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Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials

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DISCRETION VERSUS SUPERSESSION: CALIBRATING THE POWER BALANCE BETWEEN LOCAL PROSECUTORS AND STATE OFFICIALS[†]

ABSTRACT

Driven by shifts in public opinion, reform-minded prosecutors recently have unseated “tough-on-crime” incumbent prosecutors in local elections all across the United States. As these reformers institute more liberal prosecution policies, the “tough-on-crime” legal establishment in their states will be tempted to rely on laws allowing state officials to supersede local prosecutors.

This Comment identifies the landscape in which supersession efforts will likely take place and offers a view as to the best way to calibrate local and state decision-making on this terrain. It first reviews the range of supersession laws that presently exist in the United States. It then singles out one state’s supersession regime—Pennsylvania’s—as striking the right balance between local discretion and state oversight, and advocates for its adoption in other states to both preserve prosecutorial discretion and prevent illegitimate prosecutorial abuses of power.

[†] This Comment received the Myron Penn Laughlin Award for Excellence in Legal Research and Writing.

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INTRODUCTION

On January 14, 2017, Markeith Loyd was arrested for murdering Sade Dixon, his pregnant ex-girlfriend, and Orlando Police Lieutenant Debra Clayton.¹ A month later, Loyd was indicted by a grand jury on two counts of first-degree murder.² Aramis Ayala, the recently-elected local prosecutor in Orlando, announced at a hastily arranged press conference that she would not seek the death penalty against Loyd.³ But Ayala went one step further, announcing that her office would not seek the death penalty against *any* defendants:

While I currently do have discretion to pursue death sentences, I have determined that doing so is not in the best interest of this community, or the best interest of justice. After careful review and consideration of the new statute, under my administration, I will not be seeking [the] death penalty in [the] cases handled in my office.⁴

Just hours after Ayala's press conference, Florida Governor Rick Scott issued an executive order reassigning Loyd's case from Ayala's office to that of Brad King,⁵ the local prosecutor for a neighboring judicial circuit known for his strong support for the death penalty.⁶ Scott relied on a century-old and rarely-used provision in Florida law allowing him to reassign cases from one state attorney to another for a "good and sufficient reason."⁷ Ayala challenged Scott's

¹ Caitlin Doombos & Gal Tziperman Lotan, *Markeith Loyd Indicted on First-Degree Murder Charges*, ORLANDO SENTINEL (Feb. 15, 2017, 4:50 PM), <http://www.orlandosentinel.com/news/markeith-loyd/os-markeith-loyd-state-attorney-20170215-story.html>.

² *Id.* Aramis Ayala later asserted that her statement did *not* foreclose the possibility of seeking the death penalty in the future. Emergency Non-Routine Petition, *infra* note 6, at 10.

³ Joe Burbank, *Orange-Osceola State Attorney Says She Will No Longer Pursue Death Penalty in Any Case*, ORLANDO SENTINEL (Mar. 16, 2017), <http://www.orlandosentinel.com/news/politics/92813296-132.html>.

⁴ *Id.* (quote transcribed from video).

⁵ Fla. Exec. Order No. 17-66 (Mar. 16, 2017), http://www.flgov.com/wp-content/uploads/orders/2017/EO_17-66.pdf.

⁶ Emergency Non-Routine Petition for Writ of *Quo Warranto* at 11 n.16, *Ayala v. Scott*, 224 So.3d 755 (Fla. 2017) (No. SC17-653) ("Scott's pick of . . . Brad King was not just based on the proximity of the Judicial Circuits. King testified before the Florida Legislature in January 2016 against legislation that would require unanimous juries in death penalty cases because he believed that unanimous juries made it too difficult to obtain death sentences.") (citation omitted); Dara Kam, *Ayala's Decision Spurs Debate on Death Penalty*, ORLANDO SENTINEL (Mar. 27, 2017, 10:10 AM), <http://www.orlandosentinel.com/news/politics/political-pulse/os-ayala-death-penalty-debate-20170327-story.html>.

⁷ FLA. STAT. ANN. § 27.14(1) (West 2014); Kam, *supra* note 6.

action in court,⁸ seeking a writ of *quo warranto* from the Supreme Court of Florida.⁹

The court first noted that it would apply a standard of review analogous to abuse of discretion to Scott's Executive Order.¹⁰ It then held that, because the Executive Order was based on "Ayala's blanket refusal to pursue the death penalty in any case," despite Florida law authorizing her to do so, the order was not an abuse of the Governor's discretion.¹¹ In other words, Governor Scott permissibly removed the case from Ayala's office.¹² After the ruling was handed down, Ayala agreed to pursue the death penalty in future cases.¹³

The Florida statute, Ayala's decision, and Governor Scott's response present an apt case study of the relationship between local prosecutors,¹⁴ state officials,¹⁵ and the laws that govern their interactions. Despite a near-universal acknowledgment that local prosecutors possess a great degree of discretion in deciding which cases to prosecute and which to dismiss, virtually every state has a law that empowers the supersession of local prosecutors by state officials.¹⁶ Though few of these laws have ever actually been used to supersede local

⁸ Gal Tziperman Lotan, *State Attorney Ayala Files Lawsuit Against Gov. Scott in Death Penalty Cases*, ORLANDO SENTINEL (Apr. 11, 2017, 6:10 PM), <http://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-rick-scott-death-penalty-lawsuit-20170410-story.html>.

⁹ *Ayala v. Scott*, 224 So.3d 755, 756 (Fla. 2017). A writ of *quo warranto* is "[a] common-law writ used to inquire into the authority by which a public office is held . . ." *Quo Warranto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁰ *Ayala*, 224 So.3d at 758.

¹¹ *Id.* at 758. Ayala, however, argued that in her press conference, *supra* note 4, she acknowledged that she was not refusing to ever seek the death penalty, merely that Loyd's case did not merit it. Emergency Non-Routine Petition, *supra* note 6, at 10 (" . . . Ayala made clear that she had not uniformly ruled out seeking the death penalty, and that, among other things, '[t]here may be cases, even active ones, that I think the death penalty may be appropriate because of the egregiousness of the offense.'").

¹² *Ayala*, 224 So.3d at 759.

¹³ Monivette Cordeiro, *State Attorney Aramis Ayala Agrees to Pursue Death Penalty in Future*, ORLANDO WEEKLY: BLOGGYTOWN (Sept. 2, 2017, 12:33 PM), <https://www.orlandoweekly.com/Blogs/archives/2017/09/02/state-attorney-aramis-ayala-agrees-to-pursue-death-penalty-in-future>. Notwithstanding her previous declaration "that she had not uniformly ruled out seeking the death penalty," Emergency Non-Routine Petition, *supra* note 6, at 10, Ayala created a "death penalty review panel," made up of seven prosecutors who must unanimously agree for her office to pursue the death penalty. Cordeiro, *supra*.

¹⁴ The term "local prosecutor" will be used in lieu of each state's specific name for their local prosecutor, given the lack of uniformity among the names. Depending on the state, a local prosecutor is called either a commonwealth's attorney, county attorney, county prosecutor, solicitor, district attorney, district attorney general, prosecuting attorney, state attorney, or state's attorney. GEORGE COPPOLO, STATES THAT ELECT THEIR CHIEF PROSECUTORS (2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm>.

¹⁵ "State official" usually refers to the Attorney General. However, the term can also refer to the Governor, another state official, or a collective group of state actors, like a legislature or executive cabinet.

¹⁶ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545–50 (2011); *see infra* Part II.

prosecutors,¹⁷ the point remains that, as long as they are on the books, they *could* be used—and there is a risk that they will be used more often in the not-so-distant future. As liberal, urban communities increasingly elect reform-minded prosecutors like Ayala, the criminal justice establishment likely will use supersession with greater frequency, potentially challenging traditional notions of prosecutorial discretion and democratic accountability.

This Comment explains the shift in public opinion that has led to the election of reformist prosecutors and what this shift means practically for the balance of power between state and local officials. It then presents a broad overview of statutory regimes of supersession and advocates for the nationwide adoption of a workable standard—specifically, an abuse of discretion standard modeled on Pennsylvania’s current law—that respects both prosecutorial discretion and the best interests of justice.

Part I begins by exploring recent trends in public opinion concerning criminal justice and later explains how shifting public opinion can affect the decisions made by local prosecutors. This Comment argues that, as public opinion favors criminal justice reform over the “tough-on-crime” approach that dominated from the 1960s through the 1990s, reform-minded prosecutors are more likely to be elected now than in years past, especially in liberal, urban areas. Further, this trend toward electing reformist prosecutors, who will enter office with tendencies like those of Aramis Ayala, might provoke state officials’ usage of state laws enabling supersession.¹⁸

Next, Part II surveys the constitutions and statutes of all fifty states for provisions pertaining to the discretion of local prosecutors and the ability of state officials to supersede or direct them. Virtually all states have laws governing the supersession or direction of local prosecutors by state officials (or, in some rare cases, by local officials and even by members of the public) though it is exceedingly rare that these laws are ever used or studied. This Comment makes a meaningful scholastic contribution by organizing, for the first time, these constitutional and statutory provisions into five discrete categories based on common features. Within each category, these provisions are further subdivided, depending on their statutory language and state court interpretations, if available.

¹⁷ Barkow, *supra* note 16, at 545.

¹⁸ Given that many of these newly-elected, reform-minded local prosecutors are winning elections in liberal constituencies located in otherwise conservative states, this Comment assumes that the prosecutors in question are generally more reform-minded than the statewide officials authorized to supersede them.

Finally, Part III grapples with the problem identified in Part I and proposes a solution. It suggests the adoption of a new model governing supersession and direction to prevent the anticipated erosion of local prosecutorial discretion. Specifically, this Comment advocates for a model permitting supersession of a local prosecutor only if a court finds that her action or inaction constitutes an abuse of discretion—in other words, a modified version of Pennsylvania’s supersession statute.¹⁹ This Comment argues that the principles of democratic accountability and the degree to which prosecutors and the criminal justice system are insulated from political pressure favor a model that generally defers to the discretion of local prosecutors.

I. CHANGES IN PUBLIC OPINION AND PREDICTIONS FOR THE FUTURE

To get a sense of why reform-minded candidates like Aramis Ayala are increasingly winning local prosecutorial elections, this Part begins by exploring the dramatic shift in public opinion occurring over the last fifty years. Section A briefly reviews the roots of “tough-on-crime” policies and explains why those policies have fallen out of favor in the last decade. Section B provides several case studies, focusing on various reformers elected in high-profile prosecutorial elections. This Part concludes in section C by detailing some of the early actions of these newly-elected prosecutors and the subsequent responses from the “tough-on-crime” legal establishment.

A. *Introduction and Overview*

Americans began to favor harsher criminal justice policies starting in the early 1960s, when crime rates first began to rise.²⁰ While some crime statistics were deliberately exaggerated for political purposes,²¹ public opinion dramatically shifted as a result. A backlash to the events of the 1960s and 1970s—including the nascent Civil Rights Movement,²² the Warren Court’s liberal criminal justice decisions that “restricted the authority of the police” and

¹⁹ *Infra* notes 172–73, 183–86 and accompanying text.

²⁰ NAT’L RES. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 111 (Jeremy Travis & Bruce Western eds., 2014).

²¹ *See id.* at 114 (“For example, [U.S. Attorney General] Nicholas Katzenbach . . . maintained that the crime figures were inconclusive and that false information about crime often intimidated or misled the general public.”).

²² Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 *BERKELEY J. AFR.-AM. L. & POL’Y* 3, 10–11 (2013).

were considered “soft on crime,”²³ the era’s protest culture,²⁴ and a growing perception of social disorder and lawlessness²⁵—pushed many Americans to favor “tough-on-crime” policies,²⁶ even as the rate of crime decreased in the 1990s.²⁷

This public opinion shift advantaged presidential candidates who successfully tapped into this public discontent, like Richard Nixon and Ronald Reagan,²⁸ and soon the federal government forcefully responded to the perception of lawlessness. President Nixon launched the “War on Drugs” in 1971.²⁹ This was followed by, among other things, the creation of strict mandatory minimums for drug crimes,³⁰ the passage of “three strikes” laws,³¹ the emergence of legislative schemes to try minor criminal defendants as adults,³² and an overall rise in incarceration.³³

But since the Obama administration, public support for “tough-on-crime” policies has sharply decreased and pressure for reform has increased. Recent polling shows that Americans favor reduced sentences for drug offenders, an end to mandatory minimum sentencing, and a focus on rehabilitation instead of incarceration.³⁴ While it is difficult to isolate just one factor to explain or demonstrate this shift in public opinion, some of the most influential forces have been the Black Lives Matter movement,³⁵ the successful state-level campaigns

²³ NAT’L RES. COUNCIL, *supra* note 20, at 114–15.

²⁴ Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1032 (2010) (“To a certain extent, popular anxiety about social disorganization reflected numerous nonracial factors, whether the economy, protests against the Viet Nam war, political mobilization on college campuses, the counter-culture movement generally, or the sense of social crisis engendered for many by the demands for women’s and gay rights.”)

²⁵ *Id.*

²⁶ Newell, *supra* note 22, at 12.

²⁷ NAT’L RES. COUNCIL, *supra* note 20, at 111; Joanna Shepherd, *Blakely’s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L.J. 533, 569 (2007).

²⁸ Newell, *supra* note 22, at 14–18.

²⁹ NAT’L RES. COUNCIL, *supra* note 20, at 119.

³⁰ *See id.*

³¹ *See generally* JENNIFER E. WALSH, THREE STRIKES LAWS: HISTORICAL GUIDES TO CONTROVERSIAL ISSUES IN AMERICA 31–54 (2007).

³² *See* Katherine L. Evans, Comment, *Trying Juveniles as Adults: Is the Short Term Gain of Retribution Outweighed by the Long Term Effects on Society?*, 62 MISS. L.J. 95, 100–07 (1992).

³³ Haney López, *supra* note 24, at 1029–30.

³⁴ *See Voters Want Big Changes in Federal Sentencing, Prison System*, PEW CHARITABLE TRS. (Feb. 12, 2016), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/02/12/voters-want-changes-in-federal-sentencing-prison-system>.

³⁵ Gardiner Harris, *Obama, Pushing Criminal Justice Reform, Defends ‘Black Lives Matter’*, N.Y. TIMES (Oct. 22, 2015), <https://www.nytimes.com/2015/10/23/us/politics/obama-in-call-for-reform-defends-the-black-lives-matter-movement.html>.

to legalize cannabis,³⁶ increased opposition to the death penalty,³⁷ record-breaking rates of incarceration,³⁸ and an overall decrease in crime in recent decades.³⁹ Today, politicians are increasingly comfortable supporting criminal justice reform at the expense of “tough-on-crime” policies,⁴⁰ and the rhetoric of these newfound reformers is remarkably similar to the rhetoric of liberals in the 1960s who first responded to the “War on Crime.”⁴¹ Some conservatives have also advocated for criminal justice reform, but have used rhetoric that emphasizes fiscal conservatism rather than concepts of fairness or justice.⁴² The dramatic shift in public opinion—coupled with the change in elected officials’ rhetoric—has led to a number of interesting trends in elections, most notably in local prosecutorial elections.

B. Electoral Consequences of the Shift in Public Opinion

In recent years, criminal justice reform has played a large role in elections at every level—including municipal elections,⁴³ sheriff elections,⁴⁴ state

³⁶ Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Jan. 5, 2018), <http://www.pewresearch.org/fact-tank/2018/01/05/americans-support-marijuana-legalization/>. The term “marijuana” likely originated “to demonize the drug with a foreign-sounding name,” playing on American xenophobic sentiment. SPANISH WORD HISTORIES AND MYSTERIES: ENGLISH WORDS THAT COME FROM SPANISH 142 (Editors of the American Heritage Dictionaries ed., 2007). Accordingly, this Comment uses the term “cannabis.”

³⁷ German Lopez, *Opposition to the Death Penalty Is at Its Highest Point Since 1972*, VOX (Oct. 1, 2016, 10:00 AM), <https://www.vox.com/identities/2016/10/1/13123620/death-penalty-survey>.

³⁸ Haney López, *supra* note 24, at 1029–30.

³⁹ Matt Ford, *What Caused the Great Crime Decline in the U.S.?*, ATLANTIC (April 15, 2016), <https://www.theatlantic.com/politics/archive/2016/04/what-caused-the-crime-decline/477408/>.

⁴⁰ *See infra* notes 79–82 and accompanying text.

⁴¹ Generally, liberals treated rising crime as a “race and civil rights problem, suggesting that entrenched segregation had created black cultural dysfunction and social disorder that, among other things, contributed to higher crime rates in urban areas.” NAT’L RES. COUNCIL, *supra* note 20, at 114. In his initial response to increased crime, President Lyndon Johnson linked the “War on Crime” to the “War on Poverty” and the “need to address the ‘root causes’ of crime.” *Id.* at 109. Vice President Hubert Humphrey, the 1968 Democratic nominee for President, pledged to “build a new school for every new prison promised by Nixon,” citing the relationship between poverty and crime. Newell, *supra* note 22, at 16.

⁴² Richard A. Viguerie, *Opinion, A Conservative Case for Prison Reform*, N.Y. TIMES (June 9, 2013), <http://www.nytimes.com/2013/06/10/opinion/a-conservative-case-for-prison-reform.html>.

⁴³ *E.g.*, Daniel Denvir, *How #BlackLivesMatter Is Changing the Philadelphia Mayor’s Race*, CITYLAB (May 13, 2015), <https://www.citylab.com/equity/2015/05/how-blacklivesmatter-is-changing-the-philadelphia-mayors-race/392978/> (noting that in the Philadelphia mayoral race, the leading candidates positioned themselves as criminal justice reformers, despite mixed records).

⁴⁴ David A. Graham, *Incumbents Are Out and a New Democrat Is In*, ATLANTIC (May 9, 2018), <https://www.theatlantic.com/politics/archive/2018/05/grassroots-criminal-justice-in-north-carolina/560015/> (noting that two North Carolina sheriffs—Irwin Carmichael in Charlotte and Mike Andrews in Durham—lost re-election in part because of their “‘friendly’ relationship with Immigration and Customs Enforcement”). Historically, elections for sheriff have not served as a “meaningful accountability mechanism” on sheriffs’ powers, in part because of low voter turnout, high incumbent retention, and sheriffs’ lack of engagement with

elections,⁴⁵ and the 2016 Democratic presidential primary.⁴⁶ But the most interesting and relevant trend for this Comment is the success of criminal justice reformers in local prosecutorial elections. Voters, especially those in liberal, urban communities, have increasingly elected reform-minded prosecutors to replace “tough-on-crime” incumbents. This section examines some of the most high-profile prosecutorial elections, focusing on the winning candidates’ campaigns, their actions in office, and the response by the more traditional, “tough-on-crime” legal establishment.

Reform-minded prosecutors across the United States usually campaign as “true believers” of criminal justice reform, but with varying degrees of consistency and radicalism. Marilyn Mosby, for example, was elected Baltimore City state’s attorney in 2014 on a “reform-lite” platform.⁴⁷ She blended support for police accountability and civil rights⁴⁸ with more traditional, “tough on crime” rhetoric.⁴⁹

Other successful challengers were more vocal in their support for criminal justice reform. Following the shooting of Laquan McDonald in Chicago, Black Lives Matter activists criticized Cook County State’s Attorney Anita Alvarez for waiting 13 months to bring charges against the officer who shot him.⁵⁰ Kim Foxx subsequently ran against Alvarez in the 2016 Democratic primary as a

their communities. James Tomberlin, Note, “*Don’t Elect Me*”: *Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 142–44 (2018). But despite this historical trend, elections for sheriff “seem to be part of a grassroots push for criminal-justice reform at the local ballot box,” with several prominent sheriffs losing re-election. David A. Graham, *The End of the David Clarke Era*, ATLANTIC (Aug. 15, 2018), <https://www.theatlantic.com/politics/archive/2018/08/david-clarke-era-milwaukee-sheriff/567595/>.

⁴⁵ E.g., Christopher Cadelago, *California Gubernatorial Candidates Share Views on Criminal Justice Changes*, SACRAMENTO BEE (Apr. 4, 2017, 5:02 PM), <http://www.sacbee.com/news/politics-government/capitol-alert/article142719649.html> (noting that the leading Democratic candidates for Governor of California campaigned on their criminal justice reform platforms).

⁴⁶ Vanessa Williams, *1994 Crime Bill Haunts Clinton and Sanders as Criminal Justice Reform Rises to Top in Democratic Contest*, WASH. POST (Feb. 12, 2016, 6:26 PM), https://www.washingtonpost.com/news/post-politics/wp/2016/02/12/1994-crime-bill-haunts-clinton-and-sanders-as-criminal-justice-reform-rises-to-top-in-democratic-contest/?utm_term=.f30570652b4f.

⁴⁷ See Luke Broadwater, *Mosby’s Focus on Crime Helped Unseat Bernstein*, BALT. SUN (June 25, 2014, 8:38 PM), <http://www.baltimoresun.com/sports/bs-md-ci-mosby-analysis-20140625-story.html>.

⁴⁸ Elizabeth Chuck, *Meet Marilyn Mosby, the Woman Overseeing the Gray Investigation*, MSNBC (Apr. 30, 2015, 3:32 PM), <http://www.msnbc.com/msnbc/meet-marilyn-mosby-overseeing-freddie-gray-investigation>.

⁴⁹ Ian Duncan, *Four Years in, Bernstein in Primary Fight for Re-election with Mosby*, BALT. SUN (June 14, 2014, 9:38 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-states-attorney-election-20140613-story.html>.

⁵⁰ Kim Bellware, *Black Lives Matter Movement Notches Major Win in Chicago Race*, HUFFINGTON POST (Mar. 15, 2016, 9:43 PM), https://www.huffingtonpost.com/entry/kim-foxx-chicago_us_56e8a607e4b065e2e3d7ed65.

progressive challenger.⁵¹ She altered Mosby's playbook by dropping any pretense of being a "tough-on-crime" candidate.⁵² Foxx instead campaigned on "diverting low level drug offenders into treatment," reversing wrongful convictions, prosecuting police brutality, and ending the practice of charging students for schoolyard fights.⁵³ Alvarez, meanwhile, claimed the "tough-on-crime" mantle for herself.⁵⁴ Foxx ended up easily defeating Alvarez in a nearly thirty-point landslide.⁵⁵ Kim Ogg, the Democratic nominee for District Attorney in Houston the same year, followed Foxx's lead and centered her campaign on a pledge to not prosecute low-level cannabis possession charges.⁵⁶ Ogg's victory in the general election was striking, given that her Republican opponent, the incumbent prosecutor, had already relaxed the criminal prosecution of first-time drug offenders.⁵⁷

Larry Krasner, who was elected Philadelphia District Attorney in 2017, built on the successes of reformers in other municipalities and proposed an even more radical platform. He pledged to not pursue the death penalty, to not seek cash bail for "nonviolent offenders," to emphasize diversion programs and drug courts, and "to end mass incarceration by effectively starving the criminal-justice system" of defendants.⁵⁸ Krasner's campaign promises concerned the city's police union, which opposed his candidacy and instead supported his Republican opponent.⁵⁹

In each of these four instances, the newly-elected reformers made good on their promises while in office. In Baltimore, after the death of Freddie Gray in the custody of the city police department, Marilyn Mosby swiftly—and

⁵¹ John Byrne & Hal Dardick, *Foxx: Cook County State's Attorney Win About 'Turning the Page'*, CHI. TRIB. (Mar. 16, 2016, 7:05 AM), <http://www.chicagotribune.com/news/local/politics/ct-cook-county-states-attorney-anita-alvarez-kim-foxx-met-0316-20160315-story.html>.

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Brian Rogers et al., *Anderson Defeated in Harris County DA Race*, HOUS. CHRON. (Nov. 8, 2016, 10:40 PM), <https://www.chron.com/news/politics/houston/article/Anderson-defeated-in-Harris-County-DA-race-10602957.php>; Brian Rogers, *DA Hopeful Would Reduce Drug Penalties*, HOUS. CHRON. (Jan. 20, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/DA-hopeful-would-reduce-drug-penalties-6770424.php>.

⁵⁷ Rogers, *Anderson Defeated in Harris County DA Race*, *supra* note 56.

⁵⁸ Maura Ewing, *The Progressive Civil-Rights Lawyer Philadelphia Wants for District Attorney*, ATLANTIC (May 16, 2017), <https://www.theatlantic.com/politics/archive/2017/05/philadelphia-district-attorney-election-reform/526812/>.

⁵⁹ Chris Brennan, *If Krasner Wins Race for DA, Fans and Critics Expect Disruption*, PHILA. INQUIRER (Oct. 25, 2017, 3:01 AM), <http://www.philly.com/philly/news/politics/philadelphia-da-krasner-police-misconduct-crime-soros-20171024.html>.

controversially—charged the responsible police officers with manslaughter.⁶⁰ Kim Foxx implemented bail reform and worked to end over charging of defendants in Chicago.⁶¹ And in Houston, Kim Ogg allowed those caught with small amounts of cannabis “the chance to take a drug education class instead of being arrested.”⁶²

Larry Krasner, the recently-elected Philadelphia district attorney, has pursued the boldest reforms of the four. Within a month of his inauguration, he indicated that he would end his office’s twenty-year trend of refraining from prosecuting police officers for fatal shootings,⁶³ fired thirty-one prosecutors and brought in like-minded reformers,⁶⁴ dropped all pending cannabis possession charges,⁶⁵ and directed his prosecutors to justify the cost of incarceration when pursuing it at sentencing.⁶⁶

This transformation in prosecutorial behavior runs hand in hand with a changing formula for success in local prosecutorial elections. The tone and talking points of many prosecutors’ campaigns indicate that they increasingly

⁶⁰ Alan Blinder & Richard Pérez-Peña, *6 Baltimore Police Officers Charged in Freddie Gray Death*, N.Y. TIMES (May 1, 2015), <https://www.nytimes.com/2015/05/02/us/freddie-gray-autopsy-report-given-to-baltimore-prosecutors.html>. Despite Mosby’s efforts, however, the officers were ultimately found not guilty on all counts, and they did not face federal charges, either. Rebecca R. Ruiz, *Baltimore Officers Will Face No Federal Charges in Death of Freddie Gray*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/us/freddie-gray-baltimore-police-federal-charges.html>.

⁶¹ Curtis Black, *Where Does Criminal Justice Reform Stand One Year After Kim Foxx Elected?*, CHI. REP. (Dec. 7, 2017), <http://www.chicagoreporter.com/where-does-criminal-justice-reform-stand-one-year-after-kim-foxx-elected/>. These changes notwithstanding, some activists have argued that Foxx has not moved quickly enough to implement her campaign promises. *Id.*

⁶² Tom Dart, *Houston’s New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017, 7:00 PM), <https://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas>.

⁶³ Mensah M. Dean, *DA Krasner on Lack of Charges in Police Shootings: ‘This Ain’t Fair, This is Biased’*, PHILA. INQUIRER (Jan. 12, 2018, 5:31 PM), <http://www.philly.com/philly/news/crime/da-krasner-on-lack-of-charges-in-police-shootings-this-aint-fair-this-is-a-bias-20180112.html>.

⁶⁴ See Phillip Jackson, *Larry Krasner Introduces New Leadership Team*, PHILA. TRIB. (Jan. 9, 2018), http://www.phillytrib.com/news/larry-krasner-introduces-new-leadership-team/article_245b3386-1317-5627-8dbd-95762789de5f.html; Chris Palmer et al., *Krasner Dismisses 31 from Philly DA’s Office in Dramatic First-Week Shakeup*, PHILA. INQUIRER (Jan. 5, 2018, 7:51 PM), <http://www.philly.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html>; Chris Palmer, *Provocative Police Critic on DA-Elect Krasner’s Transition Team*, PHILA. INQUIRER (Nov. 30, 2017, 4:57 PM), <http://www.philly.com/philly/news/crime/provocative-police-critic-on-da-elect-krasners-transition-team-20171130.html>.

⁶⁵ Joe Trinacria, *Larry Krasner Sues Big Pharma, Drops All Marijuana Possession Charges*, PHILA. MAG. (Feb. 16, 2018, 9:17 AM), <https://www.phillymag.com/news/2018/02/16/krasner-big-pharma-marijuana-possession/>.

⁶⁶ Chris Palmer, *In Latest Edict, Philly DA Larry Krasner Tells Prosecutors to Seek Lighter Sentences, Estimate Costs of Incarceration*, PHILA. INQUIRER (Mar. 15, 2018, 5:13 PM), <http://www.philly.com/philly/news/crime/philadelphia-district-attorney-larry-krasner-plea-deals-shorter-sentences-cost-of-mass-incarceration-20180315.html>.

recognize the popularity of criminal justice reform among their constituents. While previous candidates would brag about their conviction rates and “tough on crime” credentials,⁶⁷ a successful candidate today speaks passionately about the need for fundamental criminal justice reform.⁶⁸

Countless other successes—including Raul Torrez in Albuquerque, Michael O’Malley in Cleveland, Mark Gonzalez in Corpus Christi, Satana Deberry in Durham, Robert Shuler Smith in Jackson, Aramis Ayala in Orlando, James Stewart in Shreveport, Kim Gardner in the City of St. Louis, Wesley Bell in St. Louis County, Andrew Warren in Tampa, and even Scott Colom in the small town of Columbus, Mississippi—indicate a sea change in prosecutorial elections.⁶⁹ And the change in the tide has not been solely restricted to Democratic primaries in liberal constituencies. Even in Florida’s Fourth Judicial Circuit, which includes the city of Jacksonville and its conservative suburbs, the incumbent “tough-on-crime” prosecutor lost her bid for re-election in the Republican primary, largely due to her overly aggressive prosecutorial approach.⁷⁰

The success of reformers in these elections has been especially striking given that local prosecutorial elections have historically generated little interest or

⁶⁷ See Ann Chih Lin, *The Troubled Success of Crime Policy*, in *THE SOCIAL DIVIDE: POLITICAL PARTIES AND THE FUTURE OF ACTIVIST GOVERNMENT* 312, 312–13 (Margaret Weir ed., 1998).

⁶⁸ Consider, for example, the race to replace the late Ken Thompson as Brooklyn district attorney. The candidates in the Democratic primary each attempted to out-position each other as the best-equipped to take on the task of criminal justice reform, supporting efforts to review wrongful convictions, punish police brutality, end the cash bail system, and not prosecute prostitution or turnstile jumping. See Beth Fertig, *In Brooklyn District Attorney Race, a Different Kind of Law-and-Order*, WNYC NEWS (Aug. 31, 2017), <http://www.wnyc.org/story/brooklyn-district-attorney-candidates-compete-whos-most-progressive/>.

⁶⁹ Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <http://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519>; Maurice Chammah, *New Strategy for Justice Reform: Vote Out the DA*, MARSHALL PROJECT (Oct. 18, 2016), <https://www.themarshallproject.org/2016/10/18/new-strategy-for-justice-reform-vote-out-the-da>; Graham, *Incumbents Are Out*, *supra* note 44; Joshua Gunter, *Michael O’Malley topples Cuyahoga County Prosecutor Timothy McGinty*, CLEVELAND.COM (Mar. 16, 2016, 12:39 AM), https://www.cleveland.com/metro/index.ssf/2016/03/michael_omalley_topples_cuyaho_1.html; Astead W. Herndon, *Wesley Bell, Ferguson Councilman, Unseats St. Louis County Prosecutor*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/us/politics/wesley-bell-st-louis-election-result.html>; Kira Lerner, *Overzealous Prosecutors Are Losing Elections*, THINKPROGRESS (Sep. 1, 2016, 6:55 PM), <https://thinkprogress.org/overzealous-prosecutors-are-losing-elections-6dad096118e1/>. For a more detailed look at local prosecutorial elections, see generally David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017) (surveying recent prosecutorial elections in which voters have been turning away from “tough-on-crime” prosecutors, and exploring the possible consequences of this change for the criminal justice system).

⁷⁰ Andrew Pantazi, *What Does Angela Corey’s Loss Say About the Changing Politics of Prosecution?*, FLA. TIMES-UNION (Sept. 2, 2016, 7:19 PM), <http://jacksonville.com/news/metro/2016-09-02/story/what-does-angela-coreys-loss-say-about-changing-politics-prosecution>.

controversy.⁷¹ In a reflection of the new status quo, however, these elections will likely continue to be fruitful opportunities for criminal justice reformers—albeit accompanied by new challenges, different opponents, and at least occasional failures along the way.⁷²

C. Predictions for the Future

The energy generated by the Black Lives Matter movement, coupled with external financial support from liberal donors, is unlikely to abate in the coming years. Much of the success of reformers in prosecutorial elections has been due to the intervention of wealthy campaign contributors and third-party campaign groups, like the ones funded by well-known Democratic donor George Soros. His groups have spent millions of dollars in Florida, Illinois, Louisiana, Mississippi, New Mexico, and Texas to successfully elect reformers.⁷³ Other wealthy donors—such as Fred Eychaner—have donated hundreds of thousands of dollars directly to reform-minded candidates, like Foxx in Chicago.⁷⁴ These independent groups have continued to invest heavily in these races; their most recent effort, supporting Larry Krasner⁷⁵ in his successful 2017 campaign for Philadelphia District Attorney,⁷⁶ is unlikely to be their last. Additionally, as reformers like Aramis Ayala and Marilyn Mosby generate controversy, re-electing them will likely require vigorous campaigns.⁷⁷ As the Tea Party

⁷¹ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–93 (2009) (noting that prosecutors are re-elected 95% of the time and are entirely unopposed 85% of the time).

⁷² Indeed, in several recent prosecutorial elections targeted by criminal justice reformers—including Alameda, Sacramento, and San Diego Counties in California, and Bennington County in Vermont—the reform-minded challengers fell short as incumbent prosecutors were re-elected. Jim Therrien, *Marthage, Schmidt Fend Off Challengers in Primary*, BENNINGTON BANNER, <https://www.benningtonbanner.com/stories/marthage-schmidt-apparent-primary-winners,547648> (last updated Aug. 15, 2018, 2:15 PM); Abbie Vansickle & Paige St. John, *Big Spending by George Soros and Liberal Groups Fails to Sway D.A. Races in California*, L.A. TIMES (June 6, 2018, 9:55 PM), <http://www.latimes.com/local/california/la-me-da-election-soros-20180606-story.html>.

⁷³ Bland, *supra* note 69.

⁷⁴ Byrne & Dardick, *supra* note 51.

⁷⁵ Chris Brennan, *\$1.45 Million Soros Investment in Philly DA's Race Draws Heat for Krasner*, PHILA. INQUIRER (May 5, 2017), <http://www.philly.com/philly/news/politics/Soros-145-million-investment-in-Da-race-draws-heat-for-Krasner.html>.

⁷⁶ *Supra* notes 63–66 and accompanying text.

⁷⁷ During Mosby's reelection campaign in 2018, her two opponents attacked her for both a lack of convictions and for an alleged inconsistency between her rhetoric as a criminal justice reformer and the actions of her office. Justin Fenton, *Field Set in Baltimore State's Attorney's Race as Mosby, Challengers File*, BALT. SUN (Feb. 27, 2018, 7:50 PM), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-sao-candidates-file-20180227-story.html>. One opponent, Thiru Vignarajah, said that, if elected, "his office [would] stop prosecuting victims of addiction for petty offenses, support immigrants and oppose mandatory minimum sentences." *Id.* Ultimately, Mosby handily won the Democratic primary over her two opponents, effectively assuring her re-election with no opponent in the general election. Tim Prudente, *Marilyn Mosby Wins Re-*

movement showed, electoral success begets electoral success;⁷⁸ as an ideological movement gains more and more support following elections, energy for the movement grows and it sees even more success.

Indeed, the drive for criminal justice reform and police accountability has now joined the mainstream of American politics. Politicians and candidates are becoming less cautious about speaking out on these issues.⁷⁹ Though some Republicans and conservative activists have spoken out about police brutality and the need for reform,⁸⁰ most of the movement on these issues has come from Democratic politicians.⁸¹ This movement has real consequences for shaping public opinion and galvanizing the base of liberal American voters: as Democratic political elites bring issues into the mainstream and frame their positions on them, voters warm to those positions and follow suit.⁸²

Admittedly, the election of reformers as local prosecutors does not directly affect the *legal* structure of the prosecutorial discretion regime. But the anticipated response by state governments, especially in the form of supersession, may impose some new *de facto* limits on prosecutorial discretion. Under the current statutory regimes, cases of supersession have been

Election in Three-Way Race for Baltimore State's Attorney, BALT. SUN (June 26, 2018, 4:30 PM), <http://www.baltimoresun.com/news/maryland/politics/bs-md-ci-states-attorney-20180625-story.html>. And though Ayala's next election is two years away, a Republican candidate has already filed to run against her. Steven Lemongello, *Republican Attorney Announces 2020 Run Against State Attorney Aramis Ayala*, ORLANDO SENTINEL (Mar. 20, 2017, 12:00 PM), <http://www.orlandosentinel.com/news/politics/political-pulse/os-kevin-morenski-ken-lewis-ayala-20170320-story.html>.

⁷⁸ See Tom Cohen, *5 Years Later, Here's How the Tea Party Changed Politics*, CNN (Feb. 28, 2014, 1:17 PM), <http://www.cnn.com/2014/02/27/politics/tea-party-greatest-hits/index.html>.

⁷⁹ See, e.g., Carol E. Lee, *Democratic Convention Tackles Issues of Violence and Police*, WALL STREET J. (July 26, 2016, 11:01 PM), <https://www.wsj.com/articles/democratic-convention-tackles-issues-of-violence-and-police-1469578101>.

⁸⁰ *Supra* note 42 and accompanying text.

⁸¹ See Lee, *supra* note 79. Much of this difference can be explained by the increasingly close relationship between the Republican Party and police unions, the Republican base's confidence in the police, and cues from national Republican politicians, like Donald Trump, that claims of police brutality are overstated. Anna Brown, *Republicans More Likely than Democrats to Have Confidence in Police*; PEW RES. CTR.: FACT TANK (Jan. 13, 2017), <http://www.pewresearch.org/fact-tank/2017/01/13/republicans-more-likely-than-democrats-to-have-confidence-in-police/>; Eleanor Clift, *The GOP and Police Unions: A Love Story*, DAILY BEAST (Dec. 12, 2014, 5:45 AM), <https://www.thedailybeast.com/the-gop-and-police-unions-a-love-story>; Cleve R. Wootson, Jr. & Mark Berman, *U.S. Police Chiefs Blast Trump for Endorsing 'Police Brutality'*, WASH. POST (July 29, 2017, 7:23 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/u-s-police-chiefs-blast-trump-for-endorsing-police-brutality/?utm_term=.d9a4386b9836.

⁸² GABRIEL S. LENZ, FOLLOW THE LEADER?: HOW VOTERS RESPOND TO POLITICIANS' POLICIES AND PERFORMANCE 185 (2012) (noting that political science research shows citizens "adopt the policy views of their preferred party or candidate").

exceedingly rare⁸³: local prosecutors and statewide officials appear to have developed an equilibrium over the last half-century, which explains the historically low rate of supersession.⁸⁴ However, this equilibrium is likely based on an implicitly-agreed upon set of mutual expectations: state officials expect that local prosecutors will vigorously enforce the laws passed by the state legislature, and local prosecutors expect that, in all but the rarest cases, their discretion will not be superseded.⁸⁵ But those expectations will undergo stress as reformers—especially those who opt to refrain altogether from prosecuting certain crimes⁸⁶ or seeking certain punishments⁸⁷—come into office.

As more reformers are elected—especially in liberal municipalities of otherwise conservative states—laws allowing supersession may be used with increasing frequency whenever they are available. And when supersession is unavailable, less direct methods of curtailing prosecutorial discretion will be used. For example, the state government’s aggressive response to Aramis Ayala’s refusal to seek the death penalty, including the Governor’s reassignment of her office’s homicide cases,⁸⁸ the legislature’s slashing of her office’s budget by \$1.3 million,⁸⁹ and calls from legislators for Governor Scott to remove her from office;⁹⁰ the condemnation of Kim Ogg’s refusal to prosecute low-level cannabis possession;⁹¹ and the litigation surrounding Hinds County District Attorney Robert Shuler Smith, which included the Mississippi Attorney General suing to supersede in one of Smith’s cases⁹² as well as Smith’s criminal

⁸³ Barkow, *supra* note 16, at 550. However, data is not readily available—and is likely not even kept by states—on how often supersession occurs. See *infra* note 150 and accompanying text.

⁸⁴ See Barkow, *supra* note 16, at 550.

⁸⁵ In the absence of data regarding instances of supersession, the relatively few court cases directly involving challenges of supersession, *infra* Part II, provide support for the conclusion that supersession is historically rare.

⁸⁶ Dart, *supra* note 62 and accompanying text (discussing Houston prosecutor Kim Ogg’s refusal to prosecute low-level marijuana possession charges).

⁸⁷ Burbank, *supra* note 3 and accompanying text (discussing Orlando prosecutor Aramis Ayala’s refusal to seek the death penalty in homicide cases).

⁸⁸ *Supra* note 5.

⁸⁹ Renata Sago, *Ayala’s Office Operating with \$1.3M Budget Cut in Rift Over Death Penalty*, WMFE (July 12, 2017), <http://www.wmfe.org/ayalas-office-operates-with-1-3m-budget-cut-over-death-penalty-rift/75487>.

⁹⁰ Dara Kam & Jim Turner, *Backroom Briefing: Black Lawmakers Back Aramis Ayala*, SUNSHINE ST. NEWS (Mar. 23, 2017, 4:00 PM), <http://sunshinestateneews.com/story/backroom-briefing-black-lawmakers-back-aramis-ayala>.

⁹¹ Sanya Mansoor, *New Harris County Policy Reignites Marijuana Decriminalization Debate*, TEX. TRIB. (Feb. 16, 2017, 6:00 PM), <https://www.texastribune.org/2017/02/16/texas-lawmakers-disagree-houston-moves-decriminalize-marijuana/>; Mike Ward, *Patrick Blasts Ogg’s Pot Policy, but Other Lawmakers More Supportive*, HOUS. CHRON. (Feb. 16, 2017, 4:28 PM), <http://www.chron.com/news/politics/texas/article/Patrick-opposes-Ogg-s-marijuana-rule-other-10937974.php>.

⁹² *Williams v. State*, 184 So.3d 908, 909 (Miss. 2014).

prosecution for allegedly undermining a criminal drug case,⁹³ all indicate a willingness by the more traditional, “tough-on-crime” establishment to forcefully respond to disfavored (and mostly liberal) exercises of prosecutorial discretion.⁹⁴

While prosecutorial discretion is criticized by some scholars as enabling discrimination,⁹⁵ discretion allows and encourages prosecutors in the United States to look beyond mere legal sufficiency as a filing standard. Instead, prosecutors are empowered to consider substantive justice factors. Prosecutors in most municipalities either decline to prosecute or drop charges in about a quarter of the cases brought to them by the police.⁹⁶ Unduly infringing on prosecutorial discretion, as supporters of supersession would, could have the adverse effect of pushing even more cases into our already-overcrowded criminal justice system.⁹⁷ The transition from our current regime to one without meaningful prosecutorial discretion will likely happen subtly. As discretion is devalued and supersession normalized by one set of actors, the norm disfavoring the disruption of prosecutorial discretion will erode for all actors, rendering prosecutorial discretion a forceless, hollow maxim to which our legal system would pay mere lip service.

To understand why this is likely—and how statutory changes can prevent this oncoming storm—we must understand the different state models governing supersession.

II. A FIFTY-STATE SURVEY: FIVE MODELS OF PROSECUTORIAL SUPERSESSION

As an initial matter, “supersession” must be defined for the purposes of this Part. Defined herein, supersession can occur in two different ways. First, a state

⁹³ Justin Vicory, *Hinds DA Robert Shuler Smith Not Guilty on All Counts*, CLARION-LEDGER (Aug. 8, 2017, 4:22 PM), <http://www.clarionledger.com/story/news/local/2017/08/08/hinds-county-da-jury-deliberations/550536001/>.

⁹⁴ Depending on the state, this “establishment” could include the governor, attorney general, legislature, cabinet, or judges. See *infra* Part II.

⁹⁵ DeMay, *infra* note 228 at 772.

⁹⁶ U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 22 (Dec. 2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

⁹⁷ See K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 291–96 (2014) (noting the harms of an overburdened justice system, specifically that “trials are delayed and innocent people, particularly those who are incarcerated, are likely to plead guilty in exchange for their freedom”).

official⁹⁸ serving in a de facto supervisory role can direct a local prosecutor to take an action in a criminal case, which includes bringing a criminal case if one does not already exist, as well as dropping charges that a local prosecutor has already filed. Second, a state official can remove a local prosecutor from a case and reassign it to someone else, including the state official herself.

It is also necessary to consider what supersession is not. Supersession does not refer to an instance in which a state official initiates a prosecution based on her independent power to prosecute, even when a local prosecutor has decided not to pursue a case.⁹⁹ While an exercise of independent power to prosecute may have some of the same practical effects as supersession from a criminal defendant's point of view, supersession in this Comment necessarily implicates the displacement or direction of a local prosecutor. In essence, the prosecutorial discretion of a local prosecutor must be overruled for a state official's action to function as supersession.

With that in mind, there are five different models of prosecutorial supersession:

- A. States where a state official can supersede a local prosecutor in all cases.

⁹⁸ Each state with a supersession statute or constitutional provision on point designates at least one state official by statute or constitutional provision with the power to override any prosecutor's discretion. This state official is usually the attorney general but can also be the governor or, less commonly, a judge, an executive cabinet, or a legislature. See *supra* note 15 and accompanying text.

⁹⁹ Most states grant their attorney general at least *some* independent power to initiate a criminal prosecution, even if only in a set of limited circumstances. Barkow, *supra* note 16, at 545–51. Several states grant their attorney general common law powers, which two states—Arkansas and Illinois—have interpreted to include the power to initiate criminal prosecutions that existed at common law. Arkansas statutes expressly note that the attorney general has “duties . . . under the common law,” ARK. CODE ANN. §§ 25-16-703 to -706 (West Supp. 2018), and the state supreme court has held that these duties included prosecution. *State ex rel. Williams v. Karston*, 187 S.W.2d 327, 329 (Ark. 1945). Beyond this grant of power, no Arkansas state official has any power to supersede a local prosecutor.

Similarly, the Illinois state constitution states that the attorney general “shall have the duties and powers that may be prescribed by law,” ILL. CONST. art. V, § 15, which also includes the power to initiate prosecutions. *People v. Buffalo Confectionary Co.*, 401 N.E.2d 546, 549 (Ill. 1980) (citing *People v. Massarella*, 382 N.E.2d 262 (Ill. 1978)). However, this power is “exercised concurrently with the . . . [county’s] State’s Attorney,” *id.*, and cannot be used to “usurp[]” the State’s Attorney “to take exclusive charge of the prosecution.” *People v. Flynn*, 31 N.E.2d 591, 593 (Ill. 1940). But the mere fact that a state grants its attorney general common law duties and powers does not mean that she can cite those powers to supersede a local prosecutor. For example, the Idaho Supreme Court rejected the state attorney general’s attempt to take control of a local criminal prosecution from a county prosecutor in 1996, finding that the attorney general’s common law powers did not enable him to “assert[] dominion and control over the case[.]” *Newman v. Lance*, 922 P.2d 395, 396–98, 401 (Idaho 1996).

- B. States where a state official can supersede local prosecutors when it is in the public interest or in the interest of justice.
- C. States where the state official can supersede local prosecutors when requested to do so by either another state official or members of the public.
- D. States where the state official can supersede the local prosecutor if she refuses to (or does not) enforce the law.
- E. States where a local prosecutor can be superseded with the approval of a court (or an independent commission).

All five models share a common objective: opening an escape valve to grant a state actor the ability to check local prosecutors' exercise of discretion. This institutional design feature takes its cue from our federal system, which seeks to "control the abuses of government."¹⁰⁰ All judicial and political actors at all levels possess necessarily limited power within their respective jurisdictions, and all are subject to constraints imposed by other actors. Put simply, all five models represent different ways of calibrating the power balance between local prosecutors and state officials.

Many states do not fit into just one category and instead have statutory schemes that are best categorized as belonging to multiple models.¹⁰¹ This Part analyzes each model in turn with the understanding that each model is not entirely internally consistent—some models encompass a spectrum of liberal or conservative constructions of the relevant statutes.

¹⁰⁰ THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

¹⁰¹ In Washington, for example, the attorney general may supersede the discretion of local prosecutors in two different ways, which can be categorized as belonging to three different models. If the attorney general believes "that the criminal laws are being improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations of such criminal laws," she may "direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general determines to be necessary and proper." WASH. REV. CODE ANN. § 43.10.090 (West 2018). If the prosecuting attorney refuses to do so, the attorney general can take over the prosecution herself. *Id.* Additionally, the attorney general may initiate and conduct prosecutions if requested to do so by the prosecuting attorney where the crime happened, the governor, or by a majority of the committee overseeing the state patrol's organized crime intelligence unit. WASH. REV. CODE ANN. § 43.10.232 (West 2018). This statutory scheme, therefore, fits into three discrete models, namely, Groups A, C, and D. *See infra* Sections II.A., II.C., II.D.

A. *States Where a State Official Can Supersede a Local Prosecutor in All Cases*

Though states within this model theoretically grant their local prosecutors discretion, there are no barriers whatsoever for a state official who wishes to supersede a local prosecutor. This model takes three distinct forms, which this section will discuss in turn. In the first, a state official handles all criminal prosecutions herself, and prosecutorial discretion is nonexistent. In the second, a state official serves as the “supervisor” of independently-elected local prosecutors and can order them to take a particular action, effectively resulting in no discretion. And in the third, a state official can supersede a local prosecutor for *any* reason.

First, in three states—Alaska, Delaware, and Rhode Island—there is no local prosecutorial discretion because a statewide officer directs all criminal prosecutions. In Alaska and Rhode Island, the attorney general’s office handles all criminal prosecutions directly,¹⁰² and in Delaware, the attorney general appoints a state prosecutor, who is directly answerable to the attorney general.¹⁰³ It would thus be redundant to elect local prosecutors in these states, and unsurprisingly, none does. While the Alaska attorney general appoints district attorneys who operate within the attorney general’s office,¹⁰⁴ there are no comparable positions in Delaware or Rhode Island.¹⁰⁵ Any local prosecutors, therefore, serve at the will of the statewide officer, and enjoy no statutorily-guaranteed discretion at all.

Second, in Montana, New Hampshire, and Washington, the state attorney general serves as the “supervisor” of local prosecutors, and can order them to take particular actions, at least in some circumstances. Though many other states

¹⁰² ALASKA STAT. ANN. § 44.23.020(b)(4) (West Supp. 2018); 42 R.I. GEN. LAWS ANN. § 42-9-4 (West 2014).

¹⁰³ DEL. CODE ANN. tit. 29, § 2505(c) (West Supp. 2018).

¹⁰⁴ ALASKA STAT. ANN. § 44.17.010, 040 (West 2007). Though neither the Constitution of Alaska nor Alaska Statutes explicitly give the Attorney General the power to appoint District Attorneys, *State v. Breeze*, 873 P.2d 627, 633 (Alaska Ct. App. 1994), her power to do so is implicit and regularly exercised, Press Release, Alaska Attorney General, Attorney General Appoints New Bethel DA (July 18, 2017).

¹⁰⁵ Given that Delaware and Rhode Island are the two smallest states by total land area and have the smallest number of counties, it is not surprising that local prosecutors are neither elected by nor appointed to counties. Indeed, county power in Delaware is limited, *see* DEL. CODE ANN. tit. 9, § 330 (West Supp. 2018), and is nonexistent altogether in Rhode Island, Clyde F. Snider, *American County Government: A Mid-Century Review*, 46 AM. POL. SCI. R. 66, 66 (1952). What is surprising, however, is that other small states with nonexistent—or very weak—county governments, such as Connecticut, Massachusetts, and New Hampshire, *do* have local prosecutors elected by or appointed to counties. *See infra* notes 108–09, 128, 178 and accompanying text.

explicitly reject the notion that local prosecutors, especially elected local prosecutors, operate within a “chain-of-command,” these three states embrace it.¹⁰⁶

Montana and New Hampshire both grant their attorneys general broad powers to supervise local prosecutors. Montana requires its local prosecutors to “promptly institute and diligently prosecute” criminal cases “when ordered or directed by the attorney general,”¹⁰⁷ while New Hampshire law similarly notes that county attorneys are “under the direction of the attorney general”¹⁰⁸ and “shall be subject to” her control “whenever in [her] discretion [s]he shall see fit to exercise” it.¹⁰⁹ Washington, however, does not position its local prosecutors quite as subserviently as do Montana and New Hampshire. The attorney general only has the ability to give a local prosecutor an order when the attorney general concludes that “the criminal laws are being improperly enforced” in a county and “that the prosecuting attorney of the county has failed or neglected to institute and prosecute violations of such criminal laws, either generally or with regard to a specific offense or class of offenses.”¹¹⁰ In such a case, the attorney general “shall direct the prosecuting attorney to take such action in connection with any prosecution as the attorney general determines to be necessary and proper.”¹¹¹ If the local prosecutor fails to do so, the attorney general may then take over the case.¹¹²

Third, some states allow state officials to supersede local prosecutors for *any* reason. Though each state within this subcategory frames its statute slightly differently, all share common traits. Four of the five states—Alabama, Arizona, Maine, and Nevada—attach superficial, weak preconditions on supersession by their attorneys general. For example, Alabama merely requires that the attorney general deem her intervention “proper,”¹¹³ and Arizona and Nevada also only

¹⁰⁶ See, e.g., *Yurick v. State*, 875 A.2d 898, 903 (N.J. 2005) (“County prosecutors are expected to interact freely with county and state officials in the performance of their respective responsibilities. As we have noted before, ‘[t]here is no ordinary chain of command between the attorney-general and the county prosecutors,’ and the State is not ‘responsible for the daily functioning of the prosecutor’s office.’”) (citations omitted).

¹⁰⁷ MONT. CODE ANN. § 2-15-501(5) (West 2009).

¹⁰⁸ N.H. Rev. Stat. Ann. § 7:34 (2013).

¹⁰⁹ *Id.* § 7:11.

¹¹⁰ WASH. REV. CODE ANN. § 43.10.090 (West 2018). Accordingly, Washington is also classified as belonging to Group C, *supra* Section II.C., notes 138, 148 and accompanying text, and Group D, *supra* Section II.D., note 166 and accompanying text.

¹¹¹ § 43.10.090.

¹¹² *Id.* Due to the unusual relationship among local prosecutors, the state attorney general, and other state officials, Washington’s model of supersession is perched in Groups A, C, and D, *supra* note 101, *infra* notes 138 and 166.

¹¹³ ALA. CODE § 36-15-14 (2013).

mandate that the attorney general consider such intervention “necessary.”¹¹⁴ Maine’s precondition is similarly loose, stating that at the “Attorney General’s discretion,” she may “act in place of” a district attorney to initiate and control a criminal prosecution.¹¹⁵ Nebraska’s approach similarly allows the attorney general to “appear for the state and prosecute and defend, in any court . . . any cause or matter, civil or criminal, in which the state may be a party or interested.”¹¹⁶ With no meaningful statutory limit placed on the exercise of this power, and no state court decisions limiting that power, the attorneys general in states within this third subcategory can effectively supersede a local prosecutor in *any* case for *any* reason.

Ultimately, states within this category authorize broad grants of power to superseding state officials. In some states, this grant of power allows the state attorney general to effectively monopolize the direction of criminal prosecution. In others, it neutralizes much of the rationale for granting discretion to local prosecutors in the first place.¹¹⁷ While exercise of this power remains rare for most of the states within this model,¹¹⁸ Alabama has empowered the state-level prosecutors in the attorney general’s office to “get involved in areas that are reserved for local prosecutors in other states” by becoming “‘prosecutors of last resort’ for victims or family members.”¹¹⁹

The most obvious justification for this model is that all prosecutions within a state should be uniform. This uniformity might make sense for some of the states detailed here—namely, Delaware, New Hampshire, Rhode Island, and perhaps Maine. The combination of the small populations, small geographic sizes, and location in New England, which has limited county governments,¹²⁰ perhaps results in a greater need for statewide uniformity. But the other states, without these commonalities, have no such need. Instead, the effective result of virtually eliminating local prosecutorial discretion is that hundreds of counties nationwide elect local prosecutors whose decisions can be reversed and altered

¹¹⁴ ARIZ. REV. STAT. ANN. § 41-193(A)(2) (2013); NEV. REV. STAT. ANN. § 228.120(3) (West 2016).

¹¹⁵ ME. REV. STAT. ANN. tit. 5, § 199 (2018).

¹¹⁶ NEB. REV. STAT. ANN. § 84-203 (West 2009). Nebraska’s approach is perhaps more intellectually honest, and § 204 states plainly that the attorney general and the state Department of Justice “shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties,” implying an ability to take over cases for any reason. *Id.*

¹¹⁷ *Infra* notes 202–04, 209–10 and accompanying text.

¹¹⁸ *See* Barkow, *supra* note 16, at 550.

¹¹⁹ *Id.* at 567–68.

¹²⁰ Snider, *supra* note 105, at 75 n.11.

at the whim of the state attorney general.¹²¹ Indeed, the election of a new attorney general with an entirely different ideology and prosecutorial outlook could result in a vastly different regime for state-level prosecutions.¹²²

B. States Where a State Official Can Supersede a Local Prosecutor When It Is in the Public Interest or in the Interest of Justice

At first glance, statutory schemes within this model look extraordinarily similar to the schemes in the previous model. They are. But the states within this model theoretically place weightier preconditions on supersession.

Generally, states within this model require that supersession has to be in the public interest¹²³ or the interests of the state.¹²⁴ Some states impose additional requirements that (attempt to) further clarify what constitutes a cognizable “interest” or reason. Florida, for example, allows the Governor to supersede a local prosecutor and reassign a case if she determines, “for any . . . good and sufficient reason,” that “the ends of justice would be best served.”¹²⁵

Regardless of the clarification, these are, for the most part, broad and abstract terms that necessarily result in deference to the superseding state official, especially when, as almost all statutes specify, these determinations are made in the state official’s judgment¹²⁶ or opinion.¹²⁷ It is unclear how a court could possibly rule that a state official’s judgment of the public interest was wrong, save for plainly and obviously corrupt motives on her part. Therefore, it is

¹²¹ See Amended Brief of *Amici Curiae* Former Judges, Current and Former Prosecutors, and Legal Community Leaders in Support of Petitioner’s Emergency Non-Routine Petition for Writ of *Quo Warranto* at 19, *Ayala v. Scott*, 224 So.3d 755 (2017) (No. SC17-653) (“Governor Scott seeks authority to supplant the elected state attorney with his own choice whenever he disagrees with the prosecutor’s discretionary decisions. Such a regime would render state attorneys deputies of the governor”)

¹²² This kind of vast policy change brought on by the election of a new government official is generally discouraged and minimized in other contexts. See *generally*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (discussing the value of an agency decision’s “consistency with earlier and later pronouncements” in evaluating the validity of the decision).

¹²³ IND. CODE ANN. § 4-6-1-6 (West Supp. 2017); MASS. GEN. LAWS ANN. ch. 12, § 6 (West 2017); MONT. CODE ANN. § 2-15-501(6) (West 2009); UTAH CODE ANN. § 67-5-1(6)–(8) (West 2017); *Amemiya v. Sapienza*, 629 P.2d 1126, 1129 (Haw. 1981).

¹²⁴ IOWA CODE ANN. § 13.2(1)(b) (West 2017); N.J. STAT. ANN. § 52:17B-107(a) (West 2010); OKLA. STAT. ANN. tit. 74, § 18b(A)(3) (West Supp. 2018); S.C. CODE ANN. § 1-7-100(2) (2005); VT. STAT. ANN. tit. 3, § 157 (West 2007).

¹²⁵ FLA. STAT. ANN. § 27.14(1) (West 2014).

¹²⁶ IOWA CODE ANN. § 13.2(1)(b) (West 2017); IND. CODE ANN. § 4-6-1-6 (West Supp. 2017); MASS. GEN. LAWS ANN. ch. 12, § 6 (West 2017); N.D. CENT. CODE ANN. § 54-12-02 (West 2008); S.C. CODE ANN. § 1-7-100(2) (2005); VT. STAT. ANN. tit. 3, § 157 (West 2007).

¹²⁷ N.J. STAT. ANN. § 52:17B-107(a) (West 2010).

possible that the preconditions placed on supersession in this model are entirely theoretical and can almost certainly be overcome by a superseding official.

Indeed, the few courts that have heard cases arising under these laws have been exceedingly deferential to the superseding power of state officials. The Massachusetts Supreme Judicial Court noted that the attorney general's power of supersession was "unquestionable."¹²⁸ The Michigan Supreme Court affirmed that the attorney general could intervene "in *any* criminal proceedings in the state."¹²⁹ The New Jersey Supreme Court differed slightly from its sister courts but reached a similar conclusion. The court noted that while "[t]here is no ordinary chain of command" between the attorney general and the local prosecutors, the attorney general possesses the supersession power to ensure both the uniform enforcement of the law and the "proper and efficient handling of" the local prosecutors' "criminal business."¹³⁰ But with relatively few cases analyzing the scope and extent of the statutes within this model, it is hard to definitively conclude that the preconditions placed on supersession are illusory.

Hawai'i, however, charts a slightly different path for its attorney general. Not only are Hawai'ian courts less deferential to the attorney general's supersession powers, but the state supreme court established a narrow set of circumstances that would permit intervention. Despite the fact that the state's local prosecutors operate "under the authority of the attorney general,"¹³¹ the attorney general may only intervene if "compelling public interests require" her intervention.¹³² This power of supersession is not granted by a particular statute,¹³³ but is rather acknowledged by the Hawai'i Supreme Court as existing

¹²⁸ *Commonwealth v. Kozlowsky*, 131 N.E. 207, 211 (Mass. 1921) (citation omitted).

¹²⁹ *In re Watson*, 291 N.W. 652, 655 (Mich. 1940) (emphasis added) (citation omitted).

¹³⁰ *Yurick v. State*, 875 A.2d 898, 903–04 (N.J. 2005) (citations omitted). Despite seemingly establishing an implicit limit on the attorney general's supersession power, the court nevertheless affirmed an exercise of the power that reassigned the entirety of a county prosecutor's criminal docket. *Id.* at 900.

¹³¹ HAW. REV. STAT. ANN. § 46-1.5(17) (West Supp. 2017).

¹³² *Amemiya v. Sapienza*, 629 P.2d 1126, 1129 (Haw. 1981).

¹³³ Hawai'i is an outlier within this model, and not just because of the high threshold it requires for supersession. Its attorney general is granted theoretically broad powers to, "unless otherwise provided by law, prosecute cases involving violations of state laws." HAW. REV. STAT. ANN. § 26-7 (West Supp. 2017). This broad grant of power made sense historically, because Hawai'ian law initially created local prosecutorial offices for each county by individual legislative acts, rather than a state law that created such a position as a default in all counties. *See Sapienza*, 629 P.2d at 1128. That is not the case anymore. Current Hawai'ian law grants counties "the power to provide by charter for the prosecution of all offenses and to prosecute for offenses against the laws of the State." HAW. REV. STAT. ANN. § 46-1.5(17) (West Supp. 2017). Though this law makes the creation of a local prosecutor optional, four of the five counties' charters have done so. *E.g.*, HONOLULU COUNTY CHARTER art. VIII, § 8-104 (2017), https://www.honolulu.gov/rep/site/cor/Online_Charter_-_06.30.17.pdf. The fifth county—Kalawao—has no charter because it is a former leprosy colony administered by the state department of

in an extremely limited set of circumstances: “[F]or example, where the public prosecutor has refused to act and such refusal amounts to a serious dereliction of duty on his part, or where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act.”¹³⁴

The basic idea undergirding the statutory provisions in this model is sound: if a state official is to supersede a local prosecutor, there should be a genuine need for such intervention. The difficulty is that the courts interpreting these provisions have either found that a *de minimis* public interest (or good reason) satisfies the standard,¹³⁵ or that such a showing is effectively unnecessary because the power to supersede is so broad.¹³⁶ If the courts engaged in a case-by-case balancing test of the official’s interest in supersession and the local prosecutor’s interest in exercising discretion,¹³⁷ this exercise would perhaps be more meaningful, and result in different outcomes.

C. States Where the State Official Can Supersede a Local Prosecutor When Requested to Do so by Either Another State Official or Members of the Public

Nearly half of the states in the country allow the state attorney general to supersede a local prosecutor if requested to do so by another actor. The most common actor empowered to direct the attorney general to supersede a local prosecutor is the Governor,¹³⁸ though two states within this model, North Dakota

health. See HAW. REV. STAT. ANN. § 326-34(b) (West 2017); Alia Wong, *When the Last Patient Dies*, ATLANTIC (May 27, 2015), <https://www.theatlantic.com/health/archive/2015/05/when-the-last-patient-dies/394163/>.

¹³⁴ *Sapienza*, 629 P.2d at 1129. Since *Sapienza* was decided, the Hawai‘i Supreme Court has not heard another case involving attempted supersession.

¹³⁵ *Ayala v. Scott*, 224 So.3d 755, 757–59 (Fla. 2017).

¹³⁶ *Supra* notes 128–30 and accompanying text.

¹³⁷ While the purpose of this Comment is not to propose such a balancing test, it likely would not be entirely unlike rational basis review or intermediate scrutiny.

¹³⁸ GA. CONST. art. V, § 3, ¶ IV; MD. CONST. art. V, § 3(a)(2); ARIZ. REV. STAT. ANN. § 41-193(A)(2) (2013); COLO. REV. STAT. ANN. § 24-31-101(1)(a) (West Supp. 2017); IDAHO CODE ANN. § 31-2227(3) (West Supp. 2017); IOWA CODE ANN. § 13.2(1)(b) (West 2017); KAN. STAT. ANN. § 75-702 (West Supp. 2016); KY. REV. STAT. ANN. § 15.200(1) (West 2010); MINN. STAT. ANN. § 8.01 (West 2013); MISS. CODE ANN. § 7-5-37 (West 2016); MO. ANN. STAT. § 27.030 (West 2013); MONT. CODE ANN. § 2-15-501(6) (West 2009); NEV. REV. STAT. ANN. § 228.120(3) (West 2016); N.M. STAT. ANN. § 8-5-3 (West 2012); N.Y. EXEC. LAWS § 63(2) (McKinney Supp. 2018); OKLA. STAT. ANN. tit. 74, § 18b(A)(3) (West Supp. 2018); OR. REV. STAT. ANN. § 180.070(1) (West 2007); S.D. CODIFIED LAWS § 1-11-1(2) (2012); UTAH CODE ANN. § 67-5-1(8) (West 2017); VA. CODE ANN. § 2.2-511(A) (West 2015); WASH. REV. CODE ANN. § 43.10.090, 232 (West Supp. 2018); W. VA. CODE ANN. § 5-3-2 (West 2014); WIS. STAT. ANN. § 165.25(1m) (West Supp. 2017); WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

and Pennsylvania, exclude their Governors from this grant of power.¹³⁹ However, among the states within this model, there is great variation. Six states allow their legislatures to direct the supersession of a local prosecutor—and in Kansas, Oklahoma, South Dakota, and Wisconsin, a *single* chamber of the legislature may do so.¹⁴⁰ Courts—or individual judges—are also common actors, possessing the power to direct supersession in five states.¹⁴¹

There are some other—perhaps less intuitive—state actors empowered to direct supersession. For example, Iowa allows its Executive Council, composed of the Governor, secretary of state, state treasurer, secretary of agriculture, and state auditor,¹⁴² to collectively direct the attorney general to supersede a local prosecutor.¹⁴³ Four states similarly empower locally-elected officials to direct or request an intervention—“a sheriff, mayor, or majority of a city [commission]” in Kentucky;¹⁴⁴ a county “board of chosen freeholders” (called a county commission in most states) in New Jersey;¹⁴⁵ the majority of a county commission in North Dakota;¹⁴⁶ and a county commission in Wyoming.¹⁴⁷ Washington, as mentioned previously, grants this power to an unusual actor: the state patrol’s organized crime intelligence unit.¹⁴⁸ Perhaps most unusually, Kentucky, New Jersey, and North Dakota also empower the public to direct or request the intervention of the attorney general in a criminal prosecution. Kentucky and New Jersey allow a grand jury to request the attorney general’s intervention,¹⁴⁹ and North Dakota allows “twenty-five taxpaying citizens” of a county to petition the attorney general for intervention.¹⁵⁰

¹³⁹ N.D. CENT. CODE ANN. §§ 11-16-06, 54-12-02 to -04 (West 2008); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4)–(5) (West 2012).

¹⁴⁰ MD. CONST. art. V, § 3(a)(2); IOWA CODE ANN. § 13.2(1)(b) (West 2017); KAN. STAT. ANN. § 75-702 (West Supp. 2016); OKLA. STAT. ANN. tit. 74, § 18b(A)(3) (West Supp. 2018); S.D. CODIFIED LAWS § 1-11-1(2) (West 2012); WIS. STAT. ANN. § 165.25(1m) (West Supp. 2017).

¹⁴¹ KY. REV. STAT. ANN. § 15.200(1) (West 2010); N.J. STAT. ANN. §52:17B-106 (West 2010); N.D. CENT. CODE ANN. §§ 11-16-06, 54-12-04 (West 2008); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(5) (West 2012); WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

¹⁴² IOWA CODE ANN. § 7D.1(1) (West 2008). Imagining an analogous exercise at the federal level—in which Secretary of Agriculture Sonny Perdue plays a role in directing Attorney General Jefferson Beauregard Sessions, III, to supersede a United States Attorney—is comical.

¹⁴³ IOWA CODE ANN. § 13.2(1)(b) (West 2017).

¹⁴⁴ KY. REV. STAT. ANN. § 15.200(1) (West 2010).

¹⁴⁵ N.J. STAT. ANN. §52:17B-106 (West 2010).

¹⁴⁶ N.D. CENT. CODE ANN. § 54-12-03 (West 2008).

¹⁴⁷ WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

¹⁴⁸ *Supra* note 101. Washington’s unusual grant of power to the police to compel a prosecution seemingly raises both serious concerns of conflicts of interest and separation of powers issues.

¹⁴⁹ KY. REV. STAT. ANN. § 15.200(1) (West 2010); N.J. STAT. ANN. §52:17B-106 (West 2010).

¹⁵⁰ N.D. CENT. CODE ANN. § 54-12-03 (West 2008). Though the attorney general receives an unknown (but significant) number of petitions from the public, it is exceedingly rare for the attorney general to act on such

Further, the statutes, in describing a “direction” or “request” that the attorney general intervene, seemingly use these words interchangeably. But the distinction between these terms is critical. A direction to intervene effectively supersedes the attorney general’s discretion to, in turn, supersede the discretion of a local prosecutor. Indeed, most states within this model impose upon the attorney general an affirmative duty to intervene if another state actor wishes, by requiring her to intervene when “directed” or “required” to do so.¹⁵¹ A few states frame the state actor’s desire for intervention as a “request,” but nevertheless state that the attorney general “shall” intervene in such a case, effectively creating a direction,¹⁵² despite the arguably misleading terminology used. Other states draw fuzzier lines, obligating the attorney general to intervene in some situations based on the identity of the requester and the nature of the request, while granting the attorney general discretion in other cases.¹⁵³ Just

a petition. Generally, the attorney general’s office “refer[s] the petitioners to the county state’s attorney, who may, after review, direct that an investigation be initiated.” Email from Liz Brocker, Pub. Info. Officer, N.D. Office of Att’y Gen., to author (Oct. 2, 2017, 12:39 PM) (on file with author). For example, in 1972, citizens of Fargo successfully petitioned the attorney general to investigate the operations of the Fargo branch office of the North Dakota Motor Vehicle Registrar’s Office. Letter from Twenty-Five Taxpaying Citizens of Fargo, N.D., to Helgi Johannesson, N.D. Att’y Gen. (May 14, 1972) (on file with author). The attorney general’s office requested that Richard Hilde, an agent with the North Dakota Bureau of Criminal Investigation, investigate the allegations. Letter from Paul M. Sand, N.D. First Assistant Att’y Gen., to Richard Hilde, N.D. Bureau of Criminal Investigation (May 17, 1972) (on file with author). The result of the investigation is unknown.

¹⁵¹ GA. CONST. ANN. art. V, § 3, ¶ IV (“when required by the Governor”); MD. CONST. art. V, § 3(a)(2) (“which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct”); ARIZ. REV. STAT. ANN. § 41-193(A)(2) (2013) (“At the direction of the governor”); COLO. REV. STAT. ANN. § 24-31-101(1)(a) (West Supp. 2017) (“when required to do so by the governor”); IOWA CODE ANN. § 13.2(1)(b) (West 2017) (“when requested to do so by the governor, executive council, or general assembly”); KAN. STAT. ANN. § 75-702 (West Supp. 2016) (“when required by the governor or either branch of the legislature”); MINN. STAT. ANN. § 8.01 (West 2013) (“Whenever the governor shall so request”); MISS. CODE ANN. § 7-5-37 (West 2016) (“at the request of the governor or other state officer”); MO. ANN. STAT. § 27.030 (West 2013) (“When directed by the governor”); NEV. REV. STAT. ANN. § 228.120(3) (West 2016) (“when requested to do so by the Governor”); N.M. STAT. ANN. § 8-5-3 (West 2012) (“upon direction of the governor”); N.Y. EXEC. LAWS § 63(2) (McKinney Supp. 2018) (“Whenever required by the governor”); OKLA. STAT. ANN. tit. 74, § 18b(A)(3) (West Supp. 2018) (“at the request of the Governor, the Legislature, or either branch thereof”).

¹⁵² *E.g.*, OKLA. STAT. ANN. tit. 74, § 18b(A)(3) (West Supp. 2018) (noting that a duty of the attorney general “shall be . . . to appear at the request of the Governor . . . and prosecute . . . any cause or proceeding, civil or criminal”).

¹⁵³ For example, the New Mexico attorney general is obligated to investigate a matter in a specific county if the Governor requests her intervention but may use her discretion in deciding whether to take additional action. N.M. STAT. ANN. § 8-5-3 (West 2012). Similarly, the Wyoming attorney general may, if requested to intervene by a county commission, exercise her discretion and intervene if she “deem[s] [it] advisable.” WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017). However, she would be obligated to intervene if directed to do so by the Governor. *Id.*

three states—Kentucky, Oregon, and Pennsylvania—grant the attorney general discretion to decide, after receiving a request, whether to intervene.¹⁵⁴

States within this model theoretically place a powerful check on the state officials' supersession powers. By empowering a state official to act (only) if requested to do so by another state official, supersession power is not solely concentrated in one official. Instead, the power is better understood as just another component of the state's checks and balances. Allowing the state official to intervene (only) if requested to do so by locally-elected officials or citizens of the local prosecutor's municipality carries similar benefits. In such a system, the superseding state official is ostensibly using her power for good, by responding to concerns of those closest to the local prosecutor's decision-making. However, when such a request becomes a *demand* and supersedes the state official's autonomy, these benefits evaporate. Instead, the superseding state officials are subjected to the whims of other actors. States within this model are effectively transformed into states within the first or second models, as in sections II.A. and II.B., but with more bells and whistles.

D. States Where the State Official Can Supersede a Local Prosecutor if She Refuses to (or Does Not) Enforce the Law

Some states opt for a more restrictive model of supersession, allowing supersession only when a local prosecutor refuses or fails to act. In four states—California, Idaho, Pennsylvania, and Tennessee—a prosecutor's inaction is the only circumstance that would allow for supersession.¹⁵⁵ Of course, even absent explicit statutory authorization, a local prosecutor's refusal to act could still result in supersession. If a state's supersession regime is categorized as belonging to the first or second models—allowing supersession in any case or “in the public interest,” respectively—a state official would certainly have the power to supersede an inactive local prosecutor.¹⁵⁶

Within this model, some states require a finding by another state actor that a local prosecutor has refused to act before the attorney general is empowered to supersede. For example, the only circumstance in which Idaho allows supersession by the attorney general is when the Governor concludes that “the

¹⁵⁴ KY. REV. STAT. ANN. § 15.200(1) (West 2010); OR. REV. STAT. ANN. § 180.070(1) (West 2007); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4)–(5) (West 2012).

¹⁵⁵ CAL. CONST. art. V, § 13; TENN. CONST. art. VI, § 5; IDAHO CODE § 31-2227(3) (West Supp. 2017); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4)–(5) (West 2012).

¹⁵⁶ See *Ayala v. Scott*, 224 So.3d 755, 756–57 (Fla. 2017); *supra* Sections II.A., II.B.

penal laws . . . are not being enforced as written.”¹⁵⁷ Wyoming adds an additional requirement that theoretically sets an even higher burden: if the local prosecutor fails to act, *and* the attorney general is requested to intervene by the county commission or the trial judge, *and* “if after a thorough investigation[,] [intervention] is deemed advisable by the attorney general,” *then* the attorney general may supersede the local prosecutor.¹⁵⁸ At the other end of the spectrum lies California, which requires its attorney general to supersede a local prosecutor after she concludes—on her own—that “any law . . . is not being adequately enforced.”¹⁵⁹

Judges have a particularly strong grant of power in four states—North Dakota, Pennsylvania, Tennessee, and Wyoming. These states allow judges to either request supersession or to order it themselves if a local prosecutor does not act.¹⁶⁰ In Tennessee, if a local prosecutor does not act, state law allows a court to supersede by appointing a local prosecutor *pro tempore*; this is the *only* allowable means of supersession.¹⁶¹ Wyoming similarly allows a court to appoint a replacement prosecutor, but allows other means of supersession as well.¹⁶²

However, almost all of these statutory schemes imply a one-way standard, only allowing supersession to be ordered if a local prosecutor *fails* or *refuses* to prosecute.¹⁶³ A few states follow a seemingly less rigid approach, allowing supersession if the law is not “adequately enforced,”¹⁶⁴ “not being enforced as written,”¹⁶⁵ or “improperly enforced.”¹⁶⁶ This alternative approach focuses on the enforcement of the laws overall, and not the failure or decision not to

¹⁵⁷ IDAHO CODE ANN. § 31-2227(3) (West Supp. 2017).

¹⁵⁸ WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

¹⁵⁹ CAL. CONST. art. V, § 13. Such a requirement—triggered only by the attorney general’s determination—is a curious mental exercise, as it seemingly mandates that an attorney general intervene if she determines, through whatever process she deems appropriate, that the law is not being enforced.

¹⁶⁰ TENN. CONST. art. VI, § 5; N.D. CENT. CODE ANN. § 11-16-06 (West 2008); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4)–(5) (West 2012); WYO. STAT. ANN. § 9-1-603 (West Supp. 2017); *Id.* § 9-1-805 (West 2007).

¹⁶¹ TENN. CONST. art. VI, § 5.

¹⁶² Compare WYO. STAT. ANN. § 9-1-805 (West 2007), with WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

¹⁶³ TENN. CONST. art. VI, § 5 (“fails or refuses to attend and prosecute according to law”); N.M. STAT. ANN. § 8-5-3 (West 2012) (“failure or refusal . . . to act”); N.D. CENT. CODE ANN. § 11-16-06 (West 2008) (“refused or neglected to perform . . . duties”); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4) (West 2012) (“failed or refused to prosecute”); WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017) (“failure or refusal . . . to act” or has a conflict of interest); *id.* § 9-1-805 (West 2007) (“refuses to act in a prosecution”).

¹⁶⁴ CAL. CONST. art. V, § 13.

¹⁶⁵ IDAHO CODE ANN. § 31-2227(3) (West Supp. 2017).

¹⁶⁶ WASH. REV. CODE ANN. § 43.10.090 (West 2018).

prosecute a particular case, and suggests that prosecutors are meant to pursue justice, not necessarily convictions.¹⁶⁷ This approach suggests that an argument could be made for supersession when a prosecutor unethically or corruptly initiates a prosecution. In such a case, pursuing a prosecution would be perverting the laws, not enforcing them.

Indeed, there are instances in which a local prosecutor's decision to initiate a prosecution would be a perversion, rather than an enforcement, of the law. Take, for example, the 2006 Duke University lacrosse case. Durham County District Attorney Mike Nifong pursued baseless charges against three Duke lacrosse players, likely with explicitly political motivations.¹⁶⁸ After facing widespread national scrutiny, Nifong ended up transferring the case to the state attorney general, who dismissed the charges,¹⁶⁹ and Nifong was ultimately disbarred.¹⁷⁰ Had the North Carolina attorney general possessed the ability to supersede Nifong—or any other local prosecutor—for a failure to adequately or properly enforce the law,¹⁷¹ a strong argument could have been made for supersession in that case.

Many of these state statutes provide more meaningful protections of prosecutorial discretion than those in other models. Instead of allowing state officials to supersede because they feel like it or because they disagree with local prosecutors' discretion, this model compels a finding that the local prosecutor acted incorrectly. Pennsylvania's model, discussed in greater detail in section II.E. and Part III, only allows the attorney general to supersede after demonstrating "that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion."¹⁷² The strength of Pennsylvania's model is that it provides greater clarity and less room for

¹⁶⁷ Such an approach, if an accurate interpretation of the law, tracks closely with the American Bar Association's (ABA's) recommendation that prosecutors "seek justice within the bounds of the law, not merely to convict," CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION STANDARD 3-1.2(b) (AM. BAR ASS'N 2015), and the Supreme Court's observations about the proper role of a prosecutor. *Berger v. United States*, 295 U.S. 78, 88 (1935) (The prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.")

¹⁶⁸ Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337, 1337, 1356 (2007).

¹⁶⁹ *Id.* at 1347.

¹⁷⁰ *Id.* at 1352.

¹⁷¹ North Carolina law does not explicitly allow supersession for that reason. N.C. GEN. STAT. ANN. § 114-2 (West Supp. 2017).

¹⁷² 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4) (West 2012).

whimsical interpretation. Rather than adopting the nebulous standards of some of the other states—which allow supersession if the local prosecutor is generally failing to enforce the law—Pennsylvania sets a clear prerequisite with a clear standard of review.¹⁷³

E. States Where a Local Prosecutor Can Be Superseded with the Approval of a Court (or an Independent Commission)

Unlike the preceding models, most states within this model only allow supersession of a local prosecutor if a court or commission¹⁷⁴ explicitly authorizes it.¹⁷⁵ Some statutes provide specific guidelines to guide the court's decision-making process, such as requiring a particularized showing of the local prosecutor's absence, conflict of interest, disqualification, malfeasance, or refusal to prosecute.¹⁷⁶ Under Louisiana's constitution, however, the court with original jurisdiction in a criminal prosecution may allow the attorney general to "institute, prosecute, or intervene," or in other words to supersede a local prosecutor, so long as there is "cause."¹⁷⁷

Within this model, once a court authorizes the supersession of a local prosecutor, it also appoints a specific replacement for that prosecutor, either as a separate action or as an action inherent in its authorization of supersession. Connecticut, Louisiana, and Pennsylvania give their courts no autonomy at all to select a replacement. In Connecticut, depending on which party is making the request, the replacement is either the chief state's attorney or another state's

¹⁷³ Further, the Pennsylvania attorney general does have to argue that a local prosecutor's inaction generally reflects her failure to enforce the law. *Supra* notes 163–66. There are good reasons to argue that local prosecutors *should* pursue justice and not convictions. *Supra* note 167. However, failure to generally enforce the law and failure to pursue justice are more naturally interpreted as grounds for removal from office, not as grounds for supersession in individual cases.

¹⁷⁴ Because Connecticut is the only state that empowers an independent commission, the Criminal Justice Commission, with the ability to authorize the supersession of a local prosecutor, CONN. GEN. STAT. ANN. § 51-277(d)(3) (West 2016), as opposed to a court, this Comment uses the word "court" interchangeably with "commission."

¹⁷⁵ However, some states, such as North Dakota and Wyoming allow judicial intervention *in addition to* allowing intervention by a state official. *Compare* N.D. CENT. CODE ANN. § 11-16-06 (West 2008), *and* WYO. STAT. ANN. § 9-1-805 (West 2007), *with* N.D. CENT. CODE ANN. § 54-12-02 to -04 (West 2008), *and* WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

¹⁷⁶ *E.g.*, TENN. CONST. art. VI, § 5; CONN. GEN. STAT. ANN. § 51-277(d)(3) (West 2016); N.D. CENT. CODE ANN. § 11-16-06 (West 2008); 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4) (West 2012); TEX. CODE CRIM. PROC. ANN. art. 2.07(a) (West 2018); WYO. STAT. ANN. § 9-1-603(c) (West Supp. 2017).

¹⁷⁷ LA. CONST. art. IV, § 8. In *Plaquemines Par. Comm'n Council v. Perez*, the Louisiana Supreme Court provided no additional elaboration or clarification on what "cause" is, and instead merely noted, "The 'cause' requirement refers to a showing that the district attorney is not adequately asserting some right or interest of the state." 379 So.2d 1373, 1377 (La. 1980) (citing Lee Hargrave, *The Judiciary Article of the Louisiana Constitution of 1974*, 37 LA. L. REV. 765, 835 (1977)).

attorney.¹⁷⁸ In contrast, in Louisiana and Pennsylvania, only the attorney general may supersede and subsequently replace a local prosecutor.¹⁷⁹ But in the remaining states—North Dakota, Tennessee, Texas, and Wyoming—courts have greater autonomy to appoint a replacement of their choosing. North Dakota courts may either request the attorney general’s intervention or appoint a replacement attorney without restriction.¹⁸⁰ Tennessee courts are similarly unrestricted in appointing a county attorney general *pro tempore*,¹⁸¹ and Texas and Wyoming courts are explicitly empowered to appoint “any competent attorney” and “any member of the bar,” respectively.¹⁸²

Unique within this model is Pennsylvania’s specific statutory scheme, which only allows the attorney general¹⁸³ to supersede a local prosecutor if she “establishes by a preponderance of the evidence,” to a judge assigned by the state’s highest court, “that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion.”¹⁸⁴ The Third Circuit noted that this is a “narrowly circumscribed power to supersede a district attorney.”¹⁸⁵ Indeed, no other state—within this model or any other¹⁸⁶—requires such a strong demonstration before allowing supersession.

F. Summary of State Statutory Models

Each state (theoretically) has a slightly different model for supersession, and indeed, these five models sometimes vary wildly. Within this variation, common questions arise and are answered with more variety still. The biggest question concerns how a state official may intervene. In most states, if the attorney general intervenes, she takes full control of a pending case and may unilaterally make decisions about investigating or initiating a prosecution.¹⁸⁷ But some states respect the autonomy of local prosecutors more and limit the attorney general to assisting in a prosecution.¹⁸⁸ Of the states with such provisions, only

¹⁷⁸ CONN. GEN. STAT. ANN. § 51-277(d)(3) (West 2016).

¹⁷⁹ LA. CONST. art. IV, § 8; 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4) (West 2012).

¹⁸⁰ N.D. CENT. CODE ANN. § 11-16-06 (West 2008).

¹⁸¹ TENN. CONST. art. VI, § 5.

¹⁸² TEX. CODE CRIM. PROC. ANN. art. 2.07(a) (West 2018); WYO. STAT. ANN. § 9-1-805 (West 2007).

¹⁸³ The Attorney General can intervene either by her own volition, or if the “president judge in the district having jurisdiction” of the criminal proceeding “has reason to believe that the case is a proper one” for her intervention. 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4)–(5) (West 2012).

¹⁸⁴ *Id.* § 732-205(a)(4).

¹⁸⁵ Carter v. City of Philadelphia, 181 F.3d 339, 353 (3d Cir. 1999).

¹⁸⁶ *Supra* Sections II.A., II.B., II.C., II.D.

¹⁸⁷ *E.g.*, ALA. CODE § 36-15-14 (2013).

¹⁸⁸ 15 ILL. COMP. STAT. ANN. 205/4 (West 2015); IND. CODE ANN. § 4-6-1-6 (West Supp. 2017); ME. REV. STAT. ANN. tit. 5, § 199 (2013); MASS. GEN. LAWS ANN. ch. 12, § 6 (West 2017); MISS. CODE ANN. § 7-5-37

Mississippi's courts have interpreted the assistance provision. The Mississippi Supreme Court observed, "The operative word in [state law] is but one: *assist*. According to the statute's plain language, the attorney general may *assist* a local district attorney in the discharge of his or her duties."¹⁸⁹ This is an extremely narrow superseding power. Less restrictively, some states only allow the attorney general to control the prosecution when present,¹⁹⁰ thereby creating a dichotomy between greater prosecutorial discretion when the attorney general is not present and less discretion when she is.

Plausible arguments can be made in favor of each model, and for each of the statutes and constitutional provisions categorized within these models, but one regime in particular stands out: Pennsylvania's. It is the only statutory regime that protects prosecutorial discretion while creating a clear procedure and standard of review for permissible acts of supersession. The next Part explains and justifies Pennsylvania's regime in greater detail.

III. THE NEED FOR PROSECUTORIAL DISCRETION AND HOW TO PROTECT IT

With more criminal justice reformers winning local prosecutorial elections, and with inconsistent state standards that frequently discard prosecutorial discretion in favor of distant, out-of-touch decision-making by state officials, a new approach to supersession is needed. This Part begins in section A by defending prosecutorial discretion as a norm within our criminal justice system, making both a practical and constitutional case for it. Next, section B identifies a state statutory model—Pennsylvania's—that both protects prosecutorial discretion and provides ample opportunity to rectify genuine abuses within the criminal justice system.

A. *The Practical and Constitutional Case for Prosecutorial Discretion*

With laws governing supersession of local prosecutors likely gaining newfound importance, the current piecemeal approach is inadequate. Because prosecutorial discretion is a concept central to our legal system,¹⁹¹ we must act to create a uniform standard to protect it.

(West 2016); MO. ANN. STAT. § 27.030 (West 2013); MONT. CODE ANN. § 2-15-501(6) (West 2009); S.C. CODE ANN. § 1-7-100 (2005); UTAH CODE ANN. § 67-5-1(8) (West 2017).

¹⁸⁹ *Williams v. State*, 184 So.3d 908, 914 (Miss. 2014).

¹⁹⁰ *E.g.*, MASS. GEN. LAWS ANN. ch. 12, § 6 (West 2017).

¹⁹¹ *E.g.*, 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, 1342 (1993).

Prosecutorial discretion has inherent value in our judicial system. Local prosecutors are better-acquainted with the facts and attendant circumstances of individual cases brought by their offices than the state officials statutorily empowered to supersede them. And with limited resources and virtually limitless crime to prosecute, local prosecutors must make strategic decisions about which cases to act on. With our criminal justice system in a time of transformation, increasingly favoring reform over traditional “tough on crime” policies,¹⁹² it is important to allow prosecutors to rely on their judgment and proximity to their communities to determine which cases to prosecute and how to prosecute them. But even as we defend prosecutorial discretion, we must also recognize that deference to discretion is not, and should not be, without limit. It is necessary for an escape valve to remain open, even if just slightly, to prevent illegitimate abuses of power.

Courts repeatedly recognize that prosecutorial discretion ought to be valued.¹⁹³ But the loose approach that many courts have taken to interpreting the scope of permissible supersession reveals the truth: while most states have achieved a symbiotic equilibrium with local prosecutors in which supersession is rare,¹⁹⁴ they certainly are not obligated to maintain that equilibrium. Instead, the equilibrium is only supported as a byproduct (perhaps an unintentional one) of each state’s system of checks and balances. The only obstacle truly preventing supersession from becoming commonplace is the restraint of the state officials who possess superseding power.

While this equilibrium should be supported, it should not be supported at the cost of treating local prosecutors as mere *political* actors, akin to executive or legislative branch officials. Treating the decision of a local prosecutor similarly to the decision of a state agency or the Governor—by allowing superseding state officials to overrule local prosecutors at will—blurs the practical and democratic significance of a prosecutor’s decision.

Actions taken within the judicial and criminal realms are, and should be, treated differently from political actions. The American criminal justice system seeks, as the ABA notes, “justice within the bounds of the law.”¹⁹⁵ Following several centuries of evolving jurisprudence, our current legal system reflects that pursuit of justice. The federal Constitution—and parallel state constitutions—clearly set apart criminal proceedings from civil proceedings and other state

¹⁹² See *supra* Part I.

¹⁹³ See, e.g., *Ayala v. Scott*, 224 So.3d 755, 760–62 (Fla. 2017) (Pariente, J., dissenting).

¹⁹⁴ Barkow, *supra* note 16, at 550.

¹⁹⁵ AM. BAR ASS’N, *supra* note 167.

actions.¹⁹⁶ For example, states are explicitly prohibited from passing bills of attainder or ex post facto laws.¹⁹⁷ Specific rules governing criminal procedure found in the Fourth, Fifth, Sixth, and Eighth Amendments have been incorporated against the states,¹⁹⁸ but protections governing civil proceedings found in the Seventh Amendment have not.¹⁹⁹ This is a difference that reveals implicit—and important—differences between the criminal and civil realms of law.

Further, the interplay between political and judicial actors is fundamentally different from the relationship between local prosecutors and judicial actors. While the executive and legislative branches can pass laws and amend constitutions to abrogate most court decisions, in no circumstance can a branch abrogate a court holding that a particular person cannot be charged with a particular crime. Further, federal and state courts are extraordinarily reluctant to intervene in legislative policymaking and to answer political questions. Courts reject challenges to perfectly constitutional acts of legislation because legislatures are entitled to make subjectively “bad” policy decisions if they so choose.²⁰⁰ But courts will sometimes intervene in criminal proceedings, to ensure that prosecutors “refrain from improper methods calculated to produce a wrongful conviction.”²⁰¹ The stakes in criminal proceedings are far greater, because a wrong decision means that an innocent party’s rights are violated, the guilty party goes free, or the victim is deprived of justice.

Treating prosecutorial decisions as merely *political* decisions violates the spirit—though admittedly not the letter—of the Constitution.²⁰² Instead, local

¹⁹⁶ *Infra*, notes 197–99 and accompanying text.

¹⁹⁷ U.S. CONST. art. I, § 10, cl. 1.

¹⁹⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 764–65 n.12 (2010) (listing the provisions of the Bill of Rights that have been incorporated to the states via the Fourteenth Amendment).

¹⁹⁹ *Id.* at 765 n.13.

²⁰⁰ Indeed, in *Lawrence v. Texas*, Justice Thomas indicated that while he would vote to uphold Texas’s ban on sodomy as a member of the Court, if he “were a member of the Texas Legislature, [he] would vote to repeal it.” 539 U.S. 558, 605 (Thomas, J., dissenting).

²⁰¹ *Berger v. United States*, 295 U.S. 78, 88 (1935); *supra* note 167. However, some criminal justice reformers argue that the courts have turned a blind eye to prosecutorial abuses. See Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 24–25 (2009).

²⁰² The Supreme Court has implicitly rejected the notion that a prosecutor is an “executive branch” member and therefore subject to traditional checks and balances. See *generally* *Imbler v. Pachtman*, 424 U.S. 409, 420–21 (1976) (noting that, unlike executive branch officials, prosecutors possess “a form of ‘quasi-judicial’ immunity . . . derivative of the immunity of judges”) (citation omitted). The Supreme Court has further held that the political question doctrine is inapplicable to prosecutorial actions, providing further support for the view that prosecutors are not political actors. See *United States v. Nixon*, 418 U.S. 683, 693 (1974).

prosecutors should be treated as “quasi-judicial officers.”²⁰³ Decisions about how and whom to prosecute should not be subjected to the same pressures as political decisions, because doing so opens the door to corrupt motives and results. Prosecutors are only partially dependent on political actors for their grant of power, in that prosecutors can only pursue criminal charges for acts which the political actors have criminalized. Increasing prosecutors’ dependence on political actors would subject them to the political whims of whichever state officials are in power at any given time and would detract from their sworn duty to independently pursue justice.²⁰⁴

Indeed, the American legal system strongly disfavors using criminal law as a proxy for political decisions. Though since our nation’s founding, politically-motivated prosecutions have been conducted against politicians of all ideologies,²⁰⁵ they nonetheless taint the criminal justice system. Political prosecutions violate basic tenets of due process and allow the government to punish dissidents for their opinions, a clear violation of the First Amendment.²⁰⁶ Today, politicians of both parties condemn what they perceive to be “political prosecutions”—though they unsurprisingly disagree on what constitutes a “political prosecution”—reflecting the near-universal disapproval of the practice,²⁰⁷ much to the dissatisfaction of would-be demagogues.²⁰⁸

Further, basic principles of democratic and political accountability strongly indicate that local prosecutors are meant to have at least a minimal level of discretion. Forty-six of the fifty states provide for the election of local prosecutors.²⁰⁹ While the merits of using elections to select local prosecutors can

²⁰³ Amended Brief of *Amici Curiae*, *supra* note 121, at 8–10; *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967) (“The prosecuting attorney is an officer of the court, holding a *quasi*-judicial position.”) (emphasis added); *Bauers v. Heisel*, 361 F.2d 581, 589–90 (3d Cir. 1966) (noting that a prosecutor’s “primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent”) (citation omitted); Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1535 (2012) (noting that “many [original] state constitutions classified district attorneys as functionaries of the judicial branch”).

²⁰⁴ *Supra* note 167.

²⁰⁵ See Eric A. Posner, *Political Trials in Domestic and International Law* 8–9 (Univ. of Chi. Pub. Law & Legal Theory Working Paper No. 87, 2005), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1230&context=public_law_and_legal_theory.

²⁰⁶ See *id.* at 18–19.

²⁰⁷ For example, calls by Donald Trump and other prominent Republicans to prosecute Hillary Clinton for something, David A. Graham, *Trump Demands the Prosecution of His Defeated Rival*, ATLANTIC (Nov. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/11/trump-justice-department-clinton/544928/>, reflect the kind of political prosecutions that could easily occur at the state level in the future without strong protections of local prosecutorial discretion.

²⁰⁸ *Id.*

²⁰⁹ Ellis, *supra* note 203, at 1530 n.3.

be fiercely debated,²¹⁰ it seems inapposite to the electoral system to allow state officials to supersede a local prosecutor in almost any case. If that were true, what would be the point of electing them in the first place? To elect an official to a position means that some power is imputed to her. In no other context do we elect public officials who are entirely subservient to another branch of government and another government actor with no independent power of their own.

But this debate, which questions the extent to which we should devolve power to local elected officials, does not operate in a vacuum. Throughout the country, state governments are overriding and preempting efforts by local governments to, among other things, increase the minimum wage,²¹¹ expand civil rights,²¹² create new rights for workers,²¹³ and protect the environment.²¹⁴ While these preemption efforts are arguably hypocritical for state politicians who otherwise favor “small government,”²¹⁵ they put the looming supersession of local prosecutorial discretion in political context and represent yet another manner in which local prosecutors are improperly treated as mere political actors.

In this discussion, many questions about separation of powers and the merits of devolution of power (and federalism more generally) arise. It is unnecessary to reach conclusions on all of these far-reaching issues, but rather to address the issue at hand: the preservation of prosecutorial discretion and the limitations on state officials’ supersession powers.

²¹⁰ Indeed, there is a strong argument that local prosecutors should not be elected. The United States is the only country in the world that elects local prosecutors, and it is curious that we do so in partisan elections, as most states do, with relatively few restrictions on campaign finance. Electing prosecutors seemingly indebts them to other actors—like interest groups, businesses, politicians, ideological organizations, and partisan constituencies—on whom they rely for fundraising and votes in future elections. *See, e.g.,* Andrew Novak, *It’s Too Dangerous to Elect Prosecutors*, DAILY BEAST (Aug. 24, 2015, 1:12 AM), <https://www.thedailybeast.com/its-too-dangerous-to-elect-prosecutors>.

²¹¹ Yuki Noguchi, *As Cities Raise Minimum Wages, Many States Are Rolling Them Back*, NPR (July 18, 2017, 4:39 PM), <http://www.npr.org/2017/07/18/537901833/as-cities-raise-minimum-wages-many-states-are-rolling-them-back>.

²¹² David A. Graham, *North Carolina Overturns LGBT-Discrimination Bans*, ATLANTIC (Mar. 24, 2016), <https://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-bathrooms/475125/>.

²¹³ Dave Jamieson, *Paid Sick Leave Laws Preemptively Voided By Republican Governors*, HUFFINGTON POST (June 18, 2013, 1:09 PM), https://www.huffingtonpost.com/2013/06/18/paid-sick-leave-laws-voided-republicans_n_3460020.html.

²¹⁴ Jim Malewitz, *Curbing Local Control, Abbott Signs “Denton Fracking Bill”*, TEX. TRIB. (May 18, 2015, 4:00 PM), <https://www.texastribune.org/2015/05/18/abbott-signs-denton-fracking-bill/>.

²¹⁵ Charles P. Pierce, *This Week in the Laboratories of Hypocrisy*, ESQUIRE (Dec. 29, 2016), <http://www.esquire.com/news-politics/politics/news/a51933/conservatives-small-government/> (“Small government conservatives don’t seem fond of local governments.”).

B. *The Solution: An Abuse of Discretion Standard*

Even accepting the adoption of a new model of prosecutorial supersession, any model is going to make different people unhappy at different times. Suppose that a locally-elected prosecutor uses her discretion to not pursue charges in any of the following cases:

- A. Drug possession charges against a known drug addict.
- B. Homicide charges against a police officer who killed a motorist during a traffic stop.
- C. Corruption charges against the prosecutor's close political ally and campaign contributor.

Generally speaking, a liberal actor might agree with the exercise of prosecutorial discretion in A and disagree with it in B. Conversely, a conservative actor might agree with the exercise of prosecutorial discretion in B and disagree with it in A. And though we might hope that all actors would disapprove of the prosecutor's actions in C, the reality is that the perception might be altered by the prosecutor's and the actor's political affiliation and ideology.

These examples helpfully illustrate that actors will view the same concept—the exercise of prosecutorial discretion—differently depending on the surrounding context and circumstances. While it may be tempting to suggest the adoption of a shrewdly-tailored model that would achieve one's desired result in all circumstances, such a model would be clunky and likely indefensible. Views of prosecutorial discretion—much like views of the Recess Appointments Clause²¹⁶ and the Senate filibuster—are highly dependent on an actor's position and whether her party is in power. Of course, we should always strive to discern the best rule, regardless of our partisan preferences. Accordingly, any ideal model of prosecutorial discretion should be created with a Rawlsian veil of ignorance, in which no actor knows exactly how the model will impact her desired policy outcomes.²¹⁷

²¹⁶ “A given interpretation may be good for your team at one point in history and bad at another. Therefore, ideology and the appeal of desired outcomes in the short-term can more easily be set aside here than when considering many substantive constitutional issues.” Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 CARDOZO L. REV. 443, 443 (2005).

²¹⁷ “Imagine that you have set for yourself the task of developing a totally new social contract for today's society. How could you do this fairly? . . . Rawls proposes that you imagine yourself in an original position behind a veil of ignorance. Behind this veil, you know nothing about yourself . . . or your position In this original position, behind the veil of ignorance, what will the rational person choose? What fundamental

The question of which model of prosecutorial discretion should be adopted can be at least partially framed as a standard of review question. When a trial court makes findings of fact, an appellate court reviews those findings under a deferential standard of review.²¹⁸ Logically, this relationship makes sense—a trial court is the best-acquainted with the factual issues in any given case, because it has seen the evidence and heard the testimony firsthand.²¹⁹ Less obviously, a trial court has a greater cognitive understanding of how certain kinds of cases are conducted within its jurisdiction—how attorneys generally behave, what actions prosecutors’ offices generally take, etc.²²⁰ An appellate court, however, cannot be guaranteed to appreciate the significance of any of these things. A judge reading briefs and the transcript on appeal will not be able to get the same feel for the reliability of a piece of evidence or a witness’s testimony that a trial judge would.

Similarly, when a local prosecutor receives a case, conducts interviews with witnesses and victims, reviews evidence, and consults with law enforcement, she is better acquainted with the facts of the case than the Governor, attorney general, legislature, or any other state actor ever could be.²²¹ The exercise of the prosecutor’s discretion to charge or not to charge, therefore, is analogous to the exercise of a trial court’s discretion in reaching a factual finding. Therefore, an abuse of discretion standard of review should be applied to the decision of the *prosecutor*, not to the decision of the *superseder*.

In *Ayala v. Scott*, the Florida Supreme Court embraced the abuse of discretion standard, holding that it would review Governor Scott’s supersession of Ayala “similar to the way in which it reviews exercises of discretion by the lower courts.”²²² But notably, the court applied it to the wrong party’s action: it judged the Governor’s Executive Order—not Ayala’s initial exercise of discretion—under the abuse standard.

principles of society will operate? For Rawls, the best principles will be fair principles. The individual cannot know whether she . . . would suffer or benefit from the structure of any biased institutions. Therefore, the safest principles will provide for the highest minimum standards of justice in the new society.” SPENCER J. MAXCY, ETHICAL SCHOOL LEADERSHIP 93 (2002).

²¹⁸ E.g., FED. R. CIV. P. 52(a)(6) and comparable state rules.

²¹⁹ *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985).

²²⁰ JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 38 (1980) (noting that “local prosecution [results in] applying local standards to the enforcement of essentially local laws”).

²²¹ Even assuming, *arguendo*, that state officials and local prosecutors live and work in the same cities, state officials handle statewide matters instead of local matters on a day-to-day basis. Even when the superseding state actors are county or city officials, *supra* notes 144–47 and accompanying text, their official portfolios and responsibilities (and likely lack of legal education) prevent them from appreciating the significance of a local prosecutor’s actions.

²²² *Ayala v. Scott*, 224 So.3d 755, 758 (Fla. 2017).

By holding as it did in *Ayala v. Scott*, the Florida Supreme Court effectively applied a *de novo* standard of review to the local prosecutor's action and an abuse of discretion standard of review to that of the superseding actor. Such a decision is altogether backwards, and would be comparable to the U.S. Supreme Court holding that it would review a factual finding made by an appellate court under abuse of discretion, while in turn applying a *de novo* standard of review to findings made by the trial court. Applying such a holding would turn all of the rationale behind an abuse of discretion standard of review on its head, because *none* of the rationale favoring abuse of discretion could possibly apply to an appellate court—or to a superseding actor.

Adopting an abuse of discretion model explicitly tied to review of the prosecutor's actions, like Pennsylvania has, would allow local prosecutors authority to set their priorities. This broad grant of authority may result in the increased prosecution of some offenses, and the decreased prosecution of others. Such prioritization would easily survive under an abuse of discretion standard as a necessary consequence of limited resources.

More importantly, local prosecutors would be empowered to base criminal prosecutions on the values and desires of their constituencies. A local prosecutor might not pursue the death penalty if she represents a predominantly Catholic community that disfavors capital punishment. A prosecutor in such a situation might conclude that, for her office to have legitimacy in the eyes of the community, she must consider the values of the community before acting. It is true that opponents of such decisions might point out the incongruity of pursuing the death penalty in some counties but not in others.²²³ However, disparities in discretionary decisions are commonplace in prosecutorial offices—and other areas of the government more generally²²⁴—and usually do not raise concerns of abuse of power. For example, suppose a populous, urban municipality, like Baltimore, experiences particularly high murder rates. A local prosecutor might logically conclude that the risk to her community from murder is greater than that from drug abuse, and accordingly shift prosecutorial resources from

²²³ Joint Response of Governor Rick Scott and Attorney General Pam Bondi Opposing Emergency Petition for Extraordinary Writ at 36, *Ayala v. Scott*, 224 So.3d 755 (Fla. 2017) (No. SC17-653) (“[T]he Governor could reasonably have concluded that Ayala’s blanket policy declaration . . . was apt to have an adverse impact on the . . . uniform administration of criminal justice.”).

²²⁴ See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (noting that local authorities can make a classification if it “has relation to the purpose for which it is made and does not contain the kind of discrimination against which the Equal Protection Clause affords protection”).

narcotics to violent crimes. Such a choice is rational and common in our current system.²²⁵

But even if a county wishes to alter its priorities in prosecution for reasons other than the allocation of limited resources, a political subdivision of the United States is entitled to “serve as a laboratory[,] and try novel social and economic experiments without risk to the rest of the country.”²²⁶ For example, in the late 1980s and early 1990s, then-Miami local prosecutor Janet Reno unveiled a revolutionary system to divert first-time drug offenders to rehabilitation rather than prison.²²⁷ Reno and other prosecutors are perfectly capable of concluding that rehabilitation efforts for low-level drug users provide greater benefit to local communities than incarceration, even though the law permits incarceration. In most cases—barring unconstitutional discrimination or conflicts of interest—these motivated decisions would survive abuse of discretion.

Supersession advocates argue that instances of prosecutorial misconduct, especially in improperly pursuing the death penalty in a racist manner or against actually innocent defendants, justify stricter oversight of local prosecutors.²²⁸ Indeed, in many cases, prosecutors have abused their discretion to withhold evidence and to pursue racially-motivated cases in opportunistic ploys to win reelection.²²⁹ But an abuse of discretion standard of review does not absolutely defer to the decisions of prosecutors; it instead provides ample room for courts to rectify illegitimate abuses.

Accordingly, the Pennsylvania statute serves as a starting point for developing a workable model. Under Pennsylvania law:

²²⁵ Howell, *supra* note 97, at 286 (“It is well known that prosecutors possess nearly unfettered discretion to charge or to decline to charge, and thus are the most powerful actors in the criminal justice system.”) (citations omitted).

²²⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²²⁷ Ronald Smothers, *Miami Tries Treatment, Not Jail, in Drug Cases*, N.Y. TIMES (Feb. 19, 1993), <http://www.nytimes.com/1993/02/19/us/miami-tries-treatment-not-jail-in-drug-cases.html>.

²²⁸ See Jonathan DeMay, Note, *A District Attorney’s Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URB. L.J. 767, 780–86 (1999) (noting the improper influences on prosecutors in deciding whether to seek the death penalty); Abby L. Dennis, Note, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 134–35 (2007) (noting that prosecutorial misconduct is aggravated by a lack of transparency, poor ethical guidelines, and a lack of accountability).

²²⁹ Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 915 n.132 (2015) (“[I]t is obvious that even the most honorable prosecutors have a built-in conflict of interest in deciding what to produce to the defense before trial. This opinion is supported by the myriad cases of undisclosed exculpatory evidence in the [National] Registry of Exonerations.”); *supra* notes 168–71 and accompanying text.

Supersession shall be ordered if the Attorney General 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.²³⁰

This is, as mentioned previously, a strict standard.²³¹ It is also a one-way standard, because it only contemplates supersession when a prosecutor *does not* act; it makes no mention of supersession when a prosecutor acts *erroneously*.²³² Modifying Pennsylvania's one-way supersession standard into a *two-way* supersession standard more accurately reflects the spectrum of situations in which supersession might be legitimately necessary, in instances of both negligent inaction and negligent action. Indeed, had a Pennsylvania-type, two-way model been in place at the time of Mike Nifong's prosecution in the Duke lacrosse case,²³³ the North Carolina attorney general likely would have been able to successfully supersede to stop the prosecution. Nifong's actions likely would not have survived review under an abuse of discretion standard.

Such a two-way standard preserves most exercises of prosecutorial discretion, but allows for supersession in true instances of misconduct and impropriety. A modified Pennsylvania standard might look something like this:

Supersession shall be ordered if the Attorney General establishes, by a preponderance of the evidence, that the local prosecutor has made a decision to prosecute or not to prosecute that constitutes abuse of discretion.

Of course, adopting an abuse of discretion model would not eliminate all restraints that states can put on exercises of prosecutorial discretion. State legislatures could still impeach prosecutors for their actions,²³⁴ gerrymander judicial circuits to ensure that favored prosecutors get elected,²³⁵ enable voters to recall their local prosecutors,²³⁶ cut funding to local prosecutors pursuing

²³⁰ 71 PA. STAT. AND CONS. STAT. ANN. § 732-205(a)(4) (West 2012).

²³¹ Carter v. City of Philadelphia, 181 F.3d 339, 353 (3d Cir. 1999); *supra* note 185 and accompanying text.

²³² *Supra* notes 163–67 and accompanying text.

²³³ *Supra* notes 168–71 and accompanying text.

²³⁴ See Ben Montgomery, *Aramis Ayala: The Florida State Attorney Who Refuses to Pursue the Death Penalty*, TAMPA BAY TIMES (Mar. 26, 2017), <http://www.tampabay.com/news/publicsafety/aramis-ayala-the-florida-state-attorney-who-refuses-to-pursue-the-death/2317890>.

²³⁵ See Anna Blythe & Craig Jarvis, *GOP Wants New Election Maps for NC Judges and Prosecutors*, NEWS & OBSERVER (June 26, 2017, 2:02 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article158264799.html>.

²³⁶ See generally Sean Robinson, *Petition to Recall Pierce County Prosecutor Mark Lindquist Filed*, NEWS TRIB. (June 24, 2015, 2:46 PM), <http://www.thenewstribune.com/news/local/article26347357.html>.

disfavored policies,²³⁷ or even make local prosecutorial positions appointed, rather than elected. However, these legislative powers should not be altogether eliminated. There are normative, policy-based arguments for and against each of these actions, but those arguments are entirely outside the scope of this Comment.

CONCLUSION

The election of criminal justice reformers as local prosecutors reflects an impressive shift in American public opinion over the last several decades. Liberal, urban communities have seen firsthand the effects of “tough-on-crime” policies, and have opted instead for prosecutorial candidates who favor a different approach: the adoption of diversion programs, the end of cash bail, the decision to not prosecute low-level drug charges, and alternatives to the death penalty. As this trend in public opinion becomes stronger, not weaker, it is likely that more and more of these reformers, with many different ideologies and priorities, will be elected in all parts of the country.

But with state laws on the books allowing the supersession of these local prosecutors, the practical impact of their elections might end up being minimal if state leaders cling to their “tough-on-crime” policies. These state laws come in many different forms, with varying degrees of deference to local prosecutors, but very few have ever been used before. The rarity of their use is likely because of a mutually-beneficial equilibrium that has developed between state officials empowered with supersession and the local prosecutors—the state officials will only rarely supersede, and the local prosecutors will dutifully enforce all of the laws of the state. As reformers are increasingly elected and upset that balance, the use of supersession laws will become increasingly common.

After surveying all states’ supersession laws, this Comment identified one in particular—Pennsylvania’s—that both protects prosecutorial discretion and prevents illegitimate abuses of power, and recommended the adoption of a

²³⁷ Sago, *supra* note 89 and accompanying text.

slightly-modified version. In adopting a modified Pennsylvania standard, this Comment seeks to do something somewhat unusual in academia—advocate to preserve status quo equilibrium so that the criminal justice revolution can continue unimpeded.

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