287] *See supra* section IV.A; W. VA. CODE ANN. § 7-4-1(a) (West 2022) ("The prosecuting attorney shall attend to the criminal business of the state in the county in which he or she is elected and qualified and when the prosecuting attorney has information of the violation of any penal law committed within the county, the prosecuting attorney shall institute and prosecute all necessary and proper proceedings against the offender . . . .").

[288] IND. CONST. art. VII, § 16; *see also* State v. Market, 302 N.E.2d 528, 533 (Ind. Ct. App.

jurisdictions," to "conduct all prosecutions for felonies, misdemeanors, or infractions and all suits on forfeited recognizances."[289] The state Attorney General, by contrast, may only "consult with and advise" local prosecuting attorneys and "attend the trial of any party accused of an offense, and assist in the prosecution," if, "in the attorney general's judgment, the interest of the public requires it."[290] As one court has explained, "the general rule in Indiana is that the Attorney General cannot initiate prosecutions; instead, he may only join them when he sees fit."[291] With limited statutory exceptions,[292] local prosecuting attorneys thus appear to hold charging discretion that no other official can override; indeed, the Indiana Supreme Court has held that "[t]he determination as to who shall be prosecuted lies within the sole discretion of the prosecuting attorney."[293]

On the other hand, however, an Indiana statute appears to create a mandatory obligation of investigation, if not prosecution, when the prosecuting attorney receives evidence of a potential crime.[294] In addition, as discussed earlier, Indiana's constitution includes an unusually broad anti-suspension clause,[295] and in 1964, the Indiana

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1973) (noting agreement in the case that the Prosecuting Attorney "is a constitutional office while that of Attorney General is of statutory origin").

[289] IND. CODE ANN. § 33-39-1-5 (West 2022).

[290] *Id.* § 4-6-1-6.

[291] Doe v. Holcomb, 883 F.3d 971, 977 (7th Cir. 2018).

[292] *See, e.g.*, IND. CODE ANN. § 12-15-23-6(c)–(d) (West 2022) (allowing prosecution of Medicaid fraud cases by the Attorney General upon referral by the local prosecuting attorney).

[293] Johnson v. State, 675 N.E.2d 678, 683 (Ind. 1996); *see also* Sharpe v. State, 369 N.E.2d 683, 687 (Ind. Ct. App. 1977) ("The prosecuting attorney is vested with the discretion to determine what offense can be proved with the evidence at hand and to decide the crime with which a suspect will be charged."); Brune v. Marshall, 350 N.E.2d 661, 662 (Ind. Ct. App. 1976) (describing the prosecuting attorneys' "broad scope of discretion" as "extend[ing] to the power to investigate and determine who shall be prosecuted and the crime with which those parties will be charged").

[294] *See* IND. CODE ANN. § 33-39-1-4(a) (West 2022) (requiring the prosecuting attorney to obtain subpoenas for relevant witnesses when he or she "receives information of the commission of a felony or misdemeanor"). *But cf.* Worthington v. State, 409 N.E.2d 1261, 1268 (Ind. Ct. App. 1980) (noting the prosecuting attorney's discretion over whether to prosecute and thus concluding that, "[e]ven if the prosecutor knew all the facts pertinent to the instant case when he indicted Dorothy there is no authority requiring him to indict Worthington at the same time").

[295] *See* IND. CONST. art. I, § 26 ("The operation of the laws shall never be suspended, except by the authority of the General Assembly."); *see also supra* Part IV.A.

Supreme Court held that a prosecuting attorney could be disbarred for neglect of duty even if he was "merely was oblivious of the repeated violations of the law which occurred uninterruptedly in his view in [the county] when he was prosecuting attorney."[296] Overall, then, Indiana law appears to give local prosecuting attorneys substantial autonomy in deciding what offenses to prosecute in their jurisdiction, but the state's constitution indicates that they should not understand their authority to extend to adopting categorical nonenforcement policies.

These examples illustrate that local prosecutorial autonomy does not inevitably imply broad nonenforcement power. States can pair such autonomy with clear enforcement obligations if they choose. Indeed, still more clearly than in the states addressed here, Hawaii and North Carolina appear to make just such a pairing: although both these states appear to guarantee local prosecutorial autonomy, both also, as discussed earlier, prohibit anyone but the legislature from suspending the laws' "execution."[297] Absent such clear legal prohibitions, however, local autonomy powerfully reinforces the structural inference that locally accountable officials may adopt local nonenforcement policies, even if doing so is at odds with statewide legislative policy. Accordingly, categorical nonenforcement appears lawful in states that afford their local prosecutors broad autonomy without specifically banning suspensions of the law's execution.

G. SUMMARY

In sum, even a fairly cursory and high-level overview of governing state laws and constitutional provisions reveals substantial variation in the allocation of prosecutorial authority. Some state constitutions specifically ban suspensions of enforcement, a requirement at odds with adopting categorical nonenforcement policies at any level of government. A handful of states impose an affirmative duty on state-level officials to ensure "adequate" or "effective" enforcement of state laws, a duty that seems designed to ensure that any permissive local policies are overridden. Some others impose such tight requirements of supervision and control by state-level officials that presuming

[296] *In re* Holovachka, 198 N.E.2d 381, 391 (Ind. 1964).

[297] *See supra* note 147–149 and accompanying text.

categorical nonenforcement power at the local level is implausible. In an intermediate category, a large number of states grant state-level officials the power to override local choices, but no clear duty to do so; these states' laws seem amenable to competing interpretations and evolving practical understandings. Another group imposes specific procedural constraints on any override of local prosecutorial choices. Finally, some go so far as to sharply constrain or even eliminate this state-level supersession power, a choice that supports a strong, if not altogether inevitable, inference that local prosecutors hold broad nonenforcement authority.

As I have stressed throughout, abjuring categorical nonenforcement does not necessarily require swinging to the opposite extreme of maximal enforcement. Given the overall structure of modern American criminal law, prosecutors are almost never obligated to pursue charges in any given case; nor should they feel compelled to pursue the maximum available punishment for every given conduct violation. Even in states that appear to forbid categorical nonenforcement, entire categories of cases might never rise in practice to a level of perceived importance warranting commitment of resources. As discussed in Part II, however, taking the further step of disclosing implicit prioritization choices nevertheless makes a difference: in practical effect, it may powerfully influence public behavior, perceptions of law, and relative institutional authority within the government. On the question of whether taking that step is permissible, the fifty states' laws vary considerably and there is no single model of local prosecutorial authority.[298] An analysis that takes state law and state constitutionalism seriously requires looking at each state one by one.

V. BENEFITS OF A POSITIVE-LAW APPROACH

Attending to the variations in state law that I have documented here is ultimately a requirement of positive law that should be respected as such. Although certain general expectations regarding prosecutorial behavior have obtained until recently, there is ultimately no common model of prosecutorial autonomy and discretion across the federal government and all fifty states.

[298] *See, e.g.*, Wright, *supra* note 15, at 840 (disputing the existence of any "single definition of the role of the prosecutor").

Accordingly, as a matter of basic legal compliance, we should replace the current nationwide debate over categorical nonenforcement's legality with a debate centered on each jurisdiction's particular choices.

Even beyond its intrinsic validity, this positive-law approach could carry important benefits. For one thing, focusing on state-specific laws should lower the stakes of each local controversy. Practices developed in one jurisdiction at most set precedents for that state and others with similar institutional arrangements, not for the federal government and other states. Even if local debates remain heated, moreover, giving effect to states' varied legal arrangements would advance important federalism values.[299] The nationalized debate over prosecutorial discretion threatens to squelch such experimentation, shoehorning all fifty states into a common model of prosecutorial authority despite legal variations. As independent sovereigns with varied needs and challenges, however, states should be free to experiment not only with varied criminal laws, but also with varied arrangements for criminal enforcement.

At the same time, failing to adopt a state-specific approach carries considerable risks. As emphasized throughout this Article, the debates so far over local categorical nonenforcement have tended to ignore state positive laws and focus on policy aims and theoretical abstractions instead. In consequence, categorical nonenforcement has spread mainly through political networks and a partisan geography, not where the law best supports it.[300] California law, for example, seems to preclude local categorical

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[299] *See, e.g.*, Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)) (discussing federalism's central purpose of adapting local laws "to local conditions and local tastes").

[300] *See, e.g.*, BAZELON, *supra* note 2, at xxvii–xxviii (describing "[a] movement of organizers and activists and local leaders and defense lawyers and professors and students and donors" supporting reform through the election of reformist local prosecutors). Social scientists interested in the process of policy "diffusion" across jurisdictions have noted the potential importance of partisan alignments and networks. *See* Andrew Karch, *Emerging Issues and Future Directions in State Policy Diffusion Research*, 7 STATE POLITICS & POL'Y Q. 54, 63–65 (2007) (discussing literature positing that policies may diffuse across states through "use of ideological or partisan cues" or through "political forces that operate in multiple states"); Charles W. Tyler & Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187, 2191 (2022) (arguing that networks of "interest groups, activists, and funders" are the true laboratories of democracy today).

nonenforcement, but state-level officials have taken no action to override local progressive nonenforcement and ensure the "uniform and adequate" enforcement of state laws that the state constitution requires.[301]

This outcome is ironic: states laws restricting nonenforcement are themselves weakly enforced. Yet the irony is troubling. In periods of broad agreement over policy, informal norms and understandings may suffice to keep government running smoothly. By contrast, in periods of acute partisan conflict, political incentives encourage disruption of settled practices, making it all the more important to identify hard legal limits on what different institutions and officials can do. To the extent prosecutorial discretion's scope is an important area of contemporary political contestation, state positive law should provide an essential means of resolving the resulting disputes.

In other such areas of state-level legal conflict, scholars have noted a worrisome tendency to resolve heated inter-branch disputes through bare-knuckle political maneuvering.[302] As Miriam Seifter observes, "if the national branches are playing constitutional hardball, the states are playing hand grenades."[303] Seifter urges greater attention to state positive law as a solution; she notes in particular that states would benefit from greater development of their extra-judicial constitutional capacity, meaning an infrastructure of lawyers, commentators, and judges invested in interpreting and enforcing state constitutional and legal restraints.[304] Whatever the force of this suggestion in other areas, it carries immediate relevance to current disputes over prosecutorial authority. By the same token, embracing a positive-law orientation

[301] *See supra* notes 158–171 and accompanying text.

[302] *See* Seifter, *Judging Power Plays*, *supra* note 19, at 1218–20 (urging resolution of aggressive state-level legal reforms through interpretation of relevant state constitutional provisions). In their study of state Attorney Generals' duty to defend state laws against constitutional challenges, Neal Devins and Saikrishna Prakash documented a pattern similar to the one shown here with respect to prosecutorial discretion: though state laws varied widely with respect to whether they supported any such duty, the duty appeared to collapse uniformly nationwide following high-profile federal examples. Devins & Prakash, *supra* note 99, at 2107.

[303] Seifter, *Judging Power Plays*, *supra* note 19, at 1217.

[304] *See* Seifter, *Extra-Judicial Capacity*, *supra* note 18, at 387–88 (identifying the importance of a "constitutional community that includes would-be shamers, the motivated litigants, and the reactive employers").

in this important area could highlight its utility in other areas of state government.

In the long run, the positive-law approach need not carry any clear political valence. Although state law enables challenges to categorical nonenforcement in some states, it may insulate it from challenge in others—including some, like Texas, where state-level officials have voiced strong objections.[305] At the same time, framing the question as a matter of state law may help forestall unintended consequences. At present, many progressive prosecutors have chosen to pursue their policy aims in part through categorical nonenforcement, yet this choice risks normalizing nationwide an understanding of executive authority that is unlikely to redound entirely to the benefit of progressive causes. By making this technique's validity a matter of state-specific law, the approach urged here would help limit any local example's relevance to attempted nonenforcement of different laws at the federal level or in other states.

VI. CONCLUSION

The current structure of criminal law in many jurisdictions in the United States—a structure with deliberately excessive punishments and expansive crime definitions aimed at imposing trial penalties and facilitating conviction—is costly to the rule of law. It gives prosecutors too much discretion, weakens due process guarantees, and places citizens at undue risk of punishment for socially accepted conduct. Nevertheless, one emerging response to this structure's flaws—a model of prosecutorial discretion that encourages categorical nonenforcement—may be costly as well. Among other things, it weakens societal reliance on enacted legislation as the focus of behavioral regulation, creates confusion about what the law really requires, invites reliance on policies that may not in fact protect individuals against future enforcement, and gives prosecutors a form of de facto law-making power at odds with their limited institutional role. This prosecutorial practice might even be counterproductive with respect to reformers' own aims. By siphoning off pressure for political change, prosecutorial nonenforcement may only make more durable legislative reform

[305] *See* Marfin, *supra* note 62 (noting criticism of local nonenforcement by Texas Governor and Attorney General).

less likely.

How to balance these competing harms is an important policy question. But it is also a question of legal and institutional authority that different jurisdictions may answer differently. Federal law does not allow a general practice of categorical nonenforcement except in areas where Congress has specifically authorized it, yet state governments differ both from each other and from the federal government in their organization. These varied state governing arrangements make inferring a local categorical nonenforcement power quite plausible in some states, quite implausible in others, and potentially up for grabs in another group. To enable federalist experimentation and strengthen state constitutionalism—and because it is what the law requires—we should give effect to these differences. In criminal law, the states follow no uniform model of faithful execution, and public debates should not presume that they do.