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Constitutional Law: Faithful Execution in the Fifty States

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Constitutional Law

Faithful Execution in the Fifty States

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Acute political conflicts have arisen recently over the scope of prosecutorial discretion. For decades, if not longer, prosecutors generally presented themselves as humble servants of the public will, as reflected in legislation, even as they exercised enormous discretion in practice. Within roughly the past decade, however, this model of the prosecutorial role has eroded, giving way to a different model in which prosecutors actively reshape the operative law in their jurisdictions by openly suspending enforcement of disfavored statutes. Employed at the federal level in high-profile policies relating to marijuana regulation, immigration, and the Affordable Care Act, this model has since become a hallmark of self-described "progressive prosecutors" who have won office in local jurisdictions across the country. Among other reforms, these prosecutors have announced policies suspending enforcement of laws forbidding drug possession, petty theft, shoplifting, prostitution, and other crimes.

This approach to prosecutorial authority, which I call "categorical nonenforcement," has sparked a heated, nationwide controversy, with some celebrating the shift and others decrying it as inviting lawlessness. Yet this debate has been remarkably disconnected from the actual law governing the question. Far from prescribing a common model of prosecutorial authority, as much commentary has presumed, the laws of the federal government and the fifty states vary widely regarding the degree of enforcement discretion and autonomy for local prosecutors.

At the federal level, although enforcement discretion is central to federal criminal law and other areas of regulation, separation-of-powers provisions, including the President's constitutional duty to "take Care that the Laws be faithfully executed,"[2] place important

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[1] Excerpted and adapted from Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651 (2023).

[2] U.S. CONST. art. II, § 3.

limits on categorical nonenforcement.[3] At the state level, states nearly uniformly impose similar obligations of faithful execution on their governors, suggesting that state law likewise constrains categorical nonenforcement of state laws. Yet nearly every state also provides for locally elected prosecutors, a choice that may permit varied prosecutorial approaches based on local democratic preferences, and state laws vary widely in the degree of authority and autonomy they afford to those prosecutors. Whether categorical nonenforcement is permissible in any given jurisdiction should turn on these features of state law and not generalized abstractions or federally derived assumptions about the separation of powers.

Attention to state law reveals that the fifty states can be placed along a spectrum with respect to their relative hostility to categorical nonenforcement by local prosecutors. At one extreme, Massachusetts's constitution forbids "suspending . . . the execution of the laws;"[4] California's constitution obligates the state Attorney General to "to see that the laws of the State are uniformly and adequately enforced;"[5] and North Dakota's Supreme Court has held that local prosecutors "may not effectively repeal a law by failing to prosecute a class of offenses."[6] Laws in these states and others like them are at odds with presuming any categorical nonenforcement power at all, let alone one vested in locally elected officials.

By contrast, at the other end of the spectrum, both heavily Republican Mississippi[7] and heavily Democratic Illinois[8] limit

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[3] *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 769 (2014).

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

[5] CAL. CONST. art. V, § 13.

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

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

[8] *See* 55 ILL. COMP. STAT. 5/3-9005(a)(1) ("The duty of each State's Attorney shall be . . . [t]o commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for

centralized oversight of local prosecutors in ways that effectively guarantee broad local discretion over nonenforcement. Mississippi, in particular, allows state-level officials to intervene only to assist in local prosecutions; under its law, "[i]ntervention of the attorney general into the independent discretion of a local district attorney regarding whether or not to prosecute a criminal case constitutes an impermissible diminution of the statutory power of the district attorney."[9] As a practical matter, such autonomy makes local categorical nonenforcement possible, if not specifically authorized.

Between these extremes is a variety of intermediate choices. Some states grant state-level officials broad authority to override local-prosecutorial choices but impose no duty to exercise this authority in any particular circumstances—an arrangement that effectively leaves categorical nonenforcement to a political tug-of-war between local and state-level officials.[10] Others allow state-

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the county, in which the people of the State or county may be concerned."); Rifkin v. Bear Stearns & Co., 831 N.E.2d 563, 570 (Ill. 2005) (rejecting arguments that the legislature could "reduce a State's Attorney's constitutionally derived power to direct the legal affairs of the county").

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

[10] *See, e.g.*, COLO. REV. STAT. § 24-31-101(1)(b) (obligating the state Attorney General to "appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor"); ME. REV. STAT. tit. 5, § 199 ("The Attorney General [who is appointed by the legislature] may, in the Attorney General's discretion, act in place of or with the district attorneys, or any of them, in instituting and conducting prosecutions for crime, and is invested, for that purpose, with all the rights, powers and privileges of each and all of them."); MINN. STAT. § 8.01 (allowing the Attorney General to appear in local criminal cases at the local county attorney's request and further providing that "[w]henever the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney"); N.M. STAT. § 8-5-2(B) ("[T]he attorney general shall . . . prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor."); S.D. CODIFIED L. § 1-11-1(2) (establishing the state Attorney General's duty, "[w]hen requested by the Governor or

level officials to supersede local prosecutors, but only in limited circumstances.[11] These institutional arrangements afford local prosecutors greater freedom to adopt categorical nonenforcement policies, within certain limits.

These varied positive laws should govern whether categorical nonenforcement violates some duty of faithful execution on the part of local prosecutors or state officials. Just as the proper extent of federal prosecutorial discretion presents a question of federal separation of powers, so, too, does the extent of local prosecutorial discretion present a question of state and local positive law. Going forward, debates over categorical nonenforcement's legality should focus on the particular laws governing the question in a particular state, without presuming any uniform nationwide understanding of faithful execution.

Attending to governing state laws and constitutional provisions could help resolve current debates over prosecutorial authority in a more grounded and dispassionate matter. Doing so also could help forestall unintended consequences of current prosecutorial approaches. Though associated for the moment with progressive politics and criminal-justice reform, broad theories of prosecutorial discretion can enable law-enforcement officials to pursue any number of policy aims. Theories employed today to justify relaxed

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either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested").

[11] *See, e.g.*, LA. CONST. art. IV, § 8 (generally allowing the state Attorney General to prosecute local cases only if requested by the district attorney or "for cause, when authorized by the court which would have original jurisdiction and subject to judicial review"); PA. CONSOL. STAT. tit. 71, § 732-205(a) (generally allowing the Pennsylvania Attorney General to pursue criminal charges in place of a district attorney only if the Attorney General petitions a court and "establishes by a preponderance of the evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion"); WYO. STAT. § 9-1-603(c) (generally allowing allows the state-wide Attorney General to prosecute particular crimes when the local elected district or county attorney fails to act and the Attorney General receives a request from "the board of county commissioners of the county involved or of the district judge of the judicial district involved").

prohibitions on marijuana, prostitution, and petty theft can be used tomorrow to eliminate gun controls, voter protections, or public-health requirements, not to mention federal pollution limits, consumer protections, or banking regulations.

In any given state, such local policies should stand or fall together. By the same token, however, upholding categorical nonenforcement in one jurisdiction need not mean blessing it in others. The Constitution's federalist structure should enable not only varied policies and approaches to criminal justice but also varied institutional arrangements and understandings of prosecutorial discretion. Attending to each state's particular laws could help lower the stakes in any particular controversy over prosecutorial policy.

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

How to balance these competing harms is an important policy question. But it is also a question of legal and institutional authority that different jurisdictions may answer differently. Although federal law does not allow a general practice of categorical nonenforcement, state governments differ both from each other and from the federal government in their organization. These varied

state arrangements make local categorical nonenforcement plausible in some states, implausible in others, and potentially up for grabs in still others. To enable federalist experimentation and strengthen state constitutionalism—and because it is what the law requires—we should give effect to these differences. In criminal law, the states follow no uniform model of faithful execution, and public debates should not presume that they do.

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