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## In Defense of the Juggernaut: The Ethical and Constitutional Argument for Prosecutorial Discretion

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# IN DEFENSE OF THE JUGGERNAUT: THE ETHICAL AND CONSTITUTIONAL ARGUMENT FOR PROSECUTORIAL DISCRETION

DAVID A. LORD\*

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## ABSTRACT

*Within days of the Supreme Court's decision overturning Roe v. Wade, progressive prosecutors throughout the country announced that if their jurisdictions enacted restrictions on abortion, they would not prosecute the individuals who had these procedures or the doctors who performed them. This is the latest example of situations, like drug-crimes, illegal gun possession, and other offenses, where prosecutors*

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have declined to enforce a state law as a matter of public policy.<sup>1</sup> Critics of this broad use of prosecutorial discretion have argued that it violates the constitutional separation of powers.

*This Article argues that prosecutorial discretion is well-founded in American history, ethics, and constitutional law. This Article examines the history of prosecutors as elected officials and the impact the election process has had on the exercise of discretion in charging decisions. It explores the ethical and constitutional framework in which the exercise of prosecutorial charging discretion takes place and examines how prosecutors on both ends of the political spectrum have used charging discretion as a means of furthering public policy. This Article concludes by arguing that prosecutorial discretion is a critical part of our nation's careful system of checks and balances, and that this discretion reinforces, rather than undermines, the separation of powers.*

## I. INTRODUCTION

The ink had barely dried on the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,<sup>2</sup> which returned decisions regarding abortion regulation to the states,<sup>3</sup> when progressive prosecutors around the nation began declaring that if their jurisdictions adopted legislation banning abortion, they would refuse to prosecute individuals who had the medical procedure and the doctors performing them.<sup>4</sup> In making this announcement, the prosecutors cited to "well-settled discretion" and the need to avoid using limited resources to criminalize personal health decisions.<sup>5</sup> These announcements echoed earlier decisions by some left-leaning prosecutors who declined to pursue drug possession charges for individuals accused of possessing marijuana<sup>6</sup> and right-leaning prosecutors, who declined to

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1. See discussion of examples with such discretion *infra* Section IV.

2. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (holding that the constitution conferred the right to have an abortion and overturning *Roe v. Wade*, 410 U.S. 113 (1973)).

3. See Mariana Alfaro, Amy Wang & Timothy Bella, *Pence Calls for National Abortion Ban as Trump, GOP Celebrate the End of Roe*, WASH. POST (June 24, 2022, 12:38 PM), <https://www.washingtonpost.com/politics/2022/06/24/abortion-supreme-court-trump-pence-republicans-roe/> (assuming Congress does not enact legislation creating a nationwide ban on abortions as some leaders in the Republican Party have suggested is appropriate).

4. Zoë Richards, *Dozens of Prosecutors Say They Will Refuse to Prosecute Abortion Care*, NBC NEWS (June 24, 2022, 8:55 PM), <https://www.nbcnews.com/politics/politics-news/dozens-elected-prosecutors-say-will-refuse-prosecute-abortion-care-rcna35305>.

5. *Id.*

6. Shalia Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana*

enforce gun laws.<sup>7</sup> This debate highlights the tremendous power that democratically elected prosecutors hold in shaping the enforcement of public policy. With a single proclamation, the local prosecutor appears to have the authority to halt the enforcement of a criminal law in their jurisdiction. This creates an image of the prosecutor as an unstoppable juggernaut in the criminal justice system.<sup>8</sup> As the forces of both the right and left fight to shape public policy on contentious issues like abortion, guns, and drugs, the prosecutor becomes the fulcrum of the entire debate.<sup>9</sup>

This struggle highlights additional tensions at play between the role of the prosecutor as a law enforcement officer, the tradition of electing prosecutors to speak as a voice for their respective communities, and the practical reality of limited resources being available to prosecutorial offices. Moreover, the doctrines of separation of powers and checks and balances, which entrust separate parts of the policy making process to the legislature and the executive, create a messy overlay for this analysis.

Difficult questions must be answered. Does separation of powers mean a prosecutor must ignore the will of the people who elected her and charge someone with an unpopular crime? What if that jurisdiction's political sentiment towards an offense means that a jury drawn from that community, will not convict the defendant because of general opposition to the law? Should the prosecutor move forward with trying to enforce the will of the legislature by charging the offense? Should the prosecutor make aggressive

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*Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html>.

7. Debra Cassens Weiss, *State's Attorney in Illinois Won't Prosecute People Who Carry Weapons with "No Evil Intent,"* ABA J. (Aug. 22, 2012, 12:20 PM), [https://www.abajournal.com/news/article/states\\_attorney\\_in\\_illinois\\_wont\\_prosecute\\_people\\_who\\_carry\\_weapons\\_with\\_no;\\_see\\_also\\_Todd\\_Richmond,\\_Wis.\\_DA\\_Says\\_He\\_Won't\\_Prosecute\\_Some\\_Gun\\_Laws](https://www.abajournal.com/news/article/states_attorney_in_illinois_wont_prosecute_people_who_carry_weapons_with_no;_see_also_Todd_Richmond,_Wis._DA_Says_He_Won't_Prosecute_Some_Gun_Laws), SAN DIEGO UNION TRIB. (July 2, 2010, 12:23 PM), <https://www.sandiegouniontribune.com/sdut-wis-da-says-he-wont-prosecute-some-gun-laws-2010jul02-story.html>.

8. The juggernaut is an Anglicized name for the Hindu god Jagannath, the "Lord of the Universe." Michael J. Altman, *The Origins of the Juggernaut*, OUP BLOG (Aug. 2, 2017), <https://blog.oup.com/2017/08/origins-juggernaut-jagannath/>. "Juggernaut" has become decoupled from any reference to the Hindu god and has come to be used to describe anyone or anything that seems unstoppable, powerful or dominant. *Id.*

9. A fulcrum is the pivot point around which a lever or bar turns. Licia Morrow, *What Is a Fulcrum?*, ABOUT MECHS. (June 29, 2022), <https://www.aboutmechanics.com/what-is-a-fulcrum.htm>. For the purposes of this Article, one can imagine a policy issue as a seesaw or teeter totter, in which the left or right are proverbially "up or down" at any particular point in time. Envisioning the prosecutor as the pivot emphasizes their centrality to these discussions, because the board cannot move but for the existence of the fulcrum, i.e., the prosecutor.

peremptory challenges or challenges for cause to keep community members off the jury whose opposition to these laws might taint their fair consideration of a defendant's guilt?<sup>10</sup> Or should the prosecutor rely on the mandate of their election to act as a voice of collective community values and refuse to enforce a duly enacted law?

This Article will seek to answer those questions by examining the role of prosecutorial discretion in refusing to prosecute cases as a public policy decision. In Part II, this Article examines the history of the prosecutor as an elected official, and the development of prosecutors as a voice for the values of the local community.<sup>11</sup> Part III analyzes the ethical framework for prosecutorial discretion, as understood through the Rules of Professional Conduct and other secondary ethical authority.<sup>12</sup> Part IV explores constitutional constraints on the exercise of prosecutorial discretion.<sup>13</sup> Part V addresses the history of prosecutorial discretion as a matter of public policy.<sup>14</sup> Part VI synthesizes the earlier sections by arguing that prosecutorial discretion, rather than undermining separation of powers, actually plays a critical role in our system of checks and balances, and that many of the proposed reforms aimed at constraining this discretion will create broader harm to our constitutional order.<sup>15</sup>

## II. THE HISTORY OF THE PROSECUTOR AS AN ELECTED OFFICIAL AND THE DEVELOPMENT OF PROSECUTORIAL DISCRETION

Common sense would suggest that there is at least some connection between the decision not to prosecute a class of cases and the fact that prosecutors are elected in the first place. Presumably, as rational actors in a political sphere, prosecutors must consider the response of their electorate to their actions. It is worth noting that America is the only country to employ the use of directly elected prosecutors.<sup>16</sup> One could imagine that, in a system

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10. A challenge for cause is when one of the attorneys in a trial seeks to strike a potential juror from serving in a case because they have implied or actual bias; a peremptory challenge permits an attorney to strike a jury without providing a reason for removal. Daniel Edwards, *The Evolving Debate Over Batson's Procedures for Peremptory Challenges*, NAT'L ASS'N OF ATT'YS GEN. (Apr. 14, 2020), <https://www.naag.org/attorney-general-journal/the-evolving-debate-over-batsons-procedures-for-peremptory-challenges/>.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See infra* Part V.

15. *See infra* Part VI.

16. *See* Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 35

where the prosecutor is simply an appointed civil servant, the political pressures and incentives, which might drive a decision to not prosecute a class of cases, would be less pronounced. In such a system, the appointed prosecutor would not have to worry about whether the prosecution of certain crimes might result in votes gained or lost in their re-election campaign.

But, in the American system, which overwhelmingly relies on the use of elected prosecutors at the local level, the calculus is different. In order to obtain and retain office, an elected prosecutor must be responsive to the will of the local electorate. Voters confronted with two candidates—one who pledges not to enforce an unpopular law and the other who argues that the decision is out of their hands and rests with the legislature—might find the legal theory behind the latter position too academically nuanced. If the electorate is politically moved by the idea that restrictions on personal drug use, abortion, or gun laws will not be enforced in their hometown, despite a state mandate to the contrary, they may vote accordingly.

It is unrealistic to expect an electorate to ignore their own political preferences and accept a law they despise being enforced simply because it is the will of the state legislature, an institution that, paradoxically, is charged with passing laws reflective of the electorate's values. This is the reality in which elected prosecutors operate. Moreover, prosecutors often argue in court that they speak as the voice of the community, given that their client is the public at large, in contrast to a defense attorney, whose client is solely the person charged with the crime. A prosecutor could hardly claim that they represent the voice of their community if they routinely disregard what their electorate wants them to do.

When the United States was founded, prosecutors were appointed officials.<sup>17</sup> In the latter part of the nineteenth century, the role of prosecutors began to substantially change, as they moved from simple civil functionaries to qualitative decisionmakers about whether to prosecute particular cases.<sup>18</sup> It was within this context of an increasingly more powerful prosecutor that, in 1832, Mississippi became the first state to provide for their direct election.<sup>19</sup> At the time that this change was made, it was argued that it would promote democratic values by ensuring that those public officials with significant authority were directly elected by the people.<sup>20</sup>

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(2007) (“Only in the United States are judges and prosecutors elected....”).

17. M.J. Ellis, *The Origins of Elected Prosecutors*, 121 YALE L. J. 1528, 1537 (2012).

18. *Id.* at 1538.

19. *Id.* at 1540.

20. *Id.* at 1541.

As other states followed suit, the connection between the exercise of discretion in charging decisions and the political realities of elected office became obvious: “Prosecutors who stood for reelection in the 1850s may therefore have used the *nolle* writ [which facilitates the dismissal/non-prosecution of charges] and the newfound discretion it conferred on them to focus their time and energy on the cases that would be most helpful to their political standing.”<sup>21</sup> While this carries with it a negative association, it is worth noting that many reformers believed that directly electing prosecutors would actually improve the ethics of prosecution by removing great power from a person who might be controlled by another elected official or the party who appointed them.<sup>22</sup> The idea of electing prosecutors met its greatest resistance in the South, where there was general hostility to constitutional reforms, including expanding the offices subject to election.<sup>23</sup> South Carolina, for example, did not provide for election of executive officials until 1865.<sup>24</sup> By the time of the Civil War, twenty-five states had elected prosecutors, and four additional states would soon follow.<sup>25</sup> Every state admitted after the Civil War provided for elected prosecutors and, while some states have shifted judicial selection away from elections, no state has done so for prosecutors.<sup>26</sup>

Presently, forty-five states elect prosecutors at the local level, meaning elections play a central role in the life of a prosecutor.<sup>27</sup> Contested elections are more likely to occur in larger communities.<sup>28</sup> Additionally, a contested election is far more likely when the seat is open, rather than when an incumbent is running for reelection.<sup>29</sup> Advocacy organizations like the American Civil Liberties Union (“ACLU”) are beginning to embrace the idea of running their allies as candidates for prosecution in an attempt to influence policy discussions.<sup>30</sup> In a brochure entitled, *Why Run for Locally*

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21. *Id.* at 1547.

22. *Id.* at 1550.

23. *Id.* at 1564.

24. *Id.*

25. *Id.* at 1568.

26. *Id.*

27. Carissa Byrne Hessick, *National Study of Prosecutor Elections*, UNC L. (Feb. 2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf>.

28. *Id.* at 4.

29. *Id.* at 4–5.

30. *E.g.*, WHY RUN FOR LOCALLY ELECTED PROSECUTOR?, ACLU 1–2 (Nov. 2017), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_prosecutor\\_two\\_pager.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_prosecutor_two_pager.pdf).

*Elected Prosecutor?*, the ACLU tells its readers, “[i]f you are thinking about running for local office to positively impact lives and to transform communities, elected prosecutor might be right for you.”<sup>31</sup> This brochure goes on to note that a wave of reform-oriented candidates are increasingly winning these offices and “implementing bold agendas that reduce mass incarceration, fight racial injustice, and promote civil liberties in their local communities.”<sup>32</sup> The brochure further explains that, among other things, an elected prosecutor can decline to prosecute simple drug possession, decline to prosecute offenses with large racial disparities in arrest rates, and decline to prosecute women who seek abortion contrary to state law.<sup>33</sup> The brochure cites statistics to support the proposition that voters overwhelmingly prefer reform-minded prosecutors and holds out the tantalizing possibility that office holders with a prosecutorial background frequently go on to win election to even higher positions.<sup>34</sup>

Conservatives, seeing the same power behind these local offices, have begun to organize and fund groups that target progressive prosecutors with recall elections.<sup>35</sup> One such group raised \$250,000 and secured pledges for another \$500,000 to seek the recall of three progressive prosecutors in Northern Virginia who had been elected in 2019, among a national calling to make law enforcement “fairer and more humane.”<sup>36</sup> Citing public concerns about rising crime, the groups have said that “now is the moment that people who are for law enforcement have woken up.”<sup>37</sup> Getting involved in prosecutorial elections is enabling a Republican strategy to try to reclaim the law-and-order mantle that was frequently embraced by both parties in the 1980s and 1990s.<sup>38</sup>

With both political parties now heavily committed to the politics of these races, the centrality of the role of the prosecutor in public policy discussions is unlikely to abate in the near future. And, with a prosecutor’s discretion to charge or not charge certain crimes playing a central role in their overarching authority, it is important to understand the ethical and constitutional framework in which this power is exercised.

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31. *Id.* at 1.

32. *Id.*

33. *Id.*

34. *Id.* at 1–2.

35. Kenneth P. Vogel, *Conservative Group, Seizing on Crime as an Issue, Seeks Recall of Prosecutors*, N.Y. TIMES (Aug. 2, 2021), <https://www.nytimes.com/2021/08/02/us/politics/prosecutors-recall-virginia.html>.

36. *Id.*

37. *Id.*

38. *Id.*



### III. THE ETHICAL FRAMEWORK FOR THE EXERCISE OF PROSECUTORIAL DISCRETION

The Model Rules of Professional Conduct constitute the basis of formal, mandatory ethical guidance for attorneys, including prosecutors. The Rules provide only limited guidance, however, when it comes to the issue of prosecutorial discretion in charging decisions. Specifically, the only rule that addresses the issue is Rule 3.8 which states, “[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>39</sup> The official comments to this Rule note that in the prosecutor’s role as a “minister of justice,” they have a responsibility to ensure that “guilt is decided upon the basis of sufficient evidence.”<sup>40</sup> This rule offers guidance for one angle of the charging decision by prohibiting a prosecutor from bringing a charge where the evidence falls below the probable cause threshold. However, that threshold is relatively minimal as the standard of probable cause is merely a “reasonable ground for belief in guilt,”<sup>41</sup> that requires “only a probability or substantial chance of criminal activity, not actually showing the activity,”<sup>42</sup> and “means less than evidence which would justify condemnation or conviction.”<sup>43</sup>

If prosecutors charged every crime for which there was simply probable cause, the system would become overwhelmed. Clear injustices would ensue because individuals would be charged with offenses where they almost certainly did not commit the crime. To demonstrate the truth of this, when I teach ethics to prosecutors, I ask them to consider a version of the following hypothetical: imagine that the police are called to a domestic dispute one evening and the wife answers the door, crying, and has a black eye. She tells the police that her husband hit her and that she is sick of his abuse and wants it to stop. The husband is arrested for domestic assault. On the eve of trial, the victim comes to the prosecutor’s office, recants, and says she made the whole thing up and her black eye was the result of falling down the stairs. From my experience in sixteen years of prosecution, variations of these basic facts routinely occur in domestic violence cases.<sup>44</sup> I will then ask the

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39. MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS’N 2018).

40. *Id.* cmt. 1.

41. *Carroll v. United States*, 267 U.S. 132, 161 (1925).

42. *United States v. Wesby*, 138 S. Ct. 577, 586 (2018) (citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

43. *United States v. Diallo*, 29 F.3d 23, 25 (1st Cir. 1994).

44. *National Domestic Violence Prosecution Best Practices Guide*, NAT’L DIST. ATT’Y ASS’N (July 17, 2017), <https://ndaa.org/wp-content/uploads/NDAA-DV-White-Paper-FINAL-revised-June-23-2020-1.pdf> [hereinafter “NDAA”] (citing to statistics suggesting that recantation occurs in as many as eighty percent of all domestic violence

students, can this woman be ethically charged with the crime of filing a false police report?

If the evaluation of that question relies solely on the guidance of Rule 3.8, then the answer must be yes, as her voluntary confession (the victim telling the prosecutor she made up the crime) constitutes probable cause of filing a false police report.<sup>45</sup> But, I will then ask whether it seems morally correct to charge the wife with this crime and almost all students will answer no. In explaining their conclusion, some will cite to the fact that despite the presence of probable cause in the scenario, they themselves believe that the wife is innocent of the crime because she was telling the police the truth at the time of the offense and was not dishonest until speaking to the prosecutor. Others will cite to how prosecuting the wife in this scenario could increase trauma for her if she was the victim of violence and might create a chilling effect on her subsequent willingness to contact the police if the violence occurs again. This scenario demonstrates that there are many cases in which probable cause exists, which would make charging someone with a crime permissible under the Rules of Professional Conduct, but where the decision still seems ethically wrong.

Prosecutorial charging discretion is an area where additional ethical guidance is most needed. After all, if a prosecutor is declining to prosecute an entire class of offenses—possession of marijuana, gun possession, or abortion—they are acknowledging that the quantum of evidence is irrelevant to the decision. Implicit to the decision to exclude an entire class of cases from prosecution is the idea that what is governing that decision is solely the nature of the charge, not the amount of evidence available of any particular defendant's guilt. This ethical void creates the natural question of whether there is ethical guidance that can help prosecutors navigate the use of discretion in the interstice of cases where probable cause exists, but the prosecutor does not want to move forward with the case. What ethical norms can assist in making sure that this power is exercised in a way that is fair, reasonable, and just?

Because the Rules of Professional Conduct are silent on this issue, two leading legal associations have tried to step into the void to offer guidance. First, the American Bar Association (“ABA”) has written a text entitled “Criminal Justice Standards for the Prosecution Function,” which seeks to provide guidance for the professional conduct and performance of

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cases).

45. *See, e.g.*, *United States v. Hughes*, 640 F.3d 428, 440 (1st Cir. 2011); *Dukes v. City of Albany*, 289 F. Supp. 3d 387, 393 (N.D.N.Y. 2018); *Hirmuz v. City of Madison Heights*, 469 F. Supp. 2d 466, 479 (E.D. Mich. 2007) (a voluntary confession constitutes probable cause of committing a crime).

prosecutors in a way that is consistent with the Rules of Professional Conduct and creates aspirational “best practices.”<sup>46</sup> One section of this document addresses prosecutors’ charging discretion, noting that “the prosecutor is not obligated to file or maintain all criminal charges which the evidence might support.”<sup>47</sup> The document goes on to list sixteen factors that a prosecutor can use in exercising this discretion ethically. The first two focus on the issue of the quantum of evidence, specifically permitting consideration of “the strength of the case” and “the prosecutor’s doubt that the accused is in fact guilty.”<sup>48</sup> Each of these two factors implicitly acknowledges that the mere probable cause standard of Rule 3.8 may not be enough to vet cases and that a higher evidentiary threshold is warranted.

It is in the remaining fourteen criteria, however, that ethical guidance would help prosecutors make charging decisions. The remaining factors that the ABA believes a prosecutor can consider when exercising discretion to charge are:

- (iii) the extent or absence of harm caused by the offense;
- (iv) the impact of prosecution or non-prosecution on the public welfare;
- (v) the background and characteristics of the offender, including any voluntary restitution or efforts at rehabilitation;
- (vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- (vii) the views and motives of the victim or complainant;
- (viii) any improper conduct by law enforcement;
- (ix) unwarranted disparate treatment of similarly situated persons;
- (x) potential collateral impact on third parties, including witnesses or victims;
- (xi) cooperation of the offender in the apprehension or conviction of others;
- (xii) the possible influence of any cultural, social, socioeconomic or other improper biases;
- (xiii) changes in law or policy;
- (xiv) the fair and efficient distribution of limited prosecutorial resources;
- (xv) the likelihood of prosecution by another jurisdiction;
- (xvi) whether the public’s interests in the matter might be appropriately vindicated by available civil, regulatory, administrative or private remedies.<sup>49</sup>

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46. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION 3-1.1(b) (AM. BAR ASS’N 2017).

47. *Id.* at 3-4.4(a).

48. *Id.*

49. *Id.*

Six of those criteria could potentially offer secondary ethical justification for prosecutors who wish to decline the prosecution of a class of cases. The standards that call for consideration of the “extent or absence of harm” in the offense, the impact of prosecution on public welfare, and whether the punishment is disparate relative to the offense, squarely direct the prosecutor to examine the impact that the offense has on society more broadly as well as the impact the prosecution would have on the offender.<sup>50</sup> In the case of abortion, this was at the forefront of the minds of the prosecutors who drafted a joint letter for the organization Fair and Just Prosecution, announcing that they would not prosecute individuals charged with this crime.<sup>51</sup> In this letter, the prosecutors noted that criminalizing and prosecuting abortion would not end abortion and would instead “isolate people from the law enforcement, medical, and social resources they need.”<sup>52</sup> The prosecutors also cited to their concern that prosecution for abortion would lead to “retraumatization and criminalization of victims of sexual violence.”<sup>53</sup> These comments reflect a sentiment by the signatories that any public harm that results from abortion is outweighed by the negative impact of prosecuting the people who have abortions or the doctors who provide them.

Additionally, the ABA’s standard, which calls for consideration of “the fair and efficient distribution of limited prosecutorial resources,” played a significant role in the logic of the prosecutors signing this letter.<sup>54</sup> The following phrases were prominently cited throughout the document: “we decline to use our office’s resources to criminalize reproductive health decisions;” “prosecutors make decisions every day about how to allocate limited resources;” “[prosecution of abortion will] take resources away from the enforcement of serious crime;” “[o]ur criminal legal system is already overburdened;” “we have a responsibility to ensure that these limited resources are focused on efforts to prevent and address serious crime;” and “enforcing abortion bans would mean taking time, effort, and resources away from the prosecution of the most serious crimes . . .”<sup>55</sup> For prosecutors who already feel like their offices are overworked,<sup>56</sup> this letter reaches a clear

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50. *Id.*

51. *Joint Statement from Elected Prosecutors*, FAIR & JUST PROSECUTION (June 24, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [hereinafter “FAIR & JUST PROSECUTION”].

52. *Id.*

53. *Id.*

54. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION 3-4.4(a) (AM. BAR ASS’N, 2017).

55. See FAIR & JUST PROSECUTION, *supra* note 51.

56. See, e.g., Nelson O. Bunn, Jr. *Overworked and Understaffed: The Shifting*

conclusion that they believe it would be inappropriate to dedicate limited resources to prosecuting abortion. The ABA standards offer clear ethical support for their authority to reach this conclusion.

The ABA standards also call for consideration of “the possible influence of any cultural, social, socioeconomic or other improper biases.”<sup>57</sup> In the aforementioned letter declining to prosecute abortion, the prosecutors specifically noted that “[a]bortion bans will also disproportionately harm victims of sexual abuse, rape, incest, human trafficking, and domestic violence.”<sup>58</sup> Prosecutors could offer similar critique in declining to prosecute marijuana cases by arguing that the offense unfairly targets communities of color.<sup>59</sup>

The National District Attorneys Association has also created secondary authority, similar to the American Bar Association, that seeks to offer aspirational guidance to prosecutors on the conduct of their office.<sup>60</sup> The standards take a strong stand in favor of the wide use of discretion by stating that “[i]t is the ultimate responsibility of the prosecutor’s office to determine which criminal charges should be prosecuted and against whom.”<sup>61</sup> In offering their list of criteria for what a prosecutor can legitimately consider in exercising the discretion to charge a criminal offense, they offer criteria similar, but marginally different than the American Bar Association’s factors. The list includes:

- (a) The nature of the offense, including whether the crime involves violence or bodily injury;
- (b) The probability of conviction;
- (c) The characteristics of the accused that are relevant to his or her blameworthiness or responsibility, including the accused’s criminal history;
- (d) Potential deterrent value of prosecution to the offender and to society

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*Landscape in Local Prosecutor Caseloads*, NAT’L DIST. ATT’Y ASS’N (Feb. 24, 2020), <https://ndaajustice.medium.com/overworked-and-understaffed-the-shifting-landscape-in-local-prosecutor-caseloads-122f7ef5e4f1>.

57. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION 4-2.1 (AM. BAR ASS’N, 2017).

58. FAIR & JUST PROSECUTION, *supra* note 51 (citing to Starre Vartan, *The Lifelong Consequences of Rape*, PAC. STANDARD (June 14, 2017), <https://psmag.com/social-justice/lifelong-consequences-rape-96056>).

59. Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 776–77 (2020).

60. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 1 (3d ed. 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Edition-Revised-Commentary.pdf>.

61. *Id.* at 52.

- at large;
- (e) The value to society of incapacitating the accused in the event of a conviction;
  - (f) The willingness of the offender to cooperate with law enforcement;
  - (g) The defendant's relative level of culpability in the criminal activity;
  - (h) The status of the victim, including the victim's age or special vulnerability;
  - (i) Whether the accused held a position of trust at the time of the offense;
  - (j) Excessive costs of prosecution in relation to the seriousness of the offense;
  - (k) Recommendation of the involved law enforcement personnel;
  - (l) The impact of the crime on the community;
  - (m) Any other aggravating or mitigating circumstances.<sup>62</sup>

While this list has broad similarities to the one promulgated by the ABA, one factor in particular warrants further discussion as it relates to the topic of this Article: "the probability of conviction."<sup>63</sup> Prosecutors have to acknowledge the possibility of jury nullification, which is "a jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some societal issue that is larger than the case itself or because the result dictated by the law is contrary to the jury's sense of justice, morality or fairness."<sup>64</sup> Jury nullification has been traced as far back as 1670, when a jury refused to convict Quaker ministers of particular charges despite the judge depriving the jurors of food, water, heat, and fining them.<sup>65</sup> Jury nullification becomes particularly important when there is overwhelming evidence against the defendant, but compelling reasons for the jury to sympathize with the person accused of the crime, such as is the case in anti-war demonstration, assisted suicide of a terminally-ill loved one, and victims of police abuse or prosecutorial overreach.<sup>66</sup>

If there is a disconnect between the political sensibilities of the local jurisdiction in which the alleged crime happened and the state more broadly, this becomes an even greater practicality that the prosecutor must confront, and it works in both political directions. Just as a jury drawn from a progressive locale might refuse to convict a defendant charged with abortion

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62. *Id.*

63. *Id.*

64. *See Jury Nullification*, BLACK'S L. DICTIONARY (9th ed. 2009).

65. Monroe H. Freedman, *Jury Nullification: What It is and How to do It Ethically*, 42 HOFSTRA L. REV. 1125, 1126 (2014).

66. *Id.* at 1132–33 (noting that jury nullification has been used by attorneys in an attempt to get the jury to acquit their client of a crime against an abortion provider); *see, e.g., United States v. Anderson*, 716 F.2d 446, 449 (7th Cir. 1983).

or marijuana, in violation of a conservative state law, jurors in a rural and more conservative part of the state might decline to enforce, through their verdict, gun laws enacted at the state-level in more liberal states. If a prosecutor can ethically consider the likelihood of conviction when exercising discretion, then it is also ethically appropriate to consider local political sentiment when deciding whether to enforce a state charge.

The concern that this raises, though, is that it seemingly empowers the local prosecutor to override the will of the legislature and could result in a patchwork of enforcement throughout a state. Some scholars have warned that unchecked prosecutorial discretion, by allowing an executive official to override a legislative judgment, can “undermine core separation of powers principles and thereby threatening both individual liberty and the rule of law.”<sup>67</sup>

This creates a tension between the practical and ethical foundation of prosecutorial discretion as well as a concern that the exercise of this prosecutorial discretion could undermine the existing democratic structure of government in the states. Understanding the role of prosecutorial discretion in the constitutional context is thus of critical importance.

#### IV. THE CONSTITUTIONAL FRAMEWORK FOR THE EXERCISE OF PROSECUTORIAL DISCRETION.

The Supreme Court has long recognized that prosecutors have broad discretion to enforce criminal laws.<sup>68</sup> When a litigant asks a court to overrule the discretionary decision of a prosecutor, they are asking the Court to invade the “special province” of the executive branch and overcome a common presumption that prosecutors are doing their jobs in a lawful fashion.<sup>69</sup> In the ordinary case, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”<sup>70</sup>

Courts must show deference to the decisions of executive officers, like prosecutors, because the relevant points of analysis when considering the strength of the case, what deterrence value will be accomplished by

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67. Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 608 (2020).

68. *E.g.*, *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (placing on defendants the evidentiary burden of showing that they were the victims of selective prosecution in a racially discriminatory manner).

69. *Id.* at 464.

70. *Id.* (citing *Borkenkrieger v. Hayes*, 434 U.S. 357, 364 (1978)).

prosecution, the government's enforcement priorities, and the case's relationship to that overall plan are not considerations that a court is competent to undertake.<sup>71</sup> Courts are also reluctant to get involved in overriding prosecutorial discretion because they do not want to impair the performance of a core executive function: enforcement.<sup>72</sup> Additionally, the Supreme Court has recognized that implementation of law necessarily requires discretionary judgments.<sup>73</sup> The Court has acknowledged that discretion, including the power of a prosecutor to be lenient, is also the power to discriminate, but a system that did not "allow for discretionary acts of leniency would be totally alien to our notions of criminal justice."<sup>74</sup>

The vastly broad discretion of prosecutors is similarly reinforced by several Supreme Court decisions. For example, a prosecutor can delay bringing charges without violating a defendant's right to a speedy trial since this right does not begin until formal charging.<sup>75</sup> A prosecutor does not violate the constitution when they defer charging someone with a crime because they are not under a duty to charge individuals as soon as probable cause exists.<sup>76</sup> The Supreme Court has specifically refused to find that a prosecutor must charge (lest constitutional speedy trial rights be implicated) as soon as there is sufficient evidence to do so because such a rule would discourage the government from giving full consideration to whether prosecution should be undertaken in the first place.<sup>77</sup> "Prosecutors often need more information than proof of a suspect's guilt" before deciding to seek an indictment.<sup>78</sup> The Court has specifically recognized that assessing culpability and legal guilt are two different things.<sup>79</sup> Moreover, prosecutorial discretion can be used long before sentencing or other clemency in order to correct what the state perceives to be an unjust sentence.<sup>80</sup>

Additionally, when two statutes prohibit the exact same conduct but apply different penalties, the prosecutor has discretion to choose which statute to

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71. *Id.* at 465.

72. *Id.*

73. *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

74. *Id.* at 312.

75. *United States v. Lovasco*, 431 U.S. 783, 788–89 (1977).

76. *Id.* at 791.

77. *Id.* at 794.

78. *Id.* (offering as an example the idea that further investigation may help understand suspects relative moral culpability, even though that investigation is not critical to establishing their guilt).

79. *Id.*

80. *See Harmelin v. Michigan*, 501 U.S. 957, 1008–09 (1991) (upholding the imposition of a mandatory life sentence in a narcotics case brought by a prosecutor).



proceed under.<sup>81</sup> The system grants prosecutors vast discretion and provides for that discretion throughout all stages of the criminal justice process.<sup>82</sup> Lastly, and perhaps most importantly to this discussion, the Supreme Court has held that prosecutors are absolutely immune from civil liability when exercising discretion to charge a case.<sup>83</sup>

However, the exceedingly broad authority of prosecutors is not without limits. A defendant is entitled to have an impartial prosecutor make charging decisions.<sup>84</sup> Moreover, the constitutional doctrine prohibiting vindictive prosecution holds that a prosecutor is not allowed to exercise their discretion as a form of punishment because the defendant has simply exercised his rights, such as demanding a jury trial.<sup>85</sup> A prosecutor's discretion is subject to constitutional constraints, such that they cannot make a decision about whether to prosecute on "an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>86</sup> Similarly, at trial, a prosecutor is not allowed to use a factor, such as race, when making a discretionary challenge to a potential juror.<sup>87</sup>

This line of case law clearly supports the proposition that, as a matter of constitutional law, prosecutors who wish to decline prosecution on public policy grounds are acting solidly within their constitutional prerogatives.<sup>88</sup> Given how expansive prosecutorial discretion is as a matter of constitutional law, it is clear that the Supreme Court is not going to intervene in a prosecutor's decision to decline charging a class of cases. Moreover, the strong language employed by the Supreme Court in the cases discussed in

81. See, e.g., *United States v. Batchelder*, 442 U.S. 114, 124–25 (1979).

82. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1036 (1991) (referencing *Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting)).

83. *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). However, if a prosecutor steps beyond the traditional bounds of their job to perform the function of a complaining witness, they are not entitled to absolutely immunity from a claim that they made allegedly false statements in support of an arrest warrant. *Kalina v. Fletcher*, 522 U.S. 118, 129–31 (1997).

84. See, e.g., *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 806–07 (1987) (noting that an interested party in the role of prosecutor creates opportunities for conflicts to arise).

85. *United States v. Goodwin*, 457 U.S. 368, 372 (1982).

86. *United States v. Anderson*, 517 U.S. 456, 464 (1996) (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

87. See *Powers v. Ohio*, 499 U.S. 400, 409 (1991); *Batson v. Kentucky*, 476 U.S. 79, 84 (1986).

88. See, e.g., *United States v. Goodwin*, 457 U.S. 368, 372 (1982); *United States v. Anderson*, 517 U.S. 456, 464 (1996); *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 806–07 (1987).

this section, highlights a judicial recognition that the decision of whether to prosecute an individual is more complicated than simply whether there is proof that they have engaged in conduct that violates a duly enacted law. By deferring to the enforcement priorities of the executive branch (as practically exercised through prosecutors), the Court implicitly recognizes that prosecutors do not operate in a world of infinite resources and that it is the executive who gets to decide how those limited resources are employed when it comes to the decision to prosecute. Thus, from a constitutional perspective, there is nothing improper in deciding that a particular offense will not be prosecuted in a particular jurisdiction.

The next constitutional question to consider is whether a refusal by an executive authority to enforce a law constitutes a separation of powers problem. Since the founding of our country, the courts have been confronted with the problem of how and when to compel the executive to enforce the law. For example, the writ of mandamus has been part of our nation's judicial history from the time of *Marbury v. Madison*.<sup>89</sup> If the writ is awarded it directs an officer of the government to do a particular thing, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice."<sup>90</sup> However, even as far back as *Marbury*, the Court noted that a remedy like *mandamus* is only appropriate when "directing the performance of a duty, not depending on executive discretion."<sup>91</sup> For that reason, *mandamus* is considered a "drastic and extraordinary remedy reserved for really extraordinary causes" and should be issued in only exceptional circumstances amounting to a usurpation of power or a clear abuse of discretion.<sup>92</sup>

Within that context, it is reasonable to ask whether a judicial remedy, such as a *writ of mandamus*, would be appropriate if the prosecutor refuses to enforce the law. The argument, in essence, would be that it is the job of the legislature to write the law and the job of the executive branch, including prosecutors, to enforce it. Thus, while a prosecutor might have discretion to decline prosecution because of individual circumstances unique to that situation, the decision to decline to prosecute an entire class of cases is an abuse of discretion.

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89. *Marbury v. Madison*, 5 U.S. 137, 154 (1803).

90. *Id.* at 169.

91. *Id.* at 170 (emphasis added). Moreover, "[w]here the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated that any application to a court to control, in any respect his conduct, would be rejected without hesitation." *Id.* at 170–71.

92. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004).

However, this argument is problematic because, even when courts have shown a willingness to intervene in what they perceive to be the executive's refusal to enforce a duly enacted law, they have done so in a way that still reiterates that the decision to prosecute remains entirely discretionary. One example of this was the protracted case involving a Texas court's injunction prohibiting the Obama Administration from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program.<sup>93</sup> The federal government had cited prosecutorial discretion as a basis for creating the program, which would confer the status of "lawful presence" on an applicant, exempting them from deportation and making them eligible to apply for certain public benefits.<sup>94</sup>

In a decision upholding the granting of the injunction, the Fifth Circuit Court of Appeals still recognized that prosecutorial discretion was broad.<sup>95</sup> The Court did not take specific issue with the decision to decline to prosecute a broad range of immigration offenses, as even the litigants in the case acknowledged the right of the executive to "decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation."<sup>96</sup> Rather, the Court specifically noted that the injunction did not require the executive to enforce the immigration laws or change their priorities regarding deportation.<sup>97</sup> The Court rested its decision on the view that the executive decision reached beyond non-prosecution/enforcement and changed the classification of millions of individuals' status in a way that impacted their ability to receive benefits.<sup>98</sup>

Other courts have outright refused to issue a *writ of mandamus* against prosecutors requiring the investigation or charging of offenses.<sup>99</sup> This line

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93. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015).

94. *Id.* at 147–48.

95. *Id.* at 167, 188.

96. *Id.* at 167–68.

97. *Id.* at 169.

98. *Id.* at 170.

99. See, e.g., *In re Brown*, No. 17-1038, 2017 U.S. App. LEXIS 22336, at \*2 (6th Cir. Aug. 23, 2017) (opining that the court lacked the authority to order prosecution because the decision to initiate criminal charges rests exclusively with prosecutors); *Long v. Foreman*, No. 92 C 8262, 1993 US. Dis. LEXIS 7355, \*5 (N.D. Ill. May 27, 1993) (holding that mandamus is only appropriate to compel the performance of a clear nondiscretionary duty and the decision to initiate an investigation or prosecute is under a prosecutor's discretion); *Soto v. U.S. Att'y Gen.*, No. 99-6592, 2001 WL 34387934, at \*1 (E.D. Pa. Nov. 13, 2001) (asserting that a prosecutor acts on behalf of the community and the decision to prosecute is the prosecutor's alone to make); *Banks v. U.S. Att'y*, No. 1:08-cv-1394, 2008 U.S. Dist. LEXIS 62667, at \*5 (M.D. Pa. Aug. 15, 2008) (stating that the decision to prosecute does not belong to the court or private individuals);

of case law thus leads to the inevitable conclusion that if a prosecutor is simply declining to prosecute a case, there is no judicial remedy. These cases clearly support the proposition that prosecutorial discretion is deeply embedded in the discretion that is inherent in every executive act. Thus, the decision to prosecute, rather than being an act that undermines separation of powers, is actually part of the delicate delineation of powers to each branch of government.

#### V. THE HISTORY OF THE USE OF PROSECUTORIAL DISCRETION AS A MATTER OF PUBLIC POLICY AND RESPONSES TO THE USE OF DISCRETION

In some jurisdictions, prosecutors have campaigned specifically on a promise not to prosecute certain offenses. For example, José Garza, a former public defender and immigrant rights activist, ran on a promise to immediately end the prosecution of narcotics cases involving the possession or sale of less than one gram of a controlled substance.<sup>100</sup> Garza highlighted the negative impact that small level drug prosecution had on people of color to distinguish himself from a less progressive candidate in the 2020 Democratic primary.<sup>101</sup> Having won the election, Garza has joined the ranks of prosecutors who refuse to prosecute abortion cases after the Supreme Court overturned *Roe v. Wade*.<sup>102</sup>

Similarly, in New Orleans, Jason Williams ran on a platform that included a promise to not prosecute marijuana charges.<sup>103</sup> This contrasted his opponent, who had stopped short of committing to drop all marijuana possession charges.<sup>104</sup> Williams went on to win the election with fifty-eight percent of the vote.<sup>105</sup>

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Williams v. Soumilas, No. 17-2433, 2018 U.S. Dist. LEXIS 122378, at \*5 (D.N.J. July 23, 2018) (finding that only the executive branch, not the judiciary, has the power to initiate criminal proceedings).

100. John Nichols, *Austin, Texas, Just Voted to End the Drug War*, THE NATION (July 16, 2020), <https://www.thenation.com/article/activism/jose-garza-texas-drugs-election/>.

101. *Id.*

102. Michael McCardel, *Travis County District Attorney Will Not Prosecute Abortion Cases*, WFAA (July 2, 2022, 10:51 PM), <https://www.wfaa.com/article/news/politics/inside-politics/travis-county-district-attorney-says-will-not-prosecute-abortion-cases/287-db9eb79d-7b9d-4e85-a6c2-052dcd368176>.

103. Katie Jane Fernelius, *A D.A. Runoff Will Decide New Orleans' Criminal Justice Future*, THE APPEAL (Nov. 23, 2020), <https://theappeal.org/politicalreport/new-orleans-district-attorney-runoff/>.

104. *Id.*

105. Matt Sledge, *Jason Williams Wins New Orleans DA Race, Promising New Era in Prosecutor's Office*, NOLA.COM (Dec. 5, 2020, 10:22 PM), [https://www.nola.com/news/courts/article\\_f044cf7a-368a-11eb-ac4b-](https://www.nola.com/news/courts/article_f044cf7a-368a-11eb-ac4b-)

Sometimes decisions to refuse prosecution are announced upon assuming office. For example, in 2021, Manhattan District Attorney Cyrus R. Vance, Jr. announced that his office would no longer prosecute prostitution and unlicensed massage cases.<sup>106</sup> After making the announcement, Vance asked the courts to dismiss 914 open prostitution and unlicensed massage cases and 5,080 cases of loitering for purposes of prostitution.<sup>107</sup> Vance argued that criminally prosecuting prostitution did not make the community safer, and instead, achieved the opposite result by marginalizing vulnerable individuals.<sup>108</sup> Vance limited this policy in noting that his office would continue to prosecute other offenses related to prostitution, such as sex trafficking, and would not stop pursuing other cases stemming from prostitution-related arrests.<sup>109</sup> By enacting this policy, he joined other jurisdictions, such as Baltimore, Philadelphia, and Brooklyn, that also do not prosecute people arrested for prostitution.<sup>110</sup>

Baltimore's State Attorney Marilyn Mosby temporarily enacted a policy of not prosecuting a broad range of low-level offenses, such as possessing controlled substances, open container violations, trespassing, and prostitution, in order to decrease incarceration and reduce the chance of COVID-19 outbreaks in jail during the pandemic.<sup>111</sup> That policy was later made permanent.<sup>112</sup>

While the decision to not prosecute certain offenses is overwhelmingly driven by a progressive mindset, that is not always the case. For example, a Wisconsin prosecutor indicated that he would not prosecute the state's firearm prohibitions about concealed weapons, transporting weapons, and carrying guns in public buildings.<sup>113</sup> Ending his announcement with the words "Let Freedom Ring," the prosecutor said that these laws only put law-abiding citizens at risk and said, "I, for one, am glad that this decades-long

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106. Jonah E. Browich, *Manhattan to Stop Prosecuting Prostitution, Part of a Nationwide Shift*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/nyregion/manhattan-to-stop-prosecuting-prostitution.html>.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Celine Castronuovo, *Baltimore Drops Prosecution of Low-level Crimes, Including Prostitution, Drug Possession*, THE HILL (Mar. 27, 2021, 10:52 AM), <https://thehill.com/homenews/state-watch/545218-baltimore-drops-prosecution-of-low-level-crimes-including-prostitution/>.

112. *Id.*

113. Richmond, *supra* note 7.

era of defective thinking on gun issues is over.”<sup>114</sup> Similarly, a state’s attorney in Illinois announced he would only prosecute individuals for carrying a concealed weapon in violation of the state’s law when they have an “evil intent.”<sup>115</sup> The prosecutor issued a press release criticizing the state’s gun control laws stating that the result is “that law abiding citizens go defenseless while criminal thugs are armed.”<sup>116</sup> Resting on the discretionary power of his office, the prosecutor said:

[o]ur message is this: we will no longer use the power and authority of our office to criminalize and punish decent, otherwise law-abiding citizens who choose to exercise the rights granted to them by the Second Amendment of the United States Constitution to keep and bear arms in defense of themselves and their families.<sup>117</sup>

His opponent in the next election called his decision “reckless.”<sup>118</sup>

Prosecutors who engage in conduct that is perceived by the public as failing to enforce the law can face negative electoral consequences as well. In 2019, Chesa Boudin was elected as the District Attorney for San Francisco, overtly taking office as the most progressive candidate.<sup>119</sup> As the elected prosecutor, Boudin implemented broad diversion policies<sup>120</sup> and agreed to the release of a quarter of inmates in the local jail during the pandemic.<sup>121</sup> When crime in the city spiked, residents filed a recall petition accusing Boudin of dereliction of duty and allowing small business owners and visitors to be targeted for crime rather than focusing on prosecuting criminals.<sup>122</sup> Boudin was ultimately recalled when nearly sixty percent of

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114. *Id.*

115. Weiss, *supra* note 7.

116. *Id.*

117. *Id.*

118. *Id.*

119. Michelle Robertson, *Chesa Boudin Wins San Francisco D.A. Election*, SF GATE (Nov. 9, 2019, 6:19 AM), <https://www.sfgate.com/elections/article/Chesa-Boudin-wins-San-Francisco-D-A-election-14823180.php>.

120. Evan Sernoffky, *SF District Attorney Chesa Boudine Launches Diversion Program for Parents Facing Criminal Charges*, S.F. CHRON. (Jan. 15, 2020), <https://www.sfchronicle.com/crime/article/SF-District-Attorney-Chesa-Boudin-launches-14975839.php>.

121. Joaquin Palomino, *SF’s Jail Population Drops 25% After Inmates are Released to Thwart Virus*, S.F. CHRON. (Mar. 30, 2020), <https://www.sfchronicle.com/bayarea/article/SF-s-jail-population-drops-25-after-inmates-15165428.php>.

122. John Ferrannini, *Effort Underway to Recall SF DA Boudin*, BAY AREA REP. (Feb. 23, 2021), [https://www.ebar.com/story.php?ch=news&sc=latest\\_news&sc2=&id=302329](https://www.ebar.com/story.php?ch=news&sc=latest_news&sc2=&id=302329).

voters in San Francisco supported removing him from office.<sup>123</sup> To replace Boudin, the mayor of San Francisco appointed one of Boudin's critics, Brooke Jenkins.<sup>124</sup> While still calling herself a progressive prosecutor who supports reforms to the criminal justice system, Jenkins criticized Boudin's inflexible approaches to issues, such as declaring that he would never prosecute a juvenile as an adult no matter how serious the offense.<sup>125</sup>

Other jurisdictions are now threatening to recall progressive prosecutors,<sup>126</sup> including the country's largest jurisdiction, Los Angeles, where George Gascon was recently elected with fifty-four percent of the vote.<sup>127</sup> Gascon ran on a platform that included eliminating cash bail, not seeking the death penalty, never trying a juvenile as an adult, not using sentencing enhancements, and stopping prosecuting individuals for first-time, non-violent misdemeanors, all of which he implemented on his first day in office.<sup>128</sup> When crime spiked, Gascon was blamed, and the Beverly Hills City Council passed a vote-of-no-confidence resolution against him, causing Gascon to face the possibility of a recall election this fall.<sup>129</sup> As of the writing of this Article, that process has stalled after the L.A. County Registrar-Recorder invalidated numerous signatures as either duplicates or belonging to individuals who were not registered to vote.<sup>130</sup> Proponents of the recall are involved in litigation to overturn this decision.<sup>131</sup>

Beyond the possibility of recall elections, conservative thinkers have explored other means for responding to progressive prosecutors who decline

123. Musadiq Bidar, *San Francisco Votes Overwhelmingly to Recall Progressive DA Chesa Boudin*, CBS NEWS (June 8, 2022, 11:37 AM), <https://www.cbsnews.com/news/chesa-boudin-san-francisco-da-recalled/>.

124. Assoc. Press, *Chesa Boudin Critic Replaces Him as San Francisco DA*, U.S. NEWS (July 8, 2022, 6:49 PM), <https://www.usnews.com/news/politics/articles/2022-07-07/chesa-boudin-critic-to-replace-him-as-san-francisco-da>.

125. *Id.*

126. Sam Levin, *Bid to Recall San Francisco DA Could be Bellwether for Progressive Prosecutors*, THE GUARDIAN (June 2, 2022, 1:17 PM), <https://www.theguardian.com/us-news/2022/jun/02/chesa-boudin-san-francisco-da-recall>.

127. Ryan Lizza, *LA Wants to Recall its Most Progressive Prosecutor. Inside the DA's Hostile Office*, POLITICO (July 15, 2022, 5:17 AM), <https://www.politico.com/news/2022/07/15/george-gascon-deep-dive-00045603>.

128. *Id.*

129. *Id.*

130. Danny Hernandez, *Recall Gascon Backers See Hearing Over Invalidated Signatures Moved Up*, L.A. MAG (Oct. 25, 2022), <https://www.lamag.com/citythinkblog/recall-gascon-backers-see-hearing-over-fake-signatures-moved-up/>.

131. *Id.*

to enforce laws.<sup>132</sup> One method is to argue for state bar associations to take disciplinary action against the prosecutors under the theory that, in refusing to prosecute enacted laws, they are violating their oath of office, which constitutes “engaging in conduct prejudicial to the administration of justice” in violation of the Rules of Professional Conduct.<sup>133</sup> The proponents of this theory acknowledge that the approach is unlikely to succeed.<sup>134</sup>

Perhaps the most striking reaction to progressive prosecutors’ aggressive exercise of discretion was taken by Florida Governor Ron DeSantis, who removed Hillsborough County State Attorney Andrew Warren from office citing his disregard for his duty to enforce state laws and his pledge not to prosecute people receiving an abortion or the doctors performing them.<sup>135</sup> The Florida Constitution allows the Governor to suspend local officials for misfeasance, malfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or the commission of a felony.<sup>136</sup> DeSantis’ removal order cites neglect of duty and incompetence.<sup>137</sup> Saying, “our government is a government of laws, not a government of men,” DeSantis stated he decided to remove Warren after having seen prosecutors in Los Angeles and San Francisco, “selectively enforcing crimes.”<sup>138</sup> Warren can challenge the removal in court or through the Florida Senate. In addition to his statement that he would not prosecute abortion, DeSantis cited to Warren’s decision to not prosecute the “criminalization of gender-affirming healthcare for transgender people,” trespassing, disorderly conduct, disorderly intoxication, prostitution, and crimes where the initial encounter between law enforcement and a defendant resulted from a non-criminal violation in connection with riding a bicycle or as a pedestrian.<sup>139</sup> DeSantis order asserts that by refusing to prosecute these offenses, “Warren has effectively nullified these Florida criminal laws in the 13th Judicial Circuit, thereby eroding the rule of law, encouraging lawlessness, and usurping the exclusive role of the Florida Legislature to

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132. Craig Trainor, *Taking On “Progressive Prosecutors,”* CITY J. (Feb. 7, 2021), <https://www.city-journal.org/taking-on-progressive-prosecutors>.

133. *Id.*

134. *Id.*

135. Lawrence Mower and Emily L. Mahoney, *Desantis Removes Hillsborough County State Attorney Andrew Warren,* TAMPA BAY TIMES (Aug. 4, 2022), <https://www.tampabay.com/news/florida-politics/2022/08/04/desantis-suspends-hillsborough-county-state-attorney-andrew-warren/>.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*



define conduct.”<sup>140</sup>

Other state legislatures are proposing legislation that would allow a state’s Attorney General to take over the prosecution of offenses where a local prosecutor is refusing to do so.<sup>141</sup> Virginia Attorney General Jason Miyares, a Republican, has criticized the approach of progressive prosecutors and has sought the authority to take over the prosecution of local crime in cases where his office believes the local prosecutor is not enforcing the law.<sup>142</sup> Additionally, conservative legislators in Texas have argued for the adoption of legislation that would alter typical venue rules in order to allow district attorneys in conservative localities to prosecute abortion offenses that occur in a jurisdiction where a progressive prosecutor has refused to place charges.<sup>143</sup> If adopted, instead of a prosecution for abortion being restricted to the jurisdiction where the abortion happened, a prosecutor in a conservative jurisdiction could bring a charge for an abortion that happened anywhere in Texas.<sup>144</sup>

These types of radical changes, which would upend traditional jurisprudential norms, will not extract politics from the decision of whether to prosecute a crime. Instead, they will embed politics even more deeply into the process, by incentivizing district attorneys looking to gain a name for themselves to reach across their jurisdictional lines to prosecute ideologically tinged offenses in another part of the state. While today this may be a conservative prosecutor trying to stamp out abortion in a liberal city, it is easy to imagine the converse being done with gun laws or hate crimes that protect transgender individuals. A progressive prosecutor may choose to interfere in a conservative jurisdiction’s choices just as easily as the reverse.

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140. *Id.* An additional response to progressive prosecutors who have refused to enforce certain laws is seen in Pennsylvania, where Republicans in the legislature have filed articles of impeachment against Larry Krasner, the District Attorney of Philadelphia, accusing him of being “derelict in his obligations” to prosecute crime. Campbell Robertson, *Pennsylvania House Moves to Impeach Philadelphia’s Progressive D.A.*, WASH. POST (Oct. 26, 2022), <https://www.nytimes.com/2022/10/26/us/larry-krasner-philadelphia-impeachment.html>.

141. *E.g.*, Whitney Evans, *Bill Would Give Attorney General Power to Prosecute Violent Crimes*, VPM (Jan. 19, 2022, 4:01 PM), <https://vpm.org/news/articles/29015/bill-would-give-attorney-general-power-to-prosecute-violent-crimes>.

142. *Id.*

143. Becky Sullivan, *Texas Conservatives Have a Plan to Get Around DAs Who Won’t Enforce Abortion Laws*, NPR (July 15, 2022, 5:00 AM), <https://www.npr.org/2022/07/15/1111383520/texas-abortion-laws-prosecutors>.

144. *Id.*

VI. MAINTAINING PROSECUTORIAL DISCRETION AS THE MEANS OF  
REINFORCING SEPARATION OF POWERS

In *Planned Parenthood v. Casey*, there was a line in the majority opinion that resonates in this discussion:

The court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.<sup>145</sup>

While *Dobbs* overruled *Casey*, it recognized part of the values embedded in the above quote, stating that it was important for the public to understand that the decisions of the Court are based on principle and to carefully show in each case, “how a proper understanding of the law leads to the results we reach.”<sup>146</sup> Implicit in both quotes is an argument that the legitimacy of our court system, in part, rests on a perception that the courts should not be driven by political considerations and instead rest their decisions on some greater principle than partisan politics. But policy discussions on abortion, guns, and drugs involve the criminal justice system and all of their actors. Thus, far from removing the court system from the politics of setting policy, the discussion of these topics has dragged the courts further in. This Article addressed how one specific executive official who works within that court system—the prosecutor—has become a central player in these policy issues through their use of discretion in charging crimes.

This Article has explored significant tensions and dilemmas that are created by prosecutorial discretion. On the one hand, as this Article has established, history, constitutional law, and ethical norms all favor broad discretion for prosecutors. Prosecutors are elected by local voters and are thus accountable and sensitive to the demands of the citizens living in their jurisdiction. As such, the law recognizes the need to entrust them with the power to make decisions that reflect the desires and will of their electorate. This is reinforced by both an ethical and practical reality that not every crime can be prosecuted. Ethical norms compel the prosecutor to look further than whether there is proof that will support a conviction, and to ask the broader question of whether prosecution advances the community’s interest in the first place.

Those opposed to broad prosecutorial discretion argue that prosecutors declining to enforce particular laws is tantamount to refusing to implement

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145. *Planned Parenthood v. Casey*, 505 U.S. 833, 865–66 (1992) (overturned by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022)).

146. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2278 (2022).

the will of the legislature, who are also elected by voters. When discretion is used by a law enforcement officer to not enforce a law, it leaves some voters with an uneasy feeling, asking whether the prosecutor is doing their job. As has been demonstrated in this Article, some legislative officials are responding to this by advancing norm-shattering proposals like upending venue rules or eviscerating traditional mechanisms for maintaining local control.

Some critics of the widespread use of prosecutorial discretion argue that its broad use violates the separation of powers because it enables the prosecutor to nullify a properly enacted law within the boundaries of their locality. This creates an image of an executive official who, rather than staying in their proverbial lane of mindlessly enforcing legislation in a banal and ministerial fashion, has become all-powerful in deciding what the law should be. But this argument divorces from the discussion of separation of powers the equally important doctrine of checks and balances. In discussing this idea in the *Federalist Papers*, James Madison noted that the legislature, the executive, and the judiciary each have a will of its own.<sup>147</sup> What protects against the concentration of power in any one branch are the independent actors in the other branches, each moved by their own will and power.<sup>148</sup> “Ambition must be made to counteract ambition,” Madison wrote.<sup>149</sup> He went on to note that, in a republican government, the legislative authority necessarily predominates and that is why some remedies to avoid concentrated power, such as a separate House of Representatives and Senate, were created.<sup>150</sup> However, in noting that this protection was not enough, Madison went on to write that “[i]t may even be necessary to guard against dangerous encroachments by still further precautions.”<sup>151</sup> Thus, while it is up to the legislature to write the laws, it is for the executive to decide how they are enforced. For the system to work correctly, each branch must be able to check the other. One means by which this is done is through the executive determining how a law is implemented. Viewed in this light, prosecutorial discretion in the enforcement of laws is part of the executive’s constitutionally legitimate check on legislative power.

Perhaps part of the problem is that many people these days seem to be seeking total victory in policy decisions and our system of government, which is not easily facilitated in a system of checks and balances and

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147. THE FEDERALIST NO. 51, at 244 (James Madison) (HeinOnline).

148. *Id.* at 245.

149. *Id.*

150. *Id.* at 246.

151. *Id.*

diffusing power through different governmental levels and actors. It is important to view the prosecutor as an executive official within the broader constitutional order of American government and to see the exercise of prosecutorial discretion, not as an improper usurpation of legislative power, but rather as part of the delicate system of checks and balances. The power to write the law is not the same as the power to enforce that law. And, the enforcement of laws always requires discretion. It would bely credibility to argue that the resources exist to punish every action that the legislature has deemed a crime. Police officers do not pull over every person who dares to go over the speed limit so much as a mile per hour. But we would never argue that the officer who ignores minor infractions is derelict in their duty or trying to assume a legislative function in the exercise of their judgment. Discretion is inherent in enforcement.

Moreover, broad use of prosecutorial discretion is well embedded in both ethical norms and constitutional law, as shown throughout this Article. It constitutes neither professional misconduct nor unconstitutional behavior for a prosecutor to decline to charge someone with a crime merely because their behavior could warrant it. If prosecutorial discretion is abused, the remedy is the same that it always is in a democratic system—the ballot box. It has been effectively used by the voters against prosecutors who have been seen as moving too far or too fast. That is the right method of accountability in our system of government.

Some of the alternate methods of trying to reign in prosecutorial discretion discussed in this Article will undermine accountability. For example, if legislation is enacted that enables a state official to take over local prosecution, or allows a neighboring prosecutor in a politically different jurisdiction to enforce the law outside of their borders, political accountability for the prosecutor's decision ceases to exist. There is no longer a clear line between the actor (the prosecutor), the decision (declination of prosecution), the impact (what happens when that crime is no longer enforced), and the voter's response. Rather than undermining the traditional methods of democratic accountability, state legislatures should turn to the voters, rather than tortured legal schemes, for solutions to what they perceive to be a societal ill.

In closing, prosecutorial discretion, including the decision not to prosecute a class of cases, is well rooted in history, ethics, and constitutional law. It plays a critical role in checks and balances and maintaining the appropriate separation of powers. The method for resolving its abuses is not by destroying the power itself, but by turning to the voters on election day.