

# POPULIST PROSECUTORIAL NULLIFICATION

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*No one doubts that prosecutors may sometimes decline prosecution notwithstanding factual guilt. Everyone expects prosecutors to prioritize enforcement based on resource limitation and, occasionally, to decline prosecution on a case-by-case basis when they deem justice requires it. Recently, however, some state prosecutors have gone further, asserting the right to refuse categorically to enforce certain state laws. Examples include refusals to seek the death penalty and refusals to prosecute prostitution or recreational drug use. When may a single actor render inert her state's democratically enacted law in this way? If the answer is anything other than "never," the vast reach of American state criminal law demands a pertinent framework for ascertaining legitimacy.*

*In offering one, this Article provides the first extended analysis of the normative import of the locally elected status of the state prosecutors who make such pledges. If legitimacy is the problem, local elections can be the solution. That is, there may well be something suspect about unilateral prosecutorial negation of democratically enacted law. Yet that same negation can be justified as distinctly democratic when the elected prosecutor can wrap it in popular sanction.*

*This Article first unspools a once-robust American tradition of localized, populist nonenforcement of criminal law, best seen in jury nullification. It then draws upon democratic theory to construct a normative basis for reviving that tradition in the context of state prosecutors' categorical nonenforcement. These moves uncover a before-now unappreciated connection: At least where the prosecutor ties her categorical nullification to the polity's electorally expressed will, she accomplishes wholesale what nullifying juries could once do retail. I thus dub that wholesale action "populist prosecutorial nullification." Building upon that analogy and my normative analysis, I set out a novel framework for evaluating state prosecutors' categorical nonenforcement that is keyed to the concept of localized popular will, while accounting for populism's well-known downsides.*

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## INTRODUCTION

A district attorney candidate promises, if elected, not to enforce prostitution laws.<sup>1</sup> A district attorney refuses to enforce gun laws he deems constitutionally suspect.<sup>2</sup> Others pledge never to prosecute any recreational drug use, or never to seek the death penalty against eligible defendants.<sup>3</sup> No one thinks that prosecutors can or should enforce the law to the hilt. But does their discretionary power really authorize unilateral negation of democratically enacted law?

The question is timely. Real state prosecutors proposed—recently—those just-described nonenforcement policies. It is not hard to hypothesize more. Though attention often skews federal, the 94 presidentially appointed United States Attorneys are vastly outnumbered by over 2,300 chief state-level prosecutors,<sup>4</sup> most of whom are elected locally to serve in districts keyed to counties and multi-county areas.<sup>5</sup> All possess substantial, rarely questioned discretion over *whether* to charge an offense when probable cause gives them

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<sup>1</sup> See Otillia Steadman, *Sex Work Could Soon Be Allowed in a Huge Part of New York City*, BUZZFEED NEWS (June 14, 2019), <https://www.buzzfeednews.com/article/otilliasteadman/tiffany-caban-sex-work-queens-decriminalization-new-york>; Matt Charnock, *Boudin Will Not Prosecute Prostitution, Public Camping, and Other ‘Quality-of-Life Crimes’ Once Sworn In*, SFIST (Nov. 16, 2019), <https://sfist.com/2019/11/16/boudin-will-not-prosecute-prostitution-public-camping-and-other-quality-of-life-crimes-once-sworn-in>.

<sup>2</sup> Press Release, Ronald C. Dozier, McLean Cnty. State’s Att’y, Second Amendment and Illinois Gun Laws (Aug. 21, 2012), <https://www.mcleancountyil.gov/DocumentCenter/View/940/SAOPressRelease090612?bidId=> (invoking Second Amendment as grounds for announcing that the McLean County State’s Attorney’s Office will no longer enforce certain Illinois statutes relating to firearms).

<sup>3</sup> E.g., Wesley Bell, *End the Death Penalty*, FRIENDS OF WESLEY BELL, <https://www.votewesleybell.com/end-the-death-penalty> (last visited Feb. 20, 2020); Krasner for District Attorney, *Krasner on the Issues*, <https://krasnerforda.com/platform> (last visited Feb. 20, 2020) (“Exercising his discretion as District Attorney, Larry will never seek the death sentence.”); Monivette Cordeiro & Jeff Weiner, *Aramis Ayala Won’t Seek Re-Election as Orange-Osceola State Attorney; Belvin Perry May Enter Race*, ORLANDO SENTINEL (May 28, 2019), <https://www.orlandosentinel.com/news/breaking-news/os-ne-aramis-ayala-no-re-election-run-orange-osceola-state-attorney-20190528-z65rv7rmqjdfqoyxsd6rp6junu-story.html> (noting that Orange-Osceola State Attorney Aramis Ayala revealed, “[s]oon after taking office” that she would never seek the death penalty); John Wagner, *Queens District Attorney Candidate Backed by Sanders, Warren, Ocasio-Cortez Claims Primary Win*, WASH. POST (June 26, 2019, 10:49 AM), [https://www.washingtonpost.com/politics/queens-district-attorney-candidate-backed-by-leading-liberals-claims-primary-win/2019/06/26/438f03b8-9802-11e9-830a-21b9b36b64ad\\_story.html](https://www.washingtonpost.com/politics/queens-district-attorney-candidate-backed-by-leading-liberals-claims-primary-win/2019/06/26/438f03b8-9802-11e9-830a-21b9b36b64ad_story.html) (“During her Democratic primary campaign, Cabán made clear that if she prevailed . . . recreational drug users [would not be prosecuted] . . .”).

<sup>4</sup> See Steven W. Perry & Duren Banks, U.S. DEP’T OF JUST., 2007 NATIONAL CENSUS OF STATE COURT PROSECUTORS 1 (2011).

<sup>5</sup> See CARISSA B. HESSICK, UNIV. N.C. SCH. L., THE PROSECUTORS AND POLITICS PROJECT, NATIONAL STUDY OF PROSECUTOR ELECTIONS 4, 10 (2020) [hereinafter HESSICK, NATIONAL STUDY].

*authority* to charge, which means they can block the enforcement of criminal law against the factually guilty by simply refusing to prosecute.<sup>6</sup> At least on the retail level, most agree that such declinations are not only inevitable but optimal. They facilitate deserved mercy and oil the gears of criminal justice.<sup>7</sup> Not only are resources limited, but some cases of factual guilt would simply be wrong to pursue.<sup>8</sup> Either way, no one doubts that prosecutors sometimes may thwart the law's application where, by its letter, it would govern.

The question is how far "sometimes" goes. As the opening examples show, prosecutors are beginning to stretch their power beyond mine-run resource-driven nonenforcement and one-off ex post declinations in "anomalous cases" of factual guilt.<sup>9</sup> Instead, some propose

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<sup>6</sup> See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("[T]he decision whether or not to prosecute . . . generally rests entirely in [the prosecutor's] discretion." (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))); *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (same); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–10, 448 (2001). The United States has never adopted the European principle of "mandatory prosecution," which theoretically renders prosecution nondiscretionary. See Shawn Boyne, *German Prosecutors and the Rechtsstaat*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 138, 147 (Máximo Langer & David A. Sklansky, eds., 2017) (describing how in Germany, unlike the United States, criminal law relies on mandatory prosecution which "attempts to regulate prosecutorial decision-making and mandate prosecutors' fidelity to the law").

<sup>7</sup> See *Wayte*, 470 U.S. at 607–08 (cautioning that a judicial review of prosecution "delays the criminal proceeding, threatens to chill law enforcement . . . and may undermine prosecutorial effectiveness"); *McCleskey v. Kemp*, 481 U.S. 279, 311–12 (1987) ("[A] capital punishment system that did not allow for discretionary acts of leniency 'would be totally alien to our notions of criminal justice.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 200 n.50 (1976))); Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1352–54 (2008) (challenging the notion that prosecutorial discretion should be treated differently than other tools of mercy like nullification and clemency); Albert W. Alschuler, *A Teetering Palladium?*, 79 JUDICATURE 200, 201 (1996) ("[T]he discretion of prosecutors . . . not to enforce the law is not only tolerated but applauded . . ."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1551 (1981) ("[S]ome nonenforcement of the law will occur anyway [i.e., always].").

<sup>8</sup> See, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252–54, 1256–57 (2011) (listing examples of where it may be wrong to pursue a case, such as where punishment is too harsh, enforcement of a law is detrimental to the community, there are moral justifications for violating the law, or in exchange for a defendant's cooperation).

<sup>9</sup> Vorenberg, *supra* note 7, at 1551–52 (justifying prosecutorial nonenforcement in such "anomalous" cases but expressing doubt about its potential transformation into "a general power to control conviction and punishment"); see also William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 226 (1996) ("Prosecutorial nullification is widely considered legitimate in circumstances where the application of a statute produces an especially harsh or anomalous result or where an entire statute . . . seems out of tune with contemporary sentiment . . ."). I use "not enforce" or variants to refer both to absolute nonenforcement policies and policies of systematic underenforcement. The latter includes strongly presumptive nonenforcement.

to de facto decriminalize<sup>10</sup> in full or in part, through *programmatic* prosecutorial nullification: categorical prospective negation of law based on per se or as applied opposition to that law.<sup>11</sup> Complicating matters, these prosecutors may be locally elected, but the laws they're nullifying are *statewide* laws.<sup>12</sup>

Qualms? Join the former Attorney General of the United States, William Barr, who while in office condemned “social justice” prosecutors who “undercut[] the police, let[] criminals off the hook, and refus[e] to enforce the law.”<sup>13</sup> This is no throwaway line: In 2020, he established a federal commission to, among other things, study “[r]efusals by State and local prosecutors to enforce laws or prosecute categories of crimes.”<sup>14</sup>

He is not alone. A Pennsylvania-based Federal Chief Prosecutor, William M. McSwain, slammed Larry Krasner, his Philadelphia-based state counterpart, for “ignor[ing]” “entire sections of the criminal code.”<sup>15</sup> After Rachael Rollins won in Massachusetts on a nonenforcement platform, police officers claimed they would “continue to arrest” lawbreakers, neighboring chief prosecutors condemned her, and the National Police Association filed an ethics complaint.<sup>16</sup> And a

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<sup>10</sup> By “decriminalization” I mean prosecutors’ “de facto power of decriminalization by . . . selective enforcement or nonenforcement.” Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the “De Minimis” Defense*, 1997 B.Y.U. L. REV. 51, 99 (1997); see also Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 796–97 (2012) (describing how prosecutors engage in decriminalization).

<sup>11</sup> See, e.g., Charnock, *supra* note 1 (quoting newly elected San Francisco district attorney’s pledge that certain crimes “should not and will not be prosecuted”).

<sup>12</sup> See Kay Levine, *The State’s Role in Prosecutorial Politics*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 31, 31–32 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (“[T]he state is the source of formal penal legislation, but enforcement is determined exclusively by local prosecutors guided by community priorities and resources.”).

<sup>13</sup> William P. Barr, Att’y Gen., U.S. Dep’t of Just., Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th>.

<sup>14</sup> Press Release, William P. Barr, Att’y Gen., U.S. Dep’t of Just., Attorney General William P. Barr Announces the Establishment of the Presidential Commission on Law Enforcement and the Administration of Justice (Jan. 22, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-establishment-presidential-commission-law>.

<sup>15</sup> Press Release, William M. McSwain, U.S. Att’y, E. Dist. of Pa., Statement by United States Attorney William M. McSwain on the Shooting of Six Philadelphia Police Officers (Aug. 15, 2019), <https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police>.

<sup>16</sup> Andrea Estes & Shelley Murphy, *Stopping Injustice or Putting the Public at Risk? Suffolk DA Rachael Rollins’s Tactics Spur Pushback*, BOS. GLOBE (July 6, 2019), <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bFI/story.html>; Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association Is Throwing a Fit*

Florida prosecutor's announcement that she would refuse to ever seek the death penalty engendered the Florida governor's reassignment of all her death-eligible cases.<sup>17</sup>

Others are unperturbed. For example, focusing on nullification by "progressive prosecutors," some say blanket nonenforcement offers "underrepresented and disenfranchised" communities "more power to choose how to police themselves."<sup>18</sup> In that vein, some "current and former elected prosecutors" directly challenged the Attorney General to support nonenforcement that "move[s] conduct better addressed with public health responses out of the justice system."<sup>19</sup>

Blossoming, it seems, is a reimagining of prosecutorial discretion that goes beyond nipping and tucking to embrace substantive reworking of the law within a district attorney's jurisdiction. And repurposing old power for new ends uncovers scholarly gaps. Writing in 2014, one scholar of programmatic prosecutorial nonenforcement observed it had received "only a few relatively brief and impressionistic treatments."<sup>20</sup> Since then, sparked by prominent federal nonenforcement policies, scholars have begun spinning out normative frameworks.<sup>21</sup> They have trained deserved attention on the distinction

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over *Prosecutorial Discretion*, SLATE (Jan. 4, 2019), <https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html>.

<sup>17</sup> *Ayala v. Scott*, 224 So. 3d 755, 756–57 (Fla. 2017).

<sup>18</sup> John Pfaff, *Boston's New D.A. Pushes Back Against Prosecutors' 'Punishment-Centric' Point of View*, THE APPEAL (Nov. 14, 2018), <https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors/>; see also Carissa Byrne Hessick, *Elected Prosecutors and Non-Prosecution Policies*, PRAWFSBLAWG (Sept. 8, 2018, 9:37 AM), <https://prawfsblawg.blogs.com/prawfsblawg/2018/09/elected-prosecutors-and-non-prosecution-policies.html> (defending decriminalization through discretion); Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> (highlighting four progressive prosecutors: Wesley Bell, Rachael Rollins, Larry Krasner, and Kim Foxx).

<sup>19</sup> Press Release, Fair & Just Prosecution, Statement in Response to Attorney General Barr's Remarks to the Fraternal Order of Police (Aug. 19, 2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/08/Barr-Remarks-Sign-On-Statement.pdf>.

<sup>20</sup> Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 678 (2014).

<sup>21</sup> Compare *id.* at 673–76 (discussing the Obama Administration's federal nonenforcement policies keyed to "certain federal marijuana offenses" and the "removal of certain sympathetic undocumented immigrants," ultimately concluding that "categorical" nonenforcement policies are presumptively invalid without congressional authority), and Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) ("[T]here is simply no general presidential nonenforcement power."), and Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform: The Search for a Limiting Principle*, 14 OHIO ST. J. CRIM. L. 183, 185–86 (2016) (arguing that the Obama Administration "turned to the exercise of prosecutorial discretion rather than legislative change to achieve its [marijuana law enforcement and immigration] policy outcomes"), with Leigh Osofsky, *The Case for*

between anodyne, individualized case-specific nonenforcement and programmatic nonenforcement that de facto nullifies democratically enacted law. Likely because of their federal inspiration, however, scholars debating these issues have focused on the federal context.<sup>22</sup>

Necessarily minimized in the scholarship, then, is the degree to which the United States's globally unusual institutional choice to enforce most criminal law with locally elected prosecutors<sup>23</sup> might matter for programmatic nonenforcement. This Article fills that gap with the first full-length normative assessment of state prosecutors' programmatic nullification that centers that institutional choice.<sup>24</sup>

That analysis draws on, and richens, multiple scholarly debates. First, I place novel emphasis on these prosecutors' *elected* status to situate this phenomenon within a broader, longstanding debate on the

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*Categorical Nonenforcement*, 69 TAX L. REV. 73, 75–76, 131–32 (2015) (supporting categorical nonenforcement in some circumstances).

<sup>22</sup> See, e.g., Price, *supra* note 20, at 673–74 (focusing on “enforcement discretion” in the federal criminal and administrative contexts and employing “close examination of the [federal] Constitution’s text, structure, and normative underpinnings”); Delahunty & Yoo, *supra* note 21, at 785 (critiquing policy-based nonenforcement of federal immigration law on federal constitutional grounds); Osofsky, *supra* note 21, at 131–32 (analyzing the categorical nonenforcement of federal tax law); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1201 (2014).

<sup>23</sup> See David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 6, at 276, 277.

<sup>24</sup> Some recent, shorter scholarship has begun to address this issue. See, e.g., Hessick, *supra* note 18 (arguing that decriminalization decisions are not solely reserved for the legislature); Hessick & Hessick, *supra* note 16 (criticizing Rachael Rollins’s opponents and observing that “[t]he law has long recognized that prosecutors have discretion not to charge”); Pfaff, *supra* note 18 (objecting to the ideas that a blanket policy of decriminalization would lead to increased crime or violate the separation of powers). The most on-point recent piece highlights the relevance of state prosecutors’ elected status en route to defending their programmatic nonenforcement as valuable under a “functional” view of the separation of powers, though its normative conclusions stay within the separation-of-powers milieu. See Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 609–11, 621, 625 (2020). One recent note touched briefly on the unique issues of democratic control posed by state prosecutors’ programmatic nonenforcement policies. See, e.g., John E. Foster, Note, *Charges to Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511, 2534–35 (2019). Otherwise, scholars engaging this state-level trend have not focused on developing a normative framework. See, e.g., Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 870–76 (2019); Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 751–54 (2018); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 25–26 (2017). Broader treatments of underenforcement’s relationship to democracy have not grappled with the phenomenon examined here, although the leading article raises important considerations for any normative framework rooted in democratic ideals. See, e.g., Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1740, 1752 (2006).

proper role of the democratic public inside and outside criminal law.<sup>25</sup> Drawing on democratic theory, I advocate analyzing the trend through a popular sovereignty lens, thus advancing still-budding scholarship on the proper democratic role of the prosecutor.<sup>26</sup> Second, I couple that approach with a once-robust American tradition of localized, populist control of criminal law—best seen in jury nullification—to uncover an unappreciated similarity. When fettered to localized popular will, programmatic prosecutorial nullification acts as a hydraulic descendant of jury nullification: It facilitates wholesale the species of democratic local control that jury nullification permits retail. Thus, far from lawless novelty, this *populist* prosecutorial nulli-

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<sup>25</sup> See, e.g., Daniel S. McConkie, Jr., *Criminal Justice Citizenship*, 72 FLA. L. REV. 1023, 1025–26 (2020); see K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 89–91, 97–98 (2016) (discussing “popular sovereignty—the political agency of citizens to control and direct action of the state” and the ways in which democratic agency should be structured); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1705–06 (2005) (tracking the rise of “democratic pluralism” in postwar America, its influence in criminal procedure, and the beginning of “participatory democracy” in the 1960s); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749–51 (2014) (“[D]emosprudence represents a philosophical commitment to the lawmaking force of meaningful participatory democracy.”); *infra* Part II. Compare John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 716 (2020) (“[W]e follow this path of ‘democratization’ at considerable peril.”), and RACHEL E. BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 105–24 (2019) (indicting the influence of “the masses” as a major cause of criminal justice dysfunction), with Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 N.W. U. L. REV. 1367, 1397 (2017) (“[T]he movement to democratize criminal justice refers to a form of criminal law and procedure that is responsive to the laity rather than solely to officials and experts . . . .”), and ALBERT W. DZUR, *PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY* 17, 94–95, 106–21 (2012) (“Being bored with government . . . [is] a symptom of both institutional and cultural failure . . . failure to trust the contributions of the nonexpert . . . a failure of democratic self-respect.”), and Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–14 (2006) (discussing the tension between the “insiders—namely, judges, police, and especially prosecutors” and the “outsiders—namely, victims and the general public”), and Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 300–02 (2019) (advocating more popular inclusion in criminal law).

<sup>26</sup> See, e.g., Rappaport, *supra* note 25, at 781 (“A curious omission from the [criminal-law] democratization agenda is any discussion of . . . prosecutorial elections.”); see also Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1207 (2020) (noting an “absence of a normative theory of prosecutorial behavior”); Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 486 (2020) (observing that “little attention has been paid to how prosecutors should communicate with the public” about declinations); Máximo Langer & David Alan Sklansky, *Introduction, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY*, *supra* note 6, at 1, 1 (“The relationship between prosecutors and democracy is particularly unclear.”); John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 12, at 3, 4–9; Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 26–27 (2012).



fication grows from longstanding democratic thought. Third and finally, aided by my distillation of populist prosecutorial nullification, I offer a concrete framework for scrutinizing these policies. In short, legitimate policies reflect a localized popular will and do not invidiously trench on the self-determination of those whose will they do not implement. This framework, I argue, can provide normative grounding for evaluating prosecutorial categorical nonenforcement for a variety of actors, including state-level entities with the power to overrule local behavior.<sup>27</sup>

Three points of order before beginning. First, for analogical purposes, I focus on the petit (trial) jury in this Article, and references to the jury are to that jury unless otherwise noted.<sup>28</sup> Second, I focus on categorical prosecutorial nullification as a subset of prosecutorial nonenforcement.<sup>29</sup> These are cases where prosecutors act analogously to the nullifying jury—i.e., refusing to apply inarguably applicable law because of moral or ideological opposition to that law in all or a subset of cases.<sup>30</sup> While this is not true of all prosecutorial nonenforcement,<sup>31</sup> this subset poses the thorniest questions, as it at first blush seems to represent willful rejection of a democratic will expressed through elected representatives. Finally, although I focus on prosecutors, I recognize that other actors possess similar discretionary nonenforcement power.<sup>32</sup> Police officers may “nullify” through nonarrest,<sup>33</sup>

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<sup>27</sup> See *infra* Section IV.D.2.

<sup>28</sup> Some aspects of the indicting grand jury (such as the possibility of seeing it as a populist mechanism to thwart the enforcement of the law) might be amenable to the treatment I give the petit jury. See generally Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703 (2008). But differences, including perhaps most notably the greater state freedom not to use the grand jury, see SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, *GRAND JURY LAW AND PRACTICE* § 1:5 (2d ed. database updated Nov. 2019), Westlaw GRJURLAW, lead me to focus on the petit jury in this Article.

<sup>29</sup> Cf. Fairfax, *supra* note 8, at 1245 (drawing distinction).

<sup>30</sup> Compare Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 888, 892 (1999) (arguing that juries nullify because of disagreement with a particular law itself or disagreement with law as applied in particular circumstances), with Fairfax, *supra* note 8, at 1252–53 (defining prosecutorial nullification). The analogy is not perfect, see *id.* at 1248–49 n.23, but it is on all fours for present purposes: in both settings, applicable, otherwise legitimate law is rejected for ideological or value-driven reasons.

<sup>31</sup> See Fairfax, *supra* note 8, at 1254–58 (outlining non-nullification nonenforcement cases).

<sup>32</sup> *Id.* at 1247 (noting that “enforcement officers, petit and grand juries, and judges” all have the ability to forego prosecution).

<sup>33</sup> Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 198 (2019). Note that prosecutorial discretion is looked upon more favorably than police nonenforcement. See 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 15.1(c) (4th ed. 2020), Westlaw CRIMPROC (“[I]n the eyes of the law, discretion by the prosecutor is considered proper while discretion by the police is with rare

and judges might wield discretion to impede conviction.<sup>34</sup> But as even a recent critic of overstated prosecutorial power concedes, “virtually every criminal justice outcome can be traced to a prosecutor’s decision.”<sup>35</sup> Prosecutors’ unquestioned importance makes them worthy of targeted inquiry, notwithstanding other actors’ relevance.

This Article proceeds in five parts. Part I unspools the power of two institutions that can excuse the factually guilty: the jury and the prosecutor. Part II draws on democratic theory to elaborate—and justify employing—a democratic vision focused on autonomy and catalyzed by the subsidiarity of district attorney elections. Part III employs that vision to construct a framework for evaluating programmatic prosecutorial nullification. That framework reveals key democracy-reinforcing benefits at the phenomenon’s most legitimate core—populist prosecutorial nullification. Part IV engages potential criticisms. Part V applies the framework to real-world cases and considers its implications for future study of jury nullification and conventional prosecutorial behavior.

## I

### DISCRETION: THE JURY AND THE PROSECUTOR

Exceptions in criminal law are nothing new; *de minimis non curat lex* is Latin for a reason.<sup>36</sup> But exceptions are not limited to trifles. Long before “progressive prosecutors,” American juries and prosecutors have had generally unchecked discretionary power to excuse ille-

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exception viewed with disfavor.” (citation omitted)). Moreover, if officers care about converting their arrests to prosecutions and convictions, “arrest rates [should] respond endogenously to changes in district attorney behavior.” Sam Krumholz, *The Effect of District Attorneys on Local Criminal Justice Outcomes 10–11* (Jan. 3, 2019) (unpublished manuscript) (on file with the *New York University Law Review*). Prosecutorial nullification thus warrants examination irrespective of the police’s role.

<sup>34</sup> See Bellin, *supra* note 33, at 194–98 (“A particularly crafty judge could undermine a prosecution simply by declining to call a case in a predictable fashion.”). Some of this Article’s analysis may bear on state court judge behavior, at least those elected at a local level. It might be, however, that the differences in the judicial role might require different treatment of electorally sanctioned “judicial nullification.” Cf. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2084, 2086 (2010) (considering whether judicial elections imply “that sensitivity to public opinion is part of the job description,” but observing role-based opposition to such sensitivity among some supporters of judicial elections (citation omitted)); *id.* at 2126–27 (flagging the possibility that even those generally committed to populist collective self-rule might yet want to preserve one branch of government as expressly “backward looking” and “nonmajoritarian”). I do not attempt to resolve these differences in this piece.

<sup>35</sup> Bellin, *supra* note 33, at 212.

<sup>36</sup> See *United States v. Lehman*, 468 F.2d 93, 103 (7th Cir. 1972) (applying this common law principle, which means “the law does not concern itself with trifles”); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 334–36 (2017) (discussing state-law incorporation of the Model Penal Code’s *de minimis* provision).

gality.<sup>37</sup> Understanding that power, and its justification, is key to understanding populist prosecutorial nullification.

### A. *Jury Nullification and Democracy*

For better or worse, the diminished role<sup>38</sup> of today's criminal jury would likely have been unimaginable to the Founding generation. They knew a robust jury with substantial discretionary power to control outcomes in service of the jurors' view of justice. They had read William Blackstone's praise for the grand and petit juries as the "sacred bulwark of the nation," which "preserve[d] in the hands of the people that share which they ought to have in the administration of public justice."<sup>39</sup> They thus saw nothing untoward in juries deciding the contours of applicable law as well as the case-specific facts.<sup>40</sup> For the same reasons, they supported the jury's ability to acquit despite a proven case, i.e., jury nullification.<sup>41</sup> Then, as now, nullifying jurors might have (1) thought the law in question morally illegitimate, or (2) thought the law generally acceptable but wrong to apply in cases of a certain sort, or to a specific defendant.<sup>42</sup> Such exercises of power were fresh in Founding-era cultural memory. Most would have been familiar with the English jury that ignored judicial harangues to reject

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<sup>37</sup> See, e.g., Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 455 (1998) ("The jury's check on punishment is . . . similar to the power of the executive to *refuse* to prosecute: both are assumed to be beyond the reach of judicial order or legislative mandate.").

<sup>38</sup> See, e.g., Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 GEO. WASH. L. REV. 875, 905–06 (2019) (describing scholarly agreement on the jury's "atroph[y]" and collecting sources); see also DZUR, *supra* note 25, at 5–6 (observing the long "decline" of the American jury, as measured through the decline of trials and the rise of pleas); see also *infra* text accompanying notes 72–81.

<sup>39</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES 350; 3 WILLIAM BLACKSTONE, COMMENTARIES 380.

<sup>40</sup> See, e.g., Jenny E. Carroll, *Nullification as Law*, 102 GEO. L. J. 579, 587–88 (2014) ("[J]uries conferred a meaning in the law previously absent by driving the law beyond its prescriptive limitations towards a descriptive construct."); see also JEFFREY ABRAMSON, WE, THE JURY 30–32 (2000).

<sup>41</sup> See Carroll, *supra* note 40, at 588 ("[T]he Founders understood th[e] right [to criminal jury trials] to include a citizen's right to interpret law *and* to nullify it." (emphasis added)); Barkow, *supra* note 7, at 1340 (defining jury nullification and explaining why a jury may opt to nullify). These are distinct concepts. One can imagine a jury acquitting after adjudicating the law (e.g., resolving an ambiguity in a defendant's favor) without believing that it was acquitting "despite proof of the case," i.e., without acquitting "against" the law.

<sup>42</sup> See, e.g., Marder, *supra* note 30, at 892. Some argue that a hung jury's refusal to convict—if based on some jurors' wish to nullify—constitutes nullification. See, e.g., *id.* at 881. Because nothing here turns on the difference, this Article assumes that nullification requires acquittal.

unlawful assembly charges against William Penn.<sup>43</sup> Even more would have known, and approved, of the colonial jury that acquitted John Zenger of “seditious libel” against the Crown despite little doubt that conviction was warranted under the law announced by the court.<sup>44</sup>

There was, in short, a general understanding of the jury as representing “a procedural system and a legal culture whose every feature tended to underscore and reinforce the centrality of lay control.”<sup>45</sup> Take it from John Adams: jurors had the “right” and “Duty” to “find the verdict according to” their conscience and judgment, “tho [sic] in Direct opposition to the Direction of the Court.”<sup>46</sup> The authorities and the law as they enunciated it could be wrong, or at least contrary to the people’s “best Understanding, Judgment, and Conscience.”<sup>47</sup> For Federalists and Anti-Federalists, this was a consensus position.<sup>48</sup> It is thus unsurprising that the jury’s importance was uncontroverted at the Constitutional Convention.<sup>49</sup>

The Convention, however, precipitated a debate about the importance of the *local* jury. Anti-Federalists deemed it indispensable to preserve popular control over criminal law.<sup>50</sup> They recounted the many cases in which local juries had thwarted perceived English

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<sup>43</sup> See ABRAMSON, *supra* note 40, at 68–73 (“[The] jurors [of Penn’s trial] had made their own assessment of the law, or at least had rejected that put forth by the court.”) (quoting historian Thomas Andrew Green); see also Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 241 (1993).

<sup>44</sup> See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 52 (2003) (recounting defense’s argument that the jurors had “the right . . . to determine both the law and the fact”); ABRAMSON, *supra* note 40, at 73–74 (calling Zenger’s trial “the defining moment . . . for the English jury”). Notably, the Crown brought those charges via information after three grand juries refused to indict. Barkow, *supra*, at 52.

<sup>45</sup> LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 157 (2004); see also Larry D. Kramer, *The Supreme Court 2000, Term Foreword: We the Court*, 115 HARV. L. REV. 4, 31 (2001) (describing juries as “render[ing] verdicts based on their own interpretation and understanding of the constitution”); ABRAMSON, *supra* note 40, at 30–32.

<sup>46</sup> Kramer, *supra* note 45, at 31.

<sup>47</sup> *Id.*

<sup>48</sup> *E.g.*, Donald M. Middlebrooks, *Reviving Thomas Jefferson’s Jury: Sparf and Hansen v. United States Reconsidered*, 46 AM. J. LEGAL HIST. 353, 354 (2004) (“Federalists and Anti-Federalists alike all—support the belief in a jury responsible for deciding both fact and law.”).

<sup>49</sup> See THE FEDERALIST NO. 83, at 261 (Alexander Hamilton) (Michael A. Genovese ed., 2009) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury . . .”).

<sup>50</sup> See Middlebrooks, *supra* note 48, at 387–88 (noting that the leading Anti-Federalist described juries as “drawn from the body of the people . . . we secure to the people at large, their just and rightful control in the judicial department”); ABRAMSON, *supra* note 40, at 22–29 (quoting Patrick Henry’s insistence that not mandating local juries rendered jury trials “instrument[s] for tyranny”). Anti-Federalists also suggested that local juries

oppression.<sup>51</sup> Federalists warned that localized juries could compromise partiality.<sup>52</sup> Ultimately, while Article III was silent on locality, the Anti-Federalists won much of the debate.<sup>53</sup> The Sixth Amendment required trial by a jury “of the State and district” of the crime’s commission, and the contemporaneous Judiciary Act of 1789 required trial in, and a jury drawn from, the county of the offense.<sup>54</sup> The Fifth Amendment’s double-jeopardy bar, too, reflected the drafters’ desire to preserve the jury’s ability, via acquittal, to permanently place an accused beyond prosecution.<sup>55</sup> Indeed, the jury is fairly called the “paradigmatic image underlying the Bill of Rights.”<sup>56</sup>

One could surely question how much historical approaches should constrain how we think about the modern jury.<sup>57</sup> But understanding why the Founders lauded the jury at least offers some basis for asking whether their reasons have contemporary purchase. At any rate, the Supreme Court insists that history matters here.<sup>58</sup> And the foundational, Constitutionally-enshrined view of the jury was one of a localized lay body with power to control local operation of criminal law, through its interpretations of law and fact and—sometimes—nullification.<sup>59</sup> Thus, well into the nineteenth century, federal judges (and

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would be superior fact-finders. *See id.* at 28–29 (citing Anti-Federalists insisting on the importance of popular, local influence).

<sup>51</sup> *See* ABRAMSON, *supra* note 40, at 23–24 (describing juries as “resistance bodies”).

<sup>52</sup> *See id.* at 25–26 (noting Federalist fear that localized juries would be insufficiently disinterested because of their familiarity with the region and persons involved).

<sup>53</sup> *See id.* at 26–27 (“The Anti-Federalist success in forcing amendment of the Constitution, shrinking the geography of jury justice to some area smaller than the state, shows the vitality of the local jury ideal.”); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1186 (1991) (noting that the Sixth Amendment went “a step beyond the language of Article III”).

<sup>54</sup> U.S. CONST. amend. VI; Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73; *see also* ABRAMSON, *supra* note 40, at 35–36 (sketching the contents and implications of the Sixth Amendment and Judiciary Act’s treatment of the jury). The Judiciary Act is “contemporaneous and weighty evidence of [the Constitution’s] true meaning.” *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888).

<sup>55</sup> *See, e.g.*, Barkow, *supra* note 44, at 48–49 (arguing that the Double Jeopardy Clause “necessarily” implies the “power to decide the law as well as the facts”); *see also* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 84, 129–32 (1978).

<sup>56</sup> *See* Amar, *supra* note 53, at 1190 (observing that jury appears in three amendments and shaped three others).

<sup>57</sup> *See, e.g.*, Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 964, 1001–02 (2010).

<sup>58</sup> *See* S. Union Co. v. United States, 567 U.S. 343, 353 (2012) (“[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law.” (quoting *Oregon v. Ice*, 555 U.S. 160, 170 (2009))).

<sup>59</sup> *See, e.g.*, Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1416–17 (2017) (sketching the early jury’s facilitation of local control over “the content of . . . substantive law”); *see also* Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1484

Justices) “instructed [criminal] juries that they were the ‘judges both of the law and the fact’” and “not bound by the opinion of the court.”<sup>60</sup> The Anti-Federalists’s victory implemented the Declaration’s paean to the “consent of the governed” as indispensable to legitimate government.<sup>61</sup> It reflected broad acceptance that the People’s non-expert sense of justice was not only worth respecting but should often carry the day.<sup>62</sup> And the choice of a local scope to define the relevant People reflected the belief that those within the community where “the crime shall have been committed” have a materially different stake in the question of guilt than those outside it.<sup>63</sup>

This vision’s major deficiencies temper any praise it is due. It excluded enslaved people, and even in “free” Northern states no African Americans served on juries before 1860.<sup>64</sup> Gender, property, and religious exclusions applied as well.<sup>65</sup> United in their praise for the “consent of the governed,”<sup>66</sup> the Federalists and Anti-Federalists were also united in their hypocrisy. The “People,” as it happened, meant a particular sort of elite. So it is unsurprising that, while some juries exercised their power laudably (e.g., nullifying the Fugitive Slave Act),<sup>67</sup> unrepresentative juries often used their power to subjugate, perhaps most notably as part of the post-Civil War backlash against African American rights.<sup>68</sup> Juries were, of course, not the only defectively honored American commitment, and like other such commitments, later generations have—through struggle—won fuller reali-

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(2017) (describing the jury trial in the Founding Era as “an institution . . . [intending] to subordinate state power and state officials to the authority of a local laity, and to empower that laity”).

<sup>60</sup> Mark DeWolfe Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582, 589 & n.22 (1939) (internal quotation marks omitted); see also H. Jefferson Powell, *The Principles of ‘98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 737 (1994) (recounting Justice Samuel Chase’s acknowledgement of the “jury’s general ‘right to decide the law’” in a case under the 1798 Sedition Act).

<sup>61</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>62</sup> See ABRAMSON, *supra* note 40, at 30–32; Middlebrooks, *supra* note 48, at 353–54.

<sup>63</sup> U.S. CONST. amend. VI; see also Appleman, *supra* note 59, at 1417.

<sup>64</sup> Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 884 (1994).

<sup>65</sup> ABRAMSON, *supra* note 40, at 29; see also 4 WILLIAM BLACKSTONE, COMMENTARIES 350 (limiting to “freeholders”).

<sup>66</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>67</sup> Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL’Y 7, 14–15 (1997).

<sup>68</sup> See, e.g., Carroll, *supra* note 40, at 605–06 (recounting the role nullification played in thwarting the “promise” of Reconstruction).

zation of those principles.<sup>69</sup> Today's juries, in theory, better reflect the entire People.<sup>70</sup>

Yet, as juries have become better representations of the People, their power has waned.<sup>71</sup> Elite support for nullification and jury interpretation of the law dissipated throughout the nineteenth century.<sup>72</sup> Opponents of strong juries argued that their unpredictability contravened the need for professionalized, predictable rule of law, and contended that popular control over criminal laws was less necessary where the People's representatives had enacted them.<sup>73</sup> All-white Southern juries' postbellum obstruction of Reconstruction showed jury nullification at its worst and caused Republicans to single it out for opprobrium.<sup>74</sup> Today, the Supreme Court and much academic commentary rejects nullification and jury judgment of the law.<sup>75</sup> To be

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<sup>69</sup> See, e.g., Paul Finkelman, *The Founders and Slavery: Little Ventured, Little Gained*, 13 *YALE J.L. & HUMAN.* 413, 414 (2001) (observing that there is a "contradiction of slavery in a republic based on liberty and self-government").

<sup>70</sup> Better reflection in theory does not always manifest in fact. See, e.g., Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 *MICH. L. REV.* 785, 788–90 (2020) (collecting studies on racially disparate use of peremptory strikes and describing study of for-cause removals that showed similar racial disparities); *id.* at 808 & n.117 ("[R]ace-neutral practices in assembling [jury] venires could result in [constitutionally suspect] race and sex disparities . . . ."); *id.* at 826–27 (arguing that for-cause challenges are antidemocratic because they exclude a range of perspectives from the jury, making the jury less reflective of public values).

<sup>71</sup> See, e.g., Alschuler & Deiss, *supra* note 64, at 868 ("[A]s the jury's composition became more democratic, its role in American civic life declined.").

<sup>72</sup> Carroll, *supra* note 40, at 597 ("[F]ederal judges . . . began to instruct juries that they were not entitled to interpret law but that their role was limited to that of fact finders. . . . [M]any state courts [began] to follow their federal counterparts."); see also Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 *HOFSTRA L. REV.* 377, 444–45 (1996) (discussing the decline of jury power during the nineteenth century); Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 *U. CHI. L. REV.* 1133, 1159–63 (2011) (discussing three prominent nineteenth century legal treatise authors who agreed that "juries no longer had the right to nullify and instead were required to take the law from the court").

<sup>73</sup> Carroll, *supra* note 40, at 598–99.

<sup>74</sup> See Bressler, *supra* note 72, at 1152–53, 1182.

<sup>75</sup> See ABRAMSON, *supra* note 40, at 88–93; see also Sparf v. United States, 156 U.S. 51, 101–02 (1895) (rejecting argument that criminal juries have the right to "disregard the law as expounded to them by the court and become a law unto themselves," and holding that "in the courts of the United States it is the duty of juries in criminal cases to take the law from the court"); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 *VA. L. REV.* 253, 260 (1996) (arguing that nullification "cuts a broad [negative] path through the criminal law[.]" leading to "less accurate [verdicts]" and "undesirable incentives for both litigants and judges"); Barkow, *supra* note 7, at 1343–44 (observing "[p]opular press" skepticism towards nullification and voter rejection of pro-nullification ballot initiatives); Marder, *supra* note 30, at 905 (noting the "conventional view" that jury nullification "is always harmful"); Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 *HARV. L. REV.* 771, 785 (1998) (observing that "[j]uries are routinely instructed" that they "must" or "should" convict when the government proves its case

sure, acquittals remain unreviewable, so juries' raw power remains the same.<sup>76</sup> But jury instructions adopt the view that juries lack the right to nullify, notwithstanding that power, and guide jurors away from exercising it.<sup>77</sup> We thus need only make the uncontroversial assumption that many juries comply with those directions to see juries as (relatively) neutered.

To be sure, control over the facts can still be powerful. Think of the jury that must decide whether, all things considered, a homicide defendant claiming self-defense reasonably feared for his or her life,<sup>78</sup> or in any mine-run case whether to believe a witness.<sup>79</sup> But exercising that sort of power requires a trial. Today, plea bargaining has eliminated trials in huge swaths of cases, which means that even jury influence over the facts has diminished.<sup>80</sup> Moreover, the Supreme Court's increasingly expansive view of the petty-crime exception to defendants' jury-trial rights has necessarily narrowed the entitlement to a jury trial.<sup>81</sup> For some, this may be laudable, but it is hard to dispute the relative meagerness of the jury's current status.

Paradoxically, the Supreme Court continues to drive home the jury's value as representative of the People. So, in requiring that a jury has found that any facts increasing a crime's penalty were proven beyond a reasonable doubt, it anoints the jury "the great bulwark of [our] civil and political liberties," a hedge against "oppression and tyr-

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"beyond a reasonable doubt"). Some scholars have supported jury nullification. *See, e.g.,* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1155–56 (1997) (arguing that jury nullification "may well improve our chances of acting within the rule of law rather than subverting it"); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) (positing that, in practicing jury nullification, "it is both lawful and morally right that black jurors consider race in reaching verdicts in criminal cases"). But academia may be its high-water mark. *See, e.g.,* Brown, *supra*, at 1151 ("Nullification has more support among academics than among judges or the popular press . . .").

<sup>76</sup> *See, e.g.,* Barkow, *supra* note 44, at 49–50 (noting unreviewability of acquittals).

<sup>77</sup> *See Sparf*, 156 U.S. at 106 (declining to recognize "the right of the jury . . . to take the law into their own hands"); Muller, *supra* note 75, at 785.

<sup>78</sup> *See, e.g.,* Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377, 1392 (1994) (discussing self-defense).

<sup>79</sup> *See, e.g.,* *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . .").

<sup>80</sup> *See, e.g.,* *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (observing that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions" result from guilty pleas); *Dzur*, *supra* note 25, at 120–21 (discussing the shrinking number of jury trials over the past century).

<sup>81</sup> *See, e.g.,* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 149, 169, 175–76 (connecting this move in part to fear of jury power, including nullification).



anny[.]”<sup>82</sup> and an institution on par with “suffrage” in “ensur[ing] the people’s ultimate control in . . . the judiciary.”<sup>83</sup> In *Batson*<sup>84</sup> cases, it blesses the jury as the “most substantial [non-voting] opportunity that most citizens have to participate in the democratic process.”<sup>85</sup> Scholars, too, still emphasize the jury’s core democratic role<sup>86</sup> and often hold forth on how to revitalize it.<sup>87</sup> Rhetorically, at least, it seems the jury’s desuetude has left a populist gap in need of filling.

### B. *The Power of the Public Prosecutor*

Before any case reaches a jury, someone—usually a prosecutor—must decide that charges are warranted.<sup>88</sup> Because state prosecutors possess nearly unbounded discretion in their charging decisions, their local election could theoretically afford a separate path to localized control of nonenforcement discretion.<sup>89</sup> That move’s plausibility requires some understanding of the historical roots and contemporary evolution of the prosecutor. Two historical developments are key: from presumptively private prosecution to presumptively public prosecution, and from appointed public prosecutors to elected public prosecutors.

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<sup>82</sup> *United States v. Booker*, 543 U.S. 220, 239 (2005) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)).

<sup>83</sup> *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

<sup>84</sup> *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (holding that racial discrimination in jury selection violates a defendant’s right to equal protection under the Fourteenth Amendment).

<sup>85</sup> *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991) (“Jury service preserves the democratic element of the law . . .”).

<sup>86</sup> *See, e.g.,* FREDERICK G. WHELAN, *DEMOCRACY IN THEORY AND PRACTICE* 189 (2019) (finding that jury deliberation is “arguably the most democratic component of Anglo-American judicial systems”).

<sup>87</sup> *See generally* Barkow, *supra* note 44; Middlebrooks, *supra* note 48.

<sup>88</sup> *Fairfax*, *supra* note 28, at 734. A minority of states do still require a grand jury indictment to initiate serious criminal charges, *see SARA SUN BEALE ET AL., supra* note 28, § 1:1, but “for the most part it is the prosecutor who determines what witnesses and evidence the grand jury will hear and what charges will be presented to it.” *Id.* § 4:15. While police officers can in some jurisdictions file felony charges directly with the court, *see Bellin, supra* note 33, at 182, prosecutors can short-circuit that choice by dismissing the charges. *See Adam M. Gershowitz, Justice on the Line: Prosecutorial Screening Before Arrest*, 2019 U. ILL. L. REV. 833, 851 (2019) (noting the significant number of cases prosecutors dismiss after police file charges).

<sup>89</sup> *See Fairfax, supra* note 28, at 734 (discussing breadth of prosecutorial discretion); Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 *CRIME & DELINQ.* 568, 570 (1984) (noting prosecutors have “virtually unreviewable discretion to decide whether to prosecute”); *see also* Russell M. Gold, *Promoting Democracy in Prosecution*, 86 *WASH. L. REV.* 69, 88 (2011) (“[T]he grand and petit juries . . . cannot carry the torch of democratic accountability alone. Voters’ choice of a local prosecutor remains a necessary feature of preserving democracy in criminal prosecution.”).

## 1. *Towards the Powerful Elected Public Prosecutor*

The American colonies carried forward the English practice of presumptively private prosecution, under which an aggrieved citizen would initiate the case by official complaint and take responsibility for seeing it to completion.<sup>90</sup> The public prosecutor emerged in the colonies in the early eighteenth century, when Connecticut abandoned private prosecution, soon followed by some other colonies.<sup>91</sup> Notably, particularly at its inception, public prosecution often preserved considerable private control by tying prosecutors' pay to the number of cases they tried.<sup>92</sup> This effectively incentivized prosecutors to serve as conduits for private will, since they were motivated to pursue as many cases as the citizenry brought them.<sup>93</sup> Though states moved away from that payment model—first generally to payment for conviction<sup>94</sup> before settling on salaries—there was no retreat from the public prosecutor itself.<sup>95</sup> That model gained popularity over time but only became predominant in the late nineteenth century, when public order problems and growing state appetite for using criminal law to shape social behavior proved incompatible with ad hoc private prosecution.<sup>96</sup> Although often criticized, private prosecution still exists in limited settings.<sup>97</sup>

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<sup>90</sup> Steinberg, *supra* note 89, at 571–72; Worrall, *supra* note 26, at 5–6; Davis, *supra* note 6, at 449.

<sup>91</sup> Worrall, *supra* note 26, at 6.

<sup>92</sup> NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 42, 255–56, 258 (2013).

<sup>93</sup> *Id.* at 256.

<sup>94</sup> This move, which occurred in most states over the course of the nineteenth century, effectively dissuaded prosecutors from serving as conduits for private will—instead, it encouraged them to screen cases aggressively to ensure they picked winners. *See id.* at 42–43.

<sup>95</sup> *See id.* at 272, 363–65 (discussing the transition to salary-based payment and cataloging the date of that transition in each state).

<sup>96</sup> PARRILLO, *supra* note 92, at 31, 261; *see also* Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1325–26, 1328 (2002) (connecting 1800s push for fully public prosecution to elite fear of “riots . . . gang violence” and corruption); Davis, *supra* note 6, at 450 (positing that private prosecution “could no longer maintain order” due to population growth and urbanization); Steinberg, *supra* note 89, at 582–84 (noting that industrialization and urban growth drove “public order” problems, which drove the professionalization of police and prosecutors). Some of the quintessential public order crimes less amenable to a private-driven system were vice crimes like gambling, drinking, and prostitution, which were (arguably) “victimless behavior” with broad community acceptance. *See, e.g.*, PARRILLO, *supra* note 92, at 260–61 (making this point regarding the inadequacies of the pay-per-case prosecutorial compensation system).

<sup>97</sup> *See, e.g.*, Michael Edmund O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 683–84, 709–10 n.327 (2010) (noting most common contemporary uses of private prosecution, and collecting criticisms).

This evolution is suggestive on two fronts. First, private prosecution's original primacy reminds us that bottom-up criminal-law administration pegged to (or at least reflective of) the common person's priorities and concerns is neither new nor limited to the Founding-era petit jury.<sup>98</sup> Second, perhaps less obviously, the shift toward presumptively public prosecution seems to mark a changing approach to discretion. After all, predominantly private prosecution diffused the discretion inherent in the prosecution decision throughout an entire population. To be sure, public prosecutors still preferred private victims (if any) to cooperate. But cooperation was no longer necessary, and a single state actor held the reins of the charging decision.<sup>99</sup>

As for elections, the proliferation of public prosecutors increased the importance of their mode of selection. Early public prosecutors were generally appointed, with the appointing official varying by state.<sup>100</sup> Like other state officials, prosecutors were swept up in the Jacksonian Revolution, which preached popular sovereignty as the true embodiment of democracy, best obtained via popular election of public officials.<sup>101</sup> In 1832, Mississippi became the first state to authorize election of public prosecutors.<sup>102</sup> The trend surged over the next few decades, and almost every state had done so by the early twentieth century, just as private prosecution ebbed.<sup>103</sup> The trend has

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<sup>98</sup> Máximo Langer & David Alan Sklansky, *Epilogue: Themes and Counterthemes*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 6, at 300, 333–35 (“[G]iving private individuals and entities prosecutorial powers can be interpreted as a way to implement democratic ideals . . . .”); Worrall, *supra* note 26, at 6 (“In [English] common law . . . a crime was viewed not as an act against the state, but rather as a wrong inflicted upon a victim. The aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender . . . .”); Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 12, at 177, 203 (“[U]nder the private prosecution system . . . citizens determined prosecution priorities . . . .”). The citizen-staffed state grand jury played a similar bottom-up role in the Founding era, but has experienced a decline much like that of the petit jury. See, e.g., John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 346–47 (2005).

<sup>99</sup> See, e.g., Steinberg, *supra* note 89, at 582 (“Now [after the public prosecutor’s ascendancy], officers of the state . . . not the individual citizen, were . . . the dominant actors of criminal justice.”).

<sup>100</sup> See Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1537–39 (2012) (noting who appointed the chief prosecutor in various states: the judge of the county court in New York and Kentucky; the state legislature in Alabama, Georgia, North Carolina, and Tennessee; and the governor in Massachusetts and New Hampshire); see also Worrall, *supra* note 26, at 7.

<sup>101</sup> See, e.g., Gold, *supra* note 89, at 75–76; Ellis, *supra* note 100, at 1531, 1550–51 (observing that supporters of elections, inter alia, “believed popular election would distance the office from patronage politics” and make prosecutors “more responsive to the concerns of voters” and “the priorities of local communities.”).

<sup>102</sup> Ellis, *supra* note 100, at 1540.

<sup>103</sup> Davis, *supra* note 6, at 451.

not reversed. Today, “[a]ll but five states elect their prosecutors at the local level.”<sup>104</sup> The Jacksonians, no less than the Founders, applied a defective conception of the relevant “governed.”<sup>105</sup> Yet they provided a principle to build upon: Wealth and property should not distinguish the voices that mattered from those that did not.

The public prosecutor’s development helped expand and solidify its power. Take the embrace of publicness itself. The rejection of a primarily private system increased the import of the public prosecutor’s discretionary power by making that actor’s charging decision the one that counted.<sup>106</sup> And, as Nicholas Parrillo has argued, the roughly contemporaneous change in the bases for prosecutorial payment—from cases tried, to convictions obtained, and then finally to broad adoption of pure salary systems—dovetailed with this trend.<sup>107</sup> As he has shown, the choice of salaries likely reflected broad desire for prosecutors to exercise their discretion in muscular ways, and in particular for them to expand their equitable nonenforcement in some cases of factual guilt.<sup>108</sup>

Elections, too, may have increased prosecutorial “power, independence, and discretion.”<sup>109</sup> After all, appointed prosecutors who at least had to pay some heed to the appointing official if they wanted reappointment were now theoretically only accountable to the People. But if the populace had few effective mechanisms for measuring performance, the upshot may have been effectively unchecked

<sup>104</sup> Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598 (2014). The exceptions: Alaska’s local prosecutors are appointed by the state’s appointed attorney general. See HESSICK, NATIONAL STUDY, *supra* note 5, at 18. Connecticut’s local prosecutors are appointed by a state commission. *Id.* at 39. Delaware’s local prosecutors are appointed by its elected attorney general. *Id.* at 40. Rhode Island has no local prosecutors, although its elected attorney general handles criminal prosecutions. *Id.* at 266. And New Jersey’s local prosecutors are appointed by the governor, with senatorial advice and consent. *Id.* at 207.

<sup>105</sup> See, e.g., William M. Wiecek, *The Emergence of Equality as a Constitutional Value: The First Century*, 82 CHI.-KENT L. REV. 233, 240–41 (2007) (emphasizing that “racist hostility to black Americans” compromised the egalitarian vision of both the Founders and Jacksonians).

<sup>106</sup> See Steinberg, *supra* note 89, at 583–84 (“The assumption of discretion was the key to the modern era of the public prosecutor’s power. . . . The [key] change was in who held the power to determine how a case would be disposed . . . . [D]iscretion was lodged less in the popular bodies and more in the police and public prosecutors.”).

<sup>107</sup> See PARRILLO, *supra* note 92, at 255–94.

<sup>108</sup> *Id.* at 272–73, 277–79, 288–91. The idea, in brief: salaries would free prosecutors from the profit motive, empowering them to decline enforcement without hurting their own pockets, which would in turn make prosecutors more amenable to the sort of equitable nonenforcement that encourages citizens to view the law as legitimate, rather than exploitative. See *id.* at 272–73, 288.

<sup>109</sup> Davis, *supra* note 6, at 451.

prosecutorial power.<sup>110</sup> Whatever the causes, courts began to widely affirm the public prosecutor's discretion in the late nineteenth century.<sup>111</sup> Today, assuming probable cause, the prosecutor's "decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."<sup>112</sup>

## 2. *Exercising Discretion: Managerialism or Populism?*

Prosecutors' power over charging can empower them to nullify on precisely the same ideological grounds that juries might, i.e., opposition to a law in all or a subclass of cases.<sup>113</sup> Even leaving aside other forms of prosecutorial nonenforcement, that alone is an awesome power requiring a theory of proper exercise.<sup>114</sup>

The path to that theory runs through the longstanding debate between two ways of thinking about the proper role of the public in good governance. One is an elite-driven, managerialist approach that prizes "technocratic administration" and hopes that "expertise and insulation from the political process [will] produce better decision-making."<sup>115</sup> The other often centers popular sovereignty, is skeptical of the ability of professionalized expertise to resolve hard moral questions, and centers the need for a tight nexus between the popular will and policy output.<sup>116</sup> American criminal law, in particular, is emblematic of the dispute. Both the decline of the powerful jury and the

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<sup>110</sup> See *id.* But see David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 491–92 (2016) (noting the prevalence of this argument but offering some skepticism).

<sup>111</sup> See, e.g., Steinberg, *supra* note 89, at 570.

<sup>112</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); see also Tonry, *supra* note 26, at 5 ("Discretionary prosecutorial decisions are for all practical purposes immune from judicial review."); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 585–88 (2009) (outlining lack of "robust limiting forces" on "individual choices of th[e] chief prosecutor"); Vorenberg, *supra* note 7, at 1525 (noting prosecutors' "virtually unlimited control over charging").

<sup>113</sup> See Weinstein, *supra* note 43, at 246 (comparing prosecutorial nullification and jury nullification); Fairfax, *supra* note 8, at 1252–54.

<sup>114</sup> Cf. Bellin, *supra* note 26, at 1207 (arguing that there is a "striking" "lack of an answer" to the question of the proper "role of the American prosecutor").

<sup>115</sup> Rebecca M. Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575, 608 & n.180 (2009); see also William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 976 (2006); RAHMAN, *supra* note 25, at 9–10 (explaining that on this view democracy "recedes into the background" as experts "make socially optimal policy decisions on the basis of rationality rather than politics").

<sup>116</sup> See, e.g., Kleinfeld, *supra* note 25, at 1376, 1392–93, 1397 (framing this debate and endorsing popular sovereignty); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 689, 742 (2020) (suggesting anti-populist strain reflects "demophobia"); RAHMAN, *supra* note 25, at 99–100 (arguing that expertise "can offer insight, but not resolution" and advocating "openly moral debate

evolution of the public prosecutor evince a push toward anti-populist views of criminal-law administration.<sup>117</sup> Yet, as Stephanos Bibas has argued, the “deeply moral content” of the criminal law has made it an area where the public is reticent to “defer to technical experts.”<sup>118</sup> Where one lands in this debate informs the resolution of the ultimate question at hand: whether, and how, a prosecutor’s categorical de facto repeal of democratically enacted state law can be justified.

To see how, consider the general normative view of the modern public prosecutor. We can still see the popular sovereignty strain in the never-reversed move toward prosecutorial elections, driven by Jacksonian popular sovereignty’s demands for “more public control over the administration of justice.”<sup>119</sup> But a more recent influence is the managerialist, anti-populist belief in transferring “policy decisions” away from “democratic politics” to “expert management,” to “depoliticize[]” them and “immunize[]” them from democratic contest.<sup>120</sup> Progressive Era reformers and scholars saw increased prosecutorial professionalism, and an eradication of politics from the prosecutorial process, as the response to mushrooming, and sometimes corrupt, prosecutorial discretion.<sup>121</sup>

Stated broadly, recent commentators are surely correct that a single orthodox view of the American prosecutor (elected or not) is

through democratic politics”); Thomas Frank, *The Pessimistic Style in American Politics*, HARPER’S MAG., May 2020, at 73 (outlining both sides of this debate).

<sup>117</sup> See Kleinfeld, *supra* note 59, at 1483–84; *supra* Sections LA & I.B.1.

<sup>118</sup> Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 Nw. U. L. Rev. 1677, 1687–88 (2017); see also Daniel C. Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 6, at 40, 48, 50 (emphasizing that “a society defines itself” through how and whom it criminally condemns (citation omitted)); cf. Kahler v. Kansas, 140 S.Ct. 1021, 1047 (2020) (Breyer, J., dissenting) (“[A] community’s moral code informs its criminal law. . . . [T]he very definition of crime is conduct that merits ‘a formal and solemn pronouncement of the moral condemnation of the community.’” (quoting Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958))).

<sup>119</sup> LAFAVE ET AL., *supra* note 33, § 1.6(d) (citing DAVID J. BODENHAMER, *THE PURSUIT OF JUSTICE: CRIME AND LAW IN ANTEBELLUM INDIANA* 49 (1986)).

<sup>120</sup> RAHMAN, *supra* note 25, at 9–10; see also Sklansky, *supra* note 25, at 1708–10, 1712–14, 1727 (finding similar distrust of mass democracy and preference for expertise among the mid-twentieth century “pluralists”).

<sup>121</sup> See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 958–59 (1997) (“The call for professionalism first came in the 1920s and 1930s from those who decried . . . corruption and favoritism . . . . The ideal is . . . one of insulation from narrow interest groups and corrupt influences.”); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 731 (1996) (observing that government commissions studying criminal justice often connected “the elective nature of the office . . . to undue political influence on prosecutorial decisions”); Coles, *supra* note 98, at 182–86.

hard to pin down.<sup>122</sup> Still, if the question is professionalized expertise or populism, a dominant academic preference exists for the former.<sup>123</sup> The strongest adherents of this view deem the pursuit of “democratic accountability” to be “puzzling.”<sup>124</sup> More moderate opinions still hold that “prosecutors should pursue the public interest rather than simply implementing people’s wishes,” acting as “experts, public officials, and members of responsible elites.”<sup>125</sup> Indeed, the widespread academic opposition to any prosecutorial elections makes the point just as well. For those opponents, elections are largely a distorting distraction from the exercise of depoliticized expert judgment.<sup>126</sup>

The state of play is even clearer in the nonenforcement context, in which “courts and scholars take it as something of an article of faith” that prosecutors’ “principal—or even exclusive” charging authority stems from their “relative competence.”<sup>127</sup> The Supreme Court agrees.<sup>128</sup> Consistent with this, distillations of appropriate non-

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<sup>122</sup> See generally Bellin, *supra* note 26 (discussing the lack of a widely accepted normative theory of prosecution).

<sup>123</sup> See, e.g., Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 813 (2020) (“[P]rosecutors serve the public not by satisfying the preferences of an amalgam of citizens at a particular moment in time but by pursuing the abstract public interest in justice that is, and ought to be, *elaborated within prosecutors’ offices over time.*” (emphasis added)); William H. Simon, *The Organization of Prosecutorial Discretion*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 6, at 175, 176 (describing the “traditional idea of professional judgment” where the prosecutor applies expert, professional knowledge to arrive at a decision that is “substantially tacit and ineffable” and “cannot be explained fully to lay people”); Barkow, *supra* note 7, at 1354 (discussing view of prosecutorial discretion as an exercise of professional judgment and expertise).

<sup>124</sup> Tonry, *supra* note 26, at 12.

<sup>125</sup> Máximo Langer & David Alan Sklansky, *Epilogue: Prosecutors and Democracy—Themes and Counterthemes*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 6, at 300, 304–05; see also Green & Roiphe, *supra* note 123, at 820–21 (arguing that prosecutors are obligated to “pursue the public’s abstract and evolving interest in justice,” and that “what gives justice meaning beyond the personal view of the prosecutor is developed traditions and practices of prosecutors’ offices”); Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 72 (2012) (“[P]olicy makers should be wary of attempts to ‘democratize’ prosecutorial functions in ways that crystallize community expectations into mandated responses to . . . problems.”).

<sup>126</sup> See, e.g., Daniel C. Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 6, at 40, 62 & n.97; Sklansky, *supra* note 23, at 277–78 (noting the “widely shared view” that “[t]he last thing we should want from prosecutors is ‘democratic accountability’” and observing that “many” find it “unfortunate and embarrassing” that American prosecutors tend to be elected, consistent with the “longstanding critique” of such prosecutors “as overly political”).

<sup>127</sup> Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1686 (2010); see also Barkow, *supra* note 7, at 1354.

<sup>128</sup> See, e.g., *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (justifying presumptive nonreviewability of prosecutorial discretion by reference to, *inter alia*, respect for prosecutorial decisionmaking); *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987)

enforcement considerations tend to say much about expert prosecutorial judgment and nothing about the public's substantive preferences.<sup>129</sup> As a recent interview-based study found, veteran prosecutors tend to “locate[] the responsibility for [nonenforcement] decisions primarily in the prosecutor's office.”<sup>130</sup> Scholarly recognition that popular values *can* influence nonenforcement often appears to be more descriptive than prescriptive.<sup>131</sup> True, to some degree any elected prosecutor's nonenforcement decisions would likely correlate with those of the public from which they are drawn, and which they hope will reelect them.<sup>132</sup> But the more critical question is to what degree such prosecutors might legitimately invoke specific public policy preferences—say, nonenforcement preferences—to justify their behavior. And that question goes to the heart of the managerialist/populist theoretical divide.

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Most agree that “discretion is necessary in criminal administration because of the immense variety of factual situations . . . and the

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(plurality opinion) (emphasizing that “charging decisions are rarely simple,” requiring prosecutors to weigh “tangible and intangible factors” and “allocate . . . scarce resources”).

<sup>129</sup> See, e.g., Coles, *supra* note 98, at 183 (listing considerations such as “evidentiary concerns . . . achieving objectives more satisfactorily through [other means]; weighing potential harm to the victim or undue harm to the suspect; and costs to the system”); MacLean & Wilks, *supra* note 125, at 61 (placing “popular sentiment” among the “less appropriate factors” that prosecutors use to make decisions); Bowers, *supra* note 127, at 1657–58 (noting that the “conventional wisdom” that “the prosecutor is best situated to exercise charging discretion” ignores what the “public's moral code” might dictate); *id.* at 1706–07 & n.243 (explaining how prosecutors weigh a range of factors when deciding whether to charge). As an example, the closest the American Bar Association's sixteen factors relevant to dismissing a legally sufficient charge come to invoking the public's value preferences are the “impact . . . on the public welfare” and the possibility that “the public's interests in the matter might be appropriately vindicated” through non-criminal means—i.e., not that close. AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (4th ed. 2017). The National District Attorneys Association's National Prosecution Standards are similarly quiet. See, e.g., NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS §§ 4-1.3, 4-2.4, 4-3.5 (3d ed. 2009).

<sup>130</sup> Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1081, 1087 (2014).

<sup>131</sup> For example, two scholars observe that the “chief prosecutor sets priorities among all the available criminal charges to reflect the current values of the legislature and the local public[,]” inspired, in some cases, by “democratically declared priorities among crimes.” See, e.g., Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 154 (2008). But this follows a descriptive review, and it is unclear whether they approve. Nor is it clear how they envision priorities being “democratically declared.” *Id.*

<sup>132</sup> See, e.g., *id.* at 148 (“Chief prosecutors . . . understand that some legally valid applications of the criminal law would be political suicide.”); Tonry, *supra* note 26, at 26–27 (noting that American prosecutors tend to factor “public opinion, media attentions, and political implications” into their work).



complex interrelationship of the goals sought.”<sup>133</sup> The Founding-era powerful jury reflected a desire for the demos to exercise localized control over that sort of discretion. But that jury has disappeared. Because prosecutors have substantial charging discretion, tying prosecutorial discretion closely to the views of their electorate (if expressed in some discernible way) could have provided an alternative path to the same end. But that option runs into the dominance of the prosecutor-as-expert view, under which any nonenforcement decisions primarily should rest on prosecutors’ expertise, not the distorted or misguided views of the public.<sup>134</sup> That dominance appears to stem at least in part from the same distrust for popular competency to control criminal law that undermined the jury.<sup>135</sup>

Yet the district attorney remains elected. And though many elections are low-salience and low on substance,<sup>136</sup> some recent prosecutors have bucked both of those trends, choosing instead to advocate in their platforms *de facto* substantive change of the state’s law (through nonenforcement).<sup>137</sup> They are choices in need of a theory. The next Part takes up the task of explaining why a populist view can fill that gap.

## II

### DEMOCRACY, POPULAR SOVEREIGNTY, AND DISTRICT ATTORNEY SUBSIDIARITY

Part I’s history of criminal-law populism shows that a prosecutor invoking the People’s will to justify her nonenforcement policy would not be wholly *sui generis*. But descriptive analogy does not carry us all the way to normative justification, or tell us whether, why, and when deviation from managerialist orthodoxy might be warranted.

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<sup>133</sup> LAFAYE ET AL., *supra* note 33, § 13.2(d) (quoting James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 662).

<sup>134</sup> See Barkow, *supra* note 7, at 1354 (“In contrast to juries and executives, prosecutors are seen as making an ‘expert’ determination . . . when they choose not to bring charges.”); Bowers, *supra* note 127, at 1660 (observing that, under this view, the prosecutor is the “most competent” institutional actor to make charging decisions); BARKOW, *supra* note 25, at 105–07 (contrasting the prosecutor-as-expert view with the populist view where “the masses . . . set policies directly”).

<sup>135</sup> See, e.g., ABRAMSON, *supra* note 40, at 88 (observing that the reduction of jury power reflected a rejection of the “presum[ption that] ordinary citizens were competent to make independent judgments about the law”); cf. Wright & Levine, *supra* note 130, at 1086 n.98 (quoting prosecutors complaining about juries they disagreed with); see also *supra* text accompanying notes 71–75.

<sup>136</sup> See, e.g., Wright, *supra* note 112, at 582–83, 597, 600; Sklansky, *supra* note 110, at 515; cf. HESSICK, NATIONAL STUDY, *supra* note 5, at 5–6 (finding that most prosecutor elections are uncontested).

<sup>137</sup> See *supra* Introduction; *infra* Section V.A.

Perhaps some of the answer lies in a hoary piece of democratic rhetoric: the People rule. Most know the hits. The Constitution invokes “We the People,” the Declaration of Independence warns that legitimate governments need “the consent of the governed,” and no one would dare deny that our government is of, by, and for the people.<sup>138</sup> The Supreme Court, too, expounds American democracy by drawing on the Declaration and the Constitution to endorse the “people’s ultimate sovereignty.”<sup>139</sup> Indeed, quite different Justices, speaking individually, agree that “‘ultimate sovereignty’ resides in the governed,”<sup>140</sup> and that “all sovereignty ‘emanates from [the people].’”<sup>141</sup>

Reality rarely duplicates rhetoric. The Constitution and Bill of Rights alone reveal the strong anti-populist currents in American political thought.<sup>142</sup> Whether, how, and how much the People *really* ought to rule are longstanding questions.<sup>143</sup> Like liberty, “[w]e all

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<sup>138</sup> U.S. CONST. pmb.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); ABRAHAM LINCOLN, *Address Delivered at the Dedication of the Cemetery at Gettysburg*, in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 17, 23 (Roy P. Basler ed., 1953); see also KRAMER, *supra* note 45, at 11 (claiming the Constitution reflected “a political ideology that celebrated the central role of ‘the people’ in supplying the government with its energy and direction”); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“[The] corollaries of popular sovereignty . . . were bedrock principles in the Founding, Antebellum, and Civil War eras.”); James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 209–11 (1990).

<sup>139</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2675 (2015); see also *Chiafalo v. Washington*, 140 S. Ct. 2316, 2328 (2020) (noting that a State’s punishment of a faithless elector “accords . . . with the trust of a Nation that here, We the People rule”); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (“Ours is a ‘government of the people, by the people, for the people.’” (quoting LINCOLN, *supra* note 138, at 19)); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976) (“Under our constitutional assumptions, all power derives from the people . . . .”); see also Fred O. Smith, Jr., *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 476 (2016) (discussing the Court’s jurisprudence on state sovereignty).

<sup>140</sup> *Gamble v. United States*, 139 S. Ct. 1960, 1990 (2019) (Ginsburg, J., dissenting) (quoting *Ariz. State Legislature*, 135 S. Ct. at 2675)).

<sup>141</sup> *Id.* at 1999 (Gorsuch, J., dissenting) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 404–05 (1819)); see also *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (“‘We the people . . . ordain and establish this Constitution’ . . . was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people.” (quoting U.S. CONST. pmb.)).

<sup>142</sup> See, e.g., THE FEDERALIST NO. 10, *supra* note 49 (James Madison) (critiquing “pure” democratic majoritarianism); Steven Frias, Note, *Power to the People: How the Supreme Court Has Reviewed Legislation Enacted Through Direct Democracy*, 31 SUFFOLK U. L. REV. 721, 734 (1998) (discussing Madison’s fear of majority rule (citing, inter alia, THE FEDERALIST NO. 10, *supra* (James Madison))); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980) (arguing that the 1780s brought an American “reaction against mass democracy”).

<sup>143</sup> See *infra* Section II.A.1.

declare for [the people's rule]; but in using the same *word* we do not all mean the same *thing*.”<sup>144</sup> Democracy may literally mean “rule by the people,” but its “essentially contested” nature lies at the root of many heated battles over institutional design and optimal outcomes.<sup>145</sup>

Those battles, unsurprisingly, have high stakes. Diverse societies generate material differences of opinion on a host of fundamental issues.<sup>146</sup> Resolving those differences, e.g., through law, inevitably displeases individuals, and groups of individuals, who would prefer alternative resolutions. One line of thought holds that this is as it should be. Social living means one cannot always get one's way, and democratically enacted laws should be enforced. True, resource limitations and anomalous circumstances may prevent full enforcement, but that is a far cry from resource-independent programmatic nullification to upend disliked democratic results. This Part contests this legitimacy-based attack on programmatic prosecutorial nullification. Of course, this Article cannot render democracy uncontestable, and some normative judgments are inescapable.<sup>147</sup> Yet from at least one legitimate perspective, local direction of prosecutorial nullification actually advances democratic values. That perspective is thus worth understanding and applying.

This Part returns to the debate on popular involvement in prosecutorial conduct and situates it within a broader democratic-theory debate between advocates of managerialist democracy and proponents of popular sovereignty. Then, drawing on the centrality of autonomy and anti-domination to democracy, it selects popular sovereignty's tenets as a useful lens for gauging the legitimacy of categorical prosecutorial nullification. The Part concludes by exploring an important entailment of that lens—the all-affected principle—and the ways in which the devolution seen in district attorney elections dovetails with that entailment.

Two notes before beginning. First, although some of my arguments might justify some increased reliance on direct democracy, it is no doubt true that modernity's complexity necessarily renders exclu-

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<sup>144</sup> ABRAHAM LINCOLN, *Address at Sanitary Fair, Baltimore, Maryland, in 7 COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra* note 138, at 301.

<sup>145</sup> Sklansky, *supra* note 23, at 283 (quoting W.B. Gallie, *Essentially Contested Concepts*, 56 PROCS. ARISTOTELIAN SOC'Y 167 (1956), *reprinted in* CORNELL U. PRESS, *THE IMPORTANCE OF LANGUAGE* 121, 135 (Max Black ed., 1962)).

<sup>146</sup> See JOHN RAWLS, *POLITICAL LIBERALISM* xviii (1996) (describing the “problem of political liberalism” as follows: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?”).

<sup>147</sup> See Sklansky, *supra* note 23, at 283.

sive governance through direct democracy infeasible, thus requiring some type of indirect democracy (governance effected through elected representatives). I thus do not delve into the arguments on either side of that institutional-design divide.

Second, I recognize that “legitimacy” is yet another word of many meanings.<sup>148</sup> Here, I use it in the “moral” sense, focused on “respect-worthiness,” that Professor Richard Fallon describes.<sup>149</sup> Categorical prosecutorial nullification is vulnerable on precisely that front—it is easy to see the argument that *de facto* repeal of a democratically enacted law through unilateral nonenforcement does not “deserve respect”<sup>150</sup> or that other political actors should not consider it “worthy of being followed.”<sup>151</sup> Yet I invoke “democratic legitimacy” here to suggest that categorical nullification may sometimes nevertheless be defended as normatively “legitimate” by reference to substantive democratic norms, i.e., norms with more heft than mere “majorities should rule.”<sup>152</sup> To give one concrete example in this Article’s milieu: why *ought* state actors with broad power to overrule or limit local activity<sup>153</sup> *ever* permit local prosecutors’ categorical deviation from the state legislature’s enactments?

To be sure, the specifics of those substantive democratic norms that guide this sort of analysis may be disputed, but that is why democracy is an essentially contested concept.<sup>154</sup> The point is that there must be *reasons* it is good for the People to rule, and interrogating those reasons illuminates both what such rule should mean, as applied, and what legal institutional approaches best effect it.<sup>155</sup>

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<sup>148</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789–90, 1790 n.5 (2005).

<sup>149</sup> *Id.* at 1796; *see also id.* at 1790–91, 1795–99 (discussing how “legitimacy” can be used in a legal, sociological, or moral sense).

<sup>150</sup> *Id.* at 1799 (describing “moral legitimacy”).

<sup>151</sup> Jason M. Solomon, *The Political Puzzle of the Civil Jury*, 61 EMORY L.J. 1331, 1353–54 (2012) (describing “normative legitimacy”).

<sup>152</sup> Though some phenomena surely warrant a flat designation as illegitimate, it also seems fair to say that, past some standard of minimal legitimacy, we deal with a continuum rather than a binary. *See, e.g.*, Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2355–57 (2018). That paradigm is useful when, as is often the case, actors possess discretion regarding how to respond to a phenomenon (e.g., voters evaluating prosecutorial conduct or state-level actors considering whether to override local behavior).

<sup>153</sup> *See infra* Section IV.D.2.

<sup>154</sup> *See* Jane S. Schacter, *Metadecocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 648–49 (1995).

<sup>155</sup> *See id.*; *cf.* ROSS HARRISON, *DEMOCRACY* 228–30 (1993) (exploring the implications of there being scrutable reasons *for* democracy).

## A. *Autonomy's Applicability*

### 1. *Managerialist Democracy and Popular Sovereignty*

Start with one implication of praising democracy—rule by the People is, in some sense, *per se* positive. Everyone who claims the title of democrat thus acknowledges the need for some input/output connection between the demos and governmental action.<sup>156</sup> The long-standing debate over that connection's scope can be oversimplified into two major schools of thought that track the managerialism/populist (or anti-populist/populist) divide I outlined in Section I.B.2.

Managerialism fits into the broader cluster of ideas that disdains the value of approximating popular rule by the people at large, sometimes treating that aim as anathema to functioning democracy.<sup>157</sup> Oftentimes rejecting the idea of a discernible “popular will,” and deeming the People in any case generally incapable of productive collective decisionmaking,<sup>158</sup> this view focuses instead on producing high-quality decisions, consistent with protecting negative individual rights. Thus, real decisionmaking power should lie with a select group (or groups), who hash out society's direction among themselves, with reference to expert guidance as necessary.<sup>159</sup> Here, democracy is primarily useful as the best device “to protect citizens from the power of government.”<sup>160</sup> The People are not irrelevant, but their chief role is to “throw the rascals out,” not to have their “will” implemented.<sup>161</sup> This line of thinking has many names. For present purposes, I call it managerialist democracy, although in practice the label of liberal constitutionalism also fits.<sup>162</sup> Recent years have seen an uptick in advo-

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<sup>156</sup> See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 43 (2004); see also ALBERT WEALE, *DEMOCRACY* 51 (2007) (arguing that all “conceptions of democracy” demand that rules defining a society's “public life . . . should be the product of decision making by a body that is, in some systematic way, dependent upon the views of those who are citizens of that society”).

<sup>157</sup> See, e.g., Sklansky, *supra* note 25, at 1708–17 (sketching one manifestation of this tradition, under the title “pluralism”).

<sup>158</sup> WEALE, *supra* note 156, at 45–46, 157; see Sklansky, *supra* note 25, at 1712, 1725–27, 1739, 1810 (outlining this view in governing, judging, and policing).

<sup>159</sup> See Sklansky, *supra* note 25, at 1721–27 (outlining the view that government policy ought to be shaped and driven by elite-composed groups); WEALE, *supra* note 156, at 45–46.

<sup>160</sup> WEALE, *supra* note 156, at 101.

<sup>161</sup> *Id.* at 131. See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942) (outlining this theory of democratic governance).

<sup>162</sup> See WEALE, *supra* note 156, at 101 (discussing liberal constitutionalism).

cacy for this perspective, particularly as a counterweight to what members of this school see as dangerous populism.<sup>163</sup>

The other approach is a popular sovereignty that treats “popular participation [as] central to the very conception of democracy.”<sup>164</sup> Beyond participation, it views the pursuit and approximation of popular *control* over governmental outputs as vital for reasons beyond reaching the “best” decision.<sup>165</sup> Rather, it assigns substantial, independent value to individuals’ and groups’ ability to control their own destinies. Denying the superiority of rule by elites and experts, this school insists that democracy “is not just a synonym for good government” with no strong normative orientation on popular control.<sup>166</sup> On this view, a popular will is intelligible and worth seeking.<sup>167</sup>

Much more could be, and has been, said on both sides, and both sides could probably be described otherwise. I aim merely to set out the democratic perspectives on offer for evaluation of a democratic phenomenon. Rather than attempting to disprove one or another, I focus on the key democratic value of autonomy, which I also mean to capture the ideals also denominated as anti-domination or self-determination.<sup>168</sup> Its importance is relatively uncontested. And it offers plausible reasons for selecting the popular sovereignty perspective as a worthy prism for evaluation.

## 2. *Individual and Group Autonomy*

Consider, on that note, “[t]wo features . . . typically taken to be basic to any substantive account of democracy: the political equality of

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<sup>163</sup> See, e.g., FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 241–56 (2003) (arguing that democracy should be “[d]elegated” to expert institutions); Jonathan Rauch & Ray La Raja, *Too Much Democracy Is Bad for Democracy*, ATLANTIC (Dec. 2019), <https://www.theatlantic.com/magazine/archive/2019/12/too-much-democracy-is-bad-for-democracy/600766>; JONATHAN RAUCH & BENJAMIN WITTES, *CTR. EFFECTIVE PUB. MGMT. BROOKINGS, MORE PROFESSIONALISM, LESS POPULISM: HOW VOTING MAKES US STUPID AND WHAT TO DO ABOUT IT* (2017); JASON BRENNAN, *AGAINST DEMOCRACY* (2016); Frank, *supra* note 116 (cataloguing widespread recent support for this view).

<sup>164</sup> WEALE, *supra* note 156, at 101; Kleinfeld, *supra* note 25, at 1393–94 (connecting democracy’s core to collective self-rule).

<sup>165</sup> See, e.g., Kleinfeld, *supra* note 25, at 1390 (“[D]emocracy requires conveying government *into the hands* of the population living under that government . . .”).

<sup>166</sup> *Id.* at 1394; see also Sklansky, *supra* note 25, at 1758–61, 1790–91 (discussing how proponents of participatory democracy believe that democracy is more than “solely a mechanism for delivering good policies” and noting the distrust of elites).

<sup>167</sup> See, e.g., Sklansky, *supra* note 25, at 1784 & n.430.

<sup>168</sup> See Robert Post, *Democracy and Equality*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25–26 (2006); Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L.J. 293, 307–10 (2012); RAHMAN, *supra* note 25, at 79–80; PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 51–79 (1997) (defining freedom in terms of non-domination).

citizens and the idea of collective self-rule.”<sup>169</sup> Everyone agrees some popular input is necessary. But why? Ascertaining the content of that input in an intelligible, neutral way is slippery.<sup>170</sup> One might obviate that uncertainty by handing over power to a dictator, or perhaps a cadre of elite guardians. Or take outcomes. No doubt, the people at large may suffer from deficiencies in disinterestedness, expertise, or long-term perspective that make their decisionmaking suboptimal, even granting that there may sometimes not be an objectively best decision. Why not conclude that we’re better off the more that elites (perhaps guided by experts) rule?

A response drawing on autonomy offers a justification for a dose of popular sovereignty. At the core of autonomy is the command to value the individual’s “capacity for thought, judgment, and choice without external pressure except rational persuasion by others.”<sup>171</sup> Granting that much aligns with the common democratic position that people are in material respects equal moral agents.<sup>172</sup> It flows, too, from a recognition that the boundaries of the good can often be contested.<sup>173</sup> These principles arguably demand giving the ruled control over the direction of their lives. And they animate arguments that democracy requires “an equality of autonomous self-determination,” and that tie democratic legitimacy to citizens’ “autonomous participation” in self-government.<sup>174</sup>

Yet individual autonomy plainly must be limited. Embracing it without qualification would justify (if not require) granting each person a governance-crippling veto over government action.<sup>175</sup> So it is that the state has long been justified as embodying the relinquishment of some personal freedom or power in order to secure a greater

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<sup>169</sup> David Owen, *Democracy*, in *POLITICAL CONCEPTS* 105, 107 (Richard Bellamy & Andrew Mason eds., 2003).

<sup>170</sup> See, e.g., *id.* at 110–11 (reviewing the problem of speaking of the “popular will,” given the contingency of democratic outputs upon the democratic decision rules chosen).

<sup>171</sup> WHELAN, *supra* note 86, at 1–2.

<sup>172</sup> See Ian Shapiro, *Three Ways to Be a Democrat*, 22 *POL. THEORY* 124, 132 (1994); Post, *supra* note 168, at 28, 32, 35 n.12.

<sup>173</sup> See Shapiro, *supra* note 172, at 134, 139–40. Interesting research suggests some biological predisposition to seeking autonomy. See, e.g., Lauren A. Leotti, Sheena S. Iyengar & Kevin N. Ochsner, *Born to Choose: The Origins and Value of the Need for Control*, 14 *TRENDS COGNITIVE SCIS.* 457 (2010).

<sup>174</sup> Post, *supra* note 168, at 31–32.

<sup>175</sup> See, e.g., WHELAN, *supra* note 86, at 186–87 (“Under [a unanimity rule] no members can claim to be forced to accept anything against their will.”); Leslie Green, *Law, Legitimacy, and Consent*, 62 *S. CAL. L. REV.* 795, 795 (1989) (observing the persistence of political theories seeking to “tame[]” the “radical potential” of hinging governmental legitimacy on the consent of the governed).

degree of those liberties.<sup>176</sup> Here, indeed, is where “[a]ll the real questions of power and government start.”<sup>177</sup>

Granted, managerialists might well object that, compared to popular sovereignty, their democratic vision is just as cognizant of individual autonomy and the contestability of the good. To borrow and tweak an apt example, they could be equally sensitive to the difficulties of translating a broad commitment to national health into particular policy choices on vaccination and family planning.<sup>178</sup> Shifting focus to *group* autonomy adds a helpful wrinkle and suggests how popular sovereignty can shine as a legitimator.

To see how, consider what flows from insisting upon respect for groups of individuals acting “in a reasonable manner, within physical and social constraints, to advance their goals.”<sup>179</sup> In a thin sense, we might grant that respect because it valorizes political equals exercising their autonomy in tandem with likeminded others to determine society’s course.<sup>180</sup> On that view it might be merely a factor of summed individual autonomy.<sup>181</sup> A thicker sense of group autonomy emerges from the communitarian tradition’s insistence that groups have independent value beyond the atomistic behavior of their constituent individuals.<sup>182</sup> To communitarians, groups possess indepen-

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<sup>176</sup> See, e.g., LESLIE GREEN, *THE AUTHORITY OF THE STATE* 71–72 (1988) (suggesting that the net effect of state coercion, threatened or real, “may . . . be to reduce coercion”).

<sup>177</sup> HARRISON, *supra* note 155, at 5; see also WHELAN, *supra* note 86, at 3 (noting that, in democracies, an individual acting alone generally cannot effect her preferred political outcome).

<sup>178</sup> Cf. SCHUMPETER, *supra* note 161, at 252 (drawing on these examples in his critique of the concept of a single common good).

<sup>179</sup> WHELAN, *supra* note 86, at 2; see also Frug, *supra* note 142, at 1122 (connecting “group autonomy” to “the ability of a group of people, working together, to control actively the basic societal decisions that affect their lives”).

<sup>180</sup> See Owen, *supra* note 169, at 107–08 (discussing how democracy can be justified as an aggregation of equals making collective decisions).

<sup>181</sup> See, e.g., Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 390 (2001) (describing a view of community as “the sum of its parts (the individuals)”); cf. Andrew Altman & Christopher Heath Wellman, *The Deontological Defense of Democracy: An Argument from Group Rights*, 89 PAC. PHIL. Q. 279, 286 (2008) (arguing that the violation of a group’s “right of self-determination” harms “each individual member in her role as [a] member of the group”).

<sup>182</sup> See Amitai Etzioni, *A Moderate Communitarian Proposal*, 24 POL. THEORY 155, 155–59 (1996) (describing the value of groups in the context of the debate between communitarians and libertarians); David Hollenbach, *Virtue, the Common Good, and Democracy*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 143, 147–49 (Amitai Etzioni ed., 1995) (“Democracy requires more than [solitary individuals]. It requires the virtues of mutual cooperation, mutual responsibility, and what Aristotle called friendship, concord, and amity.”).



dent autonomy worth protecting beyond merely summing individual desires.<sup>183</sup>

True, we can no less give every group an indefeasible veto over government decisionmaking than we can give one to every individual. But prizing groups' ability to self-determine seems more compatible with popular sovereignty's emphasis on "collective self-determination" than managerialist democracy's disdain for popular control.<sup>184</sup> Popular sovereignty treats the self-determination available at the ballot box to groups and their constituent individuals as a good worthy of independent pursuit.<sup>185</sup>

Careers have been spent grappling with autonomy's implications and meanings. Nor is it the only thing that matters in democracy. But it does matter, group self-determination is a major piece of it, and it offers a compelling if not unanswerable justification for applying a popular sovereignty perspective to evaluate democratic institutional phenomena.<sup>186</sup> Programmatic prosecutorial nullification—especially when pursued by elected prosecutors—is such a phenomenon.

### *B. The All-Affected Principle, Subsidiarity, and Self-Determination*

Acknowledging the impossibility of absolute autonomy provokes institutional design questions about how best to maximize it. The popular sovereignty lens just sketched suggests one answer of particular relevance to evaluating categorical prosecutorial nullification. Its focus on self-determination first points us toward the all-affected principle, under which one's "democratic say" in political decisionmaking ought to track "the degree to which [one is] affected by the out-

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<sup>183</sup> Etzioni, *supra* note 183, at 155–56; Thomas A. Spragens, Jr., *Communitarian Liberalism*, in *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES*, *supra* note 182, at 38; Schragger, *supra* note 181, at 393 (discussing the "deep" view of community).

<sup>184</sup> See Kleinfeld, *supra* note 25, at 1390–94.

<sup>185</sup> In practice, all democracies restrict the vote, with major exclusions often including non-citizens, children, and people previously convicted of felonies. See, e.g., WHELAN, *supra* note 86, at 99–100, 107–11. Taking self-determination seriously might well render these exclusions suspect. But while this may suggest flaws in applied definition of the relevant "People," it does not weaken autonomy's universal democratic relevance. Cf. Post, *supra* note 168, at 34 & 35 n.15 (observing the problem of defining "the set . . . who must be deemed participants").

<sup>186</sup> Cf. Frug, *supra* note 142, at 1068–69 (observing long-running "critique" of the "limited ability of individuals to control their own lives" afforded by the "development of Western society," and the critics' focus on the "limited objective" of "reorganizing society to increase the degree of individual involvement in societal decisions" (emphasis added)); Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 443 (1998) (recognizing it might be quixotic to attempt to prove in some irrefutable sense the deontological superiority of a popular sovereignty based on "full and equal popular input," but arguing nevertheless that it can be defended as "normatively appealing").

come.”<sup>187</sup> That sounds in the register of the individual and group self-determination just discussed. And that move suggests another: the presumptive political devolution flowing from a commitment to subsidiarity.<sup>188</sup> Again, that principle comports with the popular sovereignty vision. After all, it holds that “legitimate authority rests,” at least as an initial matter, with “those moral agents most obviously affected by political decisions,” and that legitimate coercion must be responsive to those agents’ “equal moral standing as . . . the subject and final author of that coercion.”<sup>189</sup> Applied, it justifies various forms of “localism,” although the degree of devolution can be flexible. Elections for regional representatives like district attorneys to execute state criminal law are classic examples.

Subsidiarity, guided by the all-affected principle, can amplify autonomy in several ways. First, because it reduces voting-unit size, it increases the probability that any given vote will be determinative, increasing the value of each.<sup>190</sup> That is, it increases the likelihood that a participating individual or group will shape a social decision. Second, because it increases vote value and the degree of control people consequently feel over their daily lives, subsidiarity can increase participation.<sup>191</sup> Third, and relatedly, by actually devolving decisionmaking it *in fact* increases the degree of control one has over the locally relevant parts of one’s life.<sup>192</sup> Fourth, subsidiarity reduces coercion in an absolute sense: As voting-unit size decreases, so does the absolute number of people who must submit to a disliked decision.<sup>193</sup> Finally, subsidiarity inverts James Madison’s hope of

<sup>187</sup> Daniel Weinstock, *Cities and Federalism*, in *FEDERALISM AND SUBSIDIARITY* 259, 262 (James E. Fleming & Jacob T. Levy eds., 2014).

<sup>188</sup> See *id.* at 261 (describing subsidiarity as “directing that powers or tasks should rest with the lower-level sub-units” of a political order absent compelling contrary reason (quoting Andreas Føllesdal, *Subsidiarity*, 6 J. POL. PHIL. 190, 190 (1998))); Loren King, *Cities, Subsidiarity, and Federalism*, in *FEDERALISM AND SUBSIDIARITY*, *supra* note 188, at 291, 291 (“Subsidiarity . . . counsels that decisions be made at the lowest feasible scale of organization.”).

<sup>189</sup> King, *supra* note 189, at 301.

<sup>190</sup> See, e.g., WHELAN, *supra* note 86, at 149; Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 16–17 (2000) [hereinafter Briffault, *Localism and Regionalism*].

<sup>191</sup> See, e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *COLUM. L. REV.* 331, 340, 405 (1994) (discussing how subsidiarity “enhance[s] the individual’s sense of dignity and autonomy”); Frug, *supra* note 142, at 1069–70 (noting how subsidiarity can boost “popular participation”); RUSSELL J. DALTON, *THE PARTICIPATION GAP: SOCIAL STATUS AND POLITICAL INEQUALITY* 4–6 (2017) (cataloguing democratic arguments for prizing participation).

<sup>192</sup> See *infra* Section III.B.1.

<sup>193</sup> See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L. REV.* 215, 222 (2000) (“[B]ecause preferences for governmental

“extend[ing] the sphere” in a surprisingly helpful way.<sup>194</sup> He hoped that expanding a polity could protect individual rights by thwarting consensus.<sup>195</sup> While he was right that consensus can harm dissenters,<sup>196</sup> less dissensus suggests less coercion, and may make it more reasonable to infer a singular popular will from an election.

Real-world subsidiarity can be imperfect. County-level prosecutorial districts, for example, contain multitudes. Perhaps in some sense district-level decisions represent the will of the community of district inhabitants, but in another sense they do not, since dissenting subcommunities of interest do not disappear just because they lacked the political pull to shape the district-level decision.<sup>197</sup> Conceivably, greater devolution would sharpen subsidiarity’s benefits (although it might well exacerbate its downfalls without eradicating dissent).<sup>198</sup> Indeed, noting that much reminds us that political “communities” themselves are contingent products of political will.<sup>199</sup> But none of this erases the benefits of the system that our institutional path dependency<sup>200</sup> has left us. Relative to more-centralized alternatives, district attorney elections still catalyze the autonomy of individuals and groups within a bounded area by increasing their power to decide who executes criminal law where they live. Losers are inevitable in a majoritarian system; the difference is that devolution increases the chances for losers to have real influence on outcomes.<sup>201</sup>

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One’s position on popular control affects how one analyzes a democratic phenomenon. To some degree, the theoretical disagree-

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policy are unevenly distributed among the states and regions of the nation, more people can be satisfied by decentralized decisionmaking.”); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (“[M]ore people can be satisfied by decentralized decision making than by a single national authority.”).

<sup>194</sup> THE FEDERALIST NO. 10, *supra* note 49, at 53 (James Madison).

<sup>195</sup> *Id.* (positing that expanding a polity will “make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens”).

<sup>196</sup> See generally *infra* Section IV.A.

<sup>197</sup> See Rappaport, *supra* note 25, at 746–48 (questioning the intelligibility of “communities” and community consensus).

<sup>198</sup> See *infra* text accompanying notes 416–32.

<sup>199</sup> See Schragger, *supra* note 182, at 403–05 (“[C]ommunity itself is a result of forceful acts of literal and figurative boundary creation . . . .”); *id.* at 404 (“[L]aw is as constitutive of social geographies as it is of social institutions.”).

<sup>200</sup> See Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 252 (2000) (employing the definition of path dependence as describing circumstances in which steps down a particular path increase the cost of deviating from that path).

<sup>201</sup> See *infra* Section III.B. See *infra* Section IV.A, below, for a discussion of Madison’s fear: Majorities trampling losing minorities.

ments in this space are insoluble. Yet a focus on autonomy and self-determination at least can justify the choice of a popular sovereignty lens for evaluating a democratic phenomenon like prosecutorial programmatic nullification.

### III WHOLESALE JURY NULLIFICATION

It is easier to extol popular sovereignty than to elaborate what it means for the People to be sovereign. But it at least seems plain that the power to create law—and to unmake it through particularized exceptions—lies near sovereignty’s heart.<sup>202</sup>

That said, this Part considers the difficulty of apparently unilateral prosecutorial nullification of state law. Potential critiques are not wanting, whether one roots them in the separation of powers,<sup>203</sup> the rule of law,<sup>204</sup> some sort of local infringement on state sovereignty,<sup>205</sup> or just a rough understanding that voters who elect prosecutors are doing just that: electing a prosecutor, not an emperor,<sup>206</sup> and certainly not one empowered to make decisions that might spill over onto people who didn’t even get to vote on them.<sup>207</sup> Yet it’s worth considering whether the phenomenon may at least sometimes be justified.

This Part argues that it may. All state prosecutor categorical nullification decisions are not created equal. Some, it turns out, grow from the same democratic root as our once-muscular juries. When prosecutors nullify not unilaterally, but consistent with a reasonably ascertainable popular will, they act as a conduit for the wholesale achievement of what the same population might otherwise have done

<sup>202</sup> See, e.g., Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1860 (2009); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390–91, 410–11 (2008) (calling the power to make exceptions a “fragment of sovereignty”); cf. *Heath v. Alabama*, 474 U.S. 82, 93 (1985) (“Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.”).

<sup>203</sup> See, e.g., Price, *supra* note 20, at 677; Sawyer, *supra* note 24, at 618–22.

<sup>204</sup> See generally *infra* Section IV.B (discussing rule-of-law critiques of categorical nonenforcement).

<sup>205</sup> Cf. *Heath*, 474 U.S. at 93 (extolling as key to state sovereignty power to “create and enforce” its criminal law).

<sup>206</sup> Cf. CHARLES STIMSON & ZACH SMITH, “Progressive” Prosecutors Sabotage the Rule of Law, Raise Crime Rates, and Ignore Victims, HERITAGE FOUNDATION (Oct. 29, 2020), <https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore> (“Elected rogue prosecutors assert arrogantly that they, and they alone, know what is best for the districts they represent . . . .” (emphasis added)).

<sup>207</sup> Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 976–77 (2019) (warning of dangers of externalities on outsiders).

retail through jury control of the law. This is populist prosecutorial nullification: a hydraulic descendant of strong juries.<sup>208</sup> Viewed thusly, it merits respect as a democratically legitimate phenomenon. That respect, however, is contingent on the anti-domination principles that can justify this phenomenon. The framework, therefore, will not legitimate a policy that invidiously infringes upon the self-determination rights of losers in democratic policy debates. I conclude by sketching the phenomenon's specific democratic benefits.

### A. *The Framework*

This Section contends that we may sift programmatic prosecutorial nullification by considering the degree to which the policy (1) reflects a discernible popular will, and (2) respects the autonomy of those whose wills it does not implement.

My scaffolding is Part II's treatment of popular sovereignty. On that view, the degree to which a political choice comports with or implements a particularized popular will is central to its legitimacy. As Section II.B explained, popular sovereignty can also support an application of the all-affected principle under which the relevant popular will is divined from a devolved political area, such as the regions that elect most American prosecutors. Applying those principles, I aim to offer one way to think about the legitimacy of programmatic prosecutorial nullification.

Though I proceed through this lens, I do not entirely reject the possibility that the managerialist could glean some value from my approach. It is true that what I am searching for in the first part of my framework—a kind of popular authorization—is less important to the anti-populist views I rejected above. Yet the managerialist prosecutor certainly need not treat it as entirely unimportant. One can imagine a prosecutor making a relatively technocratic decision still finding popular preferences to be worth considering, even if she thinks of her job as delivering a primarily technocratic all-things-considered decision. That said, the force of my proposal may well decline as one moves toward the managerialist end of the spectrum.

#### 1. *Distilling the Popular Will*

I argue that a nonenforcement policy that de facto repeals democratically enacted law can nevertheless obtain legitimacy if it can be

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<sup>208</sup> Cf. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). This seminal article argued that money in elections acts hydraulically; its owners will always find a way to affect the process. See *id.* at 1705, 1708; see also Bowers, *supra* note 127, at 1687 n.146 (“[D]iscretion is a hydraulic force.”).

tied to the People's authorization.<sup>209</sup> To concretize that claim, the framework first asks whether the nullification policy reflects a reasoned, public, pre-election promise that context indicates was electorally salient.

Take first the need for a reasoned, specific, pre-election promise. The voters' choice of a prosecutor after the proposal's public ventilation through the formal election process is some evidence that they approve (or at least condone) its implementation.<sup>210</sup> The weight of that evidence reasonably turns in part on the clarity with which the policy proposal is explained and justified. That reflects the generally accepted requirement that legitimate government action be nonarbitrary.<sup>211</sup> Moreover, if the legitimator here is the public will, it appears sensible to interrogate the degree to which the prosecutor is an "honest agent" of "the public's interests."<sup>212</sup> Interest alignment requires not just that the proposal be aired but that its principles be aired in a form sufficiently specific to facilitate public consideration.

One critique of the idea of popular intent from the direct democracy context underscores the importance of specificity. Initiative lawmaking may indeed render it quixotic to ask whether the "People" intended an answer to a specific question of application that the initiative's text generates.<sup>213</sup> But so stated, the problem suggests that imputing intent becomes more reasonable the further one moves away from such questions. For example, we reasonably treat a majority's

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<sup>209</sup> Any discussion of the People must acknowledge involuntary exclusion from the electorate, *see supra* note 186, and the possibility that the composition of the electorate can be manipulated by the electorate's supposed agents—whether through gerrymandering, making it harder to vote, or a variety of other ways that legislators can affect the electoral backdrop. *See generally* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *GEO. L.J.* 491 (1997). Nevertheless, although that sort of manipulation can raise questions beyond this Article's scope about the legitimacy of the entire democratic system, there is still value in considering, as I do here, whether one particular part of that system is (or is not) uniquely illegitimate.

<sup>210</sup> *Cf.* Fairfax, *supra* note 8, at 1280 (contemplating voter engagement with potential nullification promises).

<sup>211</sup> *See* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("[T]he touchstone of due process is protection of the individual against arbitrary action of government . . . ." (citation omitted)); Osofsky, *supra* note 21, at 92–93 (noting that agency action has been justified on the basis of its nonarbitrariness).

<sup>212</sup> *Cf.* Mila Sohoni, *Crackdowns*, 103 *VA. L. REV.* 31, 84–88 (2017) (emphasis omitted) (considering reason-giving and intent in overenforcement context).

<sup>213</sup> *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 *YALE L.J.* 107, 110–12, 158–59 (1995) (querying whether it was sensible to ask whether California voters' approval of a lengthy criminal-law initiative indicated any specific intent regarding whether the alterations authorized "hearsay testimony in a preliminary hearing by someone without personal knowledge of the case" or whether they "authorized a court to order disclosure of a defense witness's address and to sanction a noncomplying attorney").

voting for a candidate as reflecting their “intent” that the candidate take office. Specificity helps move nullification promises along this spectrum by tightening the nexus between the proposal and the election, thus reducing the space for doubt regarding intent.

Specificity dovetails with the importance of the proposal’s salience. One potential strike against prosecutorial nullification is that many prosecutorial elections lack salience.<sup>214</sup> That makes sense. It is harder to claim that the popular will embraces an issue unimportant to the election.<sup>215</sup> But it is worth considering the issue at greater length in order to clarify *how* salience helps legitimize prosecutorial nullification. Consider the obvious objection: we generally elect candidates who implement policies rather than voting on the policies directly. This practice could muddy any policy-specific authorization to act inferable from an election, notwithstanding a candidate’s pre-election promise. Some would say it is fatal to any attempt to speak of a coalesced popular issue preference.<sup>216</sup> Yet even those skeptics acknowledge that an election “delivers an electoral mandate” *if* “voters’ intentions concerning issues are clear and decisive.”<sup>217</sup> Perhaps more importantly, politicians and citizens seem to believe that policy promises matter, whether as evidence of what the candidate will do if elected, a basis for sanction at the next election if deviated from, or both.<sup>218</sup> It at least seems reasonable to infer a popular issue prefer-

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<sup>214</sup> See, e.g., Fairfax, *supra* note 8, at 1269–70 (noting scholarly critique that prosecutorial elections often “fail[] . . . to highlight prosecutorial policies for voter consideration”). *But see* Wright, *supra* note 112, at 591 (suggesting some inherent salience in the prosecutorial role).

<sup>215</sup> It is theoretically possible that a prosecutor’s electoral “type” (e.g., her presentation as progressive) may be so striking that it might in fact embrace some specific issues even if not explicitly flagged. Cf. James D. Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types Versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 60 (Adam Przeworski, Susan C. Stokes & Bernard Manin eds., 1999) (arguing that voters tend to see elections as tools for prospective selection of “good types”). But I start from the premise that programmatic de facto repeals require a healthy dose of robust justification. Because I tie that justification to the strength of the difficult-to-grasp popular will, I maintain that pre-election ventilation of the proposal remains critical. Some concrete existing pledge is particularly important if, as many maintain, the only really effective tool of electoral control is retrospective sanction for unwanted behavior. See *id.* at 56 (describing how some theorists focus on politicians’ fear of losing reelection as the main tool of electoral accountability).

<sup>216</sup> See e.g., WHELAN, *supra* note 86, at 354–55, 372 (noting skepticism of the idea of a specific popular preference on a given issue).

<sup>217</sup> *Id.* at 372; see also Bernard Manin, Adam Przeworski & Susan C. Stokes, *Introduction to DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 216, at 1, 8, 12–13 (contemplating the existence of mandates as signals of voter preference communicated via elections).

<sup>218</sup> See Bernard Manin, Adam Przeworski & Susan C. Stokes, *Elections and Representation*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 216, at 29, 38 (stating that reputational concerns motivate politicians to keep their policy

ence when electoral context can be said to offer clear indicia on the matter.<sup>219</sup>

This reasoning is not foreign to the law. The objection here bears a family resemblance to arguments against the general idea of collective intent.<sup>220</sup> Yet courts resolving discrimination cases have long wielded effective tools for inferring, or imputing, a group's "intent."<sup>221</sup> Indeed, we routinely, and necessarily, attribute intent—a supposed will—to bodies that could not literally possess a single undifferentiated intent.<sup>222</sup> The question is not whether such attribution is ever appropriate, but what conditions justify it.

In that regard, salience is a reasonable guidepost. It serves the same function in this iteration of indirect democracy as the single subject rule serves in direct democracy: It justifies an inference that the majority intended some outcome by their vote.<sup>223</sup> And objective indicia exist. Helpfully, for prosecutors, at least two ever-present pieces of context will cut in favor of salience. First, the inherent novelty of any campaign promise to nullify warrants granting at least a

promises); Fearon, *supra* note 216, at 58–59, 82–83 (arguing that a politician's policy promises help voters decide if that politician is a good type, i.e., "the type who want[s] to do in office what [the voters] would want done" (emphasis omitted)); José María Maravall, *Accountability and Manipulation*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 216, at 154, 154–57 (suggesting that elections may influence politicians both prospectively and retrospectively). Consider here the evidence that elected officials really do try to fulfill campaign promises, see Ezra Klein, *Contrary to Popular Belief, Politicians Often Keep Campaign Promises*, WASH. POST (Jan. 19, 2012), [https://www.washingtonpost.com/business/economy/contrary-to-popular-belief-politicians-often-keep-campaign-promises/2012/01/19/gIQAAGq6BQ\\_story.html](https://www.washingtonpost.com/business/economy/contrary-to-popular-belief-politicians-often-keep-campaign-promises/2012/01/19/gIQAAGq6BQ_story.html), and that politicians who deviate from campaign promises feel compelled to justify that deviation, see Manin et al., *supra*, at 38 (suggesting that politicians provide justifications for breaking campaign promises because voters expect those promises to be kept).

<sup>219</sup> See Lawrence J. Grossback, David A.M. Peterson & James A. Stimson, *Electoral Mandates in American Politics*, 37 BRIT. J. POL. SCI. 711, 711 (2007) (describing strong congressional reactions to elections with clear political mandates).

<sup>220</sup> See Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 556–57 (2018) (noting appearance of skepticism about determining collective intent in various legal contexts).

<sup>221</sup> See *id.* at 556–60 (describing how courts have looked at context to determine collective intent in constitutional cases and Title VII cases); Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527–28 (2016) (describing a variety of judicial approaches to determining collective legislative intent).

<sup>222</sup> ROBERT A. KATZMANN, *JUDGING STATUTES* 34–35 (2014) (observing that we attribute intent to "local governments, trade associations, and businesses"); see also *Romer v. Evans*, 517 U.S. 620, 623 (1996) (invalidating statewide initiative as discriminatory); *Hunter v. Erickson*, 393 U.S. 385, 390–91, 393 (1969) (invalidating city initiative as discriminatory).

<sup>223</sup> See Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 706–09 (2010) (discussing justifications for the single subject rule—i.e., the common requirement that direct democracy initiatives "be confined to 'one subject'").



mild per se presumption of salience for any such proposal.<sup>224</sup> After all, the more the proposal grabs the public's attention, the more reasonable it is to treat the election as a referendum on the proposal. Second, remember the geographic and subject-matter constraints on district attorney power. Simply put, a prosecutor candidate's platform is likely to contain fewer, and more localized, planks than actors with more capacious bailiwicks (e.g., a gubernatorial candidate).<sup>225</sup> There is simply less to distract onlookers from the promised policy when a prosecutor takes the unusual step of promising nullification.

Beyond those indicators, salience is contextual. Of substantial importance is the presence of an opponent, often absent in prosecutorial elections, although most voters live in jurisdictions where a choice is likely.<sup>226</sup> The absence of an alternative cuts against the significance of the electorate's "selection" of a candidate. Yet a contested election is not strictly necessary. Other indicia of authorization can counterbalance uncontested status. Examples would include the reelection of a prosecutor after her implementation of a previously promised policy (perhaps in an opposed election), high turnout, or a policy that represents such a dramatic break with the status quo that opposition would be expected if it contradicted local views. While the question of contestation is close, localities should not be barred from accessing this sort of local control merely because (for example) they are too small, or an incumbent prosecutor is too popular and effective to generate regularly contested elections.<sup>227</sup> Moreover, increasing the import of elections, as this proposal would, should also raise the likelihood that they will be contested.

Other relevant fact-specific considerations can be imagined. Did the candidate center the nullification proposal in his or her self-portrayal? That makes more sensible an inference that voters understood it as key to the candidate's political project, and thus one the candidate would prioritize implementing post-election. Perhaps media covered the proposal as key to the campaign; that too suggests sali-

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<sup>224</sup> See, e.g., Osofsky, *supra* note 21, at 94 (“[C]ategorical nonenforcement can increase the salience of nonenforcement decisions, making it more likely that the politically accountable branches and the public will focus on them . . . providing a particularly transparent statement of nonenforcement.”).

<sup>225</sup> See Wright, *supra* note 112, at 590–91, 602 (describing how the localized character of prosecutor elections helps voters understand and respond to candidate policies).

<sup>226</sup> See HESSICK, NATIONAL STUDY, *supra* note 5, at 5.

<sup>227</sup> Indeed, in some respects, this would prove too much. It is not necessarily the case that uncontested elections are inherently defective signals of whom the people have selected.

ence.<sup>228</sup> Or maybe the candidate's opponents attacked the proposal directly, which arguably defines the election's stakes in relation to the proposal. Or the election may have generated unusually high turnout for a prosecutorial election.<sup>229</sup>

In sum, the nexus between a programmatic nullification policy and an election matters for divining democratic sanction. The subsidiarity of district attorney elections tightens that nexus in ways that can sometimes permit a prosecutor to claim legitimately that the district has authorized her nullification program.

## 2. *Outsider Effects and Invidious Domination*

Populist prosecutorial nullification advances autonomy by legitimating local self-determination. But if we think the all-affected principle helps justify this practice, we must grapple with the likelihood that not all affected assented. Perhaps popular sovereignty is “at the irreducible core of democracy,” but that does not mean majoritarianism is coextensive with democracy.<sup>230</sup> Prong two aims to ensure the policy, as implemented, minimizes supralocal effects on those beyond the district who literally had no say, and treats a policy as suspect if it impermissibly tramples the autonomy of losing minorities. “Impermissibly” must do work here. As Jeremy Waldron argues, “nothing tyrannical happens to me merely by virtue of the fact that my opinion is not acted upon by a community of which I am a member.”<sup>231</sup> Yet sometimes a policy loss is not just a loss, but something fundamentally antidemocratic in a way that our normative frameworks must at least attempt to detect.<sup>232</sup>

On that note, take first those outside the district. At the outset, we can draw again on the all-affected principle to posit that my gener-

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<sup>228</sup> Cf. Schacter, *supra* note 214, at 131–33, 155 (noting media power to shape electoral stakes).

<sup>229</sup> Referring to turnout raises the specter of apathy and nonvoters. Cf. Rappaport, *supra* note 25, at 751–52 (arguing that for “most ordinary people” participatory democracy is too time consuming). For these purposes, I consider choices not to vote nullities, i.e., expressions of indifference between the status quo and the policy preferences of the not indifferent. Indeed, this may be a place where some of the democratic difficulties posed by differing intensities of interest work themselves out. See, e.g., Saul Levmore, *Voting with Intensity*, 53 STAN. L. REV. 111, 142–48 (2000) (considering whether and how to account for different intensities of interest in democratic decisionmaking); ELAINE SPITZ, MAJORITY RULE 27–30 (1984) (discussing the benefits and difficulties of considering intensity in democratic processes).

<sup>230</sup> Kleinfeld, *supra* note 25, at 1393–94.

<sup>231</sup> JEREMY WALDRON, LAW AND DISAGREEMENT 13 (1999) (emphasis omitted).

<sup>232</sup> Cf. Kerrel Murray, Note, *Good Will Hunting: How the Supreme Court's Hunter Doctrine Can Still Shield Minorities from Political-Process Discrimination*, 66 STAN. L. REV. 443, 445, 453 (2014) (considering this challenge in the context of the Supreme Court's political-process doctrine).

alized moral disapproval of the choice that another region's voters made does not justify granting me the power to veto that choice. If just having an opinion on an issue sufficed to place one on an equal "affected" footing with those whom the policy choice affects more tangibly, the principle would seem to mean little.<sup>233</sup> Of more concern are those out-of-district effects that constrain the autonomy of outsiders (including those who regularly travel into the district).<sup>234</sup> To address that worry, we should view nullification pledges as most defensible when aimed at crimes committed within the jurisdiction, by residents, against residents.

This is not to say that any negative spillover effect invalidates a policy. Establishing boundaries carries with it some degree of unavoidable spillover from policy decisions,<sup>235</sup> and we should not treat populist prosecutorial nullification more harshly than other decisions in that regard. I mean only that spillover must be taken seriously enough to sometimes delegitimize otherwise valid populist prosecutorial nullification. To be sure, determining when spillover crosses the line can present a close question (as I suggest in Sections IV.D and V.A.3). In such cases, the popular sovereignty lens applied here would give the tie to the local nonenforcement policy.<sup>236</sup>

Within-district "outsiders" (dissenters) stand in a fundamentally different position. They possess a clear stake in how their district's criminal law operates. Yet majoritarian democracy necessitates dissenters, so their existence is not dispositive. Through the popular sovereignty lens applied here, the opportunity to influence the result through voting and other political engagement warrants a healthy, but rebuttable, presumption of legitimacy. Generally, in these situations, it is the dissenters' burden either to make their case in the next election or take advantage of the relative ease of "foot voting" by moving away.<sup>237</sup> That said, even the strongest advocates of popular sover-

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<sup>233</sup> A fair analogy here is the insufficiency of mere "psychic [dis]satisfaction" for Article III standing. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). I thus disagree with those who would give veto-justifying weight to supposed "intangible externalities." See, e.g., Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 498 (2004) (advocating for weighting intangible externalities).

<sup>234</sup> To be sure, outsider harms are only possible after first defining outsiders via the contingent political definition of the relevant community. See Schragger, *supra* note 182, at 464 (describing how local norms influence jurisdictional boundaries). Though the point is well taken, this Article takes those contingent borders as given.

<sup>235</sup> See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978) ("A city's decisions inescapably affect individuals living immediately outside its borders.")

<sup>236</sup> Section III.B offers further reason to think this would be a good thing.

<sup>237</sup> See, e.g., Ilya Somin, *Foot Voting, Decentralization, and Development*, 102 MINN. L. REV. 1649, 1649, 1662 (2018) (discussing foot voting, i.e., interjurisdictional migration undertaken because the migrant prefers the policies of his or her new jurisdiction). I

eignty acknowledge that some things are not up for majority vote.<sup>238</sup> The question is what those things are, and how we know. For present purposes, two limitations flow from the same justification for increased popular control outlined in Part II.

The first returns to autonomy. Democratic majoritarianism is not worth having because there is something magical about fifty percent plus one. On the popular sovereignty view, majoritarianism is valuable (if it is) because it reflects and advances a measure of equal self-determination for individuals and groups. If popular sovereignty goes beyond merely displeasing losers to disparate infringements on that equal self-determination, it becomes invidious domination inconsistent with its *raison d'être*.<sup>239</sup> Although, in practice, that sort of holistic standard may generate close cases,<sup>240</sup> their existence does not vitiate the point, especially when some cases are not close. Consider the easy, and easy to imagine, case of a refusal to prosecute assaults at only certain voting precincts. A legitimating theory based on self-determination must at least imply equal access to the means of self-determination. That flows into the second limitation: constitutional protections. Keeping in mind the “why” of democracy helps justify the Supreme Court’s observation that the “sovereignty of the people is itself subject to . . . constitutional limitations.”<sup>241</sup> Individual-rights provisions, like those in the Bill of Rights and Reconstruction Amendments, are not just consistent with a thick sense of democracy as more than bare majoritarianism. They perfect it by ensuring that all members of the community may participate in democracy. While constitutional violations are not always obvious, their general proscriptions provide a baseline against which the actions discussed here can be measured.<sup>242</sup>

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acknowledge that relative ease does not always mean possible in practice, but the possibility of foot voting still warrants mention.

<sup>238</sup> See, e.g., Kleinfeld, *supra* note 25, at 1393–94, 1401, 1409–10.

<sup>239</sup> See Kleinfeld, *supra* note 59, at 1466 (denying “democratic authority” where one part of society invidiously dominates or denies equal citizenship to another part) (emphasis omitted); Natapoff, *supra* note 24, at 1755 (deeming underenforcement illegitimate when it acts to render some members of communities “lesser citizens” without “serious justifications”); Vicki C. Jackson, *The (Myth of Un)Amendability of the U.S. Constitution and the Democratic Component of Constitutionalism*, 13 INT’L J. CONST. L. 575, 600–01 (2015) (arguing that democratic processes premised on equality cannot legitimate ostensibly democratic decisions that deny equality).

<sup>240</sup> See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414–15 (1985) (noting that “hard cases” may arise when there are “questions about the result announced by a clearly applicable rule”).

<sup>241</sup> *Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

<sup>242</sup> Thus, I do not advocate untrammelled “neighborhood constitutionalism” under which devolution per se legitimates otherwise unconstitutional practices. See Schragger, *supra* note 182, at 382–83 (describing that model). Constitutions are fundamentally

### 3. *New and Improved Jury Nullification*

In sum, this model can justify elected prosecutors' programmatic nullification when (1) context reveals localized electoral authorization and (2) the programs operate consistent with the self-determination rights of dissenters in and outside of the jurisdiction. That is populist prosecutorial nullification.

This reveals a before-now unappreciated analogy to historical practice. When prosecutors exercise their robust discretion programmatically to nullify, pursuant to a policy for which they can legitimately claim public approval, they accomplish wholesale what juries once might have done retail. They tie the law's application, or nonenforcement, to the People's will. Populist prosecutorial nullification is thus a hydraulic descendant of our once-strong juries.<sup>243</sup> Like those juries, it empowers the governed to judge the law, either per se or as applied in a subset of cases. In my view, the practice can be justified independent of this analogy, particularly under a popular sovereignty lens. Section III.B sketches several such justifications. But the parallel matters. The jury's populist roots, coupled with the subsidiarity-based justifications for those roots, suggest that the modern-day demise of jury trials opened a distinctly *democratic* hole in our institutions—a hole that populist prosecutorial nullification is well-suited to fill.

The analogy is useful both for the similarities it invokes and the distinctions it acknowledges. Take, for example, a key point of coextension that underscores the populist connection: the composition of prosecutorial electorates. Prosecutors are usually elected from districts tracking one or multiple counties to prosecute crimes in those districts.<sup>244</sup> Juries are generally drawn from the same geographic region in which trial is proper (usually, where the crime was committed).<sup>245</sup> Accordingly, those who elect a prosecutor comprise generally the same population from which that region's juries would be drawn.

Looking to that population suggests a point of distinction worth elaboration. One defense of jury nullification, sounding in popular sovereignty, has been that “the entire polity has the relevant exper-

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different from ordinary legislative acts. The former are exercises of a sort of “original right” by the people themselves, *see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803), while the latter represent at most the acts of the people's “agents,” *see* THE FEDERALIST No. 78, *supra* note 49 (Alexander Hamilton).

<sup>243</sup> *Cf.* Issacharoff & Karlan, *supra* note 208.

<sup>244</sup> HESSICK, NATIONAL STUDY, *supra* note 5, at 10.

<sup>245</sup> *See* 50A C.J.S. *Juries* § 266 (describing the ways vicinage is defined for jury selection); LAFAVE ET AL., *supra* note 33, § 16.1(b) (distinguishing the concepts of venue and vicinage); *id.* § 16.1(c) (outlining the formula for designating venue in criminal trials).

tise” on “the question of what constitutes justice in a particular case.”<sup>246</sup> But juries are still samples of the polity, often skewed by for-cause and peremptory challenges.<sup>247</sup> The rejoinder is predictable: the jury is “unelected, unaccountable to a constituency, and only obliquely a ‘representative’ of the area from which it is drawn.”<sup>248</sup> To these critics, there is thus no “necessary correlation between community values and an acquittal.”<sup>249</sup> Indeed, if the community disagrees with nullification, an acquittal might actually harm the community’s interests.<sup>250</sup> These challenges, in short, question the democratic chops of jury nullification. Conversely, populist prosecutorial nullification draws on all who are able and choose to vote. Although voting pools are not skew-free,<sup>251</sup> those imperfections are generally as applicable, if not more so, to jury pools.<sup>252</sup> The upshot is that populist prosecutorial nullification offers unusually strong assurance that nonenforcement represents the community.

Another place of disanalogy accentuates the point. Since the Founding, some crimes have always been treated as petty and thus outside the jury-trial guarantee.<sup>253</sup> Conversely, prosecutors wield discretionary authority over petty and non-petty crimes. But this just demonstrates the hydraulic nature of local, popular control. I argue not that the populist prosecutor envisioned here replicates every aspect of the strong jury, but that it affords localities the same sort of power those juries had. At most, the disanalogy shows only that this phenomenon offers *more* of that power. And if those who contend

<sup>246</sup> Barkow, *supra* note 7, at 1362.

<sup>247</sup> See, e.g., Frampton, *supra* note 70, at 788–90 (describing racial disparities in the exercise of both peremptory strikes and challenges for cause); Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 128 n.11 (1998) (recognizing that for-cause and peremptory challenges can make a jury unrepresentative); Joshua Revesz, Comment, *Ideological Imbalance and the Peremptory Challenge*, 125 YALE L.J. 2535, 2537, 2543–46 (2016) (contending, based on survey data, that peremptory challenges result in ideologically skewed juries).

<sup>248</sup> Leipold, *supra* note 75, at 299.

<sup>249</sup> *Id.* at 308.

<sup>250</sup> *Id.* at 307–08 (describing situations where jury nullification fails to conform with community values).

<sup>251</sup> See *supra* note 186.

<sup>252</sup> See, e.g., LAFAVE ET AL., *supra* note 33, § 22.2(b) (“Lists of voters and drivers’ license holders are most commonly used to create the list of potential jurors.”); Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L.J. 103, 138–39 (2019) (calling attention to the ways in which racial voter registration disparities have been and can continue to be the product of discriminatory governmental conduct).

<sup>253</sup> See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 n.7 (2020) (recognizing that both common law tradition and current precedent allow trials for petty offenses to occur without a jury (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 379 (1966))); Murphy, *supra* note 81, at 137–40 (sketching the Supreme Court’s approach to petty offenses).

that the Supreme Court has narrowed the jury-trial right through its interpretation of the petty-crime exception are correct,<sup>254</sup> the hydraulic relationship is clear: populist prosecutorial nullification offers communities a type of power that judicial construction has vitiated.

I acknowledge the possibility that, all else equal, an unbroken pattern of jury nullification in a jurisdiction may generate a stronger inference regarding the “popular will” than knowing only that a candidate promised not to enforce a law. After all, electoral success generally requires just a bare majority, while the relative randomness of jury selection may make blanket nullification quite unlikely unless community opposition well exceeds fifty percent plus one.<sup>255</sup> As noted, though, the legitimacy of populist prosecutorial nullification does not rest on its perfect replication of its progenitor. This potential point of departure underscores the importance of this Part’s focus on the nature of the promise and the election in which it is made: An electoral win, on its own, may be an insufficient barometer of a popular will warranting implementation.

In any event, beyond the minutiae of the analogy, this framework offers an administrable heuristic for evaluating these policies. Its value does not hinge solely on its judicial enforceability. To be sure, this model can inform any case where the legitimate reach of prosecutorial discretion matters.<sup>256</sup> Consider Parisa Dehghani-Tafti, a Virginia district attorney elected in 2019 on a platform that included refusing to prosecute marijuana possession.<sup>257</sup> When she began implementation, unelected county judges began requiring apparently unprecedented

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<sup>254</sup> See Murphy, *supra* note 81, at 149, 169 (explaining how the Supreme Court has narrowed the right to a criminal jury trial).

<sup>255</sup> How unlikely depends, among other things, on whether a jury nullifies when it hangs because of some jurors’ intent to nullify. See, e.g., Marder, *supra* note 30, at 881 & n.7, 887 (noting the technical difference between a hung jury and a nullifying jury but arguing that when a jury hangs because of some jurors’ intent to nullify, it should be considered a nullifying jury).

<sup>256</sup> See, e.g., *infra* Section V.A.1 (suggesting that this framework could have informed a judicial decision affirming the reassignment of cases); Michael Jonas, *One Year in, Rollins Takes Stock*, COMMONWEALTH (Feb. 18, 2020), <https://commonwealthmagazine.org/criminal-justice/one-year-in-rollins-takes-stock-2> (noting two cases of state trial courts attempting to block Rachael Rollins’ refusal to prosecute); cf. State v. Winne, 96 A.2d 63, 73–74 (N.J. 1953) (allowing criminal charges against a prosecutor for the bad-faith exercise of nonenforcement discretion).

<sup>257</sup> See Rebecca Burnett, *Commonwealth’s Attorney Takes Circuit Court to Va. Supreme Court*, WDVN VA. (Sept. 4, 2020, 6:42 PM), <https://www.localdvm.com/news/virginia/commonwealths-attorney-takes-circuit-court-to-va-supreme-court> (describing Dehghani-Tafti’s platform).

“specific, written explanations” for her attempts to dismiss charges.<sup>258</sup> At least one court hinted that it would reject any dismissal that it believed constituted “partisan enforcement of the laws.”<sup>259</sup> Dehghani-Tafti attempted to challenge this judicial resistance before the Virginia Supreme Court.<sup>260</sup> Although the court declined to rule on procedural grounds, a properly presented case would squarely implicate this Article’s framework.<sup>261</sup> In such a case, it should at least count in Dehghani-Tafti’s favor that she was elected on this platform, that this judicial second-guessing was apparently unprecedented, and that the second-guessers were appointed, not elected.

Beyond emphasizing that those types of facts should matter, this Article is agnostic regarding the precise way that judges might employ this framework, or whether it can or should necessarily be judicially enforced to its “full conceptual limits.”<sup>262</sup> That should not trouble us. Legal rules and norms matter beyond the bench; courts need not, and should not, be the only actors concerned with lawfulness.<sup>263</sup> Whether or not this Article’s specific framework is adopted, some normative view of the prosecutor’s role and power should inform prosecutors’ perception of their power, voters’ willingness to select or reject prosecutors, and the frequency with which empowered actors like states choose to preempt local prosecutorial behavior.<sup>264</sup>

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<sup>258</sup> Rachel Weiner, *Virginia’s Highest Court Sidesteps Marijuana Dispute in Arlington*, WASH. POST (Dec. 23, 2020, 8:00 AM), [https://www.washingtonpost.com/local/legal-issues/arlington-prosecutor-judge-dispute/2020/12/22/5863f8ea-43b7-11eb-b0e4-0f182923a025\\_story.html](https://www.washingtonpost.com/local/legal-issues/arlington-prosecutor-judge-dispute/2020/12/22/5863f8ea-43b7-11eb-b0e4-0f182923a025_story.html); see also Parisa Dehghani-Tafti, *Why I Am Fighting for Prosecutorial Discretion*, WASH. POST (Aug. 21, 2020, 10:00 AM), [https://www.washingtonpost.com/opinions/local-opinions/why-i-am-fighting-for-prosecutorial-discretion-in-arlington/2020/08/20/9395512e-e0c6-11ea-b69b-64f7b0477ed4\\_story.html](https://www.washingtonpost.com/opinions/local-opinions/why-i-am-fighting-for-prosecutorial-discretion-in-arlington/2020/08/20/9395512e-e0c6-11ea-b69b-64f7b0477ed4_story.html) (asserting that the order was “unprecedented”); *Circuit Court—17th Judicial Circuit*, ARLINGTON CTS. & JUD. SERVS., <https://courts.arlingtonva.us/circuit-court> (last visited Feb. 8, 2021) (noting that Arlington Circuit Court judges “are elected by a majority vote of each House” of the state legislature); *Judicial Selection in Virginia*, BALLOTPEdia, [https://ballotpedia.org/Judicial\\_selection\\_in\\_Virginia](https://ballotpedia.org/Judicial_selection_in_Virginia) (last visited Feb. 8, 2021) (noting that all Virginia state judges are elected by a majority vote of legislators, not direct election).

<sup>259</sup> Dehghani-Tafti, *supra* note 258.

<sup>260</sup> See Weiner, *supra* note 258 (describing Dehghani-Tafti’s petition).

<sup>261</sup> See *id.* (noting that the Virginia Supreme Court declined to rule for lack of a case or controversy).

<sup>262</sup> Cf. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (arguing that constitutional norms that are “understood to be legally valid to their full conceptual limits” may nevertheless properly be “underenforced” by judicial decisions that stop short of those limits). Similarly, some aspects of my normative framework may be more amenable to judicial weighing than others.

<sup>263</sup> See *id.* (emphasizing that norms underenforced by the judiciary still “remain in full force” for other actors).

<sup>264</sup> See *infra* Section IV.D (discussing the role of this state authority).



## B. Democratic Benefits

While its benefits draw on the strong-jury tradition, populist prosecutorial nullification offers independent, novel democratic advantages. This Subpart highlights three notable benefits: offering communities increased autonomy through devolved control over some aspects of their criminal law, investing individuals and groups more deeply in the value of the broader political unit, and enhancing democratic accountability.

### 1. Particularized, Devolved Empowerment

In some ways, this issue is about where power resides.<sup>265</sup> Who, that is, should decide whether a community permits sex work, or recreational drug possession, unlicensed cosmetology, or a host of other possible legal declarations of what ought or ought not happen?<sup>266</sup> Even under the (perhaps unwarranted) assumption of representative legislatures, nonrandom geographic ideological sorting<sup>267</sup> may mean legislative views on a law may not align with the views within a given locality. And while we should not equate a district's electorate with one undifferentiated "community,"<sup>268</sup> we should have little difficulty imagining some (or most) of a district's discrete groups objecting to laws that contravene their values. It remains useful, then, to speak of community interests, particularly with subsidiarity at work.

This Article problematizes the denial of community ability to define the good as its values dictate and live accordingly.<sup>269</sup> District attorney elections can mitigate that problem. Through facilitating local control over the state's most coercive domestic activity—crim-

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<sup>265</sup> See Pfaff, *supra* note 18 (emphasizing complexity of "the question of who should define our criminal laws" and asking why legislators and voters not based in an area should necessarily "determine what conduct demands criminal enforcement" there).

<sup>266</sup> See Steadman, *supra* note 1 (discussing a candidate's promise not to enforce prostitution laws); Wagner, *supra* note 3 (noting that Tiffany Cabán promised not to enforce recreational drug offenses if elected); N.Y. Penal Law § 230.00 (McKinney 2020) (making prostitution a misdemeanor); *Id.* §§ 221.05–25 (regulating marijuana possession); MO. ANN. STAT. §§ 329.250, .030, .010 (West 2020) (regulating cosmetology).

<sup>267</sup> Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191, 197–205 (2016) (discussing the implications and origins of intrastate political divides); Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrency and Its Implications for Popular Lawmaking*, 81 CHI.-KENT L. REV. 1029, 1046 (2006) (noting uneven distribution of policy preferences).

<sup>268</sup> See *supra* text accompanying notes 197–98; Rappaport, *supra* note 25, at 745–47, 746 nn. 208–09 (arguing that popular understandings of "community" fail to recognize the divergent interests and unique characteristics of the individuals said to belong to that community).

<sup>269</sup> See Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 976 (2004) (contending that "we . . . deny . . . communities' autonomy" when we "suppress" their normative views in favor of others).

inal law enforcement—populist prosecutorial nullification can return a measure of autonomy to groups and individuals.<sup>270</sup> Perhaps in some sense a unanimity decision rule would maximize autonomy. But if that is infeasible and might well decrease autonomy by neutering the state’s ability to protect freedom,<sup>271</sup> devolving decisionmaking to increase the “number of issues over which people are free to choose” may be the next best thing, particularly given the primacy of local action in most people’s lives.<sup>272</sup> In this way, populist prosecutorial nullification serves the same function that powerful localized juries could: a counterweight to the normative preferences of a more distant sovereign.

Outright nullification is one clear means of control. But the control can be finely grained as well, permitting communities to equitably trim laws. Legal rules often sweep beyond the core disfavored conduct that prompted them, sometimes because of human fallibility, and sometimes because legislatures craft them that way to punt tailoring to enforcers.<sup>273</sup> Good-faith disagreement may also exist about the core’s proper size. Without populist prosecutorial nullification, a community opposed to a law’s enforced breadth, but without the statewide clout to alter it, must hope that cases make it to a jury for *ex post* nullification (if the jury trial right even applies). With populist prosecutorial nullification, communities, through their prosecutors, may *ex ante* declare some cases of factual guilt permissible.

Finally, it is worth noting how particularized empowerment can have a net anti-subordinating effect. Any locality could avail itself of this Article’s path. But just as the “majority needs no protection against discrimination,”<sup>274</sup> groups that have been, and continue to be, well represented at higher levels of government may find no need for populist prosecutorial nullification to achieve desired ends. Conversely, historically disenfranchised and subordinated groups that are local majorities may well still stand in a relatively disenfranchised position at the state and federal levels. Opening populist prosecutorial

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<sup>270</sup> See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 282 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., Alfred A. Knopf 13th prtg. 1980) (“He who punishes the criminal is . . . the real master of society.”).

<sup>271</sup> See *supra* text accompanying notes 175–76.

<sup>272</sup> Shapiro, *supra* note 168, at 322; see also Smith, *supra* note 139, at 418–20, 486 (describing the expansive role of local governments).

<sup>273</sup> Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 363 (2019) (describing how legislators evade responsibility by drafting broad criminal statutes); see Brown, *supra* note 75, at 1162 (characterizing the need for interpretation when applying legal rules as “unavoidable”).

<sup>274</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 468 (1982) (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

nullification to all localities may, on balance, have a leveling effect with respect to bottom-up control over criminal law governance.<sup>275</sup>

## 2. *Binding the Polity*

Benefits also flow to higher levels of government. Political devolution makes sense in part because good-faith disagreement on the common good is inevitable,<sup>276</sup> but no amount of subsidiarity obviates the need to sometimes bind dissenters. Societies thus only work upon wide belief that non-coerced submission to the legal order is proper, even when one disagrees.<sup>277</sup>

Yet most people would prefer to avoid repeated submission to disfavored, unconsented-to rules. A popular-sovereignty perspective reveals such submission as imposing a sort of autonomy tax, or as creating democratic stressors that alienate people from their government.<sup>278</sup> Think here of your least favorite Supreme Court decision, which binds you notwithstanding its (to you) obvious logical flaws. Commentators sometimes quail about the degree to which Americans are divided, often on issues that are decided at the national level. And while our present disagreements may pale in comparison to past internecine division, much unpleasantness and associated inefficiency can occur short of formal disunity. It is thus valuable for our legal rules and institutions to consider how to combat the risk that actual—or perceived—policy domination will generate this sort of alienation.

Of course, our legal tradition rejects absolute individual (or local) immunity from top-down direction. Perhaps most notably, the Fourteenth Amendment applied the Bill of Rights to the states to protect former enslaved persons against abuse by local majorities.<sup>279</sup> As

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<sup>275</sup> See, e.g., Pfaff, *supra* note 18 (building a normative case for prosecutorial nullification, in part, based on its ability to empower historically subordinated groups who lack the ability to influence higher levels of government).

<sup>276</sup> See Shapiro, *supra* note 172, at 139–40 (observing that “there cannot be an undisputed list of goods” in a pluralistic society).

<sup>277</sup> See GREEN, *supra* note 176, at 74–75 (“[T]he credibility of most threats . . . [to coerce behavior] depends precisely on their being unnecessary for most citizens. . . . Coercion secures authority and makes it efficacious, but it does not constitute it. Coercive threats provide secondary, reinforcing motivation when political order fails in its primary normative technique . . . .”); see also Gary J. Jacobsohn, *Citizen Participation in Policy-Making: The Role of the Jury*, 39 J. POL. 73, 88 (1977) (discussing the need for juries to be perceived as legitimate); Fallon, *supra* note 148, at 1812 n.97 (discussing the role of legitimacy in the constitutional context).

<sup>278</sup> Cf. Owen, *supra* note 169, at 114–15 (discussing that there is “democratic stability in the sense of a strong identification of citizens with their democratic institutions”).

<sup>279</sup> See Bressler, *supra* note 72, at 1149–50 (arguing that a proper reading of the Reconstruction Amendments requires an understanding of the context in which they were ratified); see generally MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (summarizing the history and

that example indicates, top-down direction may sometimes be required precisely to protect autonomy. Few deny that some rights are too important to submit them to majority whim; the disagreement comes in the identification of those rights and their proper scope. And beyond protection of individual rights, there are surely some instances where unleavened populism, localized or otherwise, would preclude effective governance.<sup>280</sup> Nevertheless, top-down domination has costs for the losers and consequent costs for democratic stability.<sup>281</sup> Devolving control over criminal law can aid the broader political unit by tempering those costs.

After all, an easy way to make people feel as though they have control over their lives and societies is actually providing it.<sup>282</sup> Mechanisms like populist prosecutorial nullification visibly scratch that itch. In so doing, they ought to make those instances where top-down control is unavoidable more palatable (and more easily rationalized as unavoidable). This can create safety valves for democratic stressors, binding together the superior polity by making it more resilient to those tensions. I draw here on Heather Gerken's insight that federalism can "integrat[e] rather than divid[e] the national polity" by "pulling" empowered localities "into the project of governance and giving them a stake in its success."<sup>283</sup> It "take[s] the sting out of losing" and "helps bind winners *and* losers to national politics."<sup>284</sup> Localism and subsidiarity can act the same way,<sup>285</sup> since all forms of devolution should help societies survive "sustained friction over the long run."<sup>286</sup> Without encouraging constant defiance, devolved cate-

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purposes of the Fourteenth Amendment). The Constitution itself falls within this tradition. See McConnell, *supra* note 194, at 1489.

<sup>280</sup> Cf. Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 8–12 (2016) (justifying separating central banks from the political process).

<sup>281</sup> See Owen, *supra* note 169, at 114 (raising concerns that minority interests will be ignored or valued less in majority rule democracies).

<sup>282</sup> Cf. DZUR, *supra* note 25, at 159 (warning that "expert justice" can cause the "perpetuation of social distance between the people and their power-wielding institutions").

<sup>283</sup> Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1892, 1898 (2014).

<sup>284</sup> *Id.* at 1897 (emphasis added).

<sup>285</sup> See, e.g., *id.* at 1891 ("Both devolution and centralization are . . . means to the same end: a well-functioning democracy." (emphasis omitted)); *id.* at 1910 (extending that reasoning to local institutions like "locally elected prosecutor's offices").

<sup>286</sup> *Id.* at 1900 (citing unpublished manuscript). Indeed, because state lines are weaker predictors of communities of interest than they were at the Founding, local-level devolution may be a more targeted means of amplifying autonomy (and obtaining social-binding benefits) than mere state-level devolution. See Su, *supra* note 261, at 251–52; Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 103–05, 105 n.406 (2016).

gorical nullification can permit dissenters to feel in control, notwithstanding sometimes-unavoidable submission to external control.<sup>287</sup> In short, populist prosecutorial nullification supercharges prosecutorial discretion's ability "to reconcile the populace with a distant sovereign."<sup>288</sup>

Finally, this model also implicates key elements of Philip Pettit's "contestatory mechanisms," part of his anti-domination democratic thought.<sup>289</sup> These mechanisms permit minorities to challenge a disliked decision, not through a veto, but "to call [it] into question" and "trigger a review" in an impartial forum.<sup>290</sup> Populist prosecutorial nullification sends a clear message to other levels of government about the community's views. To the extent that this message may serve as a catalyst for broader change, populist prosecutorial nullification also aligns with the venerable, though sometimes criticized, "laboratories of democracy" tradition.<sup>291</sup> And as discussed more fully in Section IV.D, the state's retention of various ways to override local action means that this local move can trigger precisely the sort of higher-level political review the contestatory mechanism model contemplates.<sup>292</sup> Ultimately, contestatory mechanisms, by allowing dissenters to place the status quo on the political agenda for potential reconsideration, offers those losers additional reason to remain engaged and invested in the political unit.

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<sup>287</sup> Cf. Gerken, *supra* note 277, at 1898 ("Decentralization . . . gives dissenters the ability to speak truth *with* power, not just to it."); Post, *supra* note 168, at 28 (noting the importance for democracies of ensuring that "citizens . . . maintain their identification with the state" even when "the state acts in ways inconsistent with [their] ideas and values").

<sup>288</sup> Sklansky, *supra* note 110, at 506; cf. PARRILLO, *supra* note 92, at 256–58 (discussing how different forms of prosecutorial compensation shaped the prosecutor's relationship to their community).

<sup>289</sup> Owen, *supra* note 169, at 114 (citing Philip Pettit, *Republican Freedom and Contestatory Democracy*, in *DEMOCRACY'S VALUE* 163, 178–79 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999)) (describing Pettit's contestatory mechanisms).

<sup>290</sup> Owen, *supra* note 169 (quoting Pettit, *supra* note 283); cf. DZUR, *supra* note 25, at 136 (describing jury nullification as a "feedback mechanism" for signaling disapproval of "executive or . . . legislative" action); Jacobsohn, *supra* note 271, at 94 (suggesting that jury nullification serves as a way to test community perceptions of laws and policies).

<sup>291</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *But see* Gerken, *supra* note 277, at 1901 (noting critiques of the laboratory theory).

<sup>292</sup> *See* Gerken, *supra* note 277, at 1900 (devolution can "build a national movement, force issues on the national agenda, and tee up national debates, all with an eye to forging a national norm"); *see also infra* Section IV.D (discussing state power to limit localities).

### 3. *Democratic Accountability*

Democrats of all stripes generally applaud accountability.<sup>293</sup> It has also been long lamented as lacking for American prosecutors, although perhaps opponents of prosecutorial elections would praise its absence.<sup>294</sup> Nevertheless, if Americans continue to desire meaningful popular accountability for prosecutors (and the persistence of prosecutorial elections suggests that they do) populist prosecutorial nullification is a boon.

Much of the prosecutorial accountability gap stems from the difficulty of evaluating performance. Some of that opacity may be a result of the ascendancy of a managerialist view of prosecutors.<sup>295</sup> But this Article's model requires a transparent, reasoned, pre-election promise, which supports meaningful accountability, particularly relative to the status quo.<sup>296</sup> While this proposal may not fully satisfy those who lament prosecutor unaccountability, it does impose something like a reasoned decisionmaking requirement, which constrains the extent to which programmatic nullification can be untrammelled.<sup>297</sup> The transparency necessary for actual accountability in this sphere means that prosecutors and voters will perceive a greater chance that pledge compliance will be checked.<sup>298</sup> To the extent that

<sup>293</sup> Accountability can mean both that an official is expected to give reasons for their actions and that the official is subject to sanctions for conduct of which the public disapproves. WHELAN, *supra* note 86, at 344; *see also* Richman, *supra* note 126, at 65 (defining accountability similarly).

<sup>294</sup> *E.g.*, Richman, *supra* note 121, at 960–65 (sketching tension between need for accountability and prosecutorial independence); Davis, *supra* note 6, at 408 (noting accountability complaints in the early twentieth century). *But see* Tonry, *supra* note 26, at 12 (deeming calls for accountability “puzzling”).

<sup>295</sup> *E.g.*, David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 671 (2017) (arguing that “voters . . . are poorly positioned to assess the performance of an elected prosecutor” and blaming “lack of transparency” and “conflicting expectations about how prosecutors should do their jobs”); Simon, *supra* note 123, at 191–92 (connecting low substantive content of many prosecutor elections to the “traditional conception of prosecutorial work that emphasizes individual, ineffable judgment”).

<sup>296</sup> *See, e.g.*, Eoin Higgins, *Progressive DA Rachael Rollins Hasn't Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious*, INTERCEPT (Mar. 24, 2019), <https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime> (reporting community group critique of Rachael Rollins' pledge fulfillment); *cf.* Vorenberg, *supra* note 7, at 1551 (arguing that guiding nonenforcement discretion renders criminal justice “more principled, visible, and understandable”).

<sup>297</sup> *Compare* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (reasoned decisionmaking requirement), *with* Wright, *supra* note 112, at 609–10 (calling for importation of these administrative law principles to the prosecutorial context).

<sup>298</sup> *See, e.g.*, Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737, 755 (2004) (positing that a lack of transparency in governmental action renders real accountability by the polity more difficult); Higgins, *supra* note 296 (noting Rachael

the prosecutorial accountability deficit stems from community confusion “about the prosecut[orial] function,”<sup>299</sup> we may gain much from the organic education that populist prosecutorial nullification generates.

Accountability, accordingly, can also be instrumentally valuable to boost participation. Giving voters more confidence that prosecutors will follow through, and encouraging prosecutors to follow through by requiring public precommitment, ought to go far to ensure the implementation of popular preferences.<sup>300</sup> To the extent that participation deficits reflect a sense that promises are never kept, accountability may reverse that sense.

#### IV SOME PROBLEMS

Those familiar with jury nullification may be seeing the ghosts of its discontents at this point. Surely aligning populist prosecutorial nullification with jury nullification’s injection of popular sentiment risks the latter’s well-known faults—most notably, the potential of exclusionary policy. This Part thus begins by considering whether this proposal can offer any more optimism regarding risks to local minorities than jury nullification. It then engages other important critiques: whether this proposal is compatible with the rule of law, whether it authorizes impermissible “suspension” of the law, whether its weighting of supralocal effect saps its efficacy, and whether practical limitations on its impact weaken its utility.

##### *A. Against Democratic Exclusion*

We cannot “affect ‘a pure proceduralist’s nonchalance’” about what the People made sovereign may do.<sup>301</sup> Indeed, prizing self-determination demands concern about the potential that populist prosecutorial nullification might violate individuals’ autonomy.<sup>302</sup> History shows democracy at its worst when majorities simply use the political process to rent seek and either neglect or oppress outgroups.

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Rollins’ ostensible equanimity with a community group checking her compliance). Another instrumental benefit of transparency—antidiscrimination—receives independent treatment, *see infra* Section IV.A.1.

<sup>299</sup> Davis, *supra* note 6, at 209–10.

<sup>300</sup> *See, e.g., supra* note 219 and sources cited therein.

<sup>301</sup> *See* Kramer, *supra* note 263, at 996.

<sup>302</sup> *See* HARRISON, *supra* note 155, at 231 (arguing that “the same reasons which give . . . [democratic] majorit[ies] their normal legitimacy” (such as equality of democratic respect) limit what those majorities may do to minorities); Shapiro, *supra* note 172, at 147 (connecting “the democratic ideal” with a “suspicion toward hierarchy,” and noting the possibility that majorities might reach decisions inconsistent with that suspicion).

For example, the populist Jacksonians explicitly framed their democracy as exclusionary.<sup>303</sup> And the history of local control is replete with condemnable popular choices.<sup>304</sup> If that is unavoidable, injecting populism in pursuit of autonomy may be more trouble than it is worth.<sup>305</sup>

True, many prosecutors receiving recent press have been dubbed “progressive prosecutors,”<sup>306</sup> invoking a particular ideological tradition. The potential that historically disenfranchised groups might invoke localism to advance their aims is of independent interest, given American localism’s checkered history. But nothing about prosecutorial power self-limits to “progressive” application.<sup>307</sup> Today, pro-gun sentiment is rarely coded progressive, yet a pro-gun community might well elect a pro-gun prosecutor who promises to nullify gun-control laws. This Article does not attempt the difficult task of justifying populist prosecutorial nullification on the grounds that it will necessarily have a single ideological valence.<sup>308</sup>

Yet the abuse of local control is a serious risk. True, the potential for good-faith disagreement about good policy reveals tangible democratic benefit in maximizing individual and group opportunity to shape the world in ways consonant with their values. Take the gun-control example just given. Many would consider this a policy area where at least some good-faith disagreement is possible. Yet even while respect for autonomy requires maintaining space for disagreement, that same respect also means the space is finite. And the history of American majoritarianism reveals the potential for minority

<sup>303</sup> See, e.g., Forbath, *supra* note 115, at 970–71.

<sup>304</sup> See, e.g., Davidson, *supra* note 208, at 976–77 & n.87 (noting potential for antidemocratic, exclusionary localism, and collecting resources on “the racial dimensions of local exclusion”); Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 149–50, 201–02 (2016) (describing “destructive localism”—when “local autonomy is afforded to one group such that its members are able to enjoy the benefits of classic localism at the cost or expense of another group”); *id.* at 149–51 (recounting Southern municipalities’ attempts to evade desegregation post *Brown v. Board of Education*); Leipold, *supra* note 75, at 304–07 (criticizing juries that acquitted on racist or otherwise bigoted grounds).

<sup>305</sup> See, e.g., Fairfax, *supra* note 8, at 1274–75; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1861 & n.41, 1879 (1994) (sketching the persistent tension between views of localism as a protector against “potential tyranny of the state” and an optimizer of responsive democracy and the risks localism can “pose to individual autonomy”).

<sup>306</sup> See, e.g., *The Paradox of “Progressive Prosecution,” supra* note 24, at 750; Reisman, *supra* note 18.

<sup>307</sup> See, e.g., Bellin, *supra* note 26, at 1252 (“A . . . sense that prosecutors . . . should[] bend the laws to further individual conceptions of justice will not be limited to certain prosecutors.”).

<sup>308</sup> This Article thus avoids difficulties faced by “democratizers” who prize popular control as means to certain substantive ends. See Rappaport, *supra* note 25, at 807–08.



oppression lurking in invocations of popular sovereignty, especially when coupled with praise for localism.

Prong two of my model aims to address this risk by condemning populist prosecutorial nullification that invidiously dominates intra-district minorities. But history demands more than just saying that invidious domination would be bad if it happened. While I cannot show that such outcomes are impossible under this proposal, there are reasons for guarded optimism.

### 1. *Transparency as Safeguard*

Much of this Article's persuasiveness may depend on whether one finds the popular sovereignty perspective congenial. But a distinct, universal advantage—and potential safeguard against invidious parochialism—lies in its transparency. Most, regardless of their view on popular control, seem to recognize some value in conducting government action in a way that is “clear and intelligible to the people at large.”<sup>309</sup> Transparency has often been praised, and its absence lamented, in the criminal justice context broadly and the prosecutorial context specifically.<sup>310</sup> Opacity, as Stephanos Bibas explained, hampers deterrence and reduces faith in the justice system.<sup>311</sup> And it impedes *any* sort of public involvement in the criminal law governing their lives, which ought to concern even those who would limit the public's role to “throwing the rascals out”;<sup>312</sup> presumably, they still want technocratic decisionmaking to be publicly comprehensible.<sup>313</sup> Worse, hearkening back to democratic stressors, opacity engenders resentment and alienation among the excluded, for whom government stands in the position of ruler rather than agent.<sup>314</sup>

Concerns about prosecutorial nullification can rightly draw on jury nullification's negative potential. But transparency offers a key distinction. Jurors need never explain their decisions and can lie if

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<sup>309</sup> WHELAN, *supra* note 86, at 544.

<sup>310</sup> See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting) (“[I]t is healthful to keep charging practices visible to the general public . . .”); Bibas, *supra* note 25, at 923–29, 934.

<sup>311</sup> Bibas, *supra* note 25, at 947, 950–51.

<sup>312</sup> WEALE, *supra* note 156.

<sup>313</sup> See *id.* at 950–52 (deriding secrecy and opacity as obstacles to meaningful public participation); WHELAN, *supra* note 86, at 543 (positing that both publicity and transparency to the public are necessary for effective administration of the law). *But see* Sklansky, *supra* note 25, at 1789 (discussing how elite-centered theories of democracy are less interested in transparency).

<sup>314</sup> See WHELAN, *supra* note 86, at 544 (observing that lack of transparency may cause “popular frustration, distrust, and hostility to government”); Bibas, *supra* note 25, at 950.

they do explain.<sup>315</sup> Conversely, populist prosecutorial nullification demands public pre-election justification of the policy. Not only does this provide the *per se* benefits of transparency and accountability, it offers some security against the worst excesses of popular control.

To see why, take a plainly unconstitutional policy like racially selective prosecutorial nullification. The prosecutor who proceeds on such a policy has run afoul of the Supreme Court's recognized constraints on discretion and provided the "clear evidence" of a constitutional violation that is usually rather difficult to find.<sup>316</sup> Assuming the entire state does not subscribe to that prosecutor's views, such a prosecutor would have also given the state ample justification to regulate the policy out of existence.<sup>317</sup>

Surely, a skeptic might say, a malicious prosecutor would cloak invidious intent behind facially neutral justification. We could even imagine a prosecutor obtaining electoral authorization from a bigoted electorate through coded messages that made clear the real racist intent (for example) of a facially nondiscriminatory policy. Yet even this is not unanswerable.

First, this model at least means that the prosecutor must say *that* she plans to act and say *why*. The problem of pretext is not unique to this context. But requiring a reason is better than not; we can detect pretext by comparing reasons to reality.<sup>318</sup> And requiring that the policy be announced pre-election gives citizens and non-governmental organizations time to investigate, analyze, respond during the election process, and prepare to contest through other means if the prosecutor wins.

Second, unlike acquittals, the degree to which an announced categorical prosecution policy might be judicially reviewable remains

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<sup>315</sup> See Leipold, *supra* note 75, at 306–07 (emphasizing the risk of malicious nullification, and dubbing it "startling . . . that the decisions are not subject to any review" and that "no explanations are ever required from the decisionmakers").

<sup>316</sup> See *United States v. Armstrong*, 517 U.S. 456, 464–65, 469 (1996); see also *Robinson v. United States*, 769 A.2d 747, 757–58 (D.C. 2001) (applying selective-prosecution doctrine in state-court prosecution); *State v. Keene*, 693 N.E.2d 246, 253 (Ohio 1998) (same). That prosecutor has also violated the ethical rules of any state that has adopted ABA Model Rule 8.4(g), which proscribes "harassment or discrimination" on the basis of the usual suspect classifications (as well as "marital" and "socioeconomic status"). To be sure, ethical rules are often underenforced against prosecutors. See Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 147 (2016). Yet an unconstitutional practice may at least generate a response from unbiased state disciplinary authorities.

<sup>317</sup> See *infra* Section IV.D (discussing this state power).

<sup>318</sup> Cf. Bibas, *supra* note 25, at 961 ("Having to articulate reasons for decisions . . . would discipline prosecutors, much as having to write reasoned opinions disciplines judges.").

unsettled.<sup>319</sup> After all, “[t]he closest analog to the prosecutor’s vast discretion” is agency nonenforcement discretion, upon which the Supreme Court has lavished similar deference and presumptive nonreviewability.<sup>320</sup> As the leading case suggests, however, a “consciously and expressly adopted . . . general policy” of agency nonenforcement might be “so extreme” as to perhaps be reviewable.<sup>321</sup> The same may apply here. If not categorically reviewable, such policies might at least be sufficiently unique that discovery may sometimes be warranted on whether a prosecution that is apparently legitimate should actually be reviewable because it is “based on an unjustifiable standard.”<sup>322</sup> None of this is certain, but its plausibility is a clear point of difference with jury nullification.

Transparency also points up the following reassuring distinction with our prosecutorial status quo. Value-laden prosecutorial nonenforcement already occurs.<sup>323</sup> Indeed, legislatures and citizens *expect* prosecutors to exercise their nonenforcement discretion in ways more substantive than mere resource prioritization.<sup>324</sup> As an example, consider the interview-based study that found “experienced prosecutors” gauging the propriety of punishment against their personal view of whether a defendant is a “hardened, dangerous actor[]” or a “normal working pe[rson]” that has “made mistakes.”<sup>325</sup> Prosecutors are human—it is not surprising that their nonenforcement could be influenced by individual idiosyncrasies like “individual character traits, family background, and religious faith.”<sup>326</sup> Unfortunately, although their substantive nonenforcement seems far more accepted than jury

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<sup>319</sup> Cf. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 274 (2013) (suggesting that, inter alia, the “clarity and . . . generality” of a prospective statutory nonenforcement policy “makes judicial review seem more appropriate”).

<sup>320</sup> See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1048 (2006); see also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (analogizing the two).

<sup>321</sup> See *Heckler*, 470 U.S. at 833 n.4; Barron & Rakoff, *supra* note 313, at 274; Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1574, 1625 (2016) (providing a framework for judicial review of agency nonenforcement).

<sup>322</sup> *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

<sup>323</sup> See Vorenberg, *supra* note 7, at 1551.

<sup>324</sup> See, e.g., Sklansky, *supra* note 110, at 505–06 (describing substantive use of nonenforcement discretion to induce submission to top-down directives); Hessick & Kennedy, *supra* note 267, at 353–54, 363 (discussing reliance on nonenforcement to reasonably narrow over-broad and vague laws in practice); Simon, *supra* note 9, at 226 (arguing that “[p]rosecutorial nullification is widely considered legitimate” where applying a statute would create “an especially harsh or anomalous result” or run contrary to “contemporary sentiment”).

<sup>325</sup> Wright & Levine, *supra* note 130, at 1085.

<sup>326</sup> *Id.* at 1071.

nonenforcement,<sup>327</sup> prosecutors are equally able to act for illegitimate reasons, then lie about it (or give no reason at all). That opens the door for invidious factors to infiltrate the process. It is thus unsurprising that the opacity of technocratic prosecutorial decisionmaking can—and has—hidden disparate treatment.<sup>328</sup>

This all means that rejecting *populist* prosecutorial nullification would do nothing for the exclusionary potential of technocratic programmatic nullification. Populist (as I mean the term) prosecutors did not invent ideological decisions not to prosecute “entire classes of cases.”<sup>329</sup> Consider this selection of apparently managerialist categorical nonenforcement decisions: refusals to prosecute homeless people for sleeping in public spaces, refusals to prosecute polygamy cases (absent abuse or coercion), and refusals to prosecute illegal concealment of weapons absent “evil intent.”<sup>330</sup> Those are just examples, and it cannot be denied that the power not to charge has been often employed silently and programmatically.<sup>331</sup> By demanding transparent electoral authorization, this Article’s model actually cabins programmatic nullification for the same (just noted) reasons that it offers advantages over jury nullification.<sup>332</sup> A malicious managerialist prosecutor needs no theory of populist prosecutorial nullification to implement evil policy.

One might finally concede that denouncing populist prosecutors will not stop bad actors, yet still reject this model for fear that bigoted localities will push their prosecutors to new heights of populist exclusion. But it is worth remembering that orthodox prosecutors drawn from that locality would likely reflect that locality’s parochial tendencies. In the end, blame for malicious exercise of government power

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<sup>327</sup> See, e.g., Fairfax, *supra* note 8, at 1263; Barkow, *supra* note 7, at 1352–53, 1353 n.99. Consider: the now “standard method” of “resolv[ing] a criminal investigation of a corporation” is “a deferred or non-prosecution agreement.” Peter J. Henning, *Dealing with Corporate Misconduct*, 66 FLA. L. REV. F. 20, 20 (2015).

<sup>328</sup> See, e.g., Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the *Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 189 n.15 (2008) (collecting sources on biases and foibles of prosecutors); see also Bibas, *supra* note 25, at 939 & n.124 (collecting sources on sentencing disparities, including those stemming from prosecutorial discretion); P.S. Kane, Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2300 (1993) (presenting evidence of racially disparate charging); Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 HASTINGS L.J. 1255, 1323 (1996).

<sup>329</sup> K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 304 (2014).

<sup>330</sup> *Id.* at 288 n.15.

<sup>331</sup> Vice laws have often lain unused in circumstances strongly indicating deliberate prosecutorial nonfeasance. See, e.g., *State v. Winne*, 96 A.2d 63, 74 (N.J. 1953).

<sup>332</sup> See *supra* text accompanying notes 309–16.

seems better placed on the people who seek it, not on a facially neutral concept like populist prosecutorial nullification, which can, after all, just as easily be turned to inclusive and egalitarian ends by historically disenfranchised communities.<sup>333</sup>

Transparency is no cure-all. But it may make us more comfortable with pursuing the upsides of populist prosecutorial nullification.<sup>334</sup>

## 2. *Solidaristic Populism*

While appeals to the People can facilitate discrimination, we should not downplay populism's salutary potential, or conclude that it is *necessarily* anti-pluralist.<sup>335</sup> Consider perhaps the most famous American electoral success by avowed populists—the fusion between the North Carolina Republican and Populist parties in the 1890s, which briefly broke the Democratic Party's post-Reconstruction political stranglehold.<sup>336</sup> One primary basis of that collaboration, and a main reason revanchist Democrats violently crushed it, was its frontal assault on the ideologies of white supremacy and racial solidarity between white elites and poor whites.<sup>337</sup> And, more broadly, it is easy to see why a populism rooted in an affirmation of equal self-determination for all members of society could produce inclusionary results.<sup>338</sup>

In other words, at the risk of Pollyannaism, popular sovereignty may offer a path to building a democracy that advances ideals of equal dignity and autonomy. Part of that equation, no doubt, is the commitment to formal political equality shared by most proponents of

<sup>333</sup> See, e.g., Brown, *supra* note 75, at 1171, 1195 (making these points to defend jury nullification).

<sup>334</sup> See, e.g., Simon, *supra* note 123, at 180 (“[D]ecisions under explicit norms are more transparent to observers, so they are more easily assessed and changed.”).

<sup>335</sup> See, e.g., AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 176–81, 193 (2010) (sketching the attempts of late nineteenth-century Populists to build an egalitarian, transracial democratic movement).

<sup>336</sup> See, e.g., THOMAS FRANK, *THE PEOPLE, NO: A BRIEF HISTORY OF ANTI-POPULISM* 79–82 (2020); James L. Hunt, *Fusion of Republicans and Populists*, *Encyclopedia of N.C.* (2006), <https://www.ncpedia.org/fusion-republicans-and-populists>; Jedediah Purdy, *North Carolina's Long Moral March and its Lessons for the Trump Resistance*, *NEW YORKER* (Feb. 17, 2017), <https://www.newyorker.com/news/news-desk/north-carolinas-long-moral-march-and-its-lessons-for-the-trump-resistance>.

<sup>337</sup> See FRANK, *supra* note 336, at 79–82; Purdy, *supra* note 330; Hunt, *supra* note 330; RANA, *supra* note 329, at 200, 211. Attempts at similar fusion elsewhere in the South often met similar ends. See FRANK, *supra*, at 81; Purdy, *supra*; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643, 661–62 & 662 n.73 (1998) (discussing similar populist uprisings in Texas).

<sup>338</sup> See RANA, *supra* note 329, at 181 (describing grand initial aims of “inclusive and egalitarian . . . [p]opulism”).

democracy. In getting down to brass tacks, however, it also seems indispensable to think hard about how to encourage citizens to “ask [not] only what is in their private interest, but also what will best serve the community in general.”<sup>339</sup> Put another way, perhaps one way to guard against democracy’s “dark side”<sup>340</sup> is to generate the sort of community and solidarity that makes exclusion unappealing.

That is easier said than done.<sup>341</sup> Some once saw the jury, in its robust, populist form, as a solution. To Tocqueville, for example, juries made “all feel the duties which they are bound to discharge towards society and the part which they take in . . . government,” and, by “obliging [all] to turn their attention to other affairs than their own, . . . rub[bed] off that private selfishness which is the rust of society.”<sup>342</sup> On this view, prizing popular involvement required optimizing it, which in turn required citizens to develop a “notion of right” and an objective perspective through which to “judge [their] neighbor as [they] would [themselves] be judged.”<sup>343</sup> The jury, then, acted as an instrument of self-government that, itself, built the civic virtue necessary for proper self-government.<sup>344</sup>

Contemporaneous exclusionary realities like American slavery and Native dispossession dull that rhetoric’s shine.<sup>345</sup> But the principles, honestly applied, have dramatic inclusionary potential. In modest ways, modern cases reflect this possibility when they treat illegitimate jury composition as injurious not just to the accused but to the community and “democratic ideal[s].”<sup>346</sup> And studies align with the

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<sup>339</sup> Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1550 (1988); see also Spragens, *supra* note 183, at 47–50.

<sup>340</sup> Forbath, *supra* note 115, at 970.

<sup>341</sup> See, e.g., RANA, *supra* note 329, at 217–18 (describing the internecine, often racialized blame-casting among the early twentieth-century populists that attended the movement’s collapse).

<sup>342</sup> TOCQUEVILLE, *supra* note 270, at 285.

<sup>343</sup> Amar, *supra* note 53, at 1186 (quoting Tocqueville).

<sup>344</sup> See, e.g., Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 *HASTINGS CONST. L.Q.* 185, 210–12 (2002) (discussing the early jury’s perception as providing “the civic maturation needed for a thriving . . . democracy”); Amar, *supra* note 53, at 1186–88 (expanding upon the numerous civic roles early American thinkers expected juries to play).

<sup>345</sup> See, e.g., Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 *CHI.-KENT L. REV.* 555, 567 (2000).

<sup>346</sup> *Rose v. Mitchell*, 443 U.S. 545, 556 (1979) (quoting *Ballard v. United States*, 329 U.S. 187, 195 (1946)) (discussing specifically the exclusion of Black people from juries); see also *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) (noting the democratic implications of racially motivated peremptory strikes of jurors); *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 329 (1970) (addressing the same issue in the context of grand juries).

modern-day proponents of civic virtue<sup>347</sup> in supporting the view that political participation, like jury service, particularly in concert with others, builds citizenship.<sup>348</sup>

Absent a jury revival, populist prosecutorial nullification may secure some of the benefits of this “collective public decisionmaking” today.<sup>349</sup> An explicit, salient pre-election nullification proposal encourages voters to engage the issue and each other. Making public reasoning about justifications and counterarguments meaningful can help develop community and build communal morality.<sup>350</sup> Should sex work really be decriminalized, or would commodifying it be immoral? Would decriminalizing public order offenses like shoplifting and trespassing lead to worse crimes, or do they harm offenders unnecessarily? State laws represent one point of view on these sorts of questions, but more devolved communities may have different views. Perhaps encouraging deep moral engagement in the exercise of collective decisionmaking authority can form new social bonds, if not rebuild those that have been lost.

One need not be too cynical to question whether communitarian ideology can transcend its exclusionary past, or the increasing alienation of the present, to make civic virtue and solidarity workable in the twenty-first century.<sup>351</sup> But the possibility that devolving control may actually help build modern communities should not be dismissed too lightly. Indeed, given the risks of atomization in a changing world, making the attempt may be a necessity.<sup>352</sup>

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<sup>347</sup> GERAINT PARRY, GEORGE MOYSER & NEIL DAY, *POLITICAL PARTICIPATION AND DEMOCRACY IN BRITAIN* 286–87 (1992); DZUR, *supra* note 25, at 70, 72 (advocating for jury in Tocquevillian tradition).

<sup>348</sup> See PARRY ET AL., *supra* note 341, at 288–89, 293; see also *id.* at 291 (“[P]articipation with others in organisations [sic] reinforces and expands political experiences in the ways that the educative theory [i.e., Tocqueville’s theory] would suggest.”); RAPPAPORT, *supra* note 25, at 726 (citing generally JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010)) (linking increased jury deliberation and increased voting).

<sup>349</sup> William H. Simon, *Social-Republican Property*, 38 *UCLA L. REV.* 1335, 1340 (1991); see also DZUR, *supra* note 25, at 70, 72 (describing jury participation as instructive not only for the jurors but also for the architects of the criminal legal system).

<sup>350</sup> See, e.g., RAHMAN, *supra* note 25, at 103–06, 110.

<sup>351</sup> See RAPPAPORT, *supra* note 25, at 742–43 (raising precisely these sorts of questions).

<sup>352</sup> See Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century The 2006 Johan Skytte Prize Lecture*, 30 *SCANDINAVIAN POL. STUD.* 137, 138–39 (2007) (arguing that increasing social heterogeneity—descriptively—poses risks to social solidarity that must be confronted through “creat[ing] a new, broader sense of ‘we’”).

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In the end, “[n]o form of democracy” can “guarantee just, wise, or public-spirited outcomes.”<sup>353</sup> Despite American popular control’s checkered history, populist prosecutorial nullification may offer some reasons for guarded optimism. I acknowledge, however, that one’s willingness to risk the downsides may turn on one’s belief in the upsides.

### B. Rule of Law

The concept of the rule of law is often ambiguous and contestable,<sup>354</sup> but it is fair to say it at least denotes rejection of a rule of arbitrariness, and an insistence that law be “general, knowable, and performable,” and predictable by those to whom it applies.<sup>355</sup> Scholars have often cast underenforcement as a potential foe of the rule of law.<sup>356</sup> Rule-of-law arguments against jury nullification, in particular, have contended that a “verdict in contravention of what the law authorizes and requires” violates the rule of law and “subject[s] citizens . . . to power based on . . . subjective predilections.”<sup>357</sup> At first blush, these criticisms seem applicable to populist prosecutorial nullification.

One response might draw on jury nullification defenders like Paul Butler to concede a rule-of-law violation but deem it a necessary evil.<sup>358</sup> Also pertinent is Darryl Brown’s defense of jury nullification. As he noted, because “general rules” are “inevitab[ly] over- and underinclusive[],” their application is often “inherently interpretive.”<sup>359</sup> Literal application can sometimes contradict not only the law’s purpose but its reasonably expected application in light of broader relevant social norms.<sup>360</sup> It may thus be that adherence to the

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<sup>353</sup> WHELAN, *supra* note 86, at 198.

<sup>354</sup> See, e.g., Osofsky, *supra* note 21, at 118; Brown, *supra* note 75, at 1154 (recounting evolution of the “conception of the rule of law”).

<sup>355</sup> Brown, *supra* note 75, at 1157–58; see also Osofsky, *supra* note 21, at 118–19 (emphasizing the basic need for “consistency and notice”).

<sup>356</sup> See Natapoff, *supra* note 24, at 1759–60.

<sup>357</sup> Brown, *supra* note 75, at 1150–51; see also Carroll, *supra* note 40, at 581 & n.8 (collecting rule-of-law critiques).

<sup>358</sup> See generally Butler, *supra* note 75 (arguing that the violation is necessary to combat the racialized overenforcement of nonviolent offenses); Brown, *supra* note 75, at 1152–53 (discussing Butler’s theory at length).

<sup>359</sup> Brown, *supra* note 75, at 1161–62.

<sup>360</sup> See *id.* at 1169–70, 1200–01. Consider the “rule of lenity,” under which courts resolve “ambiguities about the breadth of a criminal statute” in a defendant’s favor. *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). But ambiguity suggests that the statute *could* be read to cover a defendant (otherwise the rule of construction would be unnecessary). Applying the rule rejects a permissible reading in favor of extratextual fair-notice norms. See *id.*



rule of law goes beyond the apparent prescriptions of decontextualized text to include those sorts of extratextual principles.<sup>361</sup> If so, the rule of law may sometimes require referring to those principles to counteract or override the result literalism would prescribe.<sup>362</sup> So too for populist prosecutorial nullification. Literal application of the law may sometimes contradict more important principles that the rule of law also incorporates (e.g., autonomy, subsidiarity, or particular localized substantive values). On that view, the rule of law may be seen to permit localized control over the criminal law.

But populist prosecutorial nullification may have even more to offer rule-of-law sticklers. Consider its distinctions with the related nonenforcement alternatives this paper has discussed, jury nullification and managerialist prosecutorial nonenforcement. While repeated jury nullification might imply an inferable local policy of sorts,<sup>363</sup> that policy is still substantially unknowable and unpredictable. Juries are unbound by prior decisions and need not justify their decisions. Moreover, not only does their shifting membership make prediction of future performance based on past behavior unreliable, but any decisions also inconsistent with past acts are unpunishable. Similarly, the managerialist prosecutor making nonenforcement decisions often acts on intuitive judgments about the blameworthiness of defendants, on the basis of nontransparent, nontechnical principles and values.<sup>364</sup> These opaque, unpredictable decisions about whom the law regulates have something in common with the quintessential rule-of-law violation: publishing the law, but placing it where it cannot be read.<sup>365</sup>

Conversely, the nullification policy adopted pursuant to a reasoned, salient pre-election promise epitomizes the sort of fair notice of the line between proscribed and permitted that is core to the rule of

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<sup>361</sup> See Brown, *supra* note 75, at 1164.

<sup>362</sup> See *id.* at 1164, 1200 (“In many . . . cases, nullification occurs within the rule of law, because the circumstances that prompt [nullification] are often grave matters of justice arising from a great disparity between the statute or its application and other sources of law and social convention.”); Bowers, *supra* note 127, at 1673 (“Decisionmakers advance the rule of law by tailoring the law to fit the incident and the offender, and by, in some instances, even exercising discretion *not* to proceed with legally sustainable charges.”).

<sup>363</sup> See, e.g., Jacobsohn, *supra* note 271, at 76 (“[A] consistent pattern of acquittals . . . has in fact effected a change in policy.”).

<sup>364</sup> See Brown, *supra* note 75, at 1189; Wright & Levine, *supra* note 130, at 1071, 1085; cf. Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 219 (2012) (“How a prosecutor disposes of a case tells us something about its relative importance . . . High dismissal rates for particular crimes sometimes reveal that the office places greater emphasis on other crimes . . .”).

<sup>365</sup> See, e.g., *Screws v. United States*, 325 U.S. 91, 96 (1945) (recounting this supposed practice of the Emperor Caligula).

law, even without formal instantiation in legislation.<sup>366</sup> True, prosecutors are technically unbound by past decisions, but past performance is more predictive where the same prosecutor's office handles all decisions. Unlike the jury and the orthodox prosecutor, this type of non-enforcement must be justified. Finally, deviation from the public promise can be noted and punished at the ballot box, absent satisfactory explanation. Indeed, here, rule-of-law values dovetail with antidiscrimination values, as a policy announced widely is much harder to deviate from on biased grounds than a policy followed *sub silentio*.

As mentioned, the “rule of law” can be slippery, and one might imagine a counter in this register that stresses the importance of the written law as paramount.<sup>367</sup> On this view, transparency may be salutary in the abstract, but transparently ignoring clear legislative enactments flouts the rule of law. But I have no problem assuming *arguendo* that populist prosecutorial nullification undermines the primacy of the statute nullified. The burden of this Article (and part of the point of Part II) is that at least sometimes we may validly do so—i.e., when we can identify a more-primary authority, such as the People from which legislative authority derives.<sup>368</sup>

### C. Impermissible Suspension

Much of the scholarship on federal prosecutorial nonenforcement has rested on federal constitutional principles not necessarily applicable to state practice.<sup>369</sup> To the extent it reflects a more general concern regarding prosecutors stepping beyond their proper roles that those scholars would extend to state practice, this Article takes a func-

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<sup>366</sup> See Natapoff, *supra* note 24, at 1761 (noting view of the rule of law under which “a rule is public and provides notice ‘whenever strong social agreement exists in practice’”); Luna, *supra* note 10, at 795 (envisioning rule-of-law benefits to overt prosecutorial decriminalization).

<sup>367</sup> See, e.g., Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 252–55 (2016) (warning that the rule of law may require attention to the “rule of the statute”).

<sup>368</sup> Cf. *id.* at 252 (“[D]emocratic legitimacy run[s] down from the people through their legislative representatives . . .”).

<sup>369</sup> Compare *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) (describing federal separation of powers doctrine as “not mandatory on the States”), with Price, *supra* note 20, at 675–76 (focusing on federal Take Care Clause and separation of powers principles). Nor are the stingiest federal separation-of-powers views necessarily correct. See Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1809–12 (1998). For example, if imported to the state context, the implications of “the inherently imprecise” federal Take Care Clause, Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1866 (2016), might well be properly informed by the popular sovereignty lens this Article applies.

tionalist view under which the local, elected status of state prosecutors offers reasons for comfort absent in the federal context.<sup>370</sup>

A related point is more difficult. As Zachary Price points out, many modern state constitutions contain bans on executive “suspensions” of the law.<sup>371</sup> These provisions are rooted in the Founding generation’s experience with unilateral monarchical declarations that existing statutes no longer had force or that particular individuals were excused from compliance.<sup>372</sup> If populist prosecutorial nullification was analogous to these suspensions of law, it might weaken my normative case. But the practice can be distinguished.

Start by recalling the colonial jury that nullified a seditious libel prosecution against John Peter Zenger.<sup>373</sup> It turns out that this was part of a broader pattern—before the Revolution, grand and petit juries “all but nullified the law of seditious libel.”<sup>374</sup> Juries were, indeed, part of a categorical colonial resistance to the homeland. The Founders seem to have had little problem with “suspensions” via popular juries, notwithstanding the views eventually enshrined in their state constitutions. This makes sense. Although they used different textual formulations, the state constitutions drew on, and essentially incorporated, the substance of the suspension prohibition in the English Bill of Rights.<sup>375</sup> And that prohibition targeted a particular kind of suspension: peremptory, unilateral suspension of law without consent of parliament.<sup>376</sup> All told, the Founders’ fear seemed to be of peremptory, unaccountable (even undemocratic, insofar as it ignored parliament) suspension of law from the top down, and not so much a rejection of the popular sovereign’s ability to shape the law from the bottom up.

Thus, far from repackaging royal suspension, this Article’s proposal fits comfortably within the historical tradition of muscular, localized shaping of the law through nonenforcement. Indeed, recognizing the suspension question as a separation-of-powers problem helps

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<sup>370</sup> My general separation-of-powers analysis is thus compatible (though not coextensive) with Logan Sawyer’s advocacy of a “functional” treatment of separation-of-powers questions. See Sawyer, *supra* note 24, at 627–32 (pointing, among other things, to possible benefits to “democratic decision-making”).

<sup>371</sup> Price, *supra* note 20, at 692–94, 692 n.71.

<sup>372</sup> See *id.* at 690–91.

<sup>373</sup> See Alschuler & Deiss, *supra* note 64, at 871–74; see also *supra* text accompanying note 44.

<sup>374</sup> See Alschuler & Deiss, *supra* note 64, at 874.

<sup>375</sup> See Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL’Y 405, 436 (2019).

<sup>376</sup> See Price, *supra* note 20, at 691–92 (sketching this history).

make the point.<sup>377</sup> The Founding generation separated powers to protect (their admittedly crabbed concept of) individual liberty from the potential tyranny of concentration.<sup>378</sup> This Article's framework, in fact, recognizes this danger. The election, or appointment, of a prosecutor, without more, does not make them emperors empowered to enact freewheeling policy preferences. That something more, I argue, can be found in the will of the People.

#### D. Spillover and State Power

##### 1. The Externality Problem

Why—if autonomy is this important, and if local control of law is so effective to advance it—ever decide any criminal issues at a higher level than the locality? The response, partly, is that this proposal is not absolute. A strong reason to find a policy inappropriate would be significant supralocal effect, which even strong localism advocates generally concede weighs against deferring to localities.<sup>379</sup> The all-affected principle and this Article's focus on autonomy suggest as much: One's say in a policy outcome should track the degree to which one is affected.<sup>380</sup> Part III's framework thus stressed the need to minimize spillover effects.

But the risk warrants further discussion. Unlike, e.g., real property, crime is mobile and need not respect political boundaries.<sup>381</sup> Accordingly, it is reasonable to expect some effects from a nonenforcement policy to spill into nearby political subdivisions.<sup>382</sup> Modernity enhances this risk, since spillover effects likely have increased over time, at least in metropolitan areas, as “local borders frequently abut each other, and people range widely in their daily activities

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<sup>377</sup> See *id.* at 690–92 (situating English Bill of Rights provision within “long history of struggle . . . over executive power”).

<sup>378</sup> David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 748 & n.183 (2008).

<sup>379</sup> See Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 URB. LAW. 257, 273 n.50 (1999) (collecting sources); WEALE, *supra* note 156, at 219 (recounting John Stuart Mill's contemplation of spillover-based limitations on devolved political power).

<sup>380</sup> See Weinstock, *supra* note 188, at 262; Schragger, *supra* note 181, at 444–45 (observing the difficulty that spillover effects pose to an account of democracy premised on giving individuals “a voice in the decisions that affect them”); *supra* Section II.B.

<sup>381</sup> Cf. Levine, *supra* note 12, at 34 (“Crime transcends individual state borders because of the inherent mobility of criminals and the ease of moving the tools and spoils of crime vast distances in a short time.” (citation omitted)).

<sup>382</sup> Cf. Frug, *supra* note 142, at 1117 (explaining that “purely local” matters can rarely be found).

across multiple local boundaries.”<sup>383</sup> Practically, then, if the proposed fix to avoid making all criminal law local is to recede from this Article’s prescriptions upon detecting spillover, does the fix not just make it all nonlocal? Not quite.

As an initial matter, the continued desire for local administration indicates readiness on the part of the public to accept some degree of spillover.<sup>384</sup> Any amount of policymaking devolution will engender some divergence, which in the criminal law sphere can hardly avoid leading to spillover.<sup>385</sup> The task is striking a principled balance between local control and the minimization—not elimination—of negative externalities. In other words, the problem is not spillover *qua* spillover. It is spillover of a sort that renders the policy engendering it suspect.

How might we identify such spillover? Even if one insists that modernity leaves “very little . . . ‘purely local,’”<sup>386</sup> a large chunk of criminal laws cannot be credibly cast as having problematic spillover implications if not enforced. Consider Rachael Rollins’s promise not to enforce resisting arrest charges—a physically and temporally limited crime if one ever existed.<sup>387</sup> At some point, for some crimes, the necessary links of causality to claim that a policy has meaningful supralocal effects become farcical. Much criminal activity fits into my prong two’s focus on crimes committed within the jurisdiction by residents where any proximate victim is also a resident.<sup>388</sup> Take, as one of many possible examples, the Supreme Court’s recognition that

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<sup>383</sup> Briffault, *Localism and Regionalism*, *supra* note 191, at 18; *see also* Wilson, *supra* note 298, at 185.

<sup>384</sup> After all, there has been no successful countermovement against local district attorney elections. More generally, recent surveys show a public overwhelmingly more satisfied with their local communities than the nation as a whole. *See, e.g.*, SAMUEL J. ABRAMS, KARLYN BOWMAN, ELEANOR O’NEIL & RYAN STREETER, AM. ENTER. INST., AEI SURVEY ON COMMUNITY AND SOCIETY: SOCIAL CAPITAL, CIVIC HEALTH, AND QUALITY OF LIFE IN THE UNITED STATES 1–2 (2019).

<sup>385</sup> *Cf.* Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1833–34, 1874 (2005) (arguing that decentralized criminal law enforcement means that crime may relocate based on one locality’s behavior).

<sup>386</sup> Frug, *supra* note 142, at 1117.

<sup>387</sup> Rachael Rollins, *Charges to Be Declined*, RACHAEL ROLLINS FOR SUFFOLK DA, <https://rollins4da.com/policy/charges-to-be-decline> (last visited Feb. 20, 2020).

<sup>388</sup> *See, e.g.*, Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1419–20 (2001) (collecting evidence that “the human consequences and articulated explanations of crime are largely local in nature” (footnotes omitted)).

an “attempt by a jilted wife to injure her husband’s lover” by using a chemical was “purely local.”<sup>389</sup>

The goose-gander principle might suggest discounting some spillover complaints from localities that—given modernity’s interconnectivity—are bound to impose some externalities on neighbors at some point. Perhaps that is part of the bargain of accessing the benefits associated with local self-determination. But even on that view, some externalities might violate that bargain. We can sensibly distinguish between externalities that are collateral effects of a truly local policy and those whose primary operation is to transport one district’s problems to another district. Put another way, with self-determination as a touchstone, one might train attention on whether the policy regulates supralocally as a primary rather than a collateral matter, looking to whether the policymaking locality is internalizing a proportionate amount of the negative effects it generates.

One last point. Externalities can be difficult to compare and measure.<sup>390</sup> The same forces that might draw behavior to a region in a way that neighboring jurisdictions dislike might also draw that behavior out of those neighboring jurisdictions, to reside primarily in the lenient jurisdiction. That potential for positive externalities justifies a substantial degree of deference, at least in borderline cases.

## 2. *The Overriding State*

I have suggested a normative line that disfavors substantial, disproportionate externalities and permits *de minimis* ones. While that may be easier said than enforced, the state’s capacity to overrule and control its localities can put some meat on that proposition’s bones. Municipalities are creatures of the state upon which the state confers power in its “absolute discretion,” alterable at will.<sup>391</sup> This rule holds despite most states’ status as home rule jurisdictions.<sup>392</sup> Formally,

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<sup>389</sup> *Bond v. United States*, 572 U.S. 844, 848 (2014). The Court may have been using the phrase to distinguish attempts with federal character, but the point stands; some crimes simply have no effect beyond a *de minimis* one anywhere but the locality they occur.

<sup>390</sup> See, e.g., Brett Frischmann, *Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801, 817 (2009) (outlining some difficulties pertaining to spillover analysis).

<sup>391</sup> *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)); see also *Schuetz v. Coal. to Def. Affirmative Action*, 572 U.S. 291, 327 (2014) (Scalia, J., concurring) (“Generally, ‘a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power.’” (quoting *Holt*, 439 U.S. at 71)).

<sup>392</sup> Logan, *supra* note 382, at 1423 (explaining that home rule jurisdiction states consider each municipality as a miniature state within the state). Home rule states recognize (to varying degrees) their local governments’ “freedom from state interference in areas of local concern” and broad intra-locality lawmaking authority. Richard Briffault, *Our*

states remain “the legal superiors of their local governments,” even though in practice local governments tend to operate with substantial latitude, by custom and by dint of parent state declination to step in.<sup>393</sup> Accordingly, states retain the power to modify local control over particular subject matter if the will exists to retract that control. The state thus arguably has some normative stake in *how* municipalities exercise their delegated powers, especially where the municipal choice affects the implementation of state law.<sup>394</sup>

A concrete example demonstrates how this could work. Imagine a prosecutor who promises not to enforce criminal prohibitions on drinking-water pollution.<sup>395</sup> Perhaps his district’s residents are unconcerned with the law (imagine that their pollution only affects downstream districts). On this Article’s framework, this is a clear case of illegitimate supralocal effect, and the state has several options to counteract it. First, most states permit supersession—i.e., mandatory direction from state officials to local prosecutors to take an action in a criminal case or reassignment of the case away from the local prosecutor—in some circumstances.<sup>396</sup> Second, the state could give state-level prosecutors under the statewide attorney general’s office “exclu-

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*Localism: Part I—the Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) [hereinafter Briffault, *Our Localism*]; see also Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977, 1000 (2011) (noting the “tremendous range” of home rule approaches). To oversimplify, “all powers are granted until retracted.” Briffault, *Our Localism*, *supra*, at 10. But (as the last quote suggests) this is consistent with the Supreme Court’s broad recognition of state authority to retract the locality’s power.

<sup>393</sup> Briffault, *Our Localism*, *supra* note 386, at 112–14 (tying “limited use” of state authority to override local action to “systemic belief in the social and political value of local decision making”); see also Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 569 (2011) [hereinafter Barkow, *Federalism*] (“[M]ost state legislatures allow local authorities to operate without much oversight in the day-to-day application of that law.”).

<sup>394</sup> See Davidson, *supra* note 208, at 961 (“[T]he *general welfare* of the state is inherent in the delegation of legal authority to geographically bounded local communities.”). See generally Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020) (arguing that local prosecutors administering state law have “competing loyalties to statewide voters and local voters”).

<sup>395</sup> See, e.g., WASH. REV. CODE ANN. § 70.54.010 (LexisNexis 2020) (contamination of drinking water is a “gross misdemeanor”); Ryan P. Kelly & Margaret R. Caldwell, *Ten Ways States Can Combat Ocean Acidification (and Why They Should)*, 6 WASH. J. ENV’T L. & POL’Y 288, 336–37 (2016) (noting prevalence of state-law criminal clean-water provisions).

<sup>396</sup> Tyler Quinn Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 98, 110–11 (2018); see *id.* at 111–12 (cataloguing state variation regarding circumstances where supersession is permitted).

sive or concurrent jurisdiction” over these prosecutions.<sup>397</sup> This can be done legislatively, and would do no more than slightly expand the category of crimes over which states have extended such jurisdiction.<sup>398</sup> Third, it can offer a fiscal carrot. Normally, local funds support most local prosecution efforts.<sup>399</sup> But states can provide funds conditioned on a municipality’s use of those funds to pursue state-level prosecution priorities.<sup>400</sup> Often communities welcome these funds when residents’ priorities align with the state’s priorities. But states can also coerce policy adjustment when communities need the funds, even when prosecutors and their communities do not share the state’s priorities. This was sometimes true when California sought to encourage statutory rape prosecutions in the early 1990s.<sup>401</sup>

The important takeaway is that none of this is automatic. Rather than trying to pinpoint the precise point at which supralocal effect becomes too substantial, we can look to whether the parent state has acted to squelch a nonenforcement policy. Here, the power of inertia and the cost of action benefit subsidiarity.<sup>402</sup> Although a state technically could wipe out every exercise of local prosecutorial policy-based nonenforcement, the cost of doing so when there is minimal tangible harm outside the district will be a strong counterweight against action. Conversely, if state decisionmakers take the time and energy to place the local nonenforcement on the agenda and exercise state power to extinguish it, I am willing to take that behavior as probative evidence that the harms were indeed perceived to be meaningful.

This solution is imperfect, even assuming genuine state-level commitment to respecting local choice absent true supralocal harm.<sup>403</sup> One can imagine supralocal effects that hit a few other localities hard

<sup>397</sup> See Barkow, *Federalism*, *supra* note 387, at 545; see *id.* at 570 (“[T]he majority of state legislatures identify specific categories [of crimes] suitable for the state-level prosecutor.”).

<sup>398</sup> See *id.* at 546–49 (collecting crimes that states tend to treat in this manner, including public corruption and election fraud, benefits fraud, and various regulatory crimes).

<sup>399</sup> See, e.g., Levine, *supra* note 12, at 37 (noting that over ninety percent of local prosecution “is funded exclusively with local money” (citation omitted)).

<sup>400</sup> See *id.* (“State-directed prosecutorial efforts . . . encourage local district attorneys to prosecute crimes in their home districts using state money and in furtherance of state-identified priorities.”).

<sup>401</sup> See, e.g., *id.* at 41–43 (describing how then-California governor Pete Wilson effectively offered state money to local prosecutors to escalate statutory rape enforcement).

<sup>402</sup> See, e.g., Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 349 (2019) (noting that externalities, without more, “do[] not ensure that the state will step in”).

<sup>403</sup> *But see* Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1364 (2020) (observing the occurrence of “aggressive and often punitive . . . state preemption that ‘assumes that local voices should



but are insufficiently statewide to prompt a statewide solution. This may be partly addressed by the unique level of subsidiarity that district attorney elections represent. Prosecutorial districts generally track county boundaries.<sup>404</sup> Counties often contain multiple municipalities, which are themselves local governments.<sup>405</sup> Counties' relative size means they represent larger communities and varieties of interests than, e.g., a particular city within the county.<sup>406</sup> Expanding the corpus of participants makes the decisionmaking pool more heterogeneous, increasing the likelihood that the interests of those outside the pool will be represented. That modulates the parochialism that a smaller decisionmaking unit containing more limited interests might generate. In other words, non-absolute subsidiarity may help limit the worst externalities. Indeed, this expansion of the local might also help limit oppressive intra-district actions for the same reasons Madison supported the expansion of the national sphere.<sup>407</sup>

District attorney elections, then, might be best thought of as representing regional subsidiarity.<sup>408</sup> This undoubtedly limits some of the benefits of subsidiarity extolled above, insofar as those benefits relate to smallness.<sup>409</sup> But if the hope is for balance, it may be that American

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almost never take the lead in crafting substantive policy” (citation omitted)); *infra* text accompanying note 410.

<sup>404</sup> See HESSICK, NATIONAL STUDY, *supra* note 5, at 10; PERRY & BANKS, *supra* note 5, at 2 (outlining that Alaska, Delaware, Connecticut, and Rhode Island are exceptions, with one office for the entire state).

<sup>405</sup> See, e.g., Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1140 n.156 (2008) (observing that counties are rarely “disaggregated from municipal governments” analytically).

<sup>406</sup> Cf. 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, 1343–44 (1993) (making this point for counties vis-à-vis states).

<sup>407</sup> See *supra* text accompanying notes 195–97 (referring to Madison’s belief that expanding the national sphere would protect individual rights); see also THE FEDERALIST NO. 10, *supra* note 49, at 53 (James Madison) (“[T]he same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic . . . .”); Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 134 (2018) (explaining that Madison believed that an extended national sphere would generate “greater social heterogeneity” making majority factions both less likely and less effective); cf. Rappaport, *supra* note 25, at 758 (suggesting that the more extreme the devolution, the worse the problem of spillover).

<sup>408</sup> See, e.g., Briffault, *Localism and Regionalism*, *supra* note 191, at 17–18 (offering similar externality-limiting justifications in contending that “the arguments for localism actually begin to make the case for some kind of region-level policy-making and governance”); see also *id.* at 20 (arguing that while it is unnecessary for regionalism to wholly supplant localism, it is necessary in some circumstances to address externalities caused by local actions).

<sup>409</sup> Cf. Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2025 (2000) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999)) (attacking

path dependency on the county system provides an unexpected panacea.

### *E. Practical Limitations*

I close with some ways in which theory may bump up against reality.

First, it is true that progressive prosecutors have often targeted crimes that many other prosecutors would have deprioritized anyway (with death-penalty nullification a notable exception).<sup>410</sup> In one district attorney's words: "I chuckle when I hear people who call themselves reformers say they're not going to prosecute low-level drug offenses . . . . No one does that . . . ."<sup>411</sup> Perhaps. But we need a rule for all cases, not just the contemporary ones. And, as the judicial resistance to Parisa Dehghani-Tafti's marijuana policy shows, a crime's supposed insignificance does not necessarily insulate nonenforcement from attack.<sup>412</sup> Furthermore, even if resource-driven underenforcement already occurs, an announcement that some crimes will categorically not be prosecuted is something different in kind, requiring special justification. Indeed, this Article helps problematize *sub silentio*, nontransparent nullification couched as resource-based prioritization.<sup>413</sup>

At any rate, even minor nullification matters. Any conviction can have substantial effects on the defendant's future and status as part of the political community.<sup>414</sup> So can the arrests that nullifying even minor crimes discourages.<sup>415</sup> Nor should we forget that some minor crimes have identifiable victims, whom nullification necessarily

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region-centric reforms offered by a localism proponent as "undermin[ing] the political advantages of 'smallness' that he extols").

<sup>410</sup> See, e.g., Bellin, *supra* note 26, at 1237 ("[T]here are enough . . . politically mandatory crimes to occupy all or nearly all of local prosecutors' time and manpower." (quoting Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600 (2005))).

<sup>411</sup> Reisman, *supra* note 18.

<sup>412</sup> See *supra* text accompanying notes 258–63.

<sup>413</sup> See Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1558–60, 1564 (2018) (describing issues associated with quiet nonenforcement, such as protection from judicial review, asymmetric treatment of groups, lack of fair notice, and transparency); cf. Sawyer, *supra* note 24, at 625–26 (flagging possibility of unannounced blanket nonenforcement).

<sup>414</sup> See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790, 1799–1800, 1799 n.49 (2012) (discussing severe collateral consequences of convictions for both felony and misdemeanor offenses).

<sup>415</sup> See Krumholz, *supra* note 33, at 5 (noting that prosecutor conduct is likely to affect police-arrest conduct); see also Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015) (describing the potentially severe consequences of being arrested, particularly for minor behavior).

affects. After all, even if one maintains that recreational drug offenses are purely victimless, we can imagine that some property owners might have some qualms about a refusal to prosecute trespassers, larceny under \$250, or receiving stolen property.<sup>416</sup>

State power poses a separate problem. Why celebrate communities' autonomy-affirming power to control criminal law if they can only exercise it at the pleasure of the parent state? To be sure, part of this Article's goal is providing guidance to states on whether preemption would be appropriate. Nevertheless, one need not be a cynic to think that state officials will be tempted to step in upon mere substantive disagreement.<sup>417</sup> But inertia matters. Overriding local policy is neither cost-free nor inevitable. It may not be worth it in some cases for the state to act; in others, legislative snags may halt the action. Those practical brakes can slow state overreach. Moreover, there is an important theoretical distinction between a legal landscape that rejects populist prosecutorial nullification and one that affirms it as presumptively legitimate, albeit alterable by affirmative state action. Treating populist prosecutorial nullification as a default rule for any jurisdiction that elects a prosecutor would be a tangible change to the status quo.

Additionally, discrete state action may be challenged. States cannot exercise their admittedly broad power over localities in unconstitutional or irrational ways.<sup>418</sup> In that vein, some argue that it may sometimes be "irrational to deny local governments the power to address local problems."<sup>419</sup> Perhaps courts might appropriately invalidate state actions on subjects not "properly the [state's] concern"—

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<sup>416</sup> See, e.g., Rollins, *supra* note 378 (including these offenses).

<sup>417</sup> See, e.g., Rachel Proctor May, *Punitive Preemption and the First Amendment*, 55 SAN DIEGO L. REV. 1, 4 (2018) (noting recent uptick in state laws passed to deprive cities of power); Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 5:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general> (recounting Pennsylvania state legislators' alteration of Pennsylvania law to give the state attorney general power to prosecute some firearms offenses). In perhaps another example of this possibility, states have stepped in to reassign death-eligible cases away from district attorneys who refused to seek it. See, e.g., *Ayala v. Scott*, 224 So. 3d 755, 756 (Fla. 2017); *Johnson v. Pataki*, 691 N.E.2d 1002, 1003 (N.Y. 1997).

<sup>418</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 631–36 (1996) (invalidating a statewide initiative barring local governments from passing or enforcing laws specifically protecting LGBT persons).

<sup>419</sup> Rosenthal, *supra* note 379, at 268–69; see also David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 493–94 (1999) (speculating that the Supreme Court's decisions in localism cases may give constitutional dimension to the idea of the local).

e.g., overruling local decisions with purely local consequences.<sup>420</sup> I plan to explore further in a future Article how this Article's framework might affect local defenses of local experimentation, but for present purposes what matters is that it is at least plausible.

In the end, the background threat of possible state regulation probably will affect populist prosecutorial nullification.<sup>421</sup> That ultimately may be a veil-of-ignorance feature, not a bug. No one can be sure, after all, that this power will be exercised nationwide consistently with his or her ideological preferences (in fact, it seems unlikely to be). If realpolitik dissuades localities from pushing too far in either direction, the resultant moderation may in fact be a mark in populist prosecutorial nullification's favor.

## V

### LESSONS

#### A. *Evaluating the Trend*

Programmatic prosecutorial nullification ought to (1) reflect localized popular will and (2) be crafted to respect the self-determination rights of those inside and outside the jurisdiction. That framework reveals a legitimate core: populist prosecutorial nullification. This Part considers a selection of recent, instructive cases to ascertain this model's usefulness for public and private evaluation of these promises. Of course, I cannot judge these prosecutors too harshly *ex post* for not adhering perfectly to my suggested standard. Any critiques are highlighted only to help show how this model can guide analysis.

##### 1. *Electoral Authorization: Aramis Ayala & Larry Krasner*

Shortly after taking office as the State Attorney for Florida's Orange and Osceola Counties, Aramis Ayala announced for the first time that she would never seek the death penalty.<sup>422</sup> She explained that death is never "in the best interest of th[e] community or in the best interest of justice," even where an individual case 'absolutely

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<sup>420</sup> See Rosenthal, *supra* note 379, at 270 (questioning whether a state legitimately overrules local decisions with truly local effects where the most directly affected people cannot hold those state policymakers accountable).

<sup>421</sup> Cf. Levinson, *supra* note 280, at 59–60 (observing this reality in the state-federal relationship).

<sup>422</sup> See Cordeiro & Weiner, *supra* note 3; Gray Rohrer, *Gov. Rick Scott Calls on Ayala to Recuse Herself in Loyd Case*, ORLANDO SENTINEL (Mar. 16, 2017 11:50 AM), <https://www.orlandosentinel.com/politics/os-death-penalty-scott-ayala-recuse-20170316-story.html>.

deserve[s] [the] death penalty.’”<sup>423</sup> The Florida Governor stepped in to reassign her death penalty cases, as Florida law permitted.<sup>424</sup> The Florida Supreme Court upheld that decision, reasoning that a “blanket refusal” could not be couched as discretion but was instead an (impermissible) “‘functional[] veto’ of state law.”<sup>425</sup> Conversely, Larry Krasner’s campaign for Philadelphia District Attorney highlighted that he would “never seek the death penalty.”<sup>426</sup> He has kept that promise, and has even attacked the death penalty as unconstitutional on appeal.<sup>427</sup>

Prong one helps sift these cases. The populist prosecutor can draw on an electorally generated signal of popular will for the special authorization needed to take the drastic step of categorically nullifying the death penalty. Krasner met this prerequisite by making his promise central and salient before votes were cast. Ayala’s after-the-fact unilateral judgment that the death penalty is improper likely does not measure up.<sup>428</sup> Indeed, applying this framework suggests that while perhaps still correct, the Florida Supreme Court’s decision may have been stated too broadly. The problem was not that Ayala had exercised a “‘functional[] veto’ of state law”;<sup>429</sup> the problem was that she could point to no local authorization of that veto.

Prong one also can distinguish among the same prosecutor’s policies. Consider Krasner’s policy of presumptively not charging some

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<sup>423</sup> Ayala v. Scott, 224 So. 3d 755, 756–57 (Fla. 2017) (alterations in original).

<sup>424</sup> See *id.* at 757.

<sup>425</sup> See *id.* at 758–59 (quoting Johnson v. Pataki, 691 N.E.2d 1002, 1007 (N.Y. 1997)).

<sup>426</sup> See, e.g., Krasner For DA, *Larry Krasner on Larry Krasner*, YOUTUBE (May 7, 2017), <https://youtu.be/IsEFPHMrAKc> (Larry Krasner’s campaign ad); Abraham Gutman, ‘Never’ Death Penalty Is What Got Larry Krasner Elected. Now, That Campaign Promise Is Broken, PHILA. INQUIRER (June 25, 2018, 5:46 PM), <https://www.inquirer.com/philly/opinion/commentary/da-larry-krasner-death-penalty-promise-renege-20180625.html> (“When I knocked on doors as a volunteer for the campaign, people said that they would vote for him because of his strong stance against the death penalty.”).

<sup>427</sup> See generally Commonwealth’s Brief for Respondent at 51, Cox v. Commonwealth, 2019 Pa. LEXIS 5498 (Sept. 27, 2019) (No. 102 EM 2018). Krasner received some criticism for a plea deal that a critic characterized as using the death penalty as leverage. Gutman, *supra* note 418. As the critic acknowledged, however, the death penalty was not sought, and Krasner was in fact criticized for what the victim’s family members viewed as a decision “not to pursue the death penalty.” Claire Sasko, *Brothers Plead Guilty to Killing Police Officer, Avoid Death Penalty*, PHILA. (June 25, 2018, 5:08 PM), <https://www.phillymag.com/news/2018/06/25/robert-wilson-murder-plea-deal>.

<sup>428</sup> For reasons noted above, see *supra* note 214, it won’t do to argue that Ayala’s “progressive” self-identification was so clear that she could claim a popular mandate for any policies that could receive that label. This calls to mind the old statutory interpretation trope that no legislature “pursues its purposes at all costs,” see *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam); presumably something similar could be said of the electorate.

<sup>429</sup> Ayala v. Scott, 224 So. 3d 755, 758 (Fla. 2017) (quoting *Johnson*, 691 N.E.2d at 1007).

marijuana-related offenses or prostitution offenses.<sup>430</sup> While he did promise generally to “shift prosecutorial resources to focus on the most serious crimes against people,”<sup>431</sup> he never specifically targeted those offenses for nullification pre-election. That degree of specificity is insufficient. For my model, the significant step of categorical nullification requires more than a generalized reform campaign.

## 2. *Antidomination and Outsider Effects: Chesa Boudin & Rachael Rollins*

Prong two’s focus on “outsiders” also matters. Take Chesa Boudin, elected in 2019 as San Francisco District Attorney after clear promises not to prosecute quality-of-life crimes like offering or soliciting sex, public camping, or blocking a sidewalk.<sup>432</sup> Prong two helps assess this example of populist prosecutorial nullification. These are classic cases of offenses committed within the district by residents, with any offended parties also being residents. While intra-district dissent is conceivable, it is not credible to cast this policy choice as an example of invidious domination of those intra-district losers.

It also helps here to return to Rachael Rollins, elected in Massachusetts on a platform including a suite of offenses warranting presumptive nonenforcement.<sup>433</sup> Rollins’s emphasis on her proposed nullification, and the explicit electoral vetting via the attacks she fended off from her general-election opponent and unsupportive community stakeholders, are ideal for this model.<sup>434</sup> At prong two, most of her list also can only be fairly described as focusing on truly local crimes; trespassing and minor larceny give a flavor.<sup>435</sup> Nor does

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<sup>430</sup> Memorandum from Larry Krasner, Dist. Attorney, City of Philadelphia, New Policies Announced February 15, 2018, <https://www.documentcloud.org/documents/4412996-Krasner-Memo-March-13-2018.html#document/p1>.

<sup>431</sup> Krasner for District Attorney, *supra* note 3.

<sup>432</sup> See Charnock, *supra* note 1.

<sup>433</sup> See *supra* text accompanying note 16.

<sup>434</sup> See Rollins, *supra* note 381 (presenting a list of charges that will be declined by default); Daniel Medwed & Brendan Deady, *Rachael Rollins and the Power to Decline to Prosecute*, GBH News (Sept. 18, 2018), <https://www.wgbh.org/news/politics/2018/09/18/rachael-rollins-and-the-power-to-decline-to-prosecute> (describing Rollins’s hard-fought and surprising victory despite negative reactions to her campaign promises before the election); Trea Lavery, *Rollins Rolls Out Policy Changes*, BAY STATE BANNER (Mar. 27, 2019), <https://www.baystatebanner.com/2019/03/27/rollins-rolls-out-policy-changes> (reiterating Rollins’s campaign promise to decline to prosecute low-level, nonviolent offenses); Samantha Michaels, *Boston’s New DA Is a Black Woman Who Is Out to Change the City’s Racist Sentencing Disparities*, MOTHER JONES (Nov. 16, 2018), <https://www.motherjones.com/crime-justice/2018/11/a-black-woman-running-for-boston-da-is-out-to-change-the-citys-racist-sentencing-disparities> (noting that Rollins faced an independent candidate with police support in the general election).

<sup>435</sup> See Rollins, *supra* note 381.

refusing to prosecute crimes like receiving stolen property or drug possession raise legitimate fears of malicious domination.

Her inclusion of drug possession with intent to distribute, however, gives some instructive pause. Drugs are easily transportable. That renders more tangible the specter of harmful impact on out-of-district residents, who are equally entitled to make differing judgments about the harms of drugs and how to prevent them. But, as implemented, Rollins's policy directs subordinates to ask whether the violator presents "clear indicia of intent to distribute beyond mere quantity," which I take to be a *de facto* kingpin safety valve.<sup>436</sup> Mass distribution, it would seem, poses unique risks of engendering spill-over beyond the people who had the ability to participate in Rollins's election. This sort of careful work to mitigate supralocal effect is exactly what prong two seeks. And it shows how prong two may properly cabin what prong one might otherwise authorize.

### 3. *Harder Cases: Tiffany Cabán*

This model does not eliminate the need for judgment. Tiffany Cabán's (barely) unsuccessful try for Queens District Attorney is an example. To pick one part of her platform, she likely would have satisfied prong one with respect to her planned nullification of prostitution laws. The clarity with which she campaigned made her plan salient, facilitated its public ventilation, and engendered attacks from her opponents.<sup>437</sup>

But prong two would have been trickier. One might say prostitution offenses simply ban consensual conduct between adults.<sup>438</sup> On that view, sufficient harm to others—either intra- or inter-district—to justify overriding the district's choice seems unlikely. Yet some might argue that decriminalizing vice will have criminogenic effects that spill into neighboring districts. On the other hand, perhaps Cabán's policy would have provided a positive externality by drawing this behavior out of neighboring districts.

Similar shades of grey arise in the invidious intra-district domination context. True, this policy does not fence minorities out of the

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<sup>436</sup> THE RACHAEL ROLLINS POLICY MEMO app. C-7 (2019).

<sup>437</sup> See Steadman, *supra* note 1 (quoting Cabán's pledge to "not prosecute sex workers, customers, [or] the promoting prostitution charges" and reporting one of her opponents' criticism of Cabán's decriminalization proposal); see, e.g., Emma Whitford, *DA Candidates Stake Out Positions on Sex Work Decriminalization*, QUEENS DAILY EAGLE (Mar. 13, 2019), <https://queenseagle.com/all/2019/3/13/da-candidates-stake-out-positions-on-sex-work-decriminalization> (reporting candidates' responses to questions about sex work decriminalization).

<sup>438</sup> See Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 424–25 (2002) (classing prostitution among consensual crimes).

decisionmaking process or trample any established constitutional rights in ways that would make such domination obvious. Yet dissenters both inside and outside the district might contend that decriminalization would lead to the sort of exploitation (say, human trafficking) that an anti-domination framework cannot countenance.<sup>439</sup> There would be counters, of course: the causal chain may be too attenuated, and perhaps the individuals who will supposedly be harmed generally support the policy. In my view, Cabán would have the better of the debate, but this model cannot eliminate or conclusively resolve these difficult value-laden questions. It does suggest, however, that we gain something important in channeling them to the people most affected by their resolution.<sup>440</sup>

## B. Future Applications

### 1. Jury Nullification

This Article's analysis offers one unexpected contribution to debates on jury nullification. While much of the reasoning could bolster pro-jury nullification scholarship, this Article may suggest that jury nullification is less necessary than its supporters think. After all, while populist prosecutorial nullification embodies populist local control, it contains safeguards that may suppress some of jury nullification's worst tendencies. Its transparency offers a greater check on its negative use than jury nullification,<sup>441</sup> and it puts the nullification choice to a larger, more representative portion of the polity.<sup>442</sup> Finally, unlike acquittals, we can at least imagine some populist prosecutorial nullification being judicially reviewable. In fact, ironically, this Article may supplement *anti*-jury-nullification scholarship by offering those who endorse jury nullification for purposive ends<sup>443</sup> a safer, more effective path to those ends.

### 2. Beyond Elections: Community Prosecution and Lesser Controls

This Article also supplements scholarship on prosecutorial conduct.

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<sup>439</sup> See, e.g., Allie Sisson, *Access to Justice for Undocumented Female Victims of Sex Trafficking*, 17 SEATTLE J. FOR SOC. JUST. 91, 121, 127–28 (2019) (noting this risk but still advocating decriminalization).

<sup>440</sup> See, e.g., RAHMAN, *supra* note 25, at 103–05, 109–11 (arguing for the intrinsic value and concrete benefits of empowering laypeople within democratic decisionmaking).

<sup>441</sup> See *supra* Section IV.A.1 (arguing that populist prosecutorial nullification affords more transparency and accountability than jury nullification, thus safeguarding against the worst excesses of popular control).

<sup>442</sup> See *supra* text accompanying notes 274–89 (noting that providing people with the feeling of control over their own lives and societies can unite local polities).

<sup>443</sup> See, e.g., Butler, *supra* note 75 (arguing for anti-racist use of jury nullification).



First, it rejects a view of American prosecutorial elections as an embarrassing nineteenth-century relic.<sup>444</sup> Far from an unfortunate vestige best suppressed, prosecutorial elections should be prized as mechanisms to maximize democratic self-determination. After all, prosecutorial elections will continue for the foreseeable future. Those focusing on ways to undermine them may be missing legitimate reasons to embrace the popularly guided prosecutor. Even those unwilling fully to endorse populist prosecutorial nullification should find reasons here to consider anew whether, and to what extent, the post-election prosecutor “should be guided in her discretionary decisions ‘by an honest effort to discern public needs and community concerns.’”<sup>445</sup> While this Article cannot offer an exhaustive further analysis of what that would mean, it can sketch some suggestions.

At minimum, this Article’s reasoning supports so-called “community prosecution.” Better still, it offers a grading rubric. Although many now invoke community prosecution, the term can be amorphous and often seems not to prescribe any particular policies or modes of operation.<sup>446</sup> It may “at the very least . . . connote[] ‘a decentralization of authority and accountability, with the ultimate aim of enabling an office to anticipate and respond to community problems.’”<sup>447</sup> But this can be quite consistent with a façade of community input that “hears” citizens but changes nothing about how the office does business.<sup>448</sup> This Article’s framework allows us to see why such façades provide little of the democratic legitimacy they invoke and to identify versions of community prosecution with real heft.<sup>449</sup>

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<sup>444</sup> See, e.g., Richman, *supra* note 126, at 62–63 (arguing that “most domestic and comparative scholars” view “prosecutorial elections” with “dismay”).

<sup>445</sup> Ramsey, *supra* note 96, at 1318.

<sup>446</sup> See, e.g., Levine, *supra* note 12, at 35 (“[T]he contours of the term ‘community prosecution’ remain somewhat unspecified.” (citations omitted)).

<sup>447</sup> *Id.* (citation omitted).

<sup>448</sup> See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 358 (2002) (“It is far easier to invoke the specter of ‘the community’ and to purport to speak and act on its behalf than to work at discovering its varied voices, goals, and concerns.”); Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1595 (2012) (noting that some initiatives represent little more than “shak[ing] hands and hold[ing] meetings, in a semblance of engagement” (quoting Cecelia Klingele, Michael S. Scott & Walter J. Dickey, *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 982)); cf. M. Elaine Nugent-Borakove & Patricia L. Fanflik, *Community Prosecution: Rhetoric or Reality?*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 12, at 211, 212 (“Community prosecution has generally been described as a grassroots approach to justice, involving citizens . . . in problem-solving efforts to address the safety concerns of the local jurisdiction.” (emphasis added) (citation omitted)).

<sup>449</sup> See, e.g., Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1611–12 (2010) (holding that community prosecution “gathers public opinion about enforcement practices” to “emphasize[] the

Additionally, this Article supports further democratization of prosecutorial flexibility. Life does not wait for elections, and community needs may change during a prosecutor's tenure. Short of nullification, it may be appropriate for prosecutors to create more mechanisms to incorporate community sentiment regarding resource allocation.<sup>450</sup> That sort of workaday enforcement decision is not one that demands formal electoral authorization, given our background expectations regarding resource-driven prioritization. Yet the principles that do require such authorization for programmatic nullification indicate that government actors should work harder to operationalize the input of those by whose consent they govern.

Two possibilities present themselves here. The state grand jury's influence over charging is widely considered to have fallen into decrepitude, and many perceive the institution now to operate (when it operates at all) as a pro forma "rubber stamp" for desired prosecutorial charges.<sup>451</sup> This Article's reasoning may counsel in favor of broader, more substantive use of grand juries. That is, prosecutors might elect to use grand juries more when they have the option<sup>452</sup> and might treat them as a meaningful veto point over the ultimate charging decision rather than manipulable tools in service of a desired prosecutorial end.<sup>453</sup> For similar reasons, prosecutors may wish to

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prosecution of cases that will contribute the most to the public's sense of safety"); Coles, *supra* note 98, at 195 (asserting that under community prosecution "priorities in prosecuting cases reflect determinations by citizens as to which offenses are most significant").

<sup>450</sup> Some scholars caution against the potential of referenda on individual cases. See Sklansky, *supra* note 289, at 673–74 (warning of "[t]he danger of politicizing the handling of particular cases" and suggesting it could be deemed "prosecution by plebiscite"). This criticism warrants attention in considering my model's implications outside the prospective categorical nonenforcement context, although jury verdicts could be viewed as a sort of community referendum in a particular case, insofar as juries represent the community. Grand juries, too, represent a version of community control over the prosecution decision.

<sup>451</sup> See Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.* 2333, 2352 & n.99 (2008) (reviewing common clichés and metaphors used to describe criticisms of grand juries); Fairfax, *supra* note 28, at 758 (noting that many believe that the grand jury fails to protect individual rights from encroachment by the government); Decker, *supra* note 98, at 345–47, 385 (detailing history and decline of the grand jury in the United States).

<sup>452</sup> Cf. SARA SUN BEALE ET AL., *supra* note 28, § 8:2 (observing that prosecutors in states that do not give the accused the right to demand a grand jury indictment for serious crimes may still choose to utilize grand juries).

<sup>453</sup> See, e.g., Decker, *supra* note 98, at 385–87 (observing substantial prosecutorial power over the grand jury's operation); SARA SUN BEALE ET AL., *supra* note 28, § 4:15 (same). For similar reasons, we might push more states to give felony defendants the right to insist upon indictment by grand jury. See, e.g., Decker, *supra*, at 354 ("About half of the states do not require a grand jury indictment to prosecute any type of criminal offense . . ."); LAFAVE ET AL., *supra* note 33, § 15.1(c) (noting nineteenth-century state rejection of the right to insist upon indictment by a grand jury).

increase and democratize their use of prosecutorial metrics by, for example, consulting the public on what information it desires.<sup>454</sup>

### CONCLUSION

Generally, critics of programmatic prosecutorial nullification may have a point. Prosecutors' broad control over charging does not equal, without more, license to remake democratically enacted law. But that something more, at least at the state level, can lie in the nexus between locally elected prosecutors and their communities. Much about what democracy entails is fundamentally contestable. Yet a view of the concept focused on subsidiarity-aided autonomy reveals a surprising justification for programmatic prosecutorial nullification. When it is *populist* prosecutorial nullification, far from antidemocratic flouting of the rule of law, it advances some of democracy's most important ends.

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<sup>454</sup> See, e.g., Simon, *supra* note 123, at 188–89 (advocating use of metrics to “measure process (such as charges filed) or outcomes (such as convictions . . . )”); Wright & Miller, *supra* note 441, at 1615, 1617 (“[Some] lead prosecutors now use case data to shape the relationship between the office and the voters.”). See generally M. Elaine Nugent-Borakove, *Performance Measures and Accountability*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR*, *supra* note 12, at 91–106 (discussing benefits, objectives, challenges, and guidance for the implementation of prosecutorial performance measurement frameworks).