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Prosecutors and their State and Local Polities

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PROSECUTORS AND THEIR STATE AND LOCAL POLITIES

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Prosecutors routinely decline to file charges in individual cases; sometimes they also announce general policies about declinations that apply prospectively to entire categories of cases. The legitimacy of these categorical declination policies is in dispute. Current accounts of declinations rely on arguments about the traditional activities of prosecutors and the distinction between executive and legislative functions in constitutional separation of powers doctrine. This Article argues that chief prosecutors in state court systems hold competing loyalties to statewide voters and local voters. These duties to state and local polities should also influence the declination policies that a prosecutor adopts.

Duties to statewide voters derive from the fact that state legislatures create the criminal codes that prosecutors enforce. State government also funds some of the work of local prosecutors, but that funding is not sufficient to allow full enforcement of the criminal law. The state-level polity, therefore, empowers the local prosecutor to allocate scarce resources and to decline charges—even for entire categories of cases—as a means of promoting public safety that matches local conditions. Local prosecutors can meet their obligations to the statewide polity by framing their policies as rebuttable presumptions against filing charges and by justifying those policies as a reallocation of limited resources.

Duties to the local polity can add further legitimacy to a prosecutor's declination policy. Local views about the relative importance of crime should matter, particularly in circumstances where local governments fund aspects of court operations, the effects of crime and law enforcement are concentrated locally, and state law grants autonomy to the local prosecutor.

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INTRODUCTION.....	824
I. CATEGORICAL DECLINATION POLICIES.....	828
A. Case-Level Declinations	829
B. The Arrival of Categorical Declinations	830
II. POTENTIAL LIMITS ON DECLINATION POLICIES	834
A. Advocates for Exceptional and Case-Level Declinations	835
B. Advocates for Leniency Across All Settings.....	837
III. DUTIES TO THE STATEWIDE POLITY	840
A. Sources of Statewide Loyalty.....	841
B. Presumptions Linked to Resource Priorities	844
IV. DUTIES TO THE LOCAL POLITY.....	847
A. Local Funding and Effects as Sources of Local Power.....	849
B. State Grants of Local Autonomy	851
C. Applications.....	855
CONCLUSION	857

INTRODUCTION

Prosecutors dominate the decision not to file criminal charges. Lately, it seems, prosecutors in some jurisdictions talk more openly and categorically about this power. Rather than deciding quietly to decline charges in a particular case, they announce publicly that going forward their office plans to decline certain types of cases across the board.¹ Such categorical declinations might extend to selected criminal statutes, such as marijuana possession, or might extend to groups of defendants, such as juveniles or homeless people, who face designated charges.²

These categorical declination policies differ from more familiar uses of the declination power for two reasons. First, they are publicly announced, and, second, they are not justified on the basis of facts in the particular case. Prosecutors traditionally refuse to file charges in individual cases for various reasons. Sometimes it is because of a lack of evidence, sometimes it is to shift limited resources to other potential cases, and sometimes it is because a criminal prosecution would not produce justice or public safety in the

¹ See *infra* Part I.

² See RACHEL ROLLINS, THE RACHAEL ROLLINS POLICY MEMO, AT D-1 (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [perma.cc/26sq-d83b] (describing policy of presumed refusal to charge for fifteen offenses, including marijuana, shoplifting, and trespass); John E. Foster, *Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511, 2512 (2019) (identifying 15 minor offenses covered by declination policy of Commonwealth's Attorney office in Boston); Charles W. Thomas & W. Anthony Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 518–21 (1976).

particular case.³ These decisions, however, are typically not announced to the public, and they do not ordinarily apply prospectively to entire categories of cases.

Legislatures and judges in the United States do not typically enforce limits on the prosecutor's discretion to decline charges.⁴ Nevertheless, a prosecutor's declination policy is a matter of debate within the prosecutor's office, among other lawyers, and with the larger voting public.⁵ Within this arena of public debate, prosecutors' announcements about their declination plans have prompted controversy about where to place those limits and when those declinations should be deemed legitimate or illegitimate.⁶

One approach to this question—one might call it the “leniency option”—validates prosecutorial leniency in almost every form. With the possible exception of declinations motivated by invidious discrimination or personal gain, this approach holds that the prosecutor may refuse to initiate charges against any individual or in any class of cases, so long as the refusal is based on an appeal to the common good. Under this view, no other governmental actor may properly compel the prosecutor to pursue a criminal case.⁷

Another school of thought—one might call it the “individuals-only option”—draws a line between case-by-case declinations (which are seen as

³ See Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMPLE POL. & C.R. L. REV. 369, 371–73 (2010) (arguing that prosecutorial discretion is necessary to make criminal law track ordinary local morality).

⁴ See Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 63 (2017) (noting that “scope of judicial authority is quite limited” as to prosecutor's choice of charges).

⁵ See Kelsy Schlotthauer, *City Mulls Charges Against Tulsa BLM Activists After DA Declines to Prosecute Some Painters*, TULSA WORLD (Oct. 21, 2020), https://tulsaworld.com/news/local/district-attorney-declines-to-file-charges-against-blm-activists-city-now-reviewing-charges/article_fde56b9a-131b-11eb-80ff-175db44565ab.html [<https://perma.cc/7NCP-TWU6>]; cf. Ronald F. Wright, Kami Chavis, & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1423 (proposing use of data to promote public debate about jury selection practices of prosecutors).

⁶ See *infra* Part II.

⁷ See, e.g., Roger A. Fairfax Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1250–52 (2011) (describing bounds of appropriate non-evidentiary grounds for prosecutors to decline charges under a “complete discretion” view); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 838–40 (2020) (describing the view that prosecutors may appropriately refuse to enforce the law in categories of cases); David Alan Sklansky, *The Nature and Function of the Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 505, 507–08 (2016) (arguing that prosecutors necessarily mediate between law and irreducible discretion as they determine which criminal cases to pursue). For additional examples, see *infra* Part II.

acceptable) and categorical decisions to decline charges (which are not).⁸ For this camp, any declinations that apply to entire categories of criminal charges or criminal defendants are improper uses of prosecutorial discretion.

These two familiar accounts of the outer bounds of the prosecutor's declination power are both grounded in the separation of powers theory, despite the different outcomes they advocate. According to this theory, a declination is legitimate when it remains an exercise of *prosecutorial* power, as defined in historical and constitutional terms.⁹ When a prosecutor encroaches on the work of the legislature by effectively decriminalizing entire categories of conduct that are punishable in the criminal code, the declination is illegitimate. Thus, according to this view, the essence of the prosecutor's role defines the boundaries of the declination power.¹⁰ The individuals-only option and the leniency option simply disagree about how to describe the essence of the prosecutor's role.

In this Article, I argue that not all limits on the declination power of state and local prosecutors in the United States derive from a separation of powers theory or from any single account of the essential nature of the prosecutor's job. Instead, proper limits on the prosecutor's declination power should also account for the division of authority between *levels* of government: federal versus state and state versus local governmental authority. Viewing prosecutor declination policies from this vantage point takes into account the importance of diverse structures and practices among different prosecutors' offices.

The different levels of government matter because prosecutors answer to a different electorate—a different polity—at each level. Although federal prosecutors enforce the criminal laws of the national government on behalf of a national polity,¹¹ most state prosecutors straddle two different polities.

⁸ See, e.g., William P. Barr, U.S. Att'y Gen., 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> [perma.cc/3xka-z63h] (criticizing some anti-law enforcement DAs for "announcing their refusal to enforce broad swathes of the criminal law").

⁹ See *infra* Part II.

¹⁰ See Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 608–09 (2020) (arguing that prosecutor declination policies can be squared with traditional prosecutor functions as defined in separation of powers concepts, properly understood).

¹¹ See L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 L. & CONTEMP. PROBS. 64, 87 (1948) (advocating declinations by federal prosecutors under a "general policy of remitting local offenders to local authorities"); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling*

They enforce the criminal laws enacted by the representatives of a statewide electorate and, at the same time, they must also account for the current enforcement priorities of the local county residents who elected them to office. Prosecutors answer, at least in part, to those local residents who most immediately feel the effects of their work to promote public safety.¹²

Although individual case declinations fit easily with the prosecutor's duty to a statewide polity, categorical declinations require more careful explanations from the prosecutor.¹³ It is easiest to justify declination policies as presumptions—that is, a general office practice of refusing to charge—while leaving open the possibility of a prosecution under exceptional circumstances. These presumptions can be founded on the prosecutor's judgment about where to spend limited resources.

Further, when local residents favor non-enforcement of particular criminal laws, their voice adds greater legitimacy to the prosecutor's declination policy. It is appropriate for voters in the district to influence the local prosecutor's priorities in pursuing one type of criminal case when compared to others.¹⁴

Some local input matters more than others. For instance, some legal environments strengthen the prosecutor's duties to the local polity when they rely on local governments to fund aspects of criminal enforcement or when they grant legal autonomy to local officials.¹⁵ In such a locally oriented legal framework, a prosecutor might go beyond mere presumptive declinations. Categorical declinations might be appropriate in that local setting to block the use of state statutes that fall outside the core provisions of the criminal code. A clear-cut rule against prosecution under these statutes can serve the customized public safety needs of the locality and reflect the current

Federalization, 75 N.Y.U. L. REV. 893, 930–36 (2000); see generally Jonathan H. Adler, *Our Federalism on Drugs*, in MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE (Jonathan H. Adler ed., 2020) (describing distinctive roles for federal and state enforcement of marijuana laws).

¹² The jumble of names that apply to prosecutors in the United States embody the conflicting loyalties between state and local polities. They are known, in various places, as “State’s Attorneys,” “County Attorneys,” “District Attorneys,” “Prosecuting Attorneys,” “Circuit Solicitors,” and many other titles. While many prosecutors are selected by voters in a single county, there are also local prosecutorial districts comprised of several counties. See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549 (2020).

¹³ See *infra* Part III.B.

¹⁴ For an insightful discussion of the political theory implications of prosecutor declination policies created in response to voter preferences, see generally W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. (forthcoming 2020), <https://ssrn.com/abstract=3542575>.

¹⁵ See *infra* Part IV.B.

enforcement priorities of the local voters. Further, a clear announcement of such a rule promotes better accountability of the prosecutor to the public.

Ultimately, this framework of competing polities can accommodate both those prosecutors who limit their declinations to individual cases and—in the proper circumstances—prosecutors who make declinations categorically. Prosecutors who decline charges on either basis can fulfill their duties to both sets of voters.

Part II of this Article offers examples of prosecutors' categorical declination policies, emphasizing that prosecutors who hold differing political views have invoked similarly broad declination authority. Part III describes the influence of separation of powers concepts in some familiar accounts of declinations. Part IV then explores the prosecutor's duties to a statewide polity and explains the importance of linking declination policies to resource allocation in that context. Part V turns to the prosecutor's duties to a local polity and elaborates how those duties can reinforce the legitimacy of most declination policies. In the end, this Article concludes that these competing loyalties are compatible, and it is possible for prosecutors to answer to both state and local constituencies.

I. CATEGORICAL DECLINATION POLICIES

The prosecutor's power to decline charges that the police recommend to them is centrally relevant to current debates about criminal justice reform. New declination policies form just one part of a larger suite of changes to the prosecutor's role that is now taking hold in some places. This different understanding of the job—described in some circles as progressive or reform prosecution—looks beyond the outcomes obtained in the criminal courts as a measure of success. These prosecutors aim to promote public safety through closer partnerships with the community, while shrinking the reach of the criminal courts and prisons.¹⁶ This changed vision of the job affects the way that prosecutors' offices approach many tasks, including diversion programs, pretrial release, conviction integrity review, sentence severity review, reentry programs, and more.¹⁷ But the charging practices of an office should appear near the top of any reformer's list. The mix of charges and declinations can reshape public safety at the local level more profoundly—

¹⁶ See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 149–68, 196–220 (2019) (describing partnerships between Brooklyn District Attorney and community groups).

¹⁷ See, e.g., Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 22 (2019); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. (forthcoming 2021) (manuscript at 11), <https://ssrn.com/abstract=3542792>.

and with less need for cooperation from other actors—than any other component of the prosecutor’s work.¹⁸

This Part places into context the typical practices American prosecutors employ when they decline charges in individual cases. Then it collects some recent examples of prosecutor office policies that call for declinations for entire categories of cases.

A. CASE-LEVEL DECLINATIONS

The decision of an individual prosecutor to decline charges in a single case is unremarkable, both in the United States and elsewhere.¹⁹ Legal traditions around the world empower prosecutors to decline charges when they believe that the evidence does not support criminal proceedings. Prosecutors in some countries, such as Germany, operate within a tradition of “compulsory prosecution,” which calls for the prosecutor to file charges whenever the government assembles sufficient evidence to support those charges.²⁰ The flip side of that duty means that the prosecutor must decline to file charges when there is insufficient proof.

Prosecutors in other systems, such as those in the Netherlands, function within a tradition of the “opportunity principle,” which allows the prosecutor to decline charges in opportune cases. Put another way, prosecutors may decline to file charges to direct limited resources to other cases or to recognize the defendant’s lack of dangerousness.²¹

¹⁸ See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 180–81 (2019) (arguing that core of prosecutor power is their authority to select charges).

¹⁹ See JÖRG-MARTIN JEHL & MARIANNE WADE, COPING WITH OVERLOADED CRIMINAL JUSTICE SYSTEMS: THE RISE OF PROSECUTORIAL POWER ACROSS EUROPE 21 (2006) (examining increased use of declinations in several national court systems in Europe); Newman F. Baker, *The Prosecutor--Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 776–86 (1933) (reviewing typical day of declination and charging decisions of an individual prosecutor).

²⁰ See Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 469–70 (1974).

²¹ See Victoria Colvin, *The Riddle of Prosecutorial Discretion*, in THE EVOLVING ROLE OF THE PUBLIC PROSECUTOR 139, 140–42 (Victoria Colvin and Philip Stenning eds., 2019); Henk van de Bunt & Jean-Louis van Gelder, *The Dutch Prosecution Service*, 41 CRIME AND JUSTICE 117, 123–25 (2012). High volumes of incoming criminal cases tend to increase the prosecutor’s power to weed out some cases within either of these traditions. See JEHL & WADE, *supra* note 19, at 8–10. Similarly, the bureaucratic structures of prosecutor services in various countries set the proper limits of declinations in those places. Senior prosecutors in some countries conduct formal reviews of declinations, sometimes at the request of the victim of an alleged crime. Such a review structure creates an institutional home where prosecutors can develop criteria for sound declination choices. See DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 128–32 (2001); Michael Jasch, *Prosecution*

The “opportunity principle” is the better description of charge selection in the United States. Prosecutors across the United States share a similar reasoning process to the countries that employ this principle as they consider whether to file or decline charges. As field studies reveal, prosecutors ask two distinct questions during the charging process.²² First is the issue of evidentiary sufficiency: is there enough evidence to prove each element of the crime beyond a reasonable doubt? Second comes the question of proportionality: does this case make wise use of the limited resources of this office and the criminal courts? Would a criminal prosecution do justice for the victim, the defendant, and the entire community when compared to other forms of accountability?²³ This two-step process for evaluating possible charges is common practice for U.S. prosecutors.

B. THE ARRIVAL OF CATEGORICAL DECLINATIONS

This consensus breaks down, however, when the topic moves from declinations in individual cases to broader categorical declination policies.

and Politics in Germany: The Struggle for Independence, in *THE EVOLVING ROLE OF THE PUBLIC PROSECUTOR*, *supra* note 21, at 205, 206–07; Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 *BUFF. CRIM. L. REV.* 165, 194–97 (2004). Judges in some legal systems have the authority to review some prosecutorial decisions to decline criminal charges. *See R (on the Application of Peter Dennis) v. DPP*, [2006] *EWHC* 3211 (Admin).

²² *See* FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 151–53 (1969) (listing typical reasons that prosecutors invoke for declinations, including evidentiary strength and factors related to proportionality of criminal charges); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 *NW. U. L. REV.* 174, 178, 187 (1965) (describing evidentiary and non-evidentiary reasons for refusal to prosecute, based on field observations). Although prosecutors follow a familiar evaluation process during the declination decision making process, they tend not to record or publicize their reasoning. *See* Jessica A. Roth, *Prosecutorial Declination Statements*, 110 *J. CRIM. L. & CRIMINOLOGY* 477, 531–36 (2020) (reviewing exceptional practices of prosecutors who issue statements explaining declinations in select cases and proposing criteria for more common usage of public statements).

²³ *See* Green & Roiphe, *supra* note 7 at 808–12 (describing reasons for charging decision grounded in public good rather than private gain); BRUCE FREDERICK & DON STEMEN, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING* 3–5 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240335.pdf> [<https://perma.cc/T7CL-M72M>]; David W. Neubauer, *After the Arrest: The Charging Decision in Prairie City*, 8 *LAW & SOC'Y REV.* 495, 503–04 (1974). For a rare legislative effort to codify this line of reasoning, see *WASH. REV. CODE* § 9.94A.411(1) (2020). Standards published by professional prosecutor associations describe the reasoning process in similar terms. *See* NATIONAL PROSECUTION STANDARDS §§ 4-1.1–4-2.4 (NAT'L DISTRICT ATT'YS ASS'N 2009); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-4.3–3-4.4 (AM. BAR ASS'N 2017).

Such policies have existed for decades.²⁴ Prosecutors have, until recently, been reluctant to release or publicize the policies they created for purposes of internal guidance and consistency.²⁵ The decision to keep these policies hidden spurred debates about transparency and public access to the policies' terms.²⁶

Recently, in response to the changing politics of crime in the United States,²⁷ more prosecutors have gone public with their declination policies. Sometimes their policies have appeared in election campaigns as candidates for the chief prosecutor's office vow not to file any charges for specific types of crimes. Consider first the chief prosecutors who campaigned in local elections on the promise to decline most or all charges for possession of small amounts of marijuana.²⁸ Others announced that they would stop filing criminal charges for jumping turnstiles to ride local subways without paying a fare.²⁹ Some prosecutors have declined to prosecute charges based on

²⁴ See Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J. L. & PUB. POL'Y 167, 170–75 (2004) (describing provisions of U.S. Attorneys' Manual, including those that "provide guidance in a wide array of areas such as charging"); U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' WRITTEN GUIDELINES FOR THE DECLINATION OF ALLEGED VIOLATIONS OF FEDERAL CRIMINAL LAWS: A REPORT TO THE UNITED STATES CONGRESS (1979); Norman Abrams, *Prosecutorial Charge Decision Systems*, 23 UCLA L. REV. 1, 4–11 (1975) (describing three exemplary charging policies); John A. Lundquist, Comment, *Prosecutorial Discretion—A Re-Evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse*, 21 DEPAUL L. REV. 485, 493–94 (1972).

²⁵ See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 25–34 (1971).

²⁶ See Leland E. Beck, *The Administrative Law of Criminal Prosecution: The Development of Prosecutorial Policy*, 27 AM. U. L. REV. 310, 345–58 (1978).

²⁷ In particular, public opinion in some jurisdictions over the last few years has made it viable for prosecutors and police to address mass incarceration and racial disparities in law enforcement. See generally Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523 (2020) (discussing democratic responsiveness and systemic legitimacy in criminal legal systems during an era of transition to less emphasis on prison usage and greater concern over racial disparities).

²⁸ E.g., Jessica Miller, *Utah County's Top Prosecutor is Moving Away from Drug Cases — but Not Everyone is on Board*, SALT LAKE TRIB. (Nov. 29, 2019), <https://www.sltrib.com/news/2019/11/29/utah-countys-top/> [<https://perma.cc/QJP7-FFK6>]; Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (Jul. 8, 2014), <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html>; Shaila Dewan, *A Growing Chorus of Big City Prosecutors Say No to Marijuana Convictions*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/us/baltimore-marijuana-possession.html> [perma.cc/7sjx-mjra].

²⁹ E.g., James C. McKinley Jr., *For Manhattan Fare Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (Jun. 30, 2017), <https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html> [perma.cc/7a5j-lybk]; ROLLINS, *supra* note 2 (describing policy of presumed refusal to charge for fifteen offenses, including marijuana, shoplifting, and trespass).

violations of social-distancing laws designed to prevent the spread of the COVID-19 pandemic.³⁰

In a related maneuver, prosecutors sometimes announce a policy to replace a more serious crime with a lesser charge as a routine matter. For instance, offices have declared that they will stop filing felony charges for retail theft below a designated dollar value, treating those cases as misdemeanors instead.³¹ Similarly, some prosecutors declare that they will not request the death penalty in murder cases.³²

Contrary to what one might expect, these categorical declination policies do not all come from prosecutors associated with the political left.³³ Switching the political valence, one Tennessee prosecutor announced to participants at a Bible conference in 2018 that he would not enforce state laws against domestic partner violence in cases involving same-sex couples. He explained this policy as a routine exercise of prosecutorial discretion: prosecutors “can choose not to prosecute anything [T]he social

³⁰ E.g., Rebecca Rosenberg, *NYC DAs Won't Prosecute Most Social Distancing-Related Arrests*, N.Y. POST (May 12, 2020, 8:54 PM), <https://nypost.com/2020/05/12/nyc-das-wont-prosecute-most-social-distancing-related-arrests> [perma.cc/8qlu-tbnl]. Similarly, some prosecutors have declared that they would not file charges in cases involving peaceful curfew violations during protests against police brutality in the wake of George Floyd's murder in Minneapolis. See Molly Crane-Newman, *Manhattan DA Won't Prosecute Protesters Amid Mass NYC Arrests, Commends New Yorkers Exercising Civil Rights at George Floyd Demonstrations*, N.Y. DAILY NEWS (June 5, 2020), <https://www.nydailynews.com/new-york/manhattan/ny-cy-vance-will-not-prosecute-protesters-20200605-koon5gsfjfc5hczw7xdnt4gci-story.html> [perma.cc/2ppe-7aya].

³¹ E.g., Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB. (Dec. 15, 2016), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html> [https://perma.cc/3TP4-7XNZ].

³² Miriam Aroni Krinsky & Jody E. Owens, *Unlikely Supporters of Ending the Death Penalty in Pa. and Beyond? Prosecutors*, PHILA. INQUIRER (Oct. 7, 2019, 10:17 AM), <https://www.inquirer.com/opinion/commentary/pennsylvania-death-penalty-supreme-court-20191007.html>.

³³ Prosecutors affiliated with the Republican Party have adopted declination policies in several offices, including Jacksonville, Florida and San Joaquin, California. See Andrew Pantazi, *State Attorney Promised to Reform the Office. Six Months Later, Has She Delivered?*, FLA. TIMES-UNION (Jun. 29, 2017), <https://www.jacksonville.com/news/metro/public-safety/2017-06-29/state-attorney-promised-reform-office-six-months-later-has-she> [https://perma.cc/2M5B-JNEL]; Evan Sernoffsky, *Central California DA Quits State Association Over Its Opposition to Criminal Justice Reforms*, S.F. CHRON. (Jan. 16, 2020), <https://www.sfchronicle.com/crime/article/Central-California-DA-quits-state-association-14981879.php> [https://perma.cc/QP6X-GXUY].

engineers on the Supreme Court now decided we have homosexual marriage. I disagree with them.”³⁴

A different type of declination policy aims for effects beyond the boundaries of the local district. Prosecutors sometimes announce their policies in an effort to influence state legislators, signaling their support for changes to the current criminal statutes. For instance, a number of prosecutors have highlighted their charging policies related to low-level drug crimes during legislative debates about possible amendments to those laws.³⁵

From time to time, prosecutors even announce anticipatory declinations, stating they do not plan to enforce *proposed* laws in the future. They announce these policies while legislators debate the bills’ merits. For instance, some prosecutors in Virginia and elsewhere declared their counties to be “Second Amendment Sanctuaries.”³⁶ They said their offices would not file criminal charges under proposed gun control laws being debated in their state legislatures because, in their view, the bills violated the constitutional right to bear arms and made local residents feel less secure.³⁷ From a different political vantage point, prosecutors have also declared that they would not enforce any proposed criminal statutes that would punish women who obtain an abortion after six weeks of pregnancy.³⁸ Those laws, in the view of the prosecutors, violated the constitutional rights of women to access these health services.³⁹

³⁴ Deanna Paul, *This ‘Good Christian’ Prosecutor is Overlooking Domestic Violence Charges for Same-Sex Couples*, WASH. POST (Jun. 5, 2019, 3:35 PM), <https://www.washingtonpost.com/nation/2019/06/05/this-good-christian-prosecutor-is-overlooking-domestic-violence-charges-same-sex-couples> [https://perma.cc/PN8K-6U6C]; see Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 184 (2016) (arguing that a prosecutor who announced a policy never to prosecute domestic violence charges would not be viewed as a legitimate exercise of prosecutorial discretion).

³⁵ See Justin Jouvenal & Rachel Weiner, *Prosecutors Won’t Pursue Marijuana Possession Charges in Two Northern Va. Counties*, WASH. POST, (Jan. 2, 2020 7:30 PM), https://www.washingtonpost.com/local/public-safety/new-fairfax-county-prosecutor-says-office-wont-prosecute-marijuana-possession/2020/01/02/ab0363a4-2d76-11ea-9b60-817cc18cf173_story.html [perma.cc/38tp-rv8v].

³⁶ See *In Virginia and Elsewhere, 2nd Amendment “Sanctuary” Movement Aims to Defy New Gun Laws*, L.A. TIMES (Dec. 21, 2019 1:33 PM) <https://www.latimes.com/world-nation/story/2019-12-21/second-amendment-sanctuary-push-aims-to-defy-new-gun-laws>.

³⁷ *Id.*; Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 496–97 (2020).

³⁸ Isaac Stanley-Becker, *‘A Responsibility to Say No’: Prosecutors Vow Not to Bring Charges under Severe Abortion Laws*, WASH. POST (May 21, 2019, 5:36 PM) <https://www.washingtonpost.com/nation/2019/05/21/georgia-prosecutors-wont-enforce-abortion-ban-sim-gill-utah> [https://perma.cc/V4ME-TGN8].

³⁹ *Id.*

II. POTENTIAL LIMITS ON DECLINATION POLICIES

In legal systems across the United States, limits on the prosecutor's categorical declinations are generally not found in federal or state constitutional doctrine or statutes.⁴⁰ Legislatures and judges remain mostly silent on the declination of charges, whether for individual defendants or for entire categories.⁴¹ A local chief prosecutor can control the declination choices of her line prosecutors,⁴² and one generally cannot appeal the decision.⁴³

Instead of formal review mechanisms within the legal system, local prosecutors in the United States face political accountability for their declinations.⁴⁴ When they announce their declination policies, prosecutors spark a debate among other actors within the local criminal courts about the wisdom and legitimacy of their choices—a debate that does not happen when line prosecutors issue individual declinations without explanation.⁴⁵ Chief prosecutors also face scrutiny from other prosecutors and attorneys throughout the state and beyond.⁴⁶ Local prosecutors often respond to

⁴⁰ While judges in a few cases have blocked prosecutors from declaring general and prospective rules about granting access to diversion programs, those rulings are based on specific language in the rules and statutes that establish those programs. *See State v. Baynes*, 690 A.2d 594, 597–600 (N.J. 1997) (preventing prosecutor from implementing categorical ban on defendant eligibility for judicially-created pretrial diversion program).

⁴¹ *See MILLER*, *supra* note 22, at 154–59.

⁴² Line prosecutors are the attorneys in the office who deal with individual case-level questions and carry out the policies of the elected chief prosecutor.

⁴³ *See Austin Sarat & Conor Clarke, Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 398 (2008). In other countries, with more centralized and bureaucratized prosecutorial services, the decision by an individual prosecutor to decline charges is reviewable by supervisors. General guidance about the filing of charges is also set at the departmental level. *See JOHNSON*, *supra* note 21 at 128–32; Moohr, *supra* note 21.

⁴⁴ *See Ronald F. Wright & Marc L. Miller, The Worldwide Accountability Deficit for Criminal Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1604–09 (2010).

⁴⁵ The National Police Association wrote a letter of complaint about the incoming Suffolk County, Massachusetts chief prosecutor's declination policies. Letter from Nat'l Police Ass'n to Constance V. Vecchione, Bar Counsel (Dec. 23, 2018), https://nationalpolice.org/dev/wp-content/uploads/2018/12/DA_Rachael_Rollins_Complaint.pdf [perma.cc/g975-4egk].

⁴⁶ *E.g.*, Andrea Estes & Shelley Murphy, *Stopping Injustice or Putting the Public at Risk? Suffolk DA Rachael Rollins's Tactics Spur Pushback*, BOSTON GLOBE (July 6, 2019, 5:57 PM) <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bF1/story.html> [perma.cc/vfc3-mt8g] (“Some fellow prosecutors as well as police officials fear that Rollins is compromising public safety by letting criminals off the hook, while some judges have scolded her assistants in open court for letting repeat offenders go and sometimes not requesting bail in serious cases.”).

critiques of their policies, creating a discussion that rarely happens in the context of individual case declinations.⁴⁷

This Part reviews two leading approaches to defining the limits of the prosecutor's power to decline charges. One approach places stronger limits on the power, allowing declinations only in exceptional cases and never in categorical form. The second approach endorses virtually all exercises of leniency by prosecutors. Despite the different outcomes they produce, however, these two approaches share a reliance on separation of powers principles and a uniform, traditional account of the prosecutor's job. For that reason, neither approach to prosecutor declinations is sufficient to explain the proper limits on this power. The job of the prosecutor differs from place to place, making it inappropriate to set uniform limits on declinations in every community and for every office.

A. ADVOCATES FOR EXCEPTIONAL AND CASE-LEVEL DECLINATIONS

Some critics of declination policies set the theoretical boundaries for proper declinations in terms of historical practice or constitutional structure. They ask whether declinations of different types fall within the traditional duties of prosecutors.

One prominent school of thought follows this line of reasoning to conclude that prosecutors should restrict themselves to declinations for individual cases and should avoid general and prospective policies. One might call this the individual-only option. For instance, U.S. Attorney General William Barr and other officials in the U.S. Department of Justice have attacked state court prosecutors who refuse to file minor criminal charges.⁴⁸ Barr criticizes these prosecutors for abdicating the prosecutor's traditional functions in two senses. First, Barr argues that prosecutors provide inadequate support for police officers when they decline to pursue too many cases.⁴⁹ Prosecutors work in tandem with the police to maximize the impact

⁴⁷ See Fair and Just Prosecution, Statement in Response to Attorney General William Barr, (Feb. 13, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/02/Prosecutor-Statement-Responding-to-AG-Barr.pdf> [perma.cc/p388-z2jj]; Sawyer, *supra* note 10, at 633–34.

⁴⁸ Barr, *supra* note 8; Jeffrey A. Rosen, Deputy Att'y Gen., Remarks at Wake Forest University (Nov. 8, 2019), <https://www.justice.gov/opa/speech/deputy-attorney-general-jeffrey-rosen-delivers-remarks-wake-forest-school-law> [perma.cc/r2ej-rkp9].

⁴⁹ Barr, *supra* note 8 (“demoralizing to law enforcement and dangerous to public safety.”); Rosen, *supra* note 48; Jan Ransom, *After Rift Over Protests, N.Y.P.D. Pulls Out of Prosecutors' Offices*, N.Y. Times (June 15, 2020), <https://www.nytimes.com/2020/06/15/nyregion/nypd-district-attorneys-protests.html> [perma.cc/4rcr-wrb5] (quoting police association official criticizing prosecutor decision not to file charges against protesters for

of criminal charges, especially those resulting in prison sentences. Thus, he says, declinations should be exceptional because each charge that a prosecutor turns away damages trust with law enforcement and weakens the deterrent power of the criminal law.⁵⁰

Second, according to this line of critique, prosecutors invade the legislature's role when they make prospective categorical judgments about which crimes are worth prosecuting and which are not. Categorical no-charge policies go beyond the prosecutor's duty to enforce the law that others create.⁵¹

There are several problems with this critique.⁵² For one thing, it ignores traditional practices of local chief prosecutors, who commonly formulate general guidance for their line prosecutors about when to decline charges.⁵³ For decades, prosecutor offices have issued policy guidance to line prosecutors, including policies that instruct prosecutors to decline charges for "joyriding" or to ignore theft or destruction of property cases that fall below

curfew violations, because picking which laws to enforce is "a dereliction of duty to their oath of office").

⁵⁰ *Id.*; Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1338 (2002); Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System is Fighting Back*, WASH. POST (Nov. 9, 2019, 5:52 PM), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html [perma.cc/7pme-r8ww] (describing predictions that declination policies will create "public safety crisis").

⁵¹ See *Ayala v. Scott*, 224 So. 3d 755, 758–59 (Fla. 2017); *Johnson v. Pataki*, 691 N.E.2d 1002, 1006–07 (N.Y. 1997); Jouvenal & Weiner, *supra* note 35 (describing views of local actors who frame categorical declination policies as separation of powers issue); Foster, *supra* note 2, at 2516–25 (describing separation of powers challenges under federal and state law); Jessica Pishko, *Prosecutors are Banding Together to Prevent Criminal-Justice Reform*, THE NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform> [perma.cc/uj4w-ms8q] (discussing separation of powers argument that some prosecutor critics employ); Bobby Allyn, *U.S. Attorney Slams Philadelphia DA Over 'Culture of Disrespect for Law Enforcement'*, NAT'L PUB. RADIO (Aug. 17, 2019, 4:26 PM), <https://www.npr.org/2019/08/17/752051788/u-s-attorney-slams-philadelphia-da-over-culture-of-disrespect-for-law-enforcemen> [perma.cc/edv6-v4uj].

⁵² For an argument about the stunted vision of crime control that animates Barr's argument, see Ronald Wright, *Opinion, Attorney General Barr Wrong About Role of Prosecutors. Tough-on-Crime Stance Stunts Progress*, USA TODAY (Dec. 27, 2019, 8:35 PM) <https://www.usatoday.com/story/opinion/policing/spotlight/2019/12/27/barr-wrong-role-prosecutors-tough-crime-stance/2757304001> [https://perma.cc/Q5YR-C2SB].

⁵³ See Donald G. Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 705–06 (1981); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 290–95 (1980); Mario Merola, *Modern Prosecutorial Techniques*, 16 CRIM. L. BULL. 232, 237–38 (1980).

a designated level of property loss.⁵⁴ The policies are prospective and categorical. If categorical declinations are not part of the prosecutor's job, that would be news to the prosecutors themselves.

Another problem with the critique is that it starts from the false assumption that all prosecutors perform the same job. These criticisms from federal prosecutors, directed to state and local prosecutors, show no awareness that state and local prosecutors operate in a completely different legal and institutional universe from them. They have different budgets to allocate, unique law enforcement relationships to manage, distinctive judicial concerns to address, and higher volumes of cases to manage. 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. It is therefore inappropriate to construct a single theory of prosecutor declinations on the basis of a single—and non-existent—tradition of the prosecutor's work.

B. ADVOCATES FOR LENIENCY ACROSS ALL SETTINGS

Another approach to declination approves almost all forms of leniency by criminal prosecutors. There are a few outer limits to declinations under this leniency option. For instance, the reasons for declination should reflect the common good, rather than private advantage,⁵⁵ and the refusal to charge cannot be motivated by invidious discrimination.⁵⁶ But even with those limitations, the claim is broad. A prosecutor's refusal to charge could be based on evidentiary weakness in the case or on proportionality concerns; it could also take the form of a silent declination in a single case or an announced policy of leniency for entire categories of crimes or suspects.⁵⁷ Like the reasonable doubt standard of proof at trial, a broad prosecutorial power to decline cases is part of a constitutional order that favors liberty.

One rationale for this wide-open approach to declinations invokes history: single-case declinations were a normal part of the legal landscape

⁵⁴ See U.S. DEP'T OF JUST., *supra* note 24, at 23–24; Lundquist, *supra* note 24, at 493–94.

⁵⁵ See Green & Roiphe, *supra* note 7, at 831–33.

⁵⁶ See *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996); *Wayte v. United States*, 470 U.S. 598, 608 (1985); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

⁵⁷ See Jeffrey Bellin, *Defending Progressive Prosecution*, 39 *YALE L. & POL'Y REV.* (forthcoming 2021) (manuscript at 25–26), <https://ssrn.com/abstract=3479165>; Fairfax, *supra* note 7, at 1246–58; Zachary S. Price, *Reliance on Nonenforcement*, 58 *WM. & MARY L. REV.* 937, 963–70 (2017); George C. Thomas, III, *Discretion and Criminal Law: The Good, The Bad, and the Mundane*, 109 *PENN ST. L. REV.* 1043, 1049–53 (2005).

during early U.S. history.⁵⁸ Granted, this practice did not mean as much in the distant past as it does today, largely because public prosecutor offices in that earlier era did not hold a monopoly over the selection of charges. Instead, private attorneys represented crime victims—that is, they prosecuted cases—in state criminal courts, which meant that no policy or practice of the *public* prosecutor could prevent *private* parties and their attorneys from filing their own criminal charges.⁵⁹ But during the ensuing decades, courts and legislatures reduced the role of crime victims in charging decisions and gave public prosecutors greater centralized control over filing charges.⁶⁰ Under this new scheme, prosecutors could make their declinations stick. Furthermore, as public prosecution became the work of full-time attorneys in offices with bureaucratic routines, their declinations moved beyond the single-case setting. It became more common to encounter office rules and expectations about declinations.⁶¹

Thus, although historical practice does support a leniency-based account of declinations to some extent, history falls short of a complete explanation. Early declination practice only extended to single cases and even the more recent examples of general office guidance about declinations were typically framed as presumptive internal guidance for ordinary cases rather than clear-cut prospective rules announced to the public.⁶²

A second rationale for broad declination power comes from the separation of powers doctrine. According to this view, judges cannot limit

⁵⁸ See JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 28–36 (1980) (describing discretionary charging power of prosecutors as chief law enforcement officer in nineteenth and twentieth centuries). The theory distinguishes criminal prosecutors from other executive branch enforcement agents, who arguably have more limited authority to decline enforcement actions. There are administrative enforcement contexts, however, where a comparison to criminal case declinations is treated as relevant. Cf. Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239 (2019) (describing role of local prosecutors in blocking operation of federal discretion over immigration removals by declining charges that would trigger removal process); see also Heckler v. Chaney, 470 U.S. 821 (1985).

⁵⁹ See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411 (2009).

⁶⁰ See *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 365 (Minn. 1977); *State v. Harrington*, 534 S.W.2d 44, 49–50 (Mo. 1976); JACOBY, *supra* note 58, at 16–19.

⁶¹ See Abrams, *supra* note 25 at 13–18; Norm Maleng, *Charging and Sentencing: Where Prosecutors' Guidelines Help Both Sides*, 1 CRIM. JUST. 6, 42–43 (1987); Kim Banks Mayer, *Applying Open Records Policy to Wisconsin District Attorneys: Can Charging Guidelines Promote Public Awareness?* 1996 WIS. L. REV. 295, 303–04 (identifying four prosecutorial offices that had adopted charge guidelines).

⁶² See Frank J. Remington, *The Decision to Charge, the Decision to Convict on a Plea of Guilty, and the Impact of Sentence Structure on Prosecution Practices*, in *DISCRETION IN CRIMINAL JUSTICE* 73, 78–79, 86–90, 100 (Lloyd E. Ohlin & Frank J. Remington eds. 1993).

the prosecutor's decision to refuse charges because the Constitution assigns that choice to the prosecutor.⁶³

Courts have routinely affirmed that prosecutors may decline to file charges, even if a grand jury or judge decided that criminal charges were appropriate.⁶⁴ The power to initiate criminal charges (and the concomitant power not to begin the case) is often said to be a quintessential executive power, sitting right at the heart of the separation of powers doctrine.⁶⁵ Judicial opinions describe the prosecutor's authority over charge selection in broad terms. Those holdings deal with single-case declinations, but their rationales and the dicta could easily apply to categorical declinations based on office policies.

Although this argument for a wide-ranging authority to decline cases has important virtues, it misses some of the diversity among prosecutors' offices and practices across jurisdictions. Prosecutorial duties are not the same everywhere. Some prosecutors have control over the entire criminal docket, while others divide responsibilities for misdemeanor and ordinance violations with city prosecutors or other specialized offices.⁶⁶ Some prosecutors even represent units of city or county government on civil matters.⁶⁷ Still another jurisdictional variation allows for prosecutors to assert a role for their offices in matters both upstream and downstream from the criminal courts, on issues such as diversion of potential defendants into community treatment and reentry of former defendants into the community after serving their criminal sentences.⁶⁸ These and other differences in history, power-sharing arrangements, and non-courtroom duties that apply to prosecutors in each state suggest that the nature of the prosecutor's job takes distinctive forms in different places.

Furthermore, even if we were to give controlling weight to the separation of powers doctrine to determine what counts as a prosecutorial function, that doctrine also varies by state. The individual-only and leniency options for prosecutor declinations both treat federal and state constitutional

⁶³ See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006). *But see* Sawyer, *supra* note 10 (proposing functional separation-of-powers framework that recognizes some legislative authority of prosecutors).

⁶⁴ See Brown, *supra* note 4, at 66–67.

⁶⁵ See *United States v. Cox*, 342 F.2d 167, 171–72 (5th Cir. 1965); *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973); *Rush v. Cavanaugh*, 2 Pa. 187, 190 (1845).

⁶⁶ See Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1142 (2012); Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 989–93 (2020).

⁶⁷ See ARIZ. REV. STAT. ANN. § 11-532 (2020).

⁶⁸ See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 363–66 (2002).

doctrine on the separation of powers as identical. But judges interpret some state constitutions to give the judiciary only limited roles over the initial filing and dismissal of criminal charges.⁶⁹ Judges in other states, however, read their constitutions and interconnected statutes to grant themselves a persistent power over dismissals.⁷⁰ Further, in certain types of cases (for instance, criminal statutes that trigger mandatory minimum sentences), judges treat the power to file or decline the charge as a component of the sentencing power the state constitution reserves for judges. As a result, under such statutes, judges have some constitutionally mandated input in a charging decision.⁷¹

Each of the two leading accounts of prosecutorial declination authority reviewed here—the more restrictive version that allows only case-specific declinations and the broader endorsement of prosecutorial exercises of leniency in any form—proceed from a uniform view of prosecutors. Public prosecutors in the United States, they presume, operate within a single historical tradition, a single definition of the role of a prosecutor. A uniform theory of declinations, however, does not work well for all the varied state and local prosecutor offices in the United States.⁷² The features of the job that all prosecutors share across jurisdictions are relevant, but the common ground among prosecutors is not sufficient to set uniform limits on their declinations.

III. DUTIES TO THE STATEWIDE POLITY

A search for the outer boundaries of prosecutorial power—as seen through the lens of history and separation of powers doctrine—is not enough to evaluate prosecutor declination practices. A more pragmatic approach explores the level of government in which prosecutors operate.⁷³

If separation of powers doctrine divides power into three columns (one for each branch of government), a level of government approach divides that power into rows (one row each for federal, state, and local governments).⁷⁴

⁶⁹ See Brown, *supra* note 4, at 67–76.

⁷⁰ *Id.* at 67–73.

⁷¹ See *State v. Brimage*, 706 A.2d 1096, 1106–07 (N.J. 1998).

⁷² See generally David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451 (2018); Sklansky, *supra* note 7 (describing prosecutors as actors that mediate between conflicting system values).

⁷³ For a similar effort to evaluate the impact of many contextual factors on the selection of a prosecutorial declination policy, see generally Murray, *supra* note 14.

⁷⁴ For a discussion of “vertical” and “horizontal” imagery in separation of powers theory, see generally Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999) (characterizing government departments with different functions as separated powers along a horizontal axis).

Some powers are available only to government actors on the federal level, but those powers might not be effective to address issues that operate on the state or local levels. Similarly, state powers do not reliably extend to problems on the federal or the local level.

Within this framework, state criminal prosecutors occupy a conflicted position, reaching across two levels of government. On the one hand, they derive some authority from the state government and should use that power to benefit the public statewide. On the other hand, local government is the source of some prosecutors' authority and capacity, and they should exercise those aspects of their power to represent the best interests of the local public.

This Section discusses the legal environments that strengthen the statewide polity's claims. I argue that declination policies are easiest to square with the claims of a statewide polity when they are framed as presumptions linked to the allocation of scarce resources. These declination practices are accepted as routine and legitimate, even for prosecutors who work in a setting that stresses duty to a statewide polity.

A. SOURCES OF STATEWIDE LOYALTY

The starting point for a prosecutor's loyalty to a statewide electorate is the particular criminal law that the prosecutor proposes to enforce. If the criminal case is based on a violation of a local ordinance, voters elsewhere in the state have little or no stake in the enforcement of that law.⁷⁵ On the other hand, if the prosecutor files criminal charges under a state statute, a statewide polity created that legal resource. Voters from all over the state elected legislators who passed that bill, along with the governor who signed it. Those voters may have an interest in seeing that law enforced throughout the state, not just in their own neighborhoods.

As a conceptual starting point, the statewide polity should control whether a duly passed statute will be enforced throughout the state. Majority rule is a central concept in criminal law, as in other fields. It is difficult to see how a minority concentrated in one part of a state should be able to declare a state criminal law inapplicable, even within its own local boundaries. The minority might disapprove of the statute, the policy, and the moral judgment it embodies. Yet, as an initial matter, a majority of voters in the state should

⁷⁵ See Brenner Fissell, *Local Offenses*, 89 *FORDHAM L. REV.* (forthcoming 2020) (manuscript at 21–22), <https://ssrn.com/abstract=3552179>; see generally Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 *OHIO ST. L.J.* 1409, 1421–38 (2001) (describing origins and extent of power of local governments to create criminal law).

expect the law to remain in force throughout the state, even in places where a statewide minority makes up a local majority.⁷⁶

Although statewide applicability is the starting point for any analysis, it is not the endpoint for every statute. Statutes that represent a fundamental statement of values constrain prosecutors the most. These provisions form the traditional core of any state criminal code, revealing a considered and sustained judgment by the statewide polity that prosecutors should enforce a particular social norm.⁷⁷ On the other hand, criminal statutes that merely provide “tools” to achieve a larger end, such as public safety, demand less loyalty and allow a prosecutor more room to consider competing objectives.

What marks the difference, then, between the core and the periphery? Which statutes require prosecutors to recognize their uniform and statewide applicability, and which are merely tools that a local prosecutor might declare to be poorly suited for the needs of the local district?

One indicator is typical levels of usage. Long-term charging practices show us that some statutes, though still on the books, go largely unenforced.⁷⁸ The Administrative Office of the Courts for any given state can generate a frequency table of criminal statutes that have formed the basis for all prosecutions in the state during the past year. Some statutes (such as simple assault) are used often. Other statutes (such as bans on adultery and other forms of consensual sexual activity), though they still appear in the criminal code, are not used at all. Similarly, some statutes are used in only a handful of cases, limited to just a few districts in the state.⁷⁹ The same remains true,

⁷⁶ Cf. Kamin, *supra* note 34, at 203–05 (arguing that deferral of federal prosecution under immigration laws, unlike declination of federal prosecution under marijuana laws, “creates new rights” for potential targets of prosecution by declaring limited reach of laws in categorical terms).

⁷⁷ This account stresses the expressive purposes of the criminal law. See generally Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397 (1965) (distinguishing expressive purposes of criminal law from traditional accounts of criminal law purposes).

⁷⁸ See Kay L. Levine, *The External Evolution of Criminal Law*, 45 *AM. CRIM. L. REV.* 1039, 1057–87 (2008) (tracking cycles of enforcement for statutory rape laws).

⁷⁹ See Jessica Smith, *Detailed North Carolina Statewide & County-Level Criminal Charging Data*, N.C. CRIM. L.: UNC SCH. OF GOV'T BLOG (June 8, 2020, 10:00 AM), <https://nccriminallaw.sog.unc.edu/detailed-north-carolina-statewide-county-level-criminal-charging-data/> [perma.cc/9667-xhja] (listing North Carolina statutes that formed the basis for fewer than 100 cases in a year, in a state with 100 counties and 43 prosecutorial districts); cf. Russell M. Gold, *Promoting Democracy in Prosecution*, 86 *WASH. L. REV.* 69, 115–17 (2011) (describing examples of prosecutors cutting costs by reducing prosecutions under criminal statutes that prosecutor treats as lower priorities).

year after year, with the same statutes routinely appearing at the top and the bottom of the frequency table.⁸⁰

Sometimes a criminal statute falls into disuse over time. Perhaps the social problem seems less pressing or different legal tools come along to address it more effectively. Legislatures in the United States, when compared to legislatures elsewhere in the world, place little stock in the coherence of the criminal code.⁸¹ They are willing to add new provisions without much thought about whether they eclipse existing sections of the code, and they are happy to leave the relative importance of related statutes to the choices of future prosecutors.⁸²

Further, it is not only older statutes that settle into a lower priority category over time. In some cases, legislators understand from the start that their new criminal statute will generate only a few cases, either because the conduct occurs rarely or because existing statutes already address the problem.⁸³ They nevertheless vote for a statute to give the prosecutor an additional tool for plea bargaining or to signal an awareness that some new social harm has arrived. Even if an existing statute could have covered the new harm, legislatures figure it never hurts to express newfound concern.⁸⁴

In sum, little-used and duplicative statutes exist in every state's criminal code. The consistent failure of prosecutors to charge under these laws amounts to a mute categorical judgment. These are not just examples of prosecutors making a few declinations in exceptional cases. Rather, they represent an unspoken, consensus-based judgment among prosecutors that some statutes no longer serve the needs of the state, or at least most parts of the state.⁸⁵

The statutes with the longest history of low frequency filings deserve the least consideration from prosecutors. That is especially true if the rare filings are limited to particular areas in the state. Conversely, criminal

⁸⁰ Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 267–71 (2004).

⁸¹ William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325, 1339 (1993).

⁸² See Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1332–39 (2008).

⁸³ See Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137, 142–43 (1995); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001).

⁸⁴ See Stuntz, *supra* note 83, at 529–33.

⁸⁵ See Price, *supra* note 57. In extreme cases, non-enforcement of a criminal law might amount to a legal defense—known as “desuetude”—against current prosecution. Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 4–5 (1966).

statutes that are frequently enforced across different areas of the state and are enforced consistently over the years make the strongest claims for continued enforcement on behalf of the statewide electorate.

Another indicator of a strong claim for the prosecutor to obey the statewide polity appears in criminal statutes that have strong spillover effects from district to district.⁸⁶ Some crimes address social harms that are primarily local, while others speak to harmful acts that affect places far from the scene of the crime. For instance, criminal prosecutions under environmental statutes that punish discharges into rivers and streams are designed to protect all downstream parties, not just those in the district where the water pollution began. Similarly, a refusal to enforce gun control laws against noncompliant sellers of firearms in one county could result in deaths and injuries in some other county.

If it is true that each criminal law creates a stronger or weaker claim of loyalty to a statewide polity, what response from a prosecutor is appropriate when a law makes such a claim? We turn now to that question.

B. PRESUMPTIONS LINKED TO RESOURCE PRIORITIES

Just as state legislatures create the criminal statutes that form the basis for most prosecutions, they also build state court systems and fund the personnel to operate them. In performing those latter functions, state legislatures fund the courts and prosecutors at modest levels that make it impossible to enforce the criminal law to its fullest extent. In so doing, state legislatures build a need for declinations into the prosecutorial system with the budgets they allot.

The level of court funding today says more about state priorities than it once did. Throughout the twentieth century, states tended to centralize their court systems. They eliminated many municipal courts and consolidated court funding and governance at the state level.⁸⁷ There were and still are holdouts: municipal courts still exist, funded at the local level.⁸⁸ In those exceptional settings, when prosecutors decline charges in the municipal courts, they respond mostly to a local polity. In the more typical state-funded and state-governed courts, however, the choices of state actors have an important effect on prosecutor declinations. If state legislatures only fund a limited number of judges and courtrooms, their budget decisions necessarily

⁸⁶ See Murray, *supra* note 14 (manuscript at 51).

⁸⁷ Ronald F. Wright, *The Wickersham Commission and Local Control of Criminal Prosecution*, 96 MARQ. L. REV. 1199, 1211–12 (2013).

⁸⁸ See RON MALEGA & THOMAS H. COHEN, DEP'T. OF JUST. BUREAU OF JUST. STAT., STATE COURT ORGANIZATION, 2011 at 15–19, (2013), <https://www.bjs.gov/content/pub/pdf/sco11.pdf> [perma.cc/lby4-eh5a].

envison—and tacitly endorse—declination power for the prosecutor. Funding levels confirm that statewide representatives, speaking for a statewide polity, expect prosecutors to prioritize some crimes above others.⁸⁹ Inevitably, the competing uses of limited state funds for criminal prosecution play out differently in various districts. Local variety is baked in.

For that reason, a policy can, without controversy, connect declinations of one crime to the budget for prosecution of other crimes.⁹⁰ The office policy might, for example, declare that local prosecutors will redirect resources from drug possession or larceny of small dollar amounts to firearms offenses.⁹¹ These are the easy cases. The relative importance of various crimes will differ from place to place, and state legislatures naturally expect local officials to make these tradeoffs.⁹² Such resource-based declination policies acknowledge that all of the state criminal statutes remain in force in the local district, but that office policy places some statutes at the back of the line.

It is more challenging, but still possible, to justify prosecutor policies that announce presumptions against filing charges under a statute without explicitly linking that presumption to resource allocation. For instance, a policy might declare that the office will only file charges in marijuana possession charges in cases involving threats to juveniles or other pronounced threats to public safety.⁹³ For these crimes, the prosecutor chooses and announces priorities among the various actions the state legislature has declared blameworthy. Without declaring that a particular crime is not actually blameworthy within the district, prosecutors can use the presumption built into the office policy to appropriately declare that some

⁸⁹ See H. Richard Uviller, *Poorer But Wiser: The Bar Looks Back at Its Contribution to the Impeachment Spectacle*, 68 *FORDHAM L. REV.* 897, 899–901 (1999).

⁹⁰ See Kamin, *supra* note 34, at 185; Joshua Luke Sandoval, *Ethical Considerations for Prosecutors: How Recent Advancements Have Changed the Face of Prosecution*, 10 *ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS* 60, 71, 98–100 (2019) (prosecutor reflecting on role of budgetary limits in declination policy choices).

⁹¹ See ROLLINS, *supra* note 2 (describing policy of presumed refusal to charge for fifteen offenses, including marijuana, shoplifting, and trespass); Schmadeke, *supra* note 31 (naming a motivation in raising bar for felony retail theft as “prioritizing limited resources”).

⁹² See Joan E. Jacoby, *The Charging Policies of Prosecutors*, in *THE PROSECUTOR* 75, 78–79 (William F. McDonald, ed., 1979); Thomas, *supra* note 57, at 1046–53 (arguing that charging discretion is beneficial when it makes the criminal code more closely aligned with public priorities); Ronald F. Wright, *Persistent Localism in the Prosecutorial Services of North Carolina*, 41 *CRIME & JUST.* 211, 216–19 (2012).

⁹³ See Clifford & Goldstein, *supra* note 28.

wrongs are more important than others.⁹⁴ This does not amount to a judgment that the state law no longer applies within the district.⁹⁵ It still leaves open the possibility that even a low-priority state law could outrank other potential crimes in particular circumstances.

Federal enforcement of marijuana possession and distribution crimes offers another example of the use of presumptions in declination policy. Federal law makes it a crime to possess marijuana.⁹⁶ Some states, however, have decriminalized marijuana possession.⁹⁷ Under a Department of Justice policy adopted in 2010, prosecutors do not declare categorically that marijuana possession in those states no longer violates federal law, and they make no commitment to stop filing such charges altogether. Instead, federal policy creates a presumption against prosecution in marijuana possession cases, instructing federal prosecutors to file charges in such cases only if they present particular risks of violence.⁹⁸ That policy is justified both in terms of limited resources and on the basis of public safety priorities.

The easiest way to justify a categorical declination policy is to implement the policy as a presumption and to explain the policy as a better use of limited resources that can deliver the best results for the local district. The greatest objection to a presumptive policy is possible dishonesty.⁹⁹ There may be times when the chief prosecutor, in truth, has decided not to bring any charges under a statute under any circumstances. In those cases, however, it would not mislead the public to explain the policy as a presumption even though there is no serious prospect that a case would ever arrive to rebut the presumption. A prosecutor who adopts a categorical declination policy normally has several reasons for doing so, including some

⁹⁴ Sklansky, *supra* note 72, at 463–64 (describing the role of voters in holding prosecutors accountable for their office priorities); *see* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 990–91 (2009). This power to prioritize crimes holds true across various conceptions of democracy, whether it be participatory, representative, or otherwise. *See* David Alan Sklansky, *Unpacking the Relationship between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY 276, 283–86 (Máximo Langer and David Alan Sklansky, eds., 2017).

⁹⁵ *Cf.* Kamin, *supra* note 34, at 200–03 (arguing that federal policy disfavoring marijuana charges in some jurisdictions is legitimate because it does not purport to invalidate the federal law within those boundaries).

⁹⁶ 21 U.S.C. §§ 812, 844 (2018).

⁹⁷ COLO. CONST. art. XVIII, § 16(3).

⁹⁸ *Justice Department Issues Memo on Marijuana Enforcement*, DEP'T OF JUSTICE (Jan. 4, 2018), <https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement> [perma.cc/3j6t-8c37]; Memorandum from Att'y Gen. Jefferson B. Sessions for All United States Att'ys on Marijuana Enforcement (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download> [perma.cc/sgu3-f9xy].

⁹⁹ *See* Sawyer, *supra* note 10.

reasons that depend on current circumstances. The public would benefit from hearing the entire range of reasons. Describing a policy as a strong presumption still gives the public adequate notice and can prompt public debate and accountability.¹⁰⁰ Announcing a presumption also shows an attractive modesty on the part of the prosecutor, leaving open the possibility that new evidence or new arguments might change the ordinary outcome and lead to charges in exceptional cases. Even if the presumption of declination is strong, it accurately informs the public that unforeseen circumstances in the future might change the outcome.

Finally, the variety that is possible for declinations does not operate in the same way for procedural rules. For instance, state statutes related to the prosecutor's duty to disclose evidence to the defense are binding on locally-elected prosecutors, even if local voters would not approve of those particular disclosure rules.¹⁰¹ Statewide procedural controls, however, set only a *minimum* level of procedural fairness. They leave room for local prosecutors to declare local policies, such as open file discovery, that place higher standards on local prosecutors than state statutes require.

IV. DUTIES TO THE LOCAL POLITY

The enforcement resources created at the state level—criminal statutes combined with limited budgets that force prosecutors to pick their priorities—support the use of case-specific declinations by prosecutors.¹⁰² Those legal resources at the state level also justify prospective declination policies in a prosecutor's office when those policies are framed in terms of a presumption against charging linked to the limited resources of the office. Such a presumption acknowledges the mixed signals that prosecutors receive from the state polity: the existence of a criminal statute on the one hand and budgetary constraints on the other. A presumption respects the judgment of the voters whose legislators declared certain conduct to be criminal, while choosing the local priorities that limited state budgets make necessary.

But the mixed message that prosecutors receive from state government does not tell the whole story. Interactions between state and local levels of accountability for the prosecutor make the story even more complicated.

The local polity sometimes prefers that a prosecutor decline more cases than the state polity would tolerate. Under some circumstances, such views

¹⁰⁰ See Murray, *supra* note 14 (manuscript at 40–41).

¹⁰¹ See generally Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016) (describing implementation of discovery laws in two states).

¹⁰² See Kamin, *supra* note 34; Murray, *supra* note 14 (manuscript at 2–3).

held by the local polity make a difference for prosecutor declination policies,¹⁰³ adding further support to declination policies framed as presumptions.¹⁰⁴ Furthermore, local input can sometimes justify a categorical policy to decline charges and not just a presumption against certain charges.¹⁰⁵ This Section examines the sources of a prosecutor's duties of loyalty to a local polity.

To see the difference level of government makes, recall the handful of states that do not elect their chief prosecutors on the local level. In Connecticut, the local prosecutors' offices in major population centers follow the lead of a statewide Chief State Attorney, who is appointed by a commission of court officials.¹⁰⁶ Across the border in Massachusetts, however, each chief local prosecutor is elected.¹⁰⁷ Imagine, then, that the State's Attorney in New Haven, Connecticut (a local prosecutor) and the District Attorney in Berkshire County, Massachusetts (another local prosecutor) each announce a declination policy related to drug possession

¹⁰³ See Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 338–39 (2002). For a discussion of the interaction between professional expertise and public preferences for prosecutor office practices, see William H. Simon, *The Organization of Prosecutorial Discretion*, in PROSECUTORS AND DEMOCRACY 175, 191–94 (Máximo Langer and David Alan Sklansky eds., 2017). For more skeptical views about democratic input into declination priorities for a prosecutor's office, see generally Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 72 (2012); John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME AND JUST. 1 (2012).

¹⁰⁴ While public input may properly influence the prosecutor's choice of priorities and setting general policies, it cannot have any role in the decisions of an individual prosecutor about whether to file charges in an individual case. The distinction between policy choices and case-level decisions marks the line where prosecutorial independence becomes a critical value. See Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 732–33 (2020); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 673–74 (2017).

¹⁰⁵ See Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801–06 (2012) (declination practices declared overtly can result in differential application of criminal law that "can be seen as beneficial under theories of federalism and localism"); Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX. L. REV. 73, 131–32 (2015) (arguing for categorical nonenforcement under some circumstances).

¹⁰⁶ CONN. GEN. STAT. § 51-278(a) (2019).

¹⁰⁷ MASS. GEN. LAWS ch. 12, § 12 (2019).

cases.¹⁰⁸ Is there any doubt that we should evaluate these decisions according to different criteria?

For the State's Attorney in Connecticut, the declination policy must further any policies and priorities of the Chief State Attorney. If the statewide policy itself prohibits local variation, the State's Attorney in New Haven cannot properly consider the views of New Haven residents in deciding whether to file charges in drug possession cases.¹⁰⁹ For the District Attorney in Berkshire County, on the other hand, there is no statewide policy to implement. She is free to consider the views of local voters in deciding whether to charge drug possession crimes or to direct those limited office resources to some other priority. Indeed, we might criticize an elected local prosecutor for ignoring the wishes of her voters when setting local policy about declinations.¹¹⁰ This Section explores the basis for that intuition.

A. LOCAL FUNDING AND EFFECTS AS SOURCES OF LOCAL POWER

One reason that local views about declinations should carry weight is that local governments fund important parts of criminal law enforcement. In some jurisdictions, the city or county government operates its own court system that specializes in adjudicating misdemeanors and lesser infractions.¹¹¹ Even in states with unified court systems, local taxpayers might fund the courthouse building or the prosecutor's office facilities.¹¹² Local taxes also sometimes pay for court administrators.¹¹³ Local governments in some states fund the salaries of a number of attorneys and other staff in the prosecutor's office.¹¹⁴

Local actors, paid with local funds, also play a central role in some diversion programs. Prosecutors' offices often work with local pretrial

¹⁰⁸ See Josh Landes, *After Campaigning on Reform, Berkshire County DA Gets to Work*, WAMC (Jan. 16, 2019), <https://www.wamc.org/post/after-campaigning-reform-berkshire-county-da-gets-work> [perma.cc/3b41-d96k] (describing office initiatives involving juveniles and marijuana prosecutions).

¹⁰⁹ See generally Kay Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020) (arguing that procedural consistency in consideration of declination factors is more appropriate as an office policy than consistency in outcomes of declination decision).

¹¹⁰ Cf. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 840 (2004) (arguing that prosecutors should make discretionary decisions based on articulable principles that command broad societal acceptance).

¹¹¹ See Mayson & Stevenson, *supra* note 66, at 989–93; Henry Ordower, J. S. Onésimo Sandoval & Kenneth Warren, *Out of Ferguson: Misdemeanors, Municipal Courts, Tax Distribution, and Constitutional Limitations*, 61 HOWARD L.J. 113, 120–21 (2017).

¹¹² See MALEGA & COHEN, *supra* note 88, at 8 (2013).

¹¹³ See MALEGA & COHEN, *supra* note 88, at 8 (2013).

¹¹⁴ See IND. CODE § 33-39-6-2 (2020).

service agencies or with non-profit community groups to help people accused of crimes with the objective of keeping them out of the criminal courts as they receive treatment and holding them accountable for their actions.¹¹⁵ Local governments also pay for many of the community organizations that design and operate non-prison punishments that judges may impose after convictions for some crimes.¹¹⁶

Local governments also fund most of the police organizations in the United States, and, with that money, the local polity claims the legitimate power to control the style and pervasiveness of policing they prefer.¹¹⁷ Local contributions to criminal courts, prosecutor personnel and operations, and programming for those accused and convicted of crimes all support a similar allocation of power: those who pay the piper can call the tune.¹¹⁸

A second reason that local views about declinations should matter is that most crime—and most criminal law enforcement—has concentrated local effects. City and county governments pass ordinances to address some of these localized social harms. As for crimes that appear in the state criminal code, different localities suffer from different levels of crime. Specific types of crimes can create stronger or milder reactions in different communities: illegal weapon possession, for instance, could create more public anxiety in some places than in others.

A large amount of crime happens within a local social network. A disproportionate number of people who are punished for criminal acts come from a small set of neighborhoods and commit most of their crimes close to

¹¹⁵ See Kalani C. Johnson, Robert C. Davis, Melissa Labriola, Michael Rempel & Warren A. Reich, *An Overview of Prosecutor-Led Diversion Programs: A New Incarnation of an Old Idea*, 41 JUST. SYS. J. 63, 63 (2019).

¹¹⁶ See COLO. REV. STAT. § 18-1.3-301(4) (2020) (providing for local funding of community corrections programs).

¹¹⁷ See generally David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (analyzing different frameworks for understanding popular control of policing in democratic societies); BRIAN A. REAVES, DEP'T OF JUST. BUREAU OF JUST. STAT., LOCAL POLICE DEPARTMENTS, 2013: PERSONNEL, POLICIES, AND PRACTICES (2015) (describing variety in local practices adopted by police departments serving different local constituencies), https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/BJS_2013LocalPoliceDeptReport.pdf [perma.cc/r4us-gy2b].

¹¹⁸ The aphorism, however, doesn't hold true for some areas of legal practice. See MODEL RULES OF PROF'L CONDUCT 1.8(f) (AM. BAR ASS'N 1983) (allowing third parties to pay client's fees only under circumstances that ensure client control of objectives and attorney independence). Drawing an analogy to the state and local contributions to prosecutors and criminal proceedings, one might treat the state as a third-party payer, helping to obtain legal representation for local interests for purposes of public safety.

home.¹¹⁹ More generally, criminologists have documented the powerful interactions between crime and place.¹²⁰ The toxic side effects of improper law enforcement also matter most at the local level.¹²¹ The residents of a local community, with their greater awareness of and responsibility for threats to public safety, should have the most to tell prosecutors about how to spend limited resources to achieve public safety.

Because of local funding and concentrated local effects, when local voters favor declinations under a particular statute, those views strengthen the justification for such an office policy. The more difficult question, which we explore in the next Section, is whether a local preference for declinations adds something that state voter preferences, standing alone, cannot.

B. STATE GRANTS OF LOCAL AUTONOMY

Local governments are creatures of state government. They only exercise the amount and type of authority that state governments grant them, and those grants of legal power take different forms.¹²² In the declination context, many sources of law combine to tell us how much authority state government actors grant prosecutors to follow guidance from local voters and institutions.

Home rule provisions in state statutes and constitutions set the scene.¹²³ Some states grant broad powers to local governments to determine their own policies across a wide range of topics, while others grant more limited local

¹¹⁹ See Sara Wakefield, *Invisible Inequality, Million Dollar Blocks, and Extra-Legal Punishment: A Review of Recent Contributions to Mass Incarceration Scholarship*, 12 PUNISHMENT & SOC'Y 209, 212–13 (2010).

¹²⁰ See generally Sangmoon Kim, Randy L. LaGrange & Cecil L. Willis, *Place and Crime: Integrating Sociology of Place and Environmental Criminology*, 49 URB. AFF. REV. 141 (2013) (analyzing impact of neighborhood characteristics on frequency and types of crimes committed in that location); Tracey L. Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998) (same); David Weisburd, *The Law of Crime Concentration and the Criminology of Place*, 53 CRIMINOLOGY 133 (2015) (same).

¹²¹ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 158–195 (2011) (arguing that local control of criminal law enforcement would produce more appropriate balances between enforcement costs and benefits).

¹²² See generally OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* (3d ed. 2009) (surveying variations in the types of control that state legal institutions exercise over local governments); William R. Andersen, *Resolving State/Local Governmental Conflict—A Tale of Three Cities*, 18 URB. L. ANN. 129 (1980) (same).

¹²³ Home rule provisions in state law grant various degrees of autonomy to local governments to pass their own laws, so long as they do not conflict with state or federal law. See generally Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006) (describing examples of home rule provisions in state constitutions and statutes); Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAW. 253 (2004) (proposing changes to home rule doctrine).

autonomy.¹²⁴ This legal framework may not specifically address the work of the criminal prosecutor, but it does establish an environment of greater or lesser autonomy for local officials to create policies based on local conditions.¹²⁵

State laws establishing the duties of the local chief prosecutors present more direct evidence of the power delegated to the local level to control declinations. Typically, statutes place the charging authority in one and only one figure for each judicial or prosecutorial district in the state.¹²⁶ North Carolina statutes, for example, place upon each of the forty-three District Attorneys throughout the state the duty to “prosecute . . . in the name of the State all criminal actions and infractions requiring prosecution” in the state courts in the relevant district.¹²⁷ The same provision also creates a duty to “advise the officers of justice in the district attorney’s district,” suggesting a coordinating role for public safety in the local community.¹²⁸

The statutory grant of authority over charging is directed to local prosecutors in particular and not to local actors more generally. These statutes do not give local judges a role in the initial selection of charges. Most states give trial judges a role in testing the quality of dismissals after the prosecutor files,¹²⁹ but, even then, the judge typically takes a secondary role, reacting to the prosecutor’s motion to dismiss charges.¹³⁰

Statewide prosecutorial officials, such as the state attorney general, also remain on the sideline in the declination decision under the typical statutory code. The state Attorneys General have no authority to hire or fire prosecutors in the local office.¹³¹ In ordinary criminal matters, the Attorneys General have limited supervisory authority as well because statutes in most states restrict their power to override the local District Attorney’s choices

¹²⁴ See generally DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (2001) (surveying variations in home rule provisions in state law).

¹²⁵ See Murray, *supra* note 14 (manuscript at 52–53).

¹²⁶ A few states still allow private citizens to initiate criminal charges, which are subject to dismissal by the trial judge or the prosecutor. N.C. GEN. STAT. §§ 15A-303, 15A-304 (2019); Brown, *supra* note 4, at 73–74.

¹²⁷ N.C. GEN. STAT. § 7A-61 (2019).

¹²⁸ *Id.*

¹²⁹ See Brown, *supra* note 4, at 70–73.

¹³⁰ See Brown, *supra* note 4, at 70–73; State v. Winne, 91 A.2d 65, 77–78 (N.J. Super. 1952), *rev’d on other grounds*, 96 A.2d 63 (N.J. 1953).

¹³¹ N.C. GEN. STAT. § 7A-60 (2019) (specifying number of Assistant District Attorneys to be hired in each office); N.C. GEN. STAT. § 7A-63 (2019) (empowering District Attorney to appoint Assistant District Attorneys, who serve “at the pleasure” of the District Attorney).

about declinations.¹³² Some state statutes grant authority to the attorney general for charging decisions in matters that create a conflict of interest for the local district attorney's office.¹³³ A few other statutes affirmatively grant the state attorney general the power to file charges in specialized cases, such as environmental crimes or financial fraud.¹³⁴ These exceptional areas are treated differently largely because they involve special expertise that might not be available to most local prosecutors' offices and crimes that may involve spillover effects that extend beyond the boundaries of a single prosecutorial district.¹³⁵

It is revealing to compare how state law treats the declination decision and the local prosecutor's role in criminal appeals, whether initiated by the defendant or the state. Some states designate the local prosecutor to represent the interests of the state,¹³⁶ while other statutes centralize control of the

¹³² The level of restriction on this power of statewide officials to supersede the original declination by the local prosecutor varies from state to state. See FLA. STAT. § 27.14(1) (2019); Tyler Q. Yeagain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 110–26 (2018) (reviewing different levels of restrictions, including power to supersede if court or commission authorizes it, if prosecutor refuses to enforce a law, upon request from another state official, when “public interest” requires, or when “necessary”). Rachel Barkow notes that state attorneys general rarely invoke the power that statutes grant them to override the charging decisions of local prosecutors. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 550–56 (2011). For a recent and overtly political example of a supersession law drafted to apply to only one local prosecutor, see Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Kramer of Authority*, THE INTERCEPT (July 8, 2019, 5:55 PM), <https://theintercept.com/2019/07/08/dal-larry-krasner-pennsylvania-attorney-general> [perma.cc/skn2-yba3] (describing legislation that authorizes state attorney general to file charges for one class of cases from a single prosecutorial district after the District Attorney announced a declination policy).

¹³³ See Barkow, *supra* note 128, at 549–50.

¹³⁴ See Barkow, *supra* note 128, at 545–49.

¹³⁵ See *infra* Part III.

¹³⁶ TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2019) (“[D]istrict attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom.”).

appeals process in the attorney general.¹³⁷ Still others create joint responsibility for appeals between the state and local levels.¹³⁸

The government's use of criminal appeals and its responses to defense appeals affect the scope of the substantive criminal law and the investigative techniques that the police can pursue. Jurisdictions that allow local prosecutors to control or influence criminal appellate practice give those prosecutors an important voice in setting the boundaries for criminal enforcement. The applications of criminal law that matter the most to local prosecutors will be the ones they assert or defend in the appellate courts. Those appellate priorities of local prosecutors will play out differently in various local districts.

Taking all of these sources of law together, it is clear that each state grants different degrees of independence to its local prosecutors. Some allow prosecutors enormous control over the practical meaning of the criminal law within their own districts, while others limit the prosecutor to choices about the best use of limited resources at the local level. The amount of influence state law gives to local prosecutors over criminal law enforcement priorities tells us this: greater grants of autonomy to local prosecutors strengthen the prosecutor's duty to local voters.

The three factors discussed in this part—large payments for criminal justice from local governments, concentrated local effects of crime, and broad grants of authority under state law to local prosecutors—make the voices of local voters more important. When these factors align, they expand

¹³⁷ MISS. CODE ANN. § 25-31-11(6) (2019) (local prosecutor “shall assist the Attorney General in appeals” from the district to the Mississippi Supreme Court); N.C. GEN. STAT. § 114-2(1) (2019); 74 OKLA. STAT. tit. 74 § 18b (2019) (state attorney general represents state in all criminal cases on appeal); WASH. REV. CODE § 43.10.030 (2020) (“Attorney General shall appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested.”). In some states, the Attorney General recovers from the county government the costs of pursuing the appeal. KAN. STAT. ANN. § 22-3612(a) (2019).

¹³⁸ N.J. STAT. ANN. § 52:17B-107 (2020) (Attorney General “may in his discretion act for any county prosecutor in representing the interests of the State in any and all appeals”); 71 PA. CONS. STAT. § 732-205(c) (2020) (Attorney General “may in his discretion, upon the request of the district attorney, prosecute the appeal”). Interestingly, some state codes grant local prosecutors authority to control appeals in lower-level crimes or in lower-level appellate courts. FLA. R. APP. PROC. 9.140(d)(1)(E) (state attorney for the district represents government in criminal appeals to circuit court); UTAH CODE ANN. § 17-18a-403 (West 2020) (local prosecutor assists Attorney General in appeals to Court of Appeals or Supreme Court, prosecutes appeals alone for crimes charged as misdemeanor or ordinance violation); WIS. STAT. § 978.05(5) (2020) (district attorney “shall represent the state in any appeal or other proceeding if the case is decided by a single court of appeals judge”).

the declination policies that prosecutors can adopt, consistent with their duties to statewide voters.

C. APPLICATIONS

Two applications of this legal framework will reveal more about its contours. The first example looks to a policy that sits near the outer bounds: a declination policy that is legitimate because all the legal characteristics align to strengthen the local prosecutor's hand. The second example involves a declination policy that, in my view, overreaches the local prosecutor's proper authority.

Local prosecutors have adopted all sorts of policies in connection with declination of charges for marijuana possession. Any of them could be justified under the right conditions. Starting at the end of the spectrum that is easiest to support, an office could reaffirm the traditional authority of line prosecutors to decline charges in individual cases, whether based on weak evidence or on the disproportionate effects of a criminal prosecution for the arrestee. A presumption against filing marijuana possession charges, which recognizes the option of filing charges if exceptional circumstances are present, would also be consistent with the prosecutor's duty to state and local polities as long as the prosecutor explains this policy as an effort to redirect resources to activities that could make a bigger impact on local public safety.

A policy one step further along the spectrum would involve a presumption against charges without any linkage to resource questions. Such a policy could be justified in a jurisdiction where the local voters clearly indicate their preference to deemphasize marijuana cases in the criminal courts and where state law leaves great latitude to local prosecutors about charging decisions. Finally, a prosecutor's office might take the final step and enact a mandatory policy against charging for small amounts of marijuana—a step beyond creating a presumption. Such a policy would be legitimate if several conditions were present. First, the local polity should express its desire clearly. Second, state law should treat the possession statute as a peripheral crime designed to strengthen the prosecutor's hand during plea negotiations, a status that can be determined from legislative history and from charging patterns over time. Third, local funding for community safety and security should be robust. Fourth, the crime's impact and the enforcement costs should be concentrated at the local level. Finally, state grants of power to local prosecutors to set local enforcement priorities should

be broad. When these conditions come together, a categorical policy against filing charges under the statute is justifiable.¹³⁹

Enforcement of the death penalty within a district presents local prosecutors with greater limits on their legitimate declination authority. Case-by-case declinations, of course, happen routinely in the death penalty context. Prosecutors decide not to file charges under the capital murder statute and instead prosecute the case under a different homicide provision.¹⁴⁰

Prosecutors also might declare that their office will only pursue capital punishment in the most extreme circumstances, not in every circumstance they believe to be legally justified. This policy amounts to a presumption against filing the charge. A chief prosecutor could properly base this policy on the high cost of death penalty cases, which diverts resources from other cases.¹⁴¹

Local opinion can strengthen the case for a resource-based presumption. If prosecutors raise the question of death penalty charges during the election campaign and raise their concerns about its expense and ineffectiveness as a crime control device in the local district, voters can respond on election day. Similarly, if a prosecutor holds real doubts about the constitutionality of the death penalty as applied, and those doubts have a colorable basis in current law, then refusing to seek the death penalty in cases that would run afoul of the prosecutor's reading of the Constitution would be legitimate.

More problematic, however, are prosecutor policies that declare a categorical refusal to file death penalty cases in the district based on moral objections to capital punishment.¹⁴² It may be true that the local polity

¹³⁹ The same analysis could support declination policies related to other crimes, such as prostitution, statutory rape, and destruction of property. *See* Levine, *supra* note 79, at 1057–87 (documenting changes in enforcement patterns for statutory rape laws).

¹⁴⁰ *See* MARC L. MILLER, RONALD F. WRIGHT, JENIA I. TURNER, KAY L. LEVINE, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS* 132–35 (6th ed. 2019) (reprinting office policy for Florida prosecutor's office relating to selection of charges in homicide cases).

¹⁴¹ *See* Brandon L. Garrett, Alexander Jakubow & Ankur Desai, *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 594, 614 (2017); Maurice Chammah, *The Price of Death: Why Capital Punishment Cases Are in Steep Decline, Even in Texas*, SLATE (Dec. 17, 2014, 8:00 AM), <https://slate.com/news-and-politics/2014/12/death-penalty-cost-prosecutors-in-rural-counties-cant-afford-to-bring-capital-cases.html> [perma.cc/ns4h-e7kp].

¹⁴² Katie Mettler, *Florida Prosecutor Refuses to Seek Death Penalty for Alleged Cop Killer, Defies Gov. Rick Scott's Order to Step Aside*, WASH. POST (Mar. 21, 2017, 4:50 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/21/floridas-first-black-prosecutor-a-death-penalty-boycotter-defies-gov-rick-scott/> [perma.cc/gyf4-ghxt]; Bill Rankin, *Fulton DA, Two Challengers Commit to Not Seeking the Death Penalty*, ATLANTA J.-

opposes capital punishment, but a local majority cannot override a statewide majority on the moral propriety of the death penalty. A categorical declination policy based on moral grounds allows a local majority to override a statewide majority on the legal force of the state statute. That is not a question the state grants to the local polity.¹⁴³

CONCLUSION

There is no single answer to the proper scope of the prosecutor's declination policy. Prosecutors in the United States differ.¹⁴⁴ The separation of powers doctrine is relevant when setting the boundary, as are the various sources of law that mark the prosecutor's competing duties to state and local polities.

Particular bodies of law and legal practices define the prosecutor's competing loyalties to the statewide and local polities. The relevant indicators include appropriations of public funds for prosecutor positions and court operations, the legislative history and typical uses of the criminal statute or ordinance the prosecutor might enforce, distinctive local effects of crime and enforcement patterns, home rule provisions in state statutes and constitutions, and the statutory authority of state-level offices (the governor or the state attorney general) to file or take control of criminal cases without an invitation from the local elected prosecutor.

At the same time, the proper scope of declination authority does not vary individually from prosecutor to prosecutor. The proper limits apply to each prosecutor's office as a whole. They are based on legal characteristics of the office, conditions in the local community, and the relevant categories of cases rather than individual preferences of the chief prosecutor or the line prosecutors.

The views of local voters can expand the legitimate range of a prosecutor's declination policy, but only if state law allows room for local views. In most jurisdictions, state law does leave an opening for local input to guide the prosecutor's choice of charges. Expansive criminal codes, limited state funding for prosecutors, and the influence of local contributions to prosecutor and court funding produce a scheme in which both levels of

CONST. (May 28, 2020), <https://www.ajc.com/news/local/fulton-two-challengers-commit-not-seeking-the-death-penalty/7sfZRVL5ngc3eRf9Xo2MgJ/> [perma.cc/h5fd-dnwe].

¹⁴³ In *Ayala v. Scott*, 224 So. 3d 755, 758–59 (Fla. 2017), the court reached the correct outcome for overly broad reasons, namely, that refusals to enforce the death penalty apart from case-by-case determinations fall outside the traditional bounds of prosecutorial discretion.

¹⁴⁴ See Ronald F. Wright, Kay L. Levine, & Marc L. Miller, *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y 27, 34–37 (2015) (reviewing empirical studies documenting structural differences in prosecutor offices).

government matter. As a result, different charging priorities take shape for various local offices.

State law can direct the prosecutor to ignore the wishes of local voters in limited circumstances: those few sections of the criminal code that express the core moral values of statewide voters, where limited resources do not provide a basis to redirect such cases to the back of the line. These situations are rare. Far more often, the best practice for a prosecutor is to listen to both state and local politics and to set local charging policies that account for the legitimate input of both.