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## REFORM PROSECUTORS AND SEPARATION OF POWERS

LOGAN SAWYER\*

### *Abstract*

*For decades, state and local prosecutors won election by promising to be tough on crime. Today, a new breed of prosecutor has gained prominence by campaigning on, and then implementing, reform agendas. Rather than emphasize the crimes they plan to prosecute, these reform prosecutors promise to use their discretion to stop the prosecution of certain crimes and halt the application of certain sanctions. They base their decision not on a lack of resources, but rather on a belief that the enforcement of those laws is unwise or unjust. Critics have decried such policies as both inappropriate and undemocratic. Prosecutors, critics say, are responsible for upholding the law, not undermining it, and a blanket refusal to enforce categories of crimes or apply specific sanctions is effectively rewriting the law. These critics argue that reform prosecutors thus violate fundamental separation-of-powers norms.*

*Though recent state court decisions have lent support to these arguments, they are deeply mistaken. Critics of reform prosecutors are quite right that the traditional discretion granted to prosecutors could, if left unchecked, undermine core separation of powers principles and thereby threaten both individual liberty and the rule of law. But their recommendation to resolve that problem with a formal understanding of separation of powers would prove not just ineffective but even counterproductive. The parchment barriers they propose will simply encourage prosecutors to hide their inevitable policy choices from voters and the other branches. This outcome may in turn undermine the best available tools to discipline prosecutorial discretion: democratic accountability provided by the ballot box and checks and balances. Left unchallenged, these separation-of-powers-based criticisms of reform prosecutors may spread to other state courts, strengthen political claims*

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\* Associate Professor of Law, University of Georgia School of Law. Thanks to Sandy Mayson, Kent Barnett, and the participants on the Emory University School of Law – University of Georgia School of Law Summer Conference for comments, criticism, and inspiration. I received excellent research assistance from a variety of students, but Laura Golden's dedication to the project deserves a special thanks.

*that reform prosecutors are acting inappropriately, and perhaps even convince some reform prosecutors to abandon their agendas.*

*Fortunately, an alternative exists. We can and should encourage all prosecutors—reform or otherwise—to express their plans openly, confident that such action is consistent with a well-established understanding of separation of powers that predates our founding and requires functional checks and balances rather than a formal separation of functions. We should encourage this openness because it will both encourage debate over criminal justice issues that reform prosecutors have helped spark and subject prosecutorial policies to the voters for approval and other branches for critique. Such a system of checks and balances represents the best available protection against the abuse of prosecutorial power.*

### *Introduction*

The events in Ferguson, Missouri in 2014 cast a national spotlight on the problems that can arise when local law enforcement oversteps its appropriate boundaries.<sup>1</sup> Public attention was riveted by protests—only sometimes peaceful—against police, prosecutors, and government policies that many claimed systematically discriminated against the poor and racial minorities.<sup>2</sup> Federal investigations followed, as did increasing scholarly attention to the significant power exercised by local law enforcement officials.<sup>3</sup> The uproar produced a political response as well.<sup>4</sup> For decades,

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1. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [hereinafter INVESTIGATION] (“Patrol assignments and schedules are geared toward aggressive enforcement of Ferguson’s municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation.”).

2. See Alan Blinder & Tanzina Vega, *Violence Flares in Ferguson After Appeals for Harmony*, N.Y. TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/us/ferguson-missouri-protests.html>; Samantha Storey, *Scenes of Chaos Unfold After a Peaceful Vigil in Ferguson*, N.Y. TIMES (Aug. 12, 2014), <https://www.nytimes.com/2014/08/13/us/after-a-peaceful-vigil-in-ferguson-scenes-of-chaos-unfold.html>.

3. See INVESTIGATION, *supra* note 1; see, e.g., Wayne A. Logan, *What the Feds Can Do to Rein in Local Mercenary Criminal Justice*, 2018 U. ILL. L. REV. 1731; Sunita Patel, *Toward Democratic Police Reform: A Vision for “Community Engagement” Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793 (2016); Richard Rosenfeld, *Ferguson and Police Use of Deadly Force*, 80 MO. L. REV. 1077 (2015).

state and local prosecutors won election by promising to be tough on crime.<sup>5</sup> But since Ferguson, a new breed of prosecutor has gained prominence by campaigning on, and later implementing, reform agendas based on generally applicable, prospective rules.<sup>6</sup>

Taking advantage of the traditionally broad meaning of “prosecutorial discretion,” reform prosecutors have emphasized not the crimes they promise to prosecute, but instead the crimes they will decline to enforce.<sup>7</sup> The decision not to prosecute certain crimes does not stem from a lack of resources, but rather the belief that enforcing those laws is unwise or unjust.<sup>8</sup> These reformers do not highlight their close relationship with police and career prosecutors but instead tout their long-standing conflicts with them.<sup>9</sup> Aramis Ayala, a Florida prosecutor, received national attention when she announced her intent not to seek the death penalty in any cases.<sup>10</sup> Mark Gonzales of Nueces County, Texas, also announced he would not prosecute misdemeanor marijuana charges.<sup>11</sup> Larry Krasner was elected the

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4. Charles D. Ellison, *The Politics of #Ferguson*, POLITICO MAG. (Aug. 14, 2014), <https://www.politico.com/magazine/story/2014/08/is-ferguson-good-for-the-gop-110037>; Wesley Lowery et al., *Federal, State Officials Take Sweeping Steps in Response to Ferguson, Mo., Unrest*, WASH. POST (Aug. 14, 2014), [https://www.washingtonpost.com/politics/federal-state-officials-take-sweeping-steps-in-response-to-ferguson-mo-unrest/2014/08/14/7c9c6de0-23f8-11e4-86ca-6f03cbd15c1a\\_story.html](https://www.washingtonpost.com/politics/federal-state-officials-take-sweeping-steps-in-response-to-ferguson-mo-unrest/2014/08/14/7c9c6de0-23f8-11e4-86ca-6f03cbd15c1a_story.html).

5. See, e.g., Jacob Rosenberg, *Can a Prosecutor Ever Truly Be Progressive? Ferguson May Be the Ultimate Test Case*, MOTHER JONES (Apr. 17, 2019), <https://www.motherjones.com/crime-justice/2019/04/progressive-prosecutors-ferguson-wesley-bell-kamala-harris-kim-gardener/>.

6. See, e.g., Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> (describing “the Ferguson effect” as “the idea that rank-and-file officers viewed increased accountability as an attack on their profession”).

7. *Id.*

8. *Id.*

9. *Id.* For example, Larry Krasner, a reform prosecutor in Philadelphia, worked as civil rights attorney for twenty-five years and sued the Philadelphia Police Department seventy-five times. *Id.*

10. Katie Mettler, *Florida Prosecutor Refuses to Seek Death Penalty for Alleged Cop Killer, Defies Gov. Rick Scott’s Order to Step Aside*, WASH. POST (Mar. 21, 2017, 4:50 AM CDT), <https://www.washingtonpost.com/news/morning-mix/wp/2017/03/21/floridas-first-black-prosecutor-a-death-penalty-boycotter-defies-gov-rick-scott/>.

11. Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO MAG. (May 6, 2018), <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322> (“Gonzalez’s résumé puts him in a small but striking new

District Attorney of Philadelphia after spending a career suing the police.<sup>12</sup> Once elected he promised to prioritize keeping people out of prison and improving access to services for the mentally ill, drug-addicted, and poor.<sup>13</sup>

These reform prosecutors have been controversial in both legal and political debates. Reform prosecutors and their supporters have argued that they are elected officers who respond to their voters by exercising charging discretion in a way that is well within the bounds of the authority that the office has always enjoyed.<sup>14</sup> Their critics, however, have decried their policies as both unwise and undemocratic. Attorney General William Barr told the Grand Lodge of the Fraternal Order of Police that reform prosecutors are “refusing to enforce the law,” and are “demoralizing to law enforcement and dangerous to public safety.”<sup>15</sup> Among other attacks, critics argue that when reform prosecutors make a prospective identification of categories of crimes or sanctions they will not enforce they are no longer exercising prosecutorial discretion, but are instead violating fundamental

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wave of U.S. prosecutors, politically liberal and in some cases even civil-rights advocates, who’ve been elected to roll back the excesses of the past 20 years’ worth of tough-on-crime law.”).

12. The *Atlantic* identified Krasner as a “‘reform-minded’ prosecutor” and part of a “growing cohort of district and state’s attorneys vowing to overhaul cash bail, abolish the death penalty, and crack down on police corruption.” Maura Ewing, *A ‘Completely Unelectable’ Progressive Will Probably Win Philadelphia’s DA Race*, ATLANTIC (Nov. 6, 2017), [https://www.theatlantic.com/politics/archive/2017/11/larry-krasner-philadelphia-da/544937/?utm\\_source=fbb](https://www.theatlantic.com/politics/archive/2017/11/larry-krasner-philadelphia-da/544937/?utm_source=fbb). The Philadelphia Fraternal Order of Police fought Krasner’s election in the general election and the Democratic primary. Holly Otterbein, “*Completely Unelectable*” *Progressive Larry Krasner Wins DA’s Race*, PHILA. MAG. (Nov. 7, 2017, 9:25 PM), <http://www.phillymag.com/news/2017/11/07/larry-krasner-wins-district-attorney-general-election/>. Its president, John McNesby, “called Krasner’s candidacy ‘hilarious.’” *Id.*

13. See Austen, *supra* note 6.

14. Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 751–52 (2018) [hereinafter Note, *The Paradox*] (“Fundamentally, progressive prosecutors seek to rebalance the use of prosecutorial discretion. Where traditional prosecutors have used their enforcement powers in a heavy-handed manner to punish marginalized individuals, progressive prosecutors institute practices that pull back on those punitive measures, or, at least, divert them.”).

15. Attorney General William P. Barr, Address 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>.

separation of powers norms.<sup>16</sup> Because prosecutors are responsible for upholding, not undermining, the law, these critics say blanket refusals to enforce entire categories of crimes or sanctions effectively change the law.<sup>17</sup>

This criticism has been common among the political opponents of reform prosecutors. After Aramis Ayala declared she would not seek the death penalty in any of her cases, the former president of the Florida Prosecuting Attorneys Association (“FPAA”) said Ayala’s decision was a constitutional violation.<sup>18</sup> “[I]f she wants to change the law,” he said she should “run for the Legislature.”<sup>19</sup> The former president stated that “[a]t the FPAA, our job as prosecutors is not to make law . . . . It is to take the law the Legislature makes and enforce [it] in the state.”<sup>20</sup> Kim Ogg, the District Attorney for Harris County, Texas, faced similar criticism after she announced a marijuana policy that would utilize diversion programs instead of jail time.<sup>21</sup> In response to Ogg’s decision, the district attorney in a neighboring county retorted, “Hey, we’re the DAs. We enforce laws, we don’t change the laws.”<sup>22</sup>

The frequency with which critics raise these arguments suggests they may have enough political punch to short-circuit the efforts of reform prosecutors. This possibility is strengthened by the approach that the highest courts in two states have taken when faced with such arguments. Most recently, the Florida Supreme Court upheld a governor’s decision to remove cases from a prosecutor who had promised not to pursue the death

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16. Note, *The Paradox*, *supra* note 14, at 753 (“Prosecutors leading these efforts, however, have been criticized for blatantly neglecting their duties and violating separation of powers doctrine.”).

17. See Joint Response of Governor Rick Scott and Attorney General Pam Bondi Opposing Emergency Petition for Extraordinary Writ at 33–34, 36, *Ayala v. Scott*, 224 So. 3d 755 (Fla. 2017) (No. SC17-653) [hereinafter Joint Response].

18. See Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> (“The FPAA brief said that Ayala had violated the separation-of-powers doctrine by effectively setting her own policy.”).

19. *Id.* (quoting former FPAA President Glenn Hess).

20. *Id.* (quoting former FPAA President Glenn Hess) (alterations in original).

21. Alan Greenblatt, *Law and the New Order: A Fresh Wave of District Attorneys Is Redefining Justice*, GOVERNING (Apr. 2017), <http://www.governing.com/topics/public-justice-safety/gov-district-attorneys-houston-criminal-justice-reform.html>.

22. *Id.* (quoting Montgomery County District Attorney Brett Ligon).

penalty.<sup>23</sup> In doing so, the court drew on an earlier decision by the New York Court of Appeals that reached a similar result.<sup>24</sup>

Those state courts are quite right that the traditional discretion granted to prosecutors could, if left unchecked, undermine core separation of powers principles and thereby threaten both individual liberty and the rule of law.<sup>25</sup> But the solution they have offered is the wrong one. They insist on a formal separation of executive power from legislative power that they believe will protect democratic accountability. But that approach will prove both ineffective and counterproductive.

The parchment barriers that emerge from a formal understanding of separation of powers will simply encourage prosecutors to hide their policy preferences from voters and other branches of government. Such an approach will undermine, rather than strengthen, the democratic accountability provided by checks and balances and the ballot box. Perhaps even more importantly, those decisions might strengthen political claims that reform prosecutors act inappropriately. They may even convince some reform prosecutors that they lack the constitutional authority to announce generally applicable, prospective rules.

To avoid those problems, this Article offers an alternative approach. It argues that a proper analysis of the potential threat reform prosecutors pose to the rule of law must start with the recognition that prosecutors legally can, regularly do, and, in fact, *must* be authorized to act independent of legislative intent.<sup>26</sup> Prosecutors, in other words, can and do exercise the discretion they have traditionally been granted by refusing to enforce

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23. *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017); see also William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2478–79 (2006) (“An independent attorney general’s ability to do so without imposing substantial burdens on the efficacy of state government makes the model an attractive candidate for adoption at the federal level.”).

24. *Ayala*, 224 So. 3d at 758–59 (discussing *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997)).

25. David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 456 (2018) [hereinafter Sklansky, *The Problems*]; see also *Prosecutors on the Firing Line: Backlash Against ‘Progressives’ Grows*, CRIME REP. (June 24, 2019), <https://thecrimereport.org/2019/06/24/prosecutors-on-the-firing-line-backlash-against-progressives-grows/>; Michael C. Dorf, *Prosecutorial Discretion Under Fire*, VERDICT (Dec. 3, 2014), <https://verdict.justia.com/2014/12/03/prosecutorial-discretion-fire>.

26. See generally Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369 (2010) [hereinafter Bibas, *Prosecutorial Discretion*].

statutes passed by previous legislatures and doing so in ways the existing legislature may disapprove.<sup>27</sup>

In making these decisions, prosecutors inevitably make policy decisions not just about the limits of available resources but also about which laws they should enforce with those limited resources.<sup>28</sup> As a result of this reality, the questions that ought to frame courts' approach to separation of powers based challenges to reform prosecutors are: (1) whether reform prosecutors should be able to express their policy choices openly and thus allow voters and other branches to cabin prosecutorial discretion with political pressures; and (2) whether allowing them to do so can be squared with separation of powers norms.

This Article argues that the answer to both questions should be “yes.” We should encourage prosecutors to subject their plans to voters for approval and other branches for critique—just as we encourage presidents, governors, and other elected executive officers to do so. Such disclosures are necessary because the democratic process and system of checks and balances represent the best forms of protection against the abuse of executive power.<sup>29</sup> Because well-established understandings of separation of powers that predate the country's founding prioritize effective checks and balances over a formal separation of function, we should also encourage prosecutors to formally and openly express their policy plans.<sup>30</sup>

The Article proceeds as follows: Part I outlines how critics of reform prosecutors have drawn strength from ambiguities about the role that prosecutors play in separation of powers theory, which highlights the important threat that prosecutorial discretion poses to individual liberty and the rule of law. Prosecutors play multiple roles in the criminal justice system as they exercise their various duties. First, prosecutors are judicial

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27. See 4 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 13.2(e) (4th ed. 2015); see also David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 *YALE L.J. F.* 203, 209–13 (2011), [https://www.yalelawjournal.org/pdf/1018\\_hpkwev93.pdf](https://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf).

28. LAFAVE ET AL., *supra* note 27, § 13.2(a); see also Keenan et al., *supra* note 27, at 210.

29. THE FEDERALIST NO. 51, at 264 (James Madison) (Ian Shapiro ed., Yale Univ. Press 2009) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”). See generally Martin H. Redish & Elizabeth J. Cisar, “*If Angels Were to Govern*”: *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 *DUKE L.J.* 449 (1991).

30. THE FEDERALIST NO. 51, *supra* note 29, at 264.



officers because, as lawyers, they are officers of the court. Second, prosecutors are executive officers because they have a duty to enforce the law, and they enjoy discretion in deciding the best way to do so. And third, prosecutors may be considered legislative officers because the broadly accepted and historically established scope of prosecutorial discretion grants prosecutors the authority to decide what laws to enforce and not enforce. In other words, this grant of authority effectively enables prosecutors to define the law within their jurisdiction. Critics of reform prosecutors are thus correct when they claim that the role reform prosecutors play is at odds with fundamental separation of powers norms that underlie American principles of self-government enshrined in almost all state constitutions.<sup>31</sup>

Part II argues that these critics have, unfortunately, convinced courts to solve that problem by applying a formal understanding of separation of powers. Under this formal approach, legislative power is understood as the power to establish “generally applicable, prospective” legal rules.<sup>32</sup> Conversely, it defines executive power as a power that applies already-existing rules to particular fact situations. Therefore, under a formalistic approach, while prosecutors are authorized to make case by case prosecutorial decisions about which individuals to prosecute, they are not authorized to make generally applicable, prospective rules about what categories of laws or punishments to enforce. By exceeding the formal boundaries of the executive power, critics of reform prosecutors claim they are exercising legislative authority and thus violating separation of powers.

Part II explains why this approach is self-defeating. A core purpose of separation of powers is to enhance democratic accountability.<sup>33</sup> Denying prosecutors the power to make clear what policies they will pursue does not enhance but actually undermines democratic accountability without limiting prosecutorial discretion in any meaningful way. It does not stop prosecutors from making a secret decision to avoid enforcing certain classes of laws or

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31. See *Separation of Powers—An Overview*, NAT'L CONF. ST. LEGISLATURES (May 1, 2019), <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> (“Forty state constitutions specify that government be divided into three branches: legislative, executive and judicial.”).

32. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1732–55 (2012) (explaining that American courts identified the law-making power as the power to make rules that were both prospective and general).

33. See Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 370 (2017) (describing that separation of powers advances purpose of constitutionalism by distributing power to prevent tyranny).

sanctions and later explaining each decision on a case-by-case basis, using the very same considerations that made them want to adopt a categorical rule in the first place. For this reason, the formalistic approach actually encourages elected prosecutors to hide their plans from their voters and other branches of government. Unfortunately, this result serves to short-circuit the very mechanisms that ensure democratic accountability: elections and checks and balances.

Finally, Part III advocates an alternative: the functional approach to separation of powers. Under this approach, courts should not let their separation of powers analysis turn on formalistic definitions of “executive” and “legislative” power. Instead, courts should focus on the functional purpose of separation of powers, which is to enhance democratic accountability through a system of checks and balances. From this perspective, prosecutors should be encouraged to inform voters of the kinds of laws they will enforce or refuse to enforce. In doing so, prosecutors not only spark a democratic debate surrounding their own election (which itself enhances democratic accountability) but may also spark debates among the different institutions of the state. When a prosecutor is open about his or her reform agenda, the other branches of government can use their own authority to change, or support, the prosecutor’s stance. Those actions both cabin prosecutorial discretion and increase the democratic responsiveness of government at every level.

### *I. Prosecutors and the Separation of Powers*

Prosecutors have one of the most difficult and important jobs in the American legal system. They are a critical cog in the enforcement of criminal law and are thus one of the primary protectors of the rule of law.<sup>34</sup> The actions prosecutors take—or choose not to take—have immediate, lasting effects on the fairness of our political system. They decide who should be charged and what those charges should be.<sup>35</sup> They decide which

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34. See generally Attorney General Robert H. Jackson, Remarks at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”).

35. AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (4th ed. 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [hereinafter CRIMINAL JUSTICE STANDARDS].

plea bargains to accept and which cases to take to trial.<sup>36</sup> At trial, they represent the government, and at sentencing, their recommendations play a critical part in determining punishment.<sup>37</sup>

In each of those tasks, prosecutors serve multiple constituencies. They must recognize the suffering of victims of crime and ensure that perpetrators receive a fair trial and an appropriate sentence.<sup>38</sup> Prosecutors also serve interests not directly involved in trial, such as preventing racial, class, or other inappropriate biases and deterring future law-breaking.<sup>39</sup> In serving these constituencies and addressing these concerns, they must, at times, balance contradictory policy concerns and theories of justice.<sup>40</sup> As they seek to deter crime, they must weigh concerns of general deterrence and equality with special deterrence and individuality.<sup>41</sup> Furthermore, prosecutors must determine what kind of retributive justice, if any, is needed. And they must do all this with limited resources and often without full knowledge of the facts.<sup>42</sup>

#### *A. Theories and Functions of Prosecutorial Power*

Formal law, institutional structures, and informal norms governing prosecutors recognize that clear rules cannot determine the best answer the complicated, delicate, and important questions prosecutors must resolve on a daily basis.<sup>43</sup> As a result, prosecutors enjoy significant discretion.<sup>44</sup> In our

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36. *Id.* § 3-1.3; *see also* Dan K. Webb & Scott F. Turow, *The Prosecutor's Function in Sentencing*, 13 *LOY. U. CHI. L.J.* 641 (1982) (outlining sentencing considerations followed by the Office of the U.S. Attorney for the Northern District of Illinois).

37. Webb & Turow, *supra* note 36, at 644–45.

38. *CRIMINAL JUSTICE STANDARDS*, *supra* note 35, § 3-1.2(b).

39. *Id.* § 3-1.6.

40. *LAFAVE ET AL.*, *supra* note 27, § 13.2(a).

41. *Wayte v. United States*, 470 U.S. 598, 607 (1985) (holding that courts are ill-equipped to evaluate “the strength of a case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan”).

42. Tamara F. Lawson, “Whites Only Tree,” *Hanging Nooses, No Crime?: Limiting the Prosecutorial Veto for Hate Crimes in Louisiana and Across America*, 8 *U. MD. L.J. RACE, RELIGION, GENDER & CLASS* 123, 172 (2008) (“[T]he real dilemma [is] between the prosecutorial responsibility to equitably enforce the law and the prosecutorial discretion to efficiently dispatch the government’s limited resources to achieve deterrence, rehabilitation and retribution.”).

43. *See, e.g., Odd v. Malone*, 538 F.3d 202, 211 n.3 (3d Cir. 2008) (noting that there is no bright-line rule when evaluating acts of prosecutorial discretion); *see also* Bibas,

system, there is very little formal oversight of the decisions prosecutors make outside of the courtroom—where their most important decisions are made.<sup>45</sup> The Model Rules of Professional Responsibility only require that prosecutors make “reasonable” charging decisions,<sup>46</sup> which is an almost meaningless limitation given that a court should dismiss any unreasonable charge.<sup>47</sup> Federal constitutional guarantees like the Equal Protection Clause formally limit prosecutors in other ways, such as by prohibiting prosecutors from acting with racial bias.<sup>48</sup> But those guarantees are enforced in a way that leaves prosecutors almost entirely insulated from liability.<sup>49</sup> For example, the U.S. Supreme Court has granted prosecutors absolute immunity from claims brought under § 1983 when they “act[] within the scope of [their] duties in initiating and pursuing a criminal prosecution.”<sup>50</sup> State constitutional rules provide similar protections.<sup>51</sup>

Both courts and scholars have for decades recognized that granting prosecutors this level of discretion can lead to abuse of power in an area where abuse is particularly threatening.<sup>52</sup> Prosecutors play a central role,

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*Prosecutorial Discretion*, *supra* note 26, at 372 (“Mechanical rules without humanity grow inhuman and insane.”).

44. LAFAVE ET AL., *supra* note 27, § 13.2(a) (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”).

45. *Id.* § 13.2(g) (“[T]here are—as a practical matter—no comparable checks upon [the prosecutor’s] discretionary judgment of whether or not to prosecute one against whom sufficient evidence exists.”).

46. MODEL CODE OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2019).

47. *See generally* Annotation, *Power of Court to Enter Nolle Prosequi or Dismiss Prosecution*, 69 A.L.R. 240 (2019).

48. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to *equal protection* because it denies him the protection that a trial by jury is intended to secure.”) (emphasis added); *see also* Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2102 (2004) (“Because the decisions fall to the subjective judgment of the prosecutor, potential abounds for unconscious racial biases to influence outcomes.”).

49. *Imbler v. Pachtman*, 424 U.S. 409, 410 (1976); *see also* Keenan et al., *supra* note 27, at 209–20.

50. *Imbler*, 424 U.S. at 410.

51. LAFAVE ET AL., *supra* note 27, § 13.5(g).

52. *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973) (“[T]he court does not have primary responsibility, but rather the role of guarding against abuse of prosecutorial discretion. The rule contemplates exposure of the reasons for dismissal ‘in order to prevent

after all, in taking from an individual not just liberty and property but even, in some jurisdictions, life.<sup>53</sup> For elected prosecutors, the political process is the clearest restraint on their discretion. But commentators widely believe that elections push prosecutors toward over-enforcement of laws, particularly on the poor, minorities, and other groups that lack political power.<sup>54</sup> Moreover, many interest groups push prosecutors towards aggressive enforcement.<sup>55</sup> Victims' groups certainly support more

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abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors,' and in pursuance of this purpose 'to gain the Court's favorable discretion, it should be satisfied that the reasons advanced for the proposed dismissal are substantial.'" (citing *United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n*, 228 F. Supp. 483, 486 (S.D.N.Y. 1964)); see also *United States v. Fields*, 475 F. Supp. 903, 908 (D.D.C. 1979); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961–63 (2009) [hereinafter Bibas, *Prosecutorial Regulation*]; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–15 (2001); Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 3–5 (2016).

53. See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.fl574350684.pdf> (last updated Nov. 21, 2019). States with the death penalty include Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. *Id.* Additionally, the federal government and the military also have the death penalty. *Id.*

54. David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647 (2017) (“[P]olitics demanded that prosecutors appear tough and unforgiving.”); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 61 (1998) (“Like most politicians, prosecutors view ‘tough on crime’ themes as the most effective tools to assure re-election.”); Russell M. Gold, *“Clientless” Lawyers*, 92 WASH. L. REV. 87, 105–06 (2017) (“[P]rosecutors have a strong interest in being viewed as tough on crime.”).

55. Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 912 (2012) (“[E]lected prosecutors, like all elected officials, undoubtedly feel pressure—either from voters or special interest groups—to be seen as tough on crime.”); Timothy H. Lee, *Don’t Go Wobbly on Criminal Justice*, CTR. FOR INDIVIDUAL FREEDOM (June 2, 2016), <http://cif.org/v/index.php/commentary/54-state-of-affairs/3127-dont-go-wobbly-on-criminal-justice>; Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren’t Happy*, NBC NEWS (Aug. 19, 2019, 11:01 AM CDT), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286>; Alex Yablon, *The NRA Is Talking Tough on Crime Again, Bipartisan Prison Sentencing Reform Be Damned*, TRACE (June 6, 2016), <https://www.thetrace.org/2016/06/nra-mandatory-minimum-sentencing-reform/>.

aggressive prosecution,<sup>56</sup> as do many voters because they do not see themselves as law-breakers or people who are likely to be falsely accused.<sup>57</sup> They are more concerned with being the victims of crime. These influences and related dynamics generally push prosecutors to campaign on “tough on crime” policies and then execute these policies in office.<sup>58</sup>

Commentators have long worried about the interaction of interest group politics, prosecutorial discretion, and over-enforcement. However, recent attention has focused on a new issue: the changing relationship between prosecutors and separation-of-powers norms and how those norms might be deployed to address prosecutorial abuses.<sup>59</sup> Because they effectively exercise executive, judicial, and legislative power, prosecutors present a separation of powers nightmare in the modern criminal process.

Prosecutors are most often understood to exercise executive authority.<sup>60</sup> As *Morrison v. Olson* and other authorities have argued, there is substantial evidence prosecutors have exercised executive power since before our nation’s founding.<sup>61</sup> Determining when the law has been violated and what

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56. See, e.g., *Advocacy Group Calls for Changes in Minnesota Law on Rape and Alcohol*, STAR TRIBUNE (Aug. 22, 2018, 8:33 AM), <http://www.startribune.com/advocacy-group-calls-for-changes-in-minnesota-law-on-rape-and-alcohol/491409031/>.

57. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873 (2009) (“[M]embers of Congress lack the incentives to enact these reforms as long as they reap political rewards for looking tough on crime.”). “Politicians view being tough on crime as a badge of honor that wins points with voters.” *Id.* at 873 n.14.

58. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 730 (2005) [hereinafter Barkow, *Administering*].

59. See Sklansky, *The Problems*, *supra* note 25, at 461 (claiming the big problem with prosecutors is that they straddle many of our legal categories, including law/politics, court/police, judicial/executive, etc.).

60. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006) (“[T]he virtually unreviewable exercise of prosecutorial discretion over charging and bargaining also stands in sharp tension with the separation of powers.”) [hereinafter Barkow, *Separation of Powers*].

61. *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (“Notwithstanding the fact that the counsel is to some degree ‘independent’ and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties.”); see also *Smith v. Meese*, 821 F.2d 1484, 1490–91 (11th Cir. 1987) (“The prosecutorial function, and the discretion that accompanies it, is thus committed by the Constitution to the Executive . . .”). Justice Scalia’s dissent in *Morrison* was emphatic, claiming that the “prosecution of crimes is a quintessentially executive function,” a function that was “always and everywhere”

to do about it seems core to “executing the law.” And, at least formally, prosecutors neither declare generally applicable, prospective rules governing the polity (as the legislature does) nor exercise final authority to determine what the law means.<sup>62</sup> Therefore, prosecutors clearly exercise executive authority.<sup>63</sup>

Looking beyond matters of form, however, one can also see that prosecutors exercise judicial and legislative powers.<sup>64</sup> They have responsibilities to the court system and to justice that differentiate them from other executive officers. Because prosecutors are attorneys, they are officers of the court, bound by additional ethical and professional responsibilities. Prosecutors, according to the Model Rules of Professional Responsibility, are “minister[s] of justice.”<sup>65</sup> The ABA’s Standards for Criminal Justice consider prosecutors “administrator[s] of justice” who have additional responsibilities beyond presenting the strongest possible

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controlled by the executive. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting). The majority agreed that there was “no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.” *Id.* at 691; *see also*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch . . .”); Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function?* *Morrison v. Olson and the Framers’ Intent*, 99 *YALE LAW J.* 1069, 1070 (1990) (“The Framers intended that prosecution would be an executive, but not necessarily presidential, function.”).

62. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

63. In the federal system this is black letter law. *See, e.g., Morrison*, 487 U.S. at 691 (“There is no real dispute that the functions performed by the independent counsel are ‘executive’ in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch.”); *Heckler*, 470 U.S. at 832 (“[W]e recognize that an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch . . .”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); *United States v. Martin*, 287 F.3d 609, 623 (7th Cir. 2002) (“The decision to indict, allege specific charges, or dismiss charges is inherently an exercise of executive power, and the prosecutor has broad discretion in these matters.”).

64. *See Sklansky, The Problems*, *supra* note 25, at 456.

65. MODEL CODE OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983).

case to the court.<sup>66</sup> They should not just seek to convict the guilty, but also protect the innocent, consider the interests of victims and witnesses, and respect the constitutional rights of suspects and defendants.<sup>67</sup>

Additionally, some historical analyses have suggested that prosecutors were considered judicial rather than executive officers at the founding.<sup>68</sup> Perhaps most importantly, prosecutors operate in an institutional context that effectively places them in a judicial role.<sup>69</sup> In the contemporary criminal justice system, the vast majority of defendants choose to accept a plea rather than go to trial.<sup>70</sup> They fear that if they go to trial, prosecutors will use their discretion to bring more charges and impose longer sentences.<sup>71</sup> As a result, defendants and their attorneys must argue the substantive merits of their case before the prosecutor, who, despite being the opposing counsel, effectively determines whether the defendant broke the law and whether the sentence is appropriate.<sup>72</sup> Because more than 95% of convictions are the result of a plea,<sup>73</sup> Rachel Barkow has argued that our criminal justice system has become “an administrative system where the

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66. CRIMINAL JUSTICE STANDARDS, *supra* note 35, § 3-1.2 (noting it is a prosecutor’s primary duty to “seek justice . . . not merely convict”).

67. *Id.*

68. See Keenan et al., *supra* note 27, at 213 & n.53 (citing that at least as early as 1854 prosecutors were exempt as judicial officers from liability).

69. *Id.* at 214.

70. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), <https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf> (“In 2016, 97.3% of defendants in the federal criminal justice system opted to concede their guilt. And in 2017, that number held steady at 97.2%.”); Barkow, *Separation of Powers*, *supra* note 60, at 1047 (“[I]t is not surprising that almost all convictions are the result of pleas.”); Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> (“The vast majority of felony convictions are now the result of plea bargains—some 94 percent at the state level, and some 97 percent at the federal level. Estimates for misdemeanor convictions run even higher.”).

71. See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 70, at 19–22.

72. Barkow, *Separation of Powers*, *supra* note 60, at 1047; Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003).

73. See *supra* note 70 and accompanying text.



prosecutor combines both executive and judicial power—posing the very danger the Framers tried to prevent.”<sup>74</sup>

Prosecutors’ authority to decide which laws will and will not be enforced could also, under some circumstances, constitute the exercise of legislative power. If law is nothing more than a prediction of when and in what ways the power of courts will be deployed,<sup>75</sup> then prosecutors legislate every time they set generally applicable, prospective rules about who to prosecute, rather than determine whether to prosecute based on a case-by-case analysis of individual facts. When prosecutors make informed, reasoned decisions on the basis of individual facts, they fulfill their sworn obligation to uphold the law.<sup>76</sup> But when they make generally applicable, prospective rules, they arguably change the law and thus encroach on the authority of the legislature.

The emergence of reform prosecutors has raised concerns about the prosecutor’s fit with separation of powers principles. Namely, critics of reform prosecutors have used those principles to attack reform prosecutors, and state courts have embraced their arguments.<sup>77</sup> The primary line of attack has been that by promising *not* to prosecute certain crimes or pursue certain sanctions, reform prosecutors are not only exceeding their executive power but also encroaching on the legislative power of the state. This encroachment, in turn, undermines core democratic and rule-of-law values.<sup>78</sup>

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74. Barkow, *Separation of Powers*, *supra* note 60, at 1048; *see also* John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571, 2577 n.41 (1997) (arguing that because of the prevalence of plea bargaining, prosecutors in fact do exercise judicial power and therefore are taking on a role “inconsistent with the most fundamental principles of our system of justice and our basic notations of fair play and efficient criminal administration”) (quoting James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1554 (1981)).

75. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

76. *See* Zachary S. Price, *Law Enforcement as Political Question*, 91 *NOTRE DAME L. REV.* 1571, 1572–76 (2016) (discussing the broad legal requirements surrounding prosecutorial decisions).

77. *See supra* notes 16–17 and accompanying text.

78. *See supra* notes 16–17 and accompanying text.

*B. The Judicial Diagnosis of Reform Prosecutors' Policies*

So far, the highest profile case to reach state courts is *Ayala v. Scott*.<sup>79</sup> In that case, an elected Florida prosecutor, Aramis Ayala, announced that she would not pursue the death penalty for any crime.<sup>80</sup> Her decision sparked waves of criticism,<sup>81</sup> culminating in Florida Governor Rick Scott's decision to use his constitutional authority to reassign criminal cases from local prosecutors when he had "good and sufficient reason."<sup>82</sup> Governor Scott argued that he had good reason to reassign the cases because Ayala was exercising legislative power rather than executive power.<sup>83</sup> Her categorical refusal to pursue the death penalty eliminated a sanction created by the state legislature without considering the criteria prescribed by the legislature in each individual case.<sup>84</sup> Because the executive power that prosecutors exercise includes a duty to apply the law to the facts of each case, the Governor argued that her inaction was effectively a nullification of the law and not a subsidiary component of her executive authority.<sup>85</sup> The court concluded that refusing to engage in a case-by-case analysis is a refusal to apply the law and is thus equivalent to ignoring or rewriting it, a power reserved to the legislature.<sup>86</sup>

Therefore, in *Ayala*, the Florida Supreme Court adopted the Governor's position and held that he did not exceed his authority by reassigning Ayala's death-penalty-eligible cases.<sup>87</sup> Under Florida law, the court reasoned, the Governor has "supreme executive power and is charged with the duty" to ensure that laws are faithfully executed.<sup>88</sup> Accordingly, the governor is granted broad authority to assign state attorneys to other circuits.<sup>89</sup> While Governor Scott received deference from the court, the Florida Supreme court also found that Ayala's conduct violated the

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79. 224 So. 3d 755 (Fla. 2017).

80. *Id.* at 756.

81. Frances Robles, *Lock 'Em Up? Prosecutors Who Say 'Not So Fast' Face a Backlash*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/aramis-ayala-prosecutors-death-penalty.html>.

82. *Ayala*, 224 So. 3d at 757 (quoting the relevant Florida statutes).

83. *See* Joint Response, *supra* note 17, at 33–34.

84. *Id.* at 37.

85. *Id.* at 33–34.

86. *See Ayala*, 224 So. 3d at 758–60 (citing *Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997)).

87. *Id.* at 759–60.

88. *Id.* at 757.

89. *Id.* at 757–58.

separation of powers principles.<sup>90</sup> By declining to exercise her discretion, the court held she was not exercising executive power but was instead exercising legislative power.<sup>91</sup>

The New York Court of Appeals took a similar approach in *Johnson v. Pataki*.<sup>92</sup> According to that court, the adoption of a blanket policy against the death penalty was, in effect, a refusal to exercise discretion and comparable to “a functional veto of state law authorizing prosecutors to pursue the death penalty in appropriate cases.”<sup>93</sup> In *Johnson*, the court reasoned that “the delineation of law enforcement functions has consistently been left to the legislature” and that the legislature clearly had not given the District Attorney authority to adopt a blanket policy and thereby refuse to exercise discretion.<sup>94</sup> As in *Ayala*, the court in *Johnson* held that “where the state constitution or the legislature has empowered the governor to act,” judicial review of a governor’s discretion is extremely limited, and the authority to counter governors’ actions lies with the people at the polls.<sup>95</sup> Therefore, these cases strongly emphasize the general formal understanding of the role of prosecutors as executive actors, limited in their capacity to enter the legislative sphere.

## II. The Failures of the Formal Fix

### A. Understanding the Formal Approach

The embrace of separation of powers arguments by courts and critics of reform prosecutors is both ironic and unfortunate. It is ironic because reform prosecutors are using their authority to reduce the threat the state poses to individual liberty—the exact purpose the separation of powers is meant to serve.<sup>96</sup> The approach to separation of powers issues the critics of reform prosecutors recommend will have the effect of increasing, rather than decreasing, the threat prosecutors pose to individual liberty by

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90. *See id.* at 758–59.

91. *See id.*

92. 691 N.E.2d 1002 (N.Y. 1997).

93. *Id.* at 1007.

94. *Id.*

95. *Id.* at 1005.

96. *See generally* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); *see also supra* notes 16, 25 and accompanying text.

encouraging prosecutors to conceal their prosecutorial policies.<sup>97</sup> In addition, the approach they have taken is unfortunate because it is likely to reduce, rather than augment, the accountability of prosecutors.<sup>98</sup> Consequently, the critics' approach will enable prosecutors to pose an even greater threat to liberty, fairness, and justice.

These judges and critics have adopted a formal approach to separation of powers. As the decisions in *Ayala* and *Johnson* indicate, a formal approach suggests that prosecutors cannot regulate their discretion with publicly announced generally applicable, prospective rules without encroaching on the authority of the state legislature.<sup>99</sup> But in the context of elected state prosecutors, the formal approach will not accomplish critics' goals because it cannot actually prevent prosecutors from using such rules. The complexities inherent in the prosecutor's role require that they be left with more than enough discretion to apply such rules implicitly by using case-by-case determinations.

A world in which prosecutors feel compelled to conceal their motives from the public and other branches of government is worse in every way. It reduces the availability of information that voters need to make informed choices, limits the control the democratic process can exert over prosecutors, makes it more difficult for other branches of government to provide checks and balances to prosecutorial discretion, and cuts short opportunities for fruitful debate over the best approach to criminal justice.

What the state courts in *Ayala* and *Johnson* ultimately found inappropriate is that the prosecutors in each case established generally applicable, prospective rules to govern their application of the death penalty.<sup>100</sup> In both cases, the prosecutors claimed that their prosecutorial discretion—an executive power—permitted adopting such rules.<sup>101</sup> Therefore, the prosecutors argued, the governor could not interfere with their decisions because their decisions were an exercise of prosecutorial discretion.<sup>102</sup> The courts rejected those arguments because the application of

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97. See sources cited *supra* note 25; see also Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law – They're Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/>.

98. Rice, *supra* note 97.

99. Both prosecutors publicly announced policy decisions, and the courts found that both prosecutors overstepped their discretionary authority. See *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017); *Johnson*, 691 N.E.2d at 1006–07.

100. *Ayala*, 224 So. 3d at 759; *Johnson*, 691 N.E.2d at 1004.

101. *Ayala*, 224 So. 3d at 758; *Johnson*, 691 N.E.2d at 1005–06.

102. *Ayala*, 224 So. 3d at 758; *Johnson*, 691 N.E.2d at 1005.

generally applicable, prospective rules is not an exercise of discretion but rather a refusal to exercise that discretion.<sup>103</sup> The courts reasoned that decisions not to enforce certain laws or proscribe certain punishments were instead an exercise of legislative power that violated separation of powers principles.<sup>104</sup>

The centrality of those arguments in *Ayala* and *Johnson* means that the court's analysis in both cases would have been different had the governors in each case sought to remove authority from the locally elected prosecutors because they disagreed with the individualized, fact-based determinations for a single prosecution, or even a series of prosecutions. But whether or not these two individual cases would have been resolved in a different way under different facts is immaterial to the following points. First, the formal understanding of separation of powers those courts adopted is likely to invalidate generally applicable, prospective rules governing a prosecutor's discretion because those courts characterize those rules as exercises of legislative power, not exercises of executive power. Second, this legal regime is counterproductive even to the goal it is trying to advance.

A formal approach to separation of powers is regularly employed and, in some contexts, may have advantages that outweigh its costs. It envisions strict separation between the legislative, executive, and judicial functions through the use of categorical, bright-line rules.<sup>105</sup> A formal approach defines certain categories of authority as legislative, executive, or judicial and then seeks to ensure those powers are wielded exclusively by the corresponding branch.<sup>106</sup> Considerations of efficiency or effectiveness are irrelevant under the formal approach. If a court reviewing the exercise of a given power finds that the wrong branch of government is exercising it, then the use of that power will be struck down—regardless of how efficient the arrangement might be.<sup>107</sup>

#### *B. The Supreme Court's Implication of a Formal Approach to Separation of Powers*

The U.S. Supreme Court has invoked formalistic arguments when it was concerned that one branch was “aggrandizing” itself at the expense of another branch, and the Court strikes down exercises of power that extend

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103. See *Ayala*, 224 So. 3d at 758–59; *Johnson*, 691 N.E.2d at 1007.

104. See *Ayala*, 224 So. 3d at 759 & n.2; *Johnson*, 691 N.E.2d at 1007.

105. Barkow, *Separation of Powers*, *supra* note 60, at 997.

106. *Id.*

107. *Id.*

beyond those traditionally held by a given branch.<sup>108</sup> Justices have also supported a formal understanding of separation of powers by examining the text of the U.S. Constitution.<sup>109</sup> Justice Scalia’s dissent in *Morrison v. Olson* is one such example.<sup>110</sup>

In *Morrison*, Justice Scalia dissented because he thought a legislative scheme that prevented the President from directly removing special prosecutors violated separation of powers.<sup>111</sup> He based his conclusion on the Vesting Clause of the Constitution, which provides that “[t]he executive Power shall be vested in a President of the United States.”<sup>112</sup> This clause,

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108. See Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 501–11 (1987) (discussing at length how justices of the U.S. Supreme Court have used the concept of “aggrandizement” in their opinions) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)); see also T.J. HALSTEAD, CONG. RESEARCH SERV., RL30249, THE SEPARATION OF POWERS DOCTRINE: AN OVERVIEW OF ITS RATIONALE AND APPLICATION 14 (1999), <https://digital.library.unt.edu/ark:/67531/metadc809717/m1/18/?q=origination%20clause> (“With its decision in *Chadha*, the Supreme Court established that Congress may exercise its legislative authority only ‘in accord with a single, finely wrought and exhaustively considered procedure,’ namely bicameral passage and presentation. This formal stance by the Court evidences the traditional concern regarding the potential aggrandizement of the legislative branch.”) (footnote omitted) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

109. See, e.g., *United States v. Brown*, 381 U.S. 437, 443 (1965) (“The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch. For example, Article III’s grant of ‘the judicial Power of the United States’ to federal courts has been interpreted both as a grant of exclusive authority areas, and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by the courts.”) (internal citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 151 (1803)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the president is to execute. The first section of the first article says that ‘All Legislative Powers herein granted shall be vested in a Congress of the United States.’ After granting many powers to the Congress, Article I goes on to provide that Congress may ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof.’”) (quoting U.S. CONST. art. I.).

110. See *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

111. See *id.* at 704–05 (Scalia, J., dissenting).

112. *Id.* at 705 (Scalia, J., dissenting) (quoting U.S. CONST. art. II, § 1, cl. 1).

Scalia reasoned, “does not mean *some* of the executive power, but *all of* the executive power.”<sup>113</sup> Accordingly, Justice Scalia posited the following:

[T]he decision of the Court of Appeals invalidating the present statute must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power? Surprising to say, the Court appears to concede an affirmative answer to both questions, but seeks to avoid the inevitable conclusion that since the statute vests some purely executive power in a person who is not the President of the United States it is void.<sup>114</sup>

This argument is formal because it rests on the definition of legal and constitutional terms and not on the practical consequences of assigning a particular power to a particular institutional actor.

Just because a formal approach to the separation of powers prevents judges from considering the efficacy of the challenged arrangement does not, of course, mean the approach itself is necessarily dysfunctional. Formal approaches to applying doctrine have a variety of advantages.<sup>115</sup> Most importantly, in the context of separation of powers, formal approaches can help ensure that a court’s recognition that an innovative institutional structure makes government authority more efficient or effective does not blind it to the threat that new structure poses for democratic accountability and individual liberty. In fact, Rachel Barkow has recently argued that, at the federal level, a formal approach to the separation of powers in the criminal law is preferable for textual, historical, and functional reasons.<sup>116</sup> But her arguments do not necessarily apply to state systems for two

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113. *Id.* (Scalia, J., dissenting).

114. *Id.* at 705 (Scalia, J., dissenting).

115. *See, e.g.*, FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991) (discussing the advantages and disadvantages of decision-making by formal rule rather than flexible standard).

116. Barkow, *Separation of Powers*, *supra* note 60, at 1050 (noting that her argument “applies only to the federal government”).

reasons.<sup>117</sup> First, states are constrained by the separation-of-powers principles in their own constitutions, not those in the federal constitution.<sup>118</sup> Second, the institutional context in which most state prosecutors operate is different than the federal context.<sup>119</sup> State prosecutors, unlike federal prosecutors, are elected, and this difference has important implications for the separation of powers analysis.<sup>120</sup>

The most worrisome impact of applying a formal separation-of-powers analysis in cases involving reform prosecutors is its inability to prevent prosecutors from secretly following their generally applicable, prospective rules. In other words, prosecutors can refuse to enforce certain crimes or proscribe certain punishments according to tacit reform rules while outwardly maintaining that they are exercising discretion on a case-by-case basis. This workaround is feasible because the legal rules and professional guidance that govern prosecutorial discretion provide little oversight for prosecutors.<sup>121</sup> And it is important for courts to defer to prosecutorial decisions. The prosecutor's job is simply too difficult and too interconnected with complicated policy considerations for close judicial oversight.<sup>122</sup> As a result, if an elected prosecutor decides not to pursue death

117. *See id.* (“[T]o the extent that similar structural abuses exist at the state level, this argument might not address them.”).

118. There are multiple reasons Barkow's argument may not determine the answer to the question presented here. The most obvious is that state and federal constitutions both use separation of powers concepts. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999) (“Separation of powers is a bedrock principle to the constitutions of each of the fifty states. . . . The overwhelming majority of modern state constitutions contain a strict separation of powers clause.”). Those constitutions are, of course, different, as Barkow recognizes. Barkow, *Separation of Powers*, *supra* note 60, at 1050–51 (“[A]rguments for using a bright-line approach to the separation of powers might not apply at the state level.”).

119. Rossi, *supra* note 118, at 1188 (“[T]he U.S. Constitution fails to dictate a specific form of separation of powers for state governments.”).

120. Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 276–81 (2002) (discussing specific policy and other rationales at play in the U.S. Attorney's Office).

121. *See* Keenan et al., *supra* note 27, at 210 (“[P]rosecutors' offices enjoy considerable autonomy in shaping their internal policies. Although judicial oversight should theoretically check this autonomy, courts are generally loath to interfere with the inner workings of a coordinate branch of government.”).

122. *See* Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 398 (2008) (“[T]he Appeals Court for the District of Columbia explained, it is ‘not a matter within the jurisdiction of the



penalty cases, “[c]ourts are, by their own admission, helpless” in reviewing prosecutorial decisions.<sup>123</sup> Nor could courts effectively force prosecutors to prosecute misdemeanor marijuana cases or any other class of punishments or crimes.<sup>124</sup>

Moreover, judicial oversight, in the form of separation-of-powers norms that prevent a prosecutor from announcing a generally applicable, prospective rule, would almost certainly interfere with whatever capability the democratic process has to cabin the discretion of prosecutors. If courts tell elected prosecutors and political candidates that announcing and applying generally applicable, prospective rules to guide their discretion violates state separation of powers norms, future officials and candidates will respond by keeping those rules secret. The loser will be the voting public, who will have less information in deciding their vote for one of the most important elected officials.

This lack of disclosure not only robs voters of information they deserve, but also reduces the democratic constraint on prosecutors by giving voters the information they need to hold candidates accountable for their policies while in office.<sup>125</sup> It also interferes with broader debates on ways to improve the criminal justice system outside of the jurisdiction.<sup>126</sup> The best that could be said against such a rule is that it may create bureaucratic waste for prosecutors who want to use rules to guide their decisions, as line prosecutors propose strategies based on case by case analysis that their elected boss will not follow. Those offices, like other government offices, are bureaucracies, and all bureaucracies operate by rule. That possibility, however, hardly seems worth the costs such an approach would impose. Analyzing the activities of reform prosecutors with a formal approach to separation of powers may seem the best way to address prosecutorial overreach, but its actual effect will be to conceal prosecutorial policies from voters and other governmental institutions.

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judicial branch of this government’ to issue injunctions against prosecutors. This reflects not just the separation of powers, but the *practical* unsuitability of reviewing a prosecutor’s reasoning.” (quoting *Moses v. Katzenbach*, 342 F.2d 931, 931 (D.C. Cir. 1965) (per curiam) (Wright, J., concurring)).

123. *Id.*

124. *See id.* at 400.

125. Sklansky, *The Problems*, *supra* note 25, at 463–64.

126. *See id.*

### III. The Functional Fix

#### A. Formalism Versus Functionalism

Fortunately, a formal separation-of-powers analysis is not the only way to approach prosecutors when they use generally applicable, prospective rules. Instead, courts could adopt a functionalist approach to separation of powers and consider not just the definition of executive, legislative, and judicial power but also how those powers should interact to produce a government that is both efficient and respectful of the liberty of its citizens. Such an approach would allow elected state prosecutors to both apply generally applicable, prospective rules that guide their discretion while in office and discuss them on the campaign trail. Allowing them to do so will both make prosecutorial offices more efficient and better protect individual liberty by offering ways to limit that discretion. Under this approach, prosecutors will be held accountable by voters, who will have more information about what a prosecutor will do. And they will also be more constrained by the checks and balances that other branches of government provide because those branches will have a clearer understanding of the prosecutor's policy preferences.

Formalism emphasizes a “definitional” understanding of separation of powers.<sup>127</sup> Exercises of government authority are defined as “legislative,” “executive,” or “judicial,” and then the exercise of that power is limited to the corresponding branch.<sup>128</sup> But formalism is not the only approach courts have taken to separation of powers issues. Critics of formalism argue it is unrealistic and often harmful.<sup>129</sup> They have championed instead a more

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127. Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 343 (1989).

128. *Id.* (“A formalist decision uses a syllogistic, definitional approach to determining whether a particular exercise of power is legislative, executive, or judicial. It assumes that all exercises of power must fall into one of these categories . . .”).

129. Justice Jackson famously derided the formal approach in *Youngstown Sheet & Tube Co. v. Sawyer*:

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

343 U.S. 579, 635 (1952) (Jackson, J., concurring).

pragmatic approach that recognizes that the strict separation of powers called for under the definitional model may impede the proper functioning of government.<sup>130</sup> The former view is traditionally termed “formalism,” while the latter model is typically labeled “functionalism.”<sup>131</sup>

Functionalism rejects as unrealistic the idea that the powers wielded by the different branches of government can be clearly defined, properly categorized, and then accurately assigned to the proper branch in ways that will create a government sufficiently active, effective, and respectful of the rights of its citizens.<sup>132</sup> Functionalism is instead characterized by the use of balancing tests that tolerate the exercise of one branch’s power by another branch if that exercise does not impede or usurp the central duties of the former branch.<sup>133</sup> Rather than looking to the judiciary to ensure each branch exercises only the proper type of authority, functionalism looks to checks and balances to protect liberty and property while also allowing for effective government action.<sup>134</sup> Checks and balances allow each branch to use the power granted to it to safeguard its own authority.<sup>135</sup> The mechanisms of checks and balances include the desire of those within each branch to protect their own interests and structural checks—such as impeachment provisions or appointments dependent on another branch.<sup>136</sup>

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130. See Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1545–50 (2015).

131. William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21 (1998) (“Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors. Functionalism, at least as an antipode, might be associated with standards or balancing tests that seek to provide public actors with greater flexibility.”).

132. *Id.* at 21–22.

133. *Id.* at 21; see also *Morrison v. Olson*, 487 U.S. 654, 694–95 (1988) (discussing what features of a potential violation of separation of powers the Court has looked at when determining whether the principle has been violated); Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 870–76 (2009) (detailing the differences between the two approaches and identifying key functional approach principles).

134. See Eskridge, *supra* note 131, at 21–22.

135. Michael C. James, *A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe*, 29 CONN. J. INT’L L. 257, 285 (2013).

136. See Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433 (1987) (highlighting the importance of checks and balances within the functional model).

Through these checks and balances, the branches maintain their independence, even while sharing powers in order to govern effectively.<sup>137</sup>

Applying a functional approach to the rule-based decision-making of reform prosecutors leads to a different outcome than the formal approach state courts have begun to apply. Under a formalistic approach, a prosecutor's blanket rule not to enforce certain crimes or punishments is considered a usurpation of legislative power. Functionalism, on the other hand, would ask whether the use of such rules allows the effective exercise of the power granted to prosecutors and whether it would interfere with the effective operation of the powers granted to the legislature or the judiciary. Although state courts to date seem to have been concerned that the exercise of such power by reform prosecutors would interfere with the legislature's authority, that assumption is misplaced. Instead, granting prosecutors such power would hardly, if at all, increase the power they already exercise or decrease the power the legislature exercises.<sup>138</sup> It would, however, allow voters to better understand the choices their elected officials make, which in turn strengthens democratic checks on prosecutorial authority and reduces the threat that power poses to individual liberty.

*B. Functionalism Bolsters Democratic Decision-Making and Checks and Balances*

State courts, including both the Florida Supreme Court<sup>139</sup> and the New York Court of Appeals,<sup>140</sup> have indicated that prosecutors undermine legislative authority when they use rule-based decision making. This concern is not entirely without merit. Legal realism has long taught that "law-on-the-books" is much less important than "law-in-action," and when prosecutors announce they will not enforce a particular statute, that announcement constitutes the law in that jurisdiction for many of the most important practical purposes.<sup>141</sup> There are, of course, differences between a prosecutor choosing not to prosecute a crime and an act not being a crime, and it is much easier for a prosecutor to change his or her mind than a legislature. While the Ex Post Facto Clause protects individuals whose

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137. *See id.*

138. *See id.* at 471–72.

139. *Ayala v. Scott*, 224 So. 3d 755, 758–59 (Fla. 2017).

140. *Johnson v. Pataki*, 691 N.E.2d 1002, 1007 (N.Y. 1997).

141. *See* Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 752–56 (2013) (providing the basics of legal realism).

conduct constitutes a violation of a later-enacted law from prosecution,<sup>142</sup> the same is not true for individuals who violate a law during a prosecutor's period of nonenforcement. Because their conduct was illegal at the time, it is punishable notwithstanding any pre-existing prosecutorial policy.

At first glance, this can appear to represent a significant interference with legislative authority. The difficulty with this argument, however, is that prosecutors already can, and regularly do, frustrate legislative intent in this way.<sup>143</sup> Granting prosecutors the discretion they need to use limited resources effectively means granting them the largely unreviewable discretion to choose to prosecute one crime, or set of crimes, over another.<sup>144</sup> Thus, the question here is not whether prosecutors can frustrate the legislative intent. They can. Instead, the question is whether they should be permitted—or even encouraged—to be clear about what they are doing.

A functional analysis suggests that the answer is clearly “yes” because such clarity provides additional information to voters who can exert at least some control over prosecutorial discretion. There are reasonable doubts about the extent to which the democratic process can effectively constrain prosecutorial discretion.<sup>145</sup> But the fact that voters are not as involved and attentive as they should be does not mean they cannot provide a useful check on prosecutorial abuse. It is certainly better to empower voters to exercise their check by providing them additional information.<sup>146</sup>

It is of course possible that the additional clarity provided by allowing prosecutors to make generally applicable, prospective rules to govern their discretion could lead to more, not less, prosecution. Stephanos Bibas has recognized the possibility that more public involvement will result in more punishment, but he finds that possibility overblown.<sup>147</sup> He also forcefully argues that, in a democracy, voters have a right to influence the prosecutors

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142. *E.g.*, *Bezell v. Ohio*, 269 U.S. 167, 169–70 (1925).

143. *See* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1244–45 (2011).

144. *See supra* note 27 and accompanying text.

145. *See* Barkow, *Administering*, *supra* note 58, at 723–30; Bibas, *Prosecutorial Regulation*, *supra* note 52, at 983–89; Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 591 (2009) (“Unfortunately, prosecutor elections do not deliver on their promise. They do not assure that the public knows and approves of the basic policy priorities and implementation of policy in the prosecutor’s office.”).

146. *See* Bibas, *Prosecutorial Regulation*, *supra* note 52, at 989 (“Better information might also help voters to monitor their agents.”).

147. *Id.* at 990 (“Voters often seem to be reflexively punitive, and more democracy might seem to lead to more overpunishment. While understandable, this concern is overblown.”).

they elect.<sup>148</sup> If we hope to help voters protect their own liberty by checking the discretion of prosecutors, a functional approach to separation of powers will help accomplish that goal.

A functional approach to separation of powers can also protect liberty by allowing other branches of government to limit the discretion of elected prosecutors. The different branches of government have a wide variety of formal and informal tools they can use to discipline the other branches.<sup>149</sup> As James Madison wrote, the structure of government is built such that “[a]mbition [could] be made to counteract ambition”<sup>150</sup>—to the benefit of good government and individual liberty. At the federal level, some of the formal powers that permit the branches to check one another include that executive nominees can ascend to their office only with the consent of the Senate and that Supreme Court justices are nominated by the Executive and confirmed by the Senate.<sup>151</sup> The Senate, in both those circumstances, could decline to confirm a candidate who it believed would pursue policies that trampled on the legislative power.

States have similar systems, many of which are directly applicable the power of prosecutors.<sup>152</sup> Of course, state constitutions vary widely in their scope and application, but in many, the legislature controls important parts of the processes for electing local prosecutors.<sup>153</sup> For example, legislatures generally play a primary role in deciding who elects prosecutors, how they are elected, whether they can run for re-election, and even whether they are elected.<sup>154</sup> In addition, prosecutors’ salaries are often set by the state legislature.<sup>155</sup> Perhaps most importantly, the institutional structure of the

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148. *Id.* at 991.

149. See Michael Leiserson, *Separation of Powers: A New Approach*, 22 GONZ. L. REV. 423, 433–35 (1987) (describing the different powers of the branches of government).

150. THE FEDERALIST NO. 51, *supra* note 29, at 264.

151. U.S. CONST. art. II, § 2, cl. 2.

152. See *Separation of Powers—An Overview*, *supra* note 31.

153. See, e.g., Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1569 (2012) (containing an appendix on how each state admitted to the Union by the Civil War elects district attorneys).

154. See *id.* (noting that many state legislatures have turned state attorneys into elected officials).

155. See Claire Kowalick, *House Bill 2384 Boosts Pay for Texas Judges, Prosecutors*, TIMES REC. NEWS (Aug. 23, 2019, 6:28 PM CT), <https://www.timesrecordnews.com/story/news/local/2019/08/23/salaries-texas-judges-prosecutors-get-boost-house-bill-2384/2097334001/>; Cindy Swirko, *Young Prosecutors, Public Defenders Get Pay Boost*, GAINESVILLE SUN (May 8, 2019, 4:29 PM), <https://www.gainesville.com/news/20190508/young-prosecutors-public-defenders-get-pay-boost>.

state's prosecutorial authority is often defined by the legislature in statutes.<sup>156</sup> Legislatures can expand or contract the oversight to which prosecutors must submit.<sup>157</sup> In some states, like Florida, governors exercise significant authority over state prosecutors, including, for example, the ability to take cases away from local prosecutors for cause.<sup>158</sup>

In this context, it is important to note that these checks operate better, not worse, when prosecutors can be explicit about how they will use their authority. The legislature can respond if it concludes a prosecutor is abusing their discretion—even if the prosecutor is making enforcement decisions on a case-by-case basis. But if the prosecutor wants to elucidate the rules that will guide their discretion, that additional information can only help checks and balances operate. There is no guarantee prosecutors will use rule-based decision-making processes or announce them if they do use them. But at least a functional approach will permit them to do so should they choose. Moreover, there is no guarantee that this process will lead to less aggressive prosecutions. But, again as with voters, the people through their legislature have the right to the criminal justice system they want, within constitutional bounds.

Allowing prosecutors to describe any formal rules they will use to govern their discretion also has a third advantage: the announcement of such rules can contribute to broader debates about the best strategies for addressing criminal justice issues beyond the prosecutor's own jurisdiction. Just as states can act as laboratories of democracy, so too can local jurisdictions, but only if other jurisdictions are aware of the policies being used.<sup>159</sup> Consider, in this context, the nationwide attention that *Ayala* brought to the death penalty.<sup>160</sup> When Aramis Ayala decided to stop pursuing the death penalty in cases within her jurisdiction, the political system sprang into action. Her imposition of a blanket rule sparked a contentious debate in Florida—and across the nation—over the appropriateness of her decision.<sup>161</sup>

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156. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 184 (2019) (“[Prosecutor’s] powers depend on an enforceable statute enacted by the legislature.”).

157. *Id.*

158. *See Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017).

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

160. *See Frances Robles & Alan Blinder, Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/us/orlando-prosecutor-will-no-longer-seek-death-penalty.html>.

161. Joint Response, *supra* note 17, at 8 n.1 (“A search of LexisNexis’s News Database, limited to the eight-month period spanning Ayala’s campaign, yields 1,472 articles in which

### *Conclusion*

The broader context of the contest between Aramis Ayala and the Florida Governor encapsulates many of the main arguments made by this Article. After Ayala announced her decision to not seek the death penalty in any cases in her jurisdiction, the governor exercised his authority to reassign several of Ayala's cases. In response, Ayala called on the courts. She filed an emergency petition for a writ of quo warranto, arguing that the Governor's action was an abuse of power.<sup>162</sup> After consideration, the Florida Supreme Court disagreed and upheld the Governor's decision.<sup>163</sup> Ayala tried to take control of those cases back by forming a board that would decide whether a case should be considered for the death penalty.<sup>164</sup> Each of those steps received significant attention from the press, both local and national, and the Florida legislature.<sup>165</sup> These events also contributed to Ayala's decision not to run for re-election, and will likely be an issue in the election for her replacement.

The ultimate impact of Ayala's fight and the debates that followed are unclear. But it is clear that her decision to announce a generally applicable, prospective rule mobilized two of the most powerful constraints on prosecutorial discretion: the democratic process and checks and balances. Ayala did not encroach upon the authority of other branches of government or threaten the individual liberty of voters by announcing that the death penalty would not be applied in her jurisdiction. Instead, she focused the attention of the governor, legislature, and voters on existing death penalty practices. She thus subjected her office and its exercise of prosecutorial discretion to heightened public and government scrutiny. She empowered other branches and voters to check her discretion by telling them what she would do. She also contributed to a growing national debate on the state of

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the term 'Florida' appears in the same sentence as the term 'death penalty' or 'capital punishment.'").

162. *Id.* at 757.

163. *Id.* at 759.

164. Gal Tziperman Lotan, *Ayala Won't Seek 29 Death-Penalty Cases Back in Orange-Osceola Counties*, ORLANDO SENTINEL (Aug. 31, 2017), <https://www.orlando-sentinel.com/news/breaking-news/os-ayala-scott-death-penalty-supreme-court-20170831-story.html>.

165. Monivette Cordeiro, *State Attorney Aramis Ayala Agrees to Pursue Death Penalty in Future*, ORLANDO WEEKLY (Sept. 2, 2017, 12:33 PM), <https://www.orlandoweekly.com/Blogs/archives/2017/09/02/state-attorney-aramis-ayala-agrees-to-pursue-death-penalty-in-future>.



our criminal justice system in general, and the death penalty in particular.<sup>166</sup> Ayala's decision to announce a generally applicable, prospective rule did not violate the separation of powers; it allowed it to operate effectively.

Ayala's behavior in office may not have been ideal. It would have been preferable for her to announce her intention not to seek the death penalty during her campaign. But her decision to provide a clear description of how she would use her prosecutorial discretion, why she would use it that way,<sup>167</sup> and why she had the authority to do it,<sup>168</sup> should be celebrated, not condemned. Yet condemnation is exactly what a formal approach to separation of powers has convinced state courts to do. Courts now treat generally applicable, prospective rules as violations of separation of powers rather than the proper exercise of prosecutorial discretion, a choice that undermines rather than strengthens the norms the separation of powers is meant to advance.

This Article has shown another way. A functional approach to the separation of powers could allow prosecutors to announce and explain how they will use their authority. It could encourage frankness by prosecutors, who could describe how they will use their discretion. It would avoid the perverse incentives of the formal approach, which encourages prosecutors to obscure their policy choices behind a smokescreen of case-by-case analysis. Allowing this frankness does not undermine executive, legislative, or judicial power. It provides governors, legislators, and judges the information they need to check abuses of prosecutorial discretion. It gives voters the same opportunity. It permits the separation of powers to operate to protect liberty and allow efficient government. Formal approaches undermine those mechanisms by hiding the information voters and government actors need to check prosecutorial discretion. They protect neither individual liberty nor government efficiency. They should be abandoned.

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166. See, e.g., Debbie Elliott, *Florida Governor Pulls Murder Cases from Prosecutor Who Shuns Death Penalty*, NPR (Apr. 3, 2017, 7:37 PM ET), <https://www.npr.org/sections/thetwo-way/2017/04/03/522372829/florida-governor-pulls-murder-cases-from-prosecutor-who-shuns-death-penalty>.

167. Sarah Wilson, *'Time for Me to Move Forward': State Attorney Aramis Ayala Won't Run for Re-Election*, WFTV 9 (May 28, 2019, 10:40 PM), <https://www.wftv.com/news/local/time-for-me-to-move-forward-state-attorney-aramis-ayala-says-she-wont-run-for-re-election/952980586> ("Under my administration I will not be seeking the death penalty in cases handled in my office.") (quoting Ayala).

168. See *id.*