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PROSECUTORIAL NULLIFICATION

ROGER A. FAIRFAX, JR.*

Abstract: It is beyond peradventure that American prosecutors have plenary charging discretion in criminal cases; prosecutors with admissible proof beyond a reasonable doubt may nevertheless decline to seek a conviction. Such declinations are sometimes rooted in legitimate law enforcement rationales, such as the absence of sufficient enforcement resources. A prosecutor, however, might decline a meritorious prosecution simply because he or she disagrees with the applicable law or its application in the particular case. This prerogative to engage in what this Article terms “prosecutorial nullification” has been under-theorized, but raises a number of profound questions: Is prosecutorial nullification a subspecies of legitimate prosecutorial discretion, or should it be considered an extralegal departure from established rules? What is the conceptual relationship of prosecutorial nullification to jury nullification and other like actions of discretion-wielding criminal justice actors? Do the unique institutional role and function of the American prosecutor provide a sufficient rationale for the power to frustrate legislative judgment and undermine (or promote) societal values and norms? This Article seeks to sharpen the definition of “prosecutorial nullification,” contextualize it within the broader conversation about discretion in the criminal process, and offer a nuanced account of its relationship with prosecutorial authority, legitimacy, and the rule of law.

INTRODUCTION

Discretion pervades the American criminal justice system.¹ Although prosecutorial discretion is largely unreviewable and un-

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¹ See, e.g., KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 348–70 (1987).

checked—and, therefore, subject to abuse—it is essential to the efficient operation of the criminal justice system.² Full enforcement of the law would not only be impractical, but also unwise. Prosecutors are expected to make decisions regarding which cases *will* be prosecuted out of the many which *could* be prosecuted.³ Any number of factors might influence the prosecutor's discretion in this regard, including resource limitations, law enforcement priorities, needs or wishes of the victim, and the perceived public interest.⁴ Yet, when, if ever, is the exercise of prosecutorial discretion better characterized as “prosecutorial nullification”?

When a jury acquits despite sufficient proof of guilt, we describe this as “jury nullification.” There seems to be consensus over the definition of jury nullification, even where there is often disagreement over whether a jury has nullified in a given case.⁵ Despite the occasional use of the term in court reporters and legal scholarship, however, a similar consensus has not been reached on the definition of “prosecutorial nullification.” When a prosecutor declines to prosecute despite sufficient proof of guilt, we are unsure what to call it. Some might characterize it as an instance of prosecutorial nullification, while others may characterize it as a garden variety exercise of prosecutorial discretion—a topic thoroughly explored through decades of thoughtful scholarly commentary.⁶

² See, e.g., MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 43 (1973) (quoting KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 216–17 (1969)).

³ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (quoting Robert H. Jackson, U.S. Att’y Gen., Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)) (“One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.”); Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (“If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.”).

⁴ See, e.g., *United States v. Lovasco*, 431 U.S. 783, 794 (1977) (“The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government’s case, in order to determine whether the prosecution would be in the public interest.”) (footnote omitted).

⁵ “Jury nullification” is defined as “the power of the jury to disregard the judge’s instructions and acquit even in the face of conclusive proof of what the judge has defined as an offense.” William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 225 (1996).

⁶ Much of the excellent contemporary scholarship on prosecutorial discretion cited throughout this Article was undoubtedly influenced by several classic works on the subject. See generally DAVIS *supra* note 2; KADISH & KADISH, *supra* note 2; FRANK W. MILLER, *PROSECU-*

This Article treats prosecutorial nullification as a distinct species of prosecutorial discretion that presents a set of intriguing, important, and complex questions: Is prosecutorial nullification an extra-legal departure from established rules governing prosecutorial authority? What is the conceptual relationship of prosecutorial nullification to jury nullification and other similar actions of discretion-wielding criminal justice actors? Do the unique institutional role and function of the American prosecutor provide a sufficient rationale for the power to frustrate legislative judgment and undermine (or promote) societal values and norms? This Article seeks to answer these and other questions while contextualizing prosecutorial nullification within the broader conversation regarding perceived departures from legal rules and norms in the administration of criminal justice.

Part I of this Article sketches a working definition of prosecutorial nullification, which distinguishes it from prosecutorial discretion more generally.⁷ Based upon the premise that the appropriate degree of prosecutorial discretion resides somewhere on the spectrum between “full enforcement” and “complete discretion,” the Article offers a typography of declination rationales improperly characterized as instances of prosecutorial nullification.⁸ This Part concludes with a consideration of those declination rationales presenting greater challenges to the tidy categorization as instances of either prosecutorial discretion or prosecutorial nullification.⁹ Part II uses a number of analytical touchstones to examine whether prosecutorial nullification is compatible with the rule of law.¹⁰ This Part explores whether prosecutors have a greater claim to legitimacy when engaging in nullification than do juries and other discretion-wielding criminal justice actors. In answering this question, Part II considers the unique role of the American prosecutor, democratic accountability, decision-making transparency, professional norms, expertise, and institutional and other constraints.¹¹ Part III briefly contemplates the implications of acknowledging prosecutorial nullification as a distinct species of prosecutorial discretion.¹² Highlighting the benefits and burdens prosecutorial nullification creates for the administra-

TION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (Frank J. Remington ed., 1969); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

⁷ See *infra* notes 15–69 and accompanying text.

⁸ See *infra* notes 45–57 and accompanying text.

⁹ See *infra* notes 58–69 and accompanying text.

¹⁰ See *infra* notes 70–120 and accompanying text.

¹¹ See *infra* notes 89–120 and accompanying text.

¹² See *infra* notes 121–155 and accompanying text.

tion of criminal justice, this Part argues that the recognition of prosecutors' ability to engage in nullification should impact the way in which we choose and regulate prosecutors.¹³ Part III concludes by suggesting potential mechanisms for regulating prosecutorial nullification and ensuring that we select prosecutors who will use this power judiciously.¹⁴

I. TOWARD A COHERENT DEFINITION OF PROSECUTORIAL NULLIFICATION

Although the literature on prosecutorial discretion is voluminous, there is scarce scholarly treatment of "prosecutorial nullification."¹⁵ Likewise, court reporters contain precious few judicial opinions that even mention "prosecutorial nullification" or some derivation of the phrase.¹⁶ Yet, Judge Jack Weinstein, in an article exploring jury nullifi-

¹³ See *infra* notes 123–131 and accompanying text.

¹⁴ See *infra* notes 132–155 and accompanying text.

¹⁵ See, e.g., Francis A. Allen, *The Law as a Path to the World*, 77 MICH. L. REV. 157, 161 (1978) ("A law-giver who has misjudged the community's sense of propriety and proportion by condemning acts that are widely approved or authorizing penalties too extreme, may encounter the phenomenon of nullification: Prosecutors may refuse to prosecute; juries may disregard the evidence and acquit; and judges may in myriad ways frustrate the enforcement of the law."); Schuyler C. Wallace, *Nullification: A Process of Government*, 45 POL. SCI. Q. 347, 348 (1930) (describing results of a survey of 3000 prosecutors across the United States, many of whom "boldly admit[ted] that they nullify both laws and ordinances whenever and wherever it seems desirable"); see also Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design*, 93 CORNELL L. REV. 703, 735–36 n.175 (2008) ("[P]rosecutors may 'nullify' a criminal statute by refusing to enforce it.").

Although largely beyond the scope of this Article, some have applied the label "prosecutorial nullification" to other types of prosecutorial decisions as well. See, e.g., Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 111 (2000) (describing as "prosecutorial nullification" a prosecutor's failure to transfer a juvenile to adult court as required by certain statutory criteria); Christopher Kennedy, *Criminal Sentences for Corporations: Alternative Fining Mechanisms*, 73 CALIF. L. REV. 443, 456–57 (1985) (characterizing as "prosecutorial nullification" the "hesitancy of prosecutors to recommend . . . fines large enough to neutralize the profit motive of corporate crime"); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 703–04 (1989–90) (describing as "a sort of prosecutorial nullification" the situation in which a prosecutor does not forcefully counter an insanity defense put forth by a defendant who, though sympathetic, does not meet the legal standard for insanity); Stephen J. Rackmill, *Printzlien's Legacy, The "Brooklyn Plan," A.K.A. Deferred Prosecution*, FED. PROBATION, June 1996, at 8, 8 (noting that prior to the Federal Juvenile Delinquency Act, which provides safeguards to segregate juvenile offenders from adult detainees, prosecutors with no other choice would often "nullify the process by declining prosecution in the interests of the youngster's welfare").

¹⁶ See, e.g., *United States v. Navarro-Vargas*, 408 F.3d 1184, 1205–06 (9th Cir. 2005) ("It is also possible that an attorney general might decide not to enforce, or at least to under-enforce, politically controversial laws or laws that, in the attorney general's view, are un-

cation, argued that of all the nullification in the criminal justice system, “the greatest nullification takes place as a result of decisions not to prosecute”¹⁷ A prosecutor can decline, for any reason or no reason at all,¹⁸ to proceed against an individual even though there is likely sufficient evidence to convict.¹⁹ In the same way other criminal justice actors—such as law enforcement officers, petit and grand juries, and judges—have the ability to forbear in the justified enforcement of the criminal law or punishment for its violation,²⁰ prosecutors may and do decide—even against the weight of the evidence—that a prosecution will not go forward. This applies not only to the binary charg-

constitutional. In effect, a decision not to prosecute someone who would likely be indicted and could be convicted is a form of prosecutorial nullification.”).

¹⁷ The Honorable Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law to Do Justice*, 30 AM. CRIM. L. REV. 239, 246 (1992). Judge Weinstein believes that prosecutorial nullification dwarfs grand jury and petit jury nullification. *See id.* at 246–47 (“Compared to prosecutorial nullification, grand jury refusal to indict and petit jury refusal to find guilt are of minor significance.”); *see also* Glenn Harlan Reynolds, *Of Dissent and Discretion*, 9 CORNELL J.L. & PUB. POL’Y 685, 686 (2000) (“Despite all the famous cases of alleged juror nullification, it is ‘prosecutorial nullification’—more commonly known as ‘prosecutorial discretion’—that plays the greatest part in keeping malefactors out of jail.”).

The closest competitor, perhaps, would be law enforcement. Of course, police are also called to make discretionary calls, and also operate under the reality that full enforcement of the law is both unwise and impractical. *See, e.g.*, KADISH & KADISH, *supra* note 2, at 73–80; Nirej Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY (forthcoming 2011); Weinstein, *supra*, at 246. Furthermore, many potential cases brought to the attention of the police are never passed on to the prosecutor. *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 561–62 (1960). Yet, cases can be generated by the prosecutor, and furthermore, the prosecutor gets the final discretionary decision on all cases the police desire to pursue.

¹⁸ *See* *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 431 n.33 (1976); Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 467 (2009). A narrow exception to prosecutors’ broad discretion can be found in the Constitution’s prohibition of selective prosecution on racial and other impermissible grounds. *See* *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Selective prosecution claims, however, are often stymied by the difficulty in obtaining discovery. *See* Angela J. Davis, *Prosecution and Race: Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 42–46 (1998).

¹⁹ *See* Fairfax, *supra* note 15, at 734–36; Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 532 n.72 (2005) (“[A] decision not to indict ‘has long been regarded as the special province of the Executive Branch, inasmuch as it is that the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.””) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)); *see also* *Young v. U.S. ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 825 (1987) (Scalia, J., concurring in the judgment).

²⁰ *See* GREENAWALT, *supra* note 1, at 348–70; Fairfax, *supra* note 15, at 732–43. *See generally* Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785 (2007).

ing/declination decision, but also to a prosecutor opting to charge a lesser offense than that which she can readily prove in a case.²¹

Perhaps the scarcity of references to “prosecutorial nullification” is a by-product of the lack of consensus and clarity as to what it is.²² Whereas a definitional and conceptual consensus has been reached on “jury nullification,” so-called “*prosecutorial* nullification” seems to have escaped thorough consideration and analysis.²³ Commentators rarely ac-

²¹ When the phrase “decline to prosecute” is used in this Article, it includes both opting for a significantly less serious charge than is warranted and the withdrawal or *nolle prosequi* of an earlier-filed, readily provable charge. A prosecutor’s decision to opt for a lesser charge than is warranted by the criminal conduct might be driven, for example, by a desire to avoid the legislature’s mandatory minimum sentencing scheme. See, e.g., David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 594 (2005); Daniel P. Kessler & Anne M. Pichl, *The Role of Discretion in the Criminal Justice System*, 14 J.L., ECON. & ORG. 256, 274 (1998); Vorenberg, *supra* note 6, at 1529.

Like the decision to charge in the first instance, the decision to *nolle prosequi* or move to dismiss charges is subject to very little review, except that the judge in some instances must formally grant the motion. See, e.g., Karen H. Schneider et al., Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 AM. CRIM. L. REV. 577, 584 (1973); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 784 n.157 (1976). For purposes of this Article, undercharging and dismissals are included in the concept of prosecutorial declination, unless otherwise noted.

²² This is not so with jury nullification. *Black’s Law Dictionary* defines “jury nullification” as “[the] knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the [juror’s] sense of justice, morality, or fairness.” BLACK’S LAW DICTIONARY 936 (9th ed. 2009) (emphasis added). Leading commentators on both sides of the normative debate over jury nullification seem to adhere to this definition as well. See, e.g., Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) (“When a jury disregards evidence presented at trial and acquits an otherwise guilty defendant, because the jury objects to the law the defendant violated or to the application of the law to the defendant, it has practiced jury nullification.”); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 253 (1996) (“Nullification occurs when the defendant’s guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit.”). The same is true for courts, which fully acknowledge (though typically condemn) the practice and power of jury nullification. See, e.g., *State v. Depaz*, 204 P.3d 217, 227 n.1 (Wash. 2009) (following *Black’s Law Dictionary* definition); *Holden v. State*, 788 N.E.2d 1253, 1254 (Ind. 2003). Indeed, the mainstream discussion surrounding jury nullification has moved far beyond the foundational questions of *whether* it exists and *what* it is, and regularly explores *when* jury nullification has occurred and what challenges it poses for the rule of law and the fair and efficient administration of justice. See, e.g., Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1149–53 (1997); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 582–84 (1939); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877, 947–58 (1999).

²³ See, e.g., Sean Keveney, *The Dishonesty Rule: A Proposal for Reform*, 81 TEX. L. REV. 381, 394 n.72 (2002) (“Although most academic interest focuses on jury nullification, prosecutors and judges wield a surprising amount of discretion. The exercise of ‘prosecutorial nullification’ is a recognized aspect of the enforcement of the criminal law.”). It is tempt-

knowledge “prosecutorial nullification” (at least not explicitly), instead recognizing prosecutorial “leniency” as an unremarkable species of prosecutorial discretion.²⁴ At the same time, some observers who do acknowledge “prosecutorial nullification” seem willing to simply apply the label to any circumstance where a prosecutor has enough evidence to convict but declines to prosecute anyway.²⁵ Prosecutorial nullification deserves a more nuanced analysis, which considers the *reasons* for the prosecutorial declination and distinguishes nullification from prosecutorial discretion more generally.

Given the lack of common understanding regarding prosecutorial nullification as its own concept, this Part attempts to provide a working definition of prosecutorial nullification. Section A identifies the full spectrum of prosecutorial discretion.²⁶ Section B then highlights cir-

ing to simply analogize prosecutorial nullification to jury nullification and borrow the definition from the latter. However, as is discussed below, there are important reasons why prosecutorial nullification deserves careful analysis, distinct from that of other discretion-wielding actors in the criminal justice system. *See infra* notes 70–120 and accompanying text.

²⁴ *See, e.g.*, Vorenberg, *supra* note 6, at 1551–52; *see also* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1422 (2008).

Prosecutors may decline to bring charges against someone they know committed the offense for any number of reasons, including that the facts of the case warrant lenient treatment. Similarly, judges can decide that, notwithstanding that a defendant has been found guilty, the circumstances of the case call for no or minimal punishment. That looks something like nullification, although few if anyone call it that.

Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 *RUTGERS J.L. & PUB. POL’Y* 411, 494–95 (2007).

²⁵ *See, e.g.*, William H. Simon, *The Ethics of Criminal Defense*, 91 *MICH. L. REV.* 1703, 1724 (1993) (characterizing a discussion of classic prosecutorial discretion as pertaining to “prosecutorial nullification”) (citing KADISH & KADISH, *supra* note 2, at 45–66).

Although the term “nullification” is generally thought to be pejorative (particularly in the context of jury nullification), the consequences of nullification are not necessarily undesirable. *See, e.g.*, Fairfax, *supra* note 15, at 708, 717. For example, the juries that nullified in order to resist the enforcement of unfair slavery and Jim Crow-era laws are often celebrated today. On the other hand, juries throughout American history also have been accused of nullifying in order to frustrate enforcement of civil rights laws or to impede prosecutions of those charged with racial violence. Likewise, a prosecutor might decline to prosecute a remorseful individual who, through a brief lapse in judgment, committed a nonviolent shoplifting offense. A prosecutor, due to his or her odious personal beliefs, might also refuse to prosecute *any* defendants for domestic violence offenses. Both of these exercises of prosecutorial discretion would be described as prosecutorial nullification under this Article’s definition, but they obviously have drastically different normative implications. *See infra* notes 36–44 and accompanying text.

²⁶ *See infra* notes 30–35 and accompanying text.

cumstances of prosecutorial discretion that are properly characterized as prosecutorial nullification.²⁷ Prosecutorial declinations that are not properly characterized as prosecutorial nullification are examined in Section C.²⁸ Finally, Section D examines declination rationales that cannot be so easily characterized.²⁹

A. *Spectrum of Discretion: Full Enforcement and Complete Discretion Models*

Imagine a spectrum along which varying assessments of the appropriate scope of a prosecutor's discretion are plotted. At one end of the spectrum is the "full enforcement" model, in which it is urged that a prosecutor has the duty to prosecute every meritorious case that comes across her desk. Where a credible allegation is supported by sufficient admissible evidence, the prosecutor must pursue the charges. Any failure to do so—for whatever reason—is a breach of that duty. At the other end of the spectrum is the "complete discretion" model, which assumes that a prosecutor has plenary discretion to bring charges in only those cases that she deems appropriate and to decline to prosecute those cases that she does not. Under this view, a prosecutor's decision not to charge in a given case—for any reason at all—is deemed an appropriate exercise of discretion.

This spectrum is important to consider because one's definition of "prosecutorial nullification" (or determination of whether it even exists) is ultimately determined by where on this spectrum one's view of the proper scope of prosecutorial discretion falls. Certainly, given the realities of modern criminal justice, few, if any, would lay claim to a vision of prosecutorial discretion residing at either extreme. Both the full enforcement model and the complete discretion model carry negative consequences most would be unwilling to accept. Full enforcement of the law would be deemed by most as too inflexible and resource intensive to be workable in our society.³⁰ Likewise, complete and unfettered discretion might too easily lead to the sort of arbitrary or improperly discriminatory criminal law enforcement our legal culture has shunned

²⁷ See *infra* notes 36–44 and accompanying text.

²⁸ See *infra* notes 45–57 and accompanying text.

²⁹ See *infra* notes 58–69 and accompanying text.

³⁰ See, e.g., KADISH & KADISH, *supra* note 2, at 43 (quoting DAVIS, *supra* note 2, at 216–17). Professor Donald Dripps does argue, however, that adoption of a full enforcement model would compel legislatures to excise unfair or unwise laws from the statute books, as their burdens would fall on *everyone*, privileged or otherwise. See Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1176 (2005).

as a normative and constitutional matter.³¹ Thus, as we move away from either extreme, we find common articulations of the scope of prosecutorial discretion.

At the complete discretion extreme, prosecutorial nullification does not exist. There is no such thing as prosecutorial nullification because there are no implicit constraints on the ability of the prosecutor to exercise discretion. As long as these exercises of discretion do not contravene any formal legal limits (such as constitutional prohibitions of discrimination on impermissible grounds), they do not constitute nullification. Thus, the closer one is to the complete discretion end of the spectrum, the less likely she will be to characterize a prosecutorial declination as prosecutorial nullification.

At the full enforcement extreme, *any* decision not to prosecute where there exists sufficient evidence to convict would constitute prosecutorial nullification. Under this conception, the prosecutor's job is to fully enforce the law. Where the prosecutor is made aware of conduct that contravenes a criminal statute and has access to admissible evidence sufficient to support a likely conviction, she should prosecute the case.³² If a prosecutor declines to prosecute a case she likely would have won, she has nullified. The closer to the full enforcement end of the spectrum one's understanding of the scope of prosecutorial discretion is, the more likely she is to consider a prosecutorial declination to be prosecutorial nullification.

Most courts and commentators, not surprisingly, seem to situate the scope of discretion somewhere between the two extremes, but much closer to the "complete discretion" end of the spectrum.³³ In this view, a prosecutor may decline to prosecute a matter even if she has enough evidence to convict. Although prosecutors are thought to have broad authority to make decisions on grounds other than the sufficiency of the

³¹ See, e.g., *Bordenkircher*, 434 U.S. at 365 ("There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."); *Cox v. Louisiana*, 379 U.S. 536, 557–58 (1965) (discussing the nexus between unfettered discretion of public officials and the danger of selective enforcement in violation of equal protection principles).

³² It is possible near the full enforcement end of the spectrum for there to be respect for "parameters of acceptable deviance" in which a norm develops permitting slight violations of the law without enforcement. See, e.g., Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 56 (2006). Such a norm, however, which merely supplements the underlying applicable legal rule, still operates as a constraint on discretion.

³³ See, e.g., *Heckler*, 470 U.S. at 832; *United States v. Lovasco*, 431 U.S. 783, 794 (1977).

evidence,³⁴ the critical question for defining prosecutorial nullification is *which* non-evidentiary grounds may legitimately inform prosecutorial discretion.³⁵

B. What Prosecutorial Nullification Is

This Article characterizes “prosecutorial nullification,” as those circumstances in which a prosecutor has sufficient evidence to secure a conviction against a defendant for conduct that violates a criminal law, but declines prosecution because of a disagreement with that law or because of the belief that the application of that law to a particular defendant or in a particular context would be unwise or unfair.³⁶

There are certain examples where an exercise of prosecutorial discretion would certainly fall within this definition of prosecutorial nullification. The first of these is where a prosecutor declines a prosecution simply because she perceives the sanction prescribed by the law to be

³⁴ See, e.g., *Lovasco*, 431 U.S. at 794 (“The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government’s case, in order to determine whether the prosecution would be in the public interest.”); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.”).

³⁵ Professor Schuyler Wallace, in a 1930 article reporting results of a survey of American prosecutors on the issue of prosecutorial nullification, identified several motivations for declinations to prosecute meritorious cases, including: (1) “desire to make their actions conform to local public opinion”; (2) belief that “enforcement of the particular law in question will produce injustice rather than justice”; and (3) “confidence that through . . . reasonable discretion on their part, better social results will be achieved than through the strict enforcement of the law.” See Wallace, *supra* note 15, at 358. Professor Wallace concluded that “these enforcement officers have been and are substituting their own judgments for that of the constitutionally ordained policy-determining body and in so doing have actually been nullifying the law.” *Id.*; see also Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 14 (1971).

³⁶ Again, the term “declination” includes a variety of prosecutorial decisions to grant leniency, including selecting a lesser offense than is warranted by the evidence. See *supra* notes 18–21 and accompanying text; see also Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819, 845 (1990) (describing as “prosecutorial nullification” circumstances when prosecutors “undercharged” by failing to bring felony murder charges when the evidence supported them) (citing Hugo Bedau, *Felony Murder Rape and the Mandatory Death Penalty: A Study in Discretionary Justice*, 10 SUFFOLK U. L. REV. 493 (1976)).

As a consequence of criminal codes with overlapping statutes, prosecutors often have multiple charging options for a single criminal transaction. See *infra* notes 105–109 and accompanying text; see also Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1117–18 (2005).

too harsh.³⁷ This is particularly likely where the law has diminished or eliminated the prosecutor's discretion to advocate for a particular sentence.³⁸ Likewise, a prosecutor may believe that a law is directed toward conduct that should not have been criminalized in the first place. In addition, a prosecutor might believe the enforcement of a law to be detrimental to broader community or societal interests.³⁹ These rationales have long been the basis for perceived instances of jury nullification.⁴⁰ Likewise, when a prosecutor employs these rationales for declining to prosecute, despite evidence sufficient to convict, the label "prosecutorial nullification" is appropriate.⁴¹

³⁷ For example, during the decade in which New York state imposed capital punishment, a prosecutor in New York declared that he would not seek the death penalty in any capital case and refused to seek the death penalty in a high-profile case involving the killing of police officer. Gail Robinson, *The DAs of New York*, GOTHAM GAZETTE (Mar. 7, 2005), <http://gothamgazette.com/article/20050307/200/1340>; see also *Enmund v. Florida*, 458 U.S. 782, 796 (1982) (noting that "it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder"); Finkel, *supra* note 36, at 842–43 (proposing a statistically accurate way to determine the likelihood of prosecutorial nullification of accomplice felony murder cases).

³⁸ See, e.g., Bjerk, *supra* note 21, at 594; Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1683 n.3 (1992) ("Over the centuries, historians have recounted numerous instances in which judges, juries, or prosecutors nullified an oppressive law or evaded its formal strictures to avoid imposing disproportionate penalties on individual lawbreakers."); Kessler & Piehl, *supra* note 21, at 274; Mark W. Owens, Note, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PAC. L.J. 881, 908 (1995) (describing prosecutorial nullification in the context of the mandatory Three Strikes law).

³⁹ Simon, *supra* note 5, at 226 (describing as "nullification," "the prosecutor's power to decline to enforce legislation when enforcement would not serve the public interest").

A popular cable television series, *The Wire*, depicted a police commander who declared that enforcement of drug possession and distribution laws would cease in a defined area of Baltimore, Maryland, subject to certain conditions, including that the narcotics distributors refrain from violence. *The Wire: Amsterdam* (HBO television broadcast Oct. 10, 2004), available at <http://www.hbo.com/the-wire/episodes#/the-wire/episodes/3/29-amsterdam/synopsis.html>.

⁴⁰ See Fairfax, *supra* note 15, at 711–16. Jury acquittals based on such rationales have been described as "classical" or "first kind" jury nullification. See, e.g., W. William Hodes, *Lord Brougham, The Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1088–97 (1996) (distinguishing jury nullification of the "first kind" (disagreement with the law), "second kind" (disagreement with the application of the law in a particular case), and "third kind" (disagreement with neither the law nor the application but acquitting to send a message)).

⁴¹ See Robert M. Paltumbos, *Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057, 1071–72 (2005) ("We accept the propriety of prosecutorial discretion in the criminal justice system as a check on unfair laws.").

In a similar vein, a prosecutor, though not necessarily opposed to a law or prescribed sanction *per se*, might determine that the *application* of a law is unwise or unfair. For example, a prosecutor might be persuaded against applying a law to a particular defendant, such as when she declines to prosecute a vulnerable person living in a high-crime part of the city for gun possession. In addition, a prosecutor's discretion might be influenced by the context in which the law was broken, such as with a refusal to prosecute a homeless person for trespassing after she was found sleeping in an office building during a severe blizzard. These would be examples of the prosecutor declining a case not because of a disagreement with the law, but because of the belief that the would-be defendant's moral (if not legal) justification for violating the law should prevent the law's application in the particular case.⁴² Jury nullification often is motivated by jurors' perceptions of an unfair or unwise application of a generally non-controversial law in a specific case.⁴³ Similarly, prosecutorial nullification is an appropriate characterization of exercises of discretion based on the prosecutor's as-applied concerns about criminal laws.⁴⁴

C. *What Prosecutorial Nullification Is Not*

It is also important to articulate what prosecutorial nullification is *not*. Prosecutors often decline prosecution because they do not have the evidence they feel is necessary to secure a conviction on a given charge, or because a given prosecution, even if likely successful, would undermine more important law enforcement interests.⁴⁵ In addition, a

⁴² See, e.g., Vorenberg, *supra* note 6, at 1551. Professor Josh Bowers has termed this "normative innocence." Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1678 (2010) ("A criminal is normatively innocent where his conduct is undeserving of communal condemnation, even if it is contrary to law.").

⁴³ See, e.g., Hodes, *supra* note 40, at 1094–95 (describing jury nullification of the "second kind," where the jury disagrees with application of the law in a given case).

⁴⁴ See Cassak & Heumann, *supra* note 24, at 494–95 ("Prosecutors may decline to bring charges against someone they know committed the offense for any number of reasons, including that the facts of the case warrant lenient treatment. . . . That looks something like nullification, although few if anyone call it that."). Some have argued for a narrower definition of prosecutorial nullification. See, e.g., Bowers, *supra* note 42, at 1685 n.137 (distinguishing "categorical nonenforcement"—which might qualify as nullification—from "equitable discretion"—which would not).

⁴⁵ See GREENAWALT, *supra* note 1, at 349 (distinguishing between prosecutorial declinations for evidence sufficiency or law enforcement reasons and "failures to prosecute (or to prosecute for crimes as serious as those actually committed) based, at least, in part, on judgments about the gravity of offenses or the character of actors").

prosecutor might decline prosecution in order to avoid incurring undue systemic costs, or out of consideration for a victim's needs or wishes. As is discussed below, none of these rationales for declining prosecution is properly characterized as prosecutorial nullification.⁴⁶

1. Sufficiency of the Evidence

Declinations based on a prosecutor's genuine assessment of the sufficiency of evidence should be excluded from the category of "prosecutorial nullification." Where a prosecutor has substantial concern regarding either the quantity or quality of evidence necessary to initiate criminal charges or ultimately to secure a conviction, the decision not to proceed with a prosecution is not properly deemed to be "nullification."⁴⁷ Certainly, a prosecutor who believes she would not be able to garner proof beyond a reasonable doubt, or that a constitutionally in-

⁴⁶ Of course, with any discussion of the prosecutor's discretion, plea bargaining is the elephant in the room. See, e.g., James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 680 ("Charging discretion is sometimes exercised to reflect the prosecutor's belief that the circumstances call for leniency, but its most important use is in plea bargaining."). This is particularly so with regard to prosecutorial nullification. Indeed, plea bargaining, which is the method by which the vast majority of criminal cases are disposed, often involves the prosecutor agreeing to a guilty plea to a lesser offense than might be proven at trial. See, e.g., Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 409 (2008); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90, 93-94 (2005). Also, a prosecutor may agree to dismiss a meritorious charge against a defendant in exchange for a guilty plea to another offense. The undercharging or declinations associated with plea bargaining are often motivated by the various reasons discussed below and, as such, may or may not represent prosecutorial nullification under the definition advanced in this Article. See, e.g., Vorenberg, *supra* note 6, at 1532-35.

Regardless, it is clear that the plea bargaining process is fertile ground for low-visibility nullification opportunities. See Kessler & Piehl, *supra* note 21, at 259.

Virtually all defendants' cases are settled by plea bargain and therefore are never subject explicitly to an application of formal law. Research in sociology and criminology suggests that this may enable actors in the system to resolve the vast majority of cases according to their own internal social norms rather than statutory rules.

Id.

⁴⁷ The quantum of evidence necessary to establish or maintain criminal charges at the relevant pretrial stages is probable cause. See MILLER, *supra* note 6, at 83-109. Although there are varying standards of "probable cause" employed at different stages of the pretrial process, evidence subject to probable cause is subject to a much lower threshold than evidence subject to the standard of "proof beyond a reasonable doubt," which is necessary for a conviction. See *id.*; Fairfax, *supra* note 15, at 720-23. For example, probable cause for purposes of the preliminary hearing and grand jury indictment may be established through evidence that would be inadmissible at trial, including hearsay evidence. See *Costello v. United States*, 350 U.S. 359, 363 (1956).

firm investigative action will lead to suppression of key evidence, would not be engaging in nullification by declining to prosecute a matter any more than would a jury that acquits because the evidence fails to reach the constitutionally required threshold. A prosecutor may also be deterred from prosecuting a seemingly meritorious case because of concerns about whether a key witness's testimony (even if true) will be deemed credible under cross-examination, or because certain disclosed exculpatory evidence may likely give rise to reasonable doubt in the minds of jurors. Even where reasonable minds could differ over whether the evidence available to the prosecutor is, indeed, sufficient to establish probable cause or to secure a conviction, a prosecutor who concludes, based on her good-faith assessment of the evidence, that the evidence is insufficient does not engage in prosecutorial nullification.

2. Law Enforcement Purposes

Also excluded from this definition of prosecutorial nullification would be instances when a prosecutor likely could secure a conviction in a case but declines to do so for legitimate law enforcement purposes.⁴⁸ A prosecutor might decline prosecution to secure the cooperation of a potential defendant who refuses to testify or provide information unless charges against him are dropped or reduced.⁴⁹ Although such formal or informal immunity deals prevent prosecutors from proceeding against individuals who likely would be convicted at trial, they often facilitate conviction of more serious offenders or more desirable targets.⁵⁰

Furthermore, as is the case in most American jurisdictions, there are not sufficient resources available to the prosecutor's office to prose-

⁴⁸ *But see, e.g.*, Adam Raviv, *Torture and Justification: Defending the Indefensible*, 13 *GEO. MASON L. REV.* 135, 178–79 n.132 (2004) (expressing concern with “prosecutorial nullification” in the torture prosecution context in which “[p]olitically driven prosecutors could well decline to prosecute officials who torture members of unpopular political or ethnic groups, even when there is clear evidence that the torture may not have been justified”).

⁴⁹ *See, e.g.*, ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* 49 (2009); Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 *CARDOZO L. REV.* 875, 876 (2002); David A. Sklansky, *Stars, Singleton, and the Prosecutor's Role*, 26 *FORDHAM URB. L.J.* 509, 513 (1999). Such bargains must be disclosed to the defendant against whom any such testimony might be used. *See Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

⁵⁰ Or, in some cases, of less serious offenders. *See, e.g.*, Libby Copeland, *Kemba Smith's Hard Time*, *WASH. POST*, Feb. 13, 2000, at F1.

cute every meritorious case.⁵¹ Prosecutors often must decide not to pursue one matter (or category of matters) in order to have the investigative or prosecutorial capacity to prosecute other matters deemed to be of higher priority.⁵² For example, assume a prosecution for a relatively minor offense involved resource-intensive trial preparation that would compromise an office's ability to prosecute an organized crime ring. The decision to forbear the resource-intensive prosecution in order to prosecute the organized crime case is not properly characterized as prosecutorial nullification, assuming the prosecutor is making a genuine determination that the former prosecution should be declined for law enforcement purposes.⁵³

3. Systemic Costs

Distinct from the preservation of law enforcement and prosecutorial resources is the desire to ensure efficient criminal justice and court administration.⁵⁴ Prosecutors are not merely repeat players, but officers of the court. Like all government lawyers, prosecutors have an obligation to facilitate the smooth operation of the justice system.⁵⁵ If a particular case, though meritorious, would represent a disproportionate burden on the justice system relative to the benefit it provides, a prosecutor might decide not to prosecute. For example, if a case would require months of trial time (and concomitant courthouse resources) but would be unlikely to vindicate a significant state interest beyond the symbolic victory of a conviction, a prosecutor's decision not to proceed should not be characterized as prosecutorial nullification. This would

⁵¹ In the wake of the recent economic crisis, even prosecutors' offices have suffered significant budget cuts. See, e.g., Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 275–76.

⁵² See, e.g., Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 418–19 & nn.22–23 (2009) (describing how resource constraints have forced prosecutors across the nation to shift or narrow enforcement priorities).

⁵³ Obviously, there is some slippage here, as a prosecutor could decline to prosecute a certain offense that violates a law she does not value (or that is committed against a victim against whom she is biased, or is committed by a defendant in favor of whom she is biased) in order to preserve resources to prosecute another offense violating a law she does value (or that is committed against a victim she does favor, or committed by a defendant she does not). Although such a declination might be easily characterized as having been made for a "law enforcement purpose," it is perhaps also an example of prosecutorial nullification. See *infra* 56–57 and accompanying text.

⁵⁴ See MILLER, *supra* note 6, at 191.

⁵⁵ See, e.g., Joshua I. Schwartz, *Two Perspectives on the Solicitor General's Independence*, 21 LOY. L.A. L. REV. 1119, 1137–38 (1988) (discussing the duty of government lawyers to help preserve court resources).

be true even if conviction were all but assured and the prosecution would require minimal expenditure of *law enforcement* resources.

4. Victim-Related Considerations

A prosecutor might decline a meritorious criminal case because the potential harm to the victim resulting from the prosecution might outweigh the benefit to the victim and society.⁵⁶ While modern criminal cases are brought in the name of the state, not the individual victim,⁵⁷ a victim's strong desire to protect her privacy, livelihood, or family would certainly weigh prominently in a prosecutor's decision about whether to decline a case. Even where a prosecutor might decline a case *against* the victim's wishes, but ostensibly for the victim's good, such a declination would not constitute prosecutorial nullification.

Similarly, there may be criminal cases that cannot proceed without the disclosure of sensitive law enforcement or national security information. The importance of protecting such sensitive information may strongly influence a prosecutor's willingness to prosecute these cases. Where a prosecutor declines to prosecute a meritorious case in these circumstances, his decision is not properly characterized as prosecutorial nullification.

D. *Nullification or Discretion? More Challenging Questions*

While the previous rationales fall outside of this Article's definition of prosecutorial nullification, the rationales below defy tidy characterization.

⁵⁶ See, e.g., MILLER, *supra* note 6, at 173–78. For example, perhaps the case can only be tried in a way that will reveal evidence that is deeply embarrassing to the alleged victim. Of course, certain categories of offenses are incompatible with such considerations. A murder victim's family would be unlikely to persuade a prosecutor with sufficient evidence against prosecuting the homicide charge. Furthermore, some offenses, such as domestic violence, are often subject to a "zero tolerance" prosecution policy. Even were a victim of domestic violence to recant her accusation (as some do), the government will often press forward with the charges. See Robert C. Davis et al., *Effects of No-Drop Prosecution of Domestic Violence upon Conviction Rates*, JUST. RES. & POL'Y, Fall 2001, at 1, 2. Indeed, some offices have taken to prosecuting the domestic violence victims for perjury and obstruction of justice when they give contradictory, exculpatory testimony at the trial of their alleged abuser (with whom they have reconciled by the time of trial). See Njeri Mathis Rutledge, *Turning a Blind Eye: Perjury in Domestic Violence Cases*, 39 N.M. L. REV. 149, 183–84 (2009).

⁵⁷ See, e.g., Fairfax, *supra* note 52, at 433.

1. Alternative (Non-Criminal) Sanctions

A prosecutor might decline a meritorious prosecution because other remedies are available to vindicate the state's interest in justice.⁵⁸ In a case in which civil or administrative sanctions are sufficient to punish and deter illegal conduct, the prosecutor might decide that no criminal charges need be brought.⁵⁹ There is a reasonable argument that this exercise of prosecutorial discretion should be characterized as prosecutorial nullification. After all, the prosecutor here is usurping the legislature, which has proscribed certain conduct and prescribed a criminal sanction for that conduct. This sanction should arguably be imposed regardless of other consequences the defendant might suffer.⁶⁰ On the other hand, the presence in the law of both civil and criminal sanctions covering the same conduct may be viewed as empowering government attorneys to decide upon the optimal way—whether through criminal or civil action—to vindicate the state's interest in deterring or punishing undesirable conduct.⁶¹

Alternatively, a prosecutor might decline prosecution because the putative defendant has already suffered enough. Perhaps the defendant has already been subjected to an embarrassing arrest or served a lengthy pretrial detention while awaiting formal charges. For some offenses and some defendants, the notoriety of the defendant's arrest or loss of liberty might be deemed by the prosecutor as having served sufficient

⁵⁸ See, e.g., MILLER, *supra* note 6, at 213–52.

⁵⁹ Here, I do not necessarily contemplate formal deferred prosecution agreements or “probation before judgment” arrangements, as these mechanisms may be implemented through statute or promulgated as official prosecutorial policies pursuant to legislative command. See, e.g., 18 U.S.C. § 3607(a) (2006) (permitting pre-judgment probation at judge's discretion in low-level drug possession cases); WIS. STAT. § 938.245 (2009–10) (permitting deferred prosecution in juvenile cases); see also Roger A. Fairfax, Jr., *Remaking the Grand Jury*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 323, 336–39 (Roger A. Fairfax, Jr. ed., 2010) [hereinafter GRAND JURY 2.0] (describing criminal deferred prosecution agreements, criminal alternative dispute resolution, and drug courts).

⁶⁰ Along with whatever sanction might be imposed theoretically would come the community's “condemnation” of the person's commission of a criminal wrong. Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1282–83 (Joshua Dressler ed., 2d ed. 2002).

⁶¹ Of course, the government can—and often does—pursue both civil and criminal actions against a defendant. It should be noted that this discussion addresses only *governmental* civil enforcement and does not contemplate the existence of private tort claims as a rationale for prosecution declination. See, e.g., L.B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 83 (1948). For example, were a prosecutor to decline a meritorious murder prosecution because the victim's family had the ability to pursue a wrongful death case, this would clearly represent an instance of prosecutorial nullification.

retribution or deterrence purposes. In addition, the circumstances or consequences of the offense itself may have already caused extraordinary harm to the offender.⁶² Such rationales for prosecutorial declination, even if characterized as prosecutorial nullification, demonstrate how the concept of prosecutorial nullification is much more nuanced than might be appreciated at first glance.

2. Desuetude

Some criminal laws remain on the statute books but are not enforced because they no longer comport with modern societal values.⁶³ Prosecutors' refusals to prosecute conduct violating a statute that has fallen into desuetude have been properly characterized as prosecutorial nullification.⁶⁴ Scholars have discussed the extent to which legislatures have shirked the duty to periodically review existing criminal laws in order to ensure they are compatible with contemporary values.⁶⁵ Some might argue that by declining to enforce statutes that are no longer in tune with popular sentiment, prosecutors are giving legislatures a pass. Indeed, legislators have little incentive to repeal unwise or outdated laws if prosecutors do not expose such shortcomings by enforcing those statutes.⁶⁶ On the other hand, from the legislature's perspective, we

⁶² Take, for instance, a prosecutor who declines to pursue a case against a harried parent who absent-mindedly left his child strapped in the car seat in a closed vehicle on a hot day. That prosecutor is not declining because she disagrees with the criminalization of manslaughter or depraved heart murder, or because she thinks that there was moral justification for the father to have committed the offense. The prosecutor is likely declining prosecution because when a parent, even through criminal negligence or extreme recklessness, unintentionally causes the death of a child, there is no punishment greater than the emotional and psychological consequences already being suffered by the would-be defendant. See Bowers, *supra* note 42, at 1682.

⁶³ See Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 5 (1966); Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209–10 nn.4 & 6 (2006) (noting a collection of sources exploring the doctrine of “desuetude”).

⁶⁴ See, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 84 (1998) (“Prosecutorial nullification is widely considered legitimate in circumstances where the application of a statute produces an especially harsh or anomalous result or where an entire statute, usually an old one, seems out of tune with contemporary sentiment—for example, the laws against fornication.”); Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 261 (2007) (noting that “most obscure or superfluous statutes in criminal codes are effectively nullified by prosecutors”).

⁶⁵ See, e.g., Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1354 (2008); Brown, *supra* note 64, at 261.

⁶⁶ See, e.g., Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 390 (1963); Myers, *supra* note 65, at 1354 (discussing that prosecutors' decli-

have the classic chicken-and-egg problem; a statute falls out of use only because prosecutors and other law enforcers fail to enforce it.

Nevertheless, even where the prosecutor refuses to prosecute defendants who have violated laws that have fallen into desuetude, it is still the case that the prosecutor is refusing to enforce a valid criminal statute. As with a prosecutor who declines a case because of her disagreement with the wisdom of a law or its application in a particular case, a prosecutor who declines to prosecute a meritorious case under a statute that has fallen into desuetude, engages in prosecutorial nullification.⁶⁷

3. Hybrid Rationales

Another conceptual difficulty lies in the reality that the many rationales for prosecutorial decisions not to prosecute do not operate in isolation from one another. A prosecutor might decide against prosecution of a meritorious case both because law enforcement interests would be disserved by prosecution and because the prosecution would impose tremendous costs on the system. This hybrid rationale would not fall under the definition of prosecutorial nullification advanced in this Article. Likewise, a prosecutor might decline to prosecute a meritorious case both because she worries about the impact of prosecution on the defendant's family and because she disagrees that the conduct should be criminalized in the first place. This hybrid rationale would fall easily within this Article's definition of prosecutorial nullification.

Hybrid rationales, however, might also straddle the definitional line dividing prosecutorial nullification from prosecutorial discretion. For example, a prosecutor might decline prosecution both because he has sympathy for a defendant *and* because he rationally prefers to utilize limited prosecutorial resources for more serious offenses. Certainly, the presence of a nullificatory rationale (even when accompanied by a genuine, non-nullificatory reason) would seem to support the characterization of the declination as prosecutorial nullification. In such cases, the non-nullificatory reason for declining prosecution may, however,

nation to enforce statutes because of desuetude removes incentives of legislatures to remove bad laws) (quoting Brown, *supra* note 64, at 261).

⁶⁷ As discussed above, the characterization that the prosecutor is engaging in nullification does not mean that the outcome of such nullification is normatively undesirable. *See supra* 36–44 and accompanying text. Whether we are comfortable with nullification with regard to the rule of law, however, is an entirely different question. *See* discussion *infra* notes 70–120.

serve as an effective pretext for shielding the exercise of discretion from claims that it constitutes prosecutorial nullification.⁶⁸

Concededly, there are nuances that make a satisfactory, comprehensive definition of prosecutorial nullification difficult. Furthermore, differing views of the scope of the prosecutorial role, including whether they fall closer to the full enforcement model or the complete discretion model, will dictate other approaches. For the aforementioned reasons, this paper assumes that prosecutorial nullification occurs when a prosecutor, because of her personal views regarding the wisdom of a law or of the desirability of punishing a culpable wrongdoer, declines to prosecute a defendant against whom she has sufficient evidence to convict without frustrating law enforcement purposes or undermining the other important interests outlined above—including the interests of victims and efficient criminal justice administration.

As the foregoing demonstrates, much of what commentators have referred to as “prosecutorial nullification” is simply garden-variety prosecutorial discretion. Conversely, what many term as “prosecutorial discretion” is better characterized as “prosecutorial nullification.” Perhaps labels are unimportant anyway; most of the courts and commentators that have considered what is properly understood as “prosecutorial nullification” have implicitly endorsed—or at least have not condemned—the practice.⁶⁹ But should prosecutorial nullification be accepted by our legal culture? Even were we to assume that an instance of prosecutorial nullification does not violate any formal legal limits placed on prosecutorial discretion (i.e., contravene any statutory command of full enforcement or constitutional or statutory prohibitions against corruption or bias in prosecutorial decision-making), does it still violate the rule of law? The next Part explores this question.

⁶⁸ It should also be acknowledged that a prosecutor might decline to prosecute a meritorious case for a reason related to corruption or bias. For example, a corrupt prosecutor might decline to prosecute in exchange for a bribe, or because there is some material professional benefit to be derived from showing favor to an influential person. Likewise, a prosecutor might decline to prosecute a defendant because he is of a favored racial or religious group, or out of prejudice against a disfavored one. Decisions grounded in such improper motivations may or may not be examples of prosecutorial nullification but, in any event, violate constitutional and ethical rules governing the work of public prosecutors. *See, e.g., Armstrong*, 517 U.S. at 463; *Oyler*, 368 U.S. at 456.

⁶⁹ *See, e.g., Navarro-Vargas*, 408 F.3d at 1213 (Hawkins, J., dissenting) (“Prosecutors can, and often do, make [charging] decisions based on their judgments as to how wise and important certain laws may be.”) (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 599 (2001) (“[P]rosecutors have the discretion not to enforce when the laws are too harsh.”)).

II. DOES PROSECUTORIAL NULLIFICATION HAVE A SPECIAL CLAIM TO LEGITIMACY?

This Part examines the legitimacy of prosecutorial nullification.⁷⁰ Section A begins exploring whether prosecutorial nullification is consistent with the rule of law.⁷¹ Section B then uses several analytical touchstones to further examine the legitimacy of prosecutors engaging in nullification.⁷²

A. *Prosecutorial Nullification and the Rule of Law*

Prosecutorial nullification seems to provoke far less outcry than jury nullification.⁷³ Many who would condemn, but grudgingly accept, a petit jury's acquittal of a sympathetic, but obviously guilty, defendant would barely raise an eyebrow were they aware of a prosecutor declining to indict that same defendant in the first instance for the same reasons of sympathy motivating the jury. As Professor Darryl Brown observes:

We fully accept that prosecutors have discretion to apply criminal law or not according to their own judgment, into which they are readily allowed to consider moral or social policy factors well beyond the facts' relation to the statutory elements. Rare is the contention that prosecutorial discretion is "lawless," as opposed to merely ill-advised. Yet a jury making essentially the same judgment—thus double-checking the prosecutor's choice by deciding whether it finds compelling reasons to nullify rather than endorse the prosecutor's application of law—faces the traditional objections of bias, irrationality, or subversion of the democratic process.⁷⁴

⁷⁰ See *infra* notes 73–120 and accompanying text.

⁷¹ See *infra* notes 73–88 and accompanying text.

⁷² See *infra* notes 89–120 and accompanying text.

⁷³ See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1354 (2008). As the author has observed elsewhere, "the term 'jury nullification' carries significant baggage." Fairfax, *supra* note 15, at 717; see also Robert C. Black, *FIIA: Monkeywrenching the Justice System?*, 66 UMKC L. REV. 11, 32–33 (1997) (arguing that use of the term "jury discretion" rather than "jury nullification" is more consistent with how the discretion of other criminal justice actors is characterized). For the reasons stated above, however, "prosecutorial nullification" does not seem to carry the same level of stigma, and can be a useful distinguishing characterization for the considered analysis of the scope and role of prosecutorial discretion.

⁷⁴ See, e.g., Brown, *supra* note 22, at 1189–90.

The perceived ubiquity and acceptance of prosecutorial nullification are often cited by defenders of the jury's prerogative to nullify.⁷⁵ Indeed, the analogy between prosecutorial nullification and jury nullification is difficult to resist. With jury nullification, the jury declines to convict despite conclusive evidence establishing the defendant's guilt. With prosecutorial nullification, a prosecutor declines to prosecute despite having sufficient evidence to obtain a conviction of the defendant. The jury's decision to acquit a culpable defendant spares that individual the societal and moral condemnation of a criminal conviction. In the same way, a prosecutor's forbearance allows a wrongdoer to avoid the stigma of a criminal conviction (and perhaps even formal allegation).

Many critics of jury nullification frame the issue as one of "power" vs. "right."⁷⁶ Under this theory, juries have the *power* to nullify because our constitutional constraints preclude our revisiting their acquittals.⁷⁷ This does not mean, however, that juries have the *right* to nullify.⁷⁸ Such exercises of jury nullification, according to critics, are illegitimate departures from legal rules and should be discouraged through any means, including aggressive *voir dire* and anti-nullification jury instructions.⁷⁹ Although juries, like most actors in the criminal justice process, have the *power* to exercise discretion, prosecutors may be seen as having a much greater claim to *legitimacy* when exercising discretionary power.⁸⁰ But what is the source of the perceived legitimacy of prosecutorial nullification?

In other words, even if a consensus can be achieved as to the definition of "prosecutorial nullification," the question remains whether the practice is consistent with the rule of law. Mortimer and Sanford Kadish explain that "the rule-of-law model requires those who exercise government authority to conform strictly to the rules."⁸¹ When a prosecutor declines to prosecute a defendant or charge a certain crime for reasons apart from evidentiary sufficiency or law enforcement purposes (even if she does so in a non-corrupt and non-discriminatory way), has she strayed from the rule of law?

⁷⁵ See, e.g., Weinstein, *supra* note 17, at 245–47.

⁷⁶ See, e.g., Fairfax, *supra* note 15, at 723–26; cf. also Howe, *supra* note 22, at 588–89.

⁷⁷ See, e.g., Fairfax, *supra* note 15, at 724–25.

⁷⁸ See, e.g., *id.* at 724; Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 503 (2001).

⁷⁹ See, e.g., Fairfax, *supra* note 15, at 724; Pettys, *supra* note 78, at 503.

⁸⁰ See Simon, *supra* note 5, at 226.

⁸¹ KADISH & KADISH, *supra* note 2, at 41.

This question is important, in part, because the enforcement of the criminal law is entrusted fully to the prosecutor's office, and thus prosecutors who engage in nullification can effectively make a law inoperative in a jurisdiction.⁸² Austin Sarat and Conor Clarke have theorized the connection between sovereign power and the prosecutor's ability to decline prosecution despite a reasonable evidentiary basis on which to proceed.⁸³ Sarat and Clarke view circumstances in which prosecutors *could* legitimately prosecute an individual but decline to do so, as examples of "lawful lawlessness,"⁸⁴ which they define as "actions that are legally authorized, but not legally regulated"⁸⁵ and "instances in which law acknowledges its own limits and confers a kind of sovereign prerogative on a legal official."⁸⁶ In their view, prosecutors' ability to decide to excuse individuals from the prohibitions of criminal law represents a "fragment of sovereignty."⁸⁷ Professor Vorenberg observes that "a prosecutor who habitually dispenses leniency is arrogating to himself a powerful weapon that he may use at his pleasure."⁸⁸ Cast in

⁸² See Wallace, *supra* note 15, at 348 (describing results of a survey of 3000 prosecutors across the United States, many of whom "boldly admit[ted] that they nullify both laws and ordinances whenever and wherever it seems desirable"); see also NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION 19 (1931) (describing the modern prosecutor as "the real arbiter of what laws shall be enforced and against whom"); Fairfax, *supra* note 15, at 735–36 n.175 (discussing how "prosecutors may 'nullify' a criminal statute by refusing to enforce it") (citing Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389 (1964)); Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEM. L. REV. 465, 483 n.66 (2008) ("For example, if a formal law is not enforced and indeed is disregarded by prosecutors or nullified by juries, perhaps that formal law is not really the 'law.'").

⁸³ Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008).

⁸⁴ *Id.*; see also Stuntz, *supra* note 69, at 597.

⁸⁵ Sarat & Clarke, *supra* note 83, at 390.

⁸⁶ *Id.*; see also Arthur Rosett, *Discretion, Severity, and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 15 (1972) ("Discretion usually is seen as normlessness . . ."). William Simon, in his influential essay, however, notes that prosecutorial nullification and other types of nullification, "are never defended as forms of lawlessness, but rather as decentralizations of law application." Simon, *supra* note 5, at 226.

⁸⁷ Sarat & Clarke, *supra* note 83, at 390.

⁸⁸ Vorenberg, *supra* note 6, at 1552; see also *State ex rel. Kurkierewicz v. Cannon*, 166 N.W.2d 255, 260 (Wis. 1969).

There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial.

Kurkierewicz, 166 N.W.2d at 260.

these terms, the question whether prosecutorial nullification is consistent with the rule of law clearly deserves greater scrutiny. Below are several analytical touchstones utilized to explore the case for prosecutorial nullification within the rule of law.

B. Analytical Touchstones

1. The Prosecutorial Role

The unique nature of the prosecutorial function may serve as a source of legitimacy for prosecutorial nullification. The conventional analogy between jury nullification and prosecutorial nullification neglects to account for the distinct roles played by each of the two actors in our system of criminal justice. The dominant view is that the jury's role is simply to determine whether the government has presented proof beyond a reasonable doubt,⁸⁹ whereas the prosecutor's role contemplates some degree of discretion.⁹⁰ Prosecutors are charged with determining whether the public interest is served by a prosecution and how a prosecution fits into a broader enforcement scheme, among other considerations. Juries, on the other hand, are charged simply with deciding whether they have been presented with sufficient proof that the defendant has committed the charged offense.⁹¹

⁸⁹ See, e.g., Pettys, *supra* note 78, at 503.

⁹⁰ Cf. Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1269 (2006). Additionally, there was a shift from a system of largely private prosecution, where victims would bring their complaints directly to the grand jury for approval to bring a criminal action against a defendant, to the modern public prosecution model, where a public lawyer represents the interests of the state. See, e.g., Fairfax, *supra* note 52, at 421–24. Perhaps inherent in this modern role is the authority to exercise discretion on bases beyond sufficiency of the evidence.

⁹¹ The same might be said of the prosecutor's role relative to that of law enforcement officers. Law enforcement officers generally enjoy a great deal of discretion; as with prosecutors, it would be impractical for law enforcement personnel to address every criminal violation they might encounter. See, e.g., STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 860 (9th ed. 2010); Goldstein, *supra* note 17, at 560–61. In addition, police choose whether to arrest based on predictions of which cases the prosecutor might decline to prosecute or the court might dismiss, among other considerations. See, e.g., SALTZBURG & CAPRA, *supra*, at 861; Goldstein, *supra* note 17, at 575 n.67.

Nevertheless, there is a greater expectation, for instance, that a police officer will confine considerations informing her decision to arrest for a serious offense to whether she has probable cause. See GREENAWALT, *supra* note 1, at 356–57 (“Police are not hired to decide what crimes are more serious than others, and they must usually act on the spur of the moment; their warrant to sift among the moral claims of various violators is much weaker than that of prosecutors.”); Bowers, *supra* note 42, at 1702; Vorenberg, *supra* note 46, at 653. A prosecutor, on the other hand, normally would be given greater latitude,

Even if one believes the jury should play a more robust discretionary role, petit jurors do not have access to the sort of information prosecutors use to make many of their declination decisions.⁹² Petit jurors are shielded from just the sort of information that a prosecutor might use in determining whether to nullify—the defendant’s history, level of remorse, and propensity to commit other bad acts, as well as how the defendant’s case compares to others in the jurisdiction.⁹³ Furthermore, by the time petit jurors are engaged in a matter, tremendous resources likely have been expended in bringing the case to trial. Unlike with prosecutorial nullification, such resources are wasted when a petit jury “nullifies” a criminal case for reasons unrelated to the evidence.⁹⁴

Thus, perhaps the role assigned to the prosecutor in the modern criminal justice system makes it such that what this Article characterizes as prosecutorial nullification is not *ultra vires*. In other words, it may be the case that the role played by the public prosecutor makes prosecutorial nullification simply a part of the prosecutor’s “job description.”⁹⁵ The established ability to exercise unreviewable discretion,⁹⁶ along with

particularly with less serious offenses. See Bowers, *supra* note 42, at 1703–05; George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN. ST. L. REV. 1043, 1052–53 (2005); Vorenberg, *supra* note 6, at 1551–52.

For example, if law enforcement officers were to respond to an alarm at a residence and discover a burglary in process, the reasonable expectation would be that the alleged perpetrator would be arrested. Even though the responding officers theoretically (in the absence of a compulsory arrest statute or policy) *could* decide not to arrest the suspect, it would seem to be an unreasonable exercise of enforcement discretion to do so—even if the defendant was sympathetic or the burglary statute carried a draconian penalty the officers thought to be unfair. See Goldstein, *supra* note 17, at 557–58 & n.27 (noting that full enforcement mandates generally appear in statutes, municipal charters, ordinances, or police manuals). If after the burglary arrest, the prosecutor subsequently declined to prosecute a meritorious case against the burglary suspect for the same reasons of sympathy or penalty avoidance, such a decision (to the understandable dismay of the victimized homeowner) would be viewed as more legitimate than the police officers’ decision not to arrest the perpetrator at the scene. This, as with the discussion of the petit jury above, is related to the role assigned—by law and legal culture—to prosecutors vis-à-vis other criminal justice actors.

⁹² See, e.g., Fairfax, *supra* note 15, at 746–47.

⁹³ However, as some have noted, heavy caseloads may prevent prosecutors from realizing such advantages. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutor Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 264 (2011).

⁹⁴ See Fairfax, *supra* note 15, at 756–57.

⁹⁵ But see Bowers, *supra* note 42, at 1688–1703; Vorenberg, *supra* note 6, 1557–59 (pointing out that the prosecutor’s adversarial and political roles may undermine the ability to exercise discretion properly, and casting doubt on the notion that the “background, training, self-selection, or general outlook of prosecutors” makes them better equipped than other actors to wield discretion).

⁹⁶ Rachel E. Barkow, *Mercy’s Decline and Administrative Law’s Ascendance*, in CRIMINAL LAW CONVERSATIONS 663, 682 (Paul H. Robinson et al. eds., 2009) (“[A]lthough juries can

the other features of the modern prosecutorial role discussed below, helps to bolster prosecutorial nullification's claim to legitimacy.

2. Democratic Accountability

Another basis for the legitimacy of prosecutorial nullification might be the prosecutor's democratic accountability.⁹⁷

Most chief prosecutors in the United States are elected, usually at the local level.⁹⁸ Even those who are appointed often serve at the pleasure of a public official who is directly elected and accountable to the people.⁹⁹ The notion that the prosecutor represents the interests of, and is accountable to, the citizenry in the enforcement of the criminal law (just as the legislature represents the interests of the citizenry in the development of the criminal law) is a powerful argument for the authority of prosecutors to engage in "nullification."¹⁰⁰

convict as well as acquit, their decisions to convict are reviewable. . . . Prosecutors, in contrast, possess both the unreviewable power to be merciful *and* the unreviewable power to impose punishment.").

There are, of course, potential checks on the prosecutor's decisions to charge, in the form of grand jury indictment, judicial probable cause determinations, and jury and judicial reasonable doubt findings at trial. *But see, e.g.*, Andrew D. Leipold, *Prosecutorial Charging Practices and Grand Jury Screening: Some Empirical Observations*, in GRAND JURY 2.0, *supra* note 59, at 195, 214 (concluding that "it is hard to find support . . . for a claim that grand juries currently serve as a meaningful check on prosecutorial charging decisions"). Nevertheless, with the ubiquity of plea bargaining, which necessarily involves the defendant's waiver of important checks on prosecutorial charging decisions, and the modern sentencing regime, in which the prosecutor's charging decision often drives the punishment, such safeguards are illusory. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044–47 (2006).

⁹⁷ As Professors Ronald Wright and Marc Miller recently stated:

The need for accountable criminal prosecutors runs deep. Prosecutors enforce the most serious moral commitments of a society, and control the most serious punishments that a government can impose, short of waging war. In democratic governments committed to the rule of law, the prosecutor must exercise this power responsibly and be able to demonstrate that fact to the public. A responsible exercise of power means judgments that are consistent with current public preferences and with fundamental, long-term legal principles. In short, the prosecutor must be accountable both to the people and to their laws.

Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010).

⁹⁸ *See, e.g.*, ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 10–11 (2007); *see also* Wright & Miller, *supra* note 97, at 1604–05.

⁹⁹ *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 540 (2011); Wright & Miller, *supra* note 97, at 1604.

¹⁰⁰ *See, e.g.*, *United States v. Navarro-Vargas*, 408 F.3d 1184, 1201, 1203 (9th Cir. 2005); *Cannon*, 166 N.W.2d at 260 (noting that although a prosecutor "is not answerable to any

As some scholars have argued, however, the democratic accountability of prosecutors—even those who are directly elected—is fairly weak given the failure of the electoral process to highlight prosecutorial policies for voter consideration.¹⁰¹ Prosecutorial re-election rates are high and the vast majority of incumbents go unchallenged.¹⁰² Furthermore, even if such prosecutorial accountability was pursued through the electoral process, it would be impossible to achieve without a certain level of transparency. Yet, because prosecutorial decision making is largely hidden from public view,¹⁰³ the voters are only able to obtain as much information about the practice of nullification as prosecutors are willing to share. Nevertheless, there is at least the potential for achieving a level of accountability that may enhance our comfort with prosecutors engaging in prosecutorial nullification.¹⁰⁴

other officer of the state in respect to the manner in which he exercises [prosecutorial discretion], . . . he is answerable to the people, for if he fails in his trust he can be recalled or defeated at the polls”). As Professors Wright and Miller note, most prosecutors are elected locally, in geographically compact areas. *See* Wright & Miller, *supra* note 97, at 1606 (“The local prosecutor remains close to the community, where democratic accountability is thought to be strongest.”); *see also* Barkow, *supra* note 99, at 537.

¹⁰¹ *See, e.g.*, DAVIS, *supra* note 98, at 163–66; Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 78–79 (2011); Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 336 (2002); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 963 (1997); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009); Gerard A. Rainville, *Differing Incentives of Appointed and Elected Prosecutors and the Relationship Between Prosecutor Policy and Votes in Local Elections* 6 (Dec. 3, 2002) (unpublished Ph.D. dissertation, American University) (on file with author).

¹⁰² *See* Wright & Miller, *supra* note 97, at 1606.

¹⁰³ *See, e.g.*, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 443, 448 (2001); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008). Prosecution declinations for non-evidentiary or law enforcement reasons are low-visibility relative to jury nullification. *See, e.g.*, Barkow, *supra* note 73, at 1353–54.

¹⁰⁴ *See* Wright & Miller, *supra* note 97, at 1600 (“Ultimately, an accountable prosecutor does more than prevent misconduct: Accountability creates faith and trust in the workings of prosecutors, courts, and government more generally.”). Perhaps this is the same level of comfort we have with the executive pardon power and clemency, which are also exercised by elected officials (or their designees) who are accountable to the voters. *See, e.g.*, Fairfax, *supra* note 15, at 740–41; Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1172–73 (2010); Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 935 (1960).

3. Delegation/Expertise

Another potential basis for the legitimacy of prosecutorial nullification may be found in the idea that the legislature has implicitly delegated to prosecutors the authority not only to enforce the law, but also to decide *whether* to enforce the law.¹⁰⁵ After all, most criminal statutes carry no explicit, affirmative mandate of full enforcement. Furthermore, legislatures in recent decades have been accused of “overcriminalization”—passing an excessive number of often redundant and overlapping criminal statutes.¹⁰⁶ Perhaps implicit in this is a delegation of authority to prosecutors to determine which, if any, of these laws are to be enforced. As Professor William Stuntz observed:

As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of the progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments.¹⁰⁷

Related to this theory of delegation is the idea that prosecutorial nullification may be perceived as more legitimate than other forms of nullification because prosecutors have expertise akin to administrative agencies. As Professor Barkow has argued, “[j]ust as agencies escape oversight when they refuse to act—because they are balancing resource constraints and other considerations—prosecutors avoid scrutiny because they are viewed as making a professional determination based on their expertise in prioritizing cases.”¹⁰⁸ Barkow hypothesizes that the administrative nature of the prosecutorial function is the reason that

¹⁰⁵ See GREENAWALT, *supra* note 1, at 349 (describing “an implicit delegated discretion to decide whether to go forward”). *But see* Vorenberg, *supra* note 46, at 680 (arguing that power of the prosecutor to disregard the coverage of criminal statutes derives from “default rather than a conscious legislative judgment”).

¹⁰⁶ See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 753–56 (2005); Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime” Policies: American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL’Y (forthcoming 2011); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541, 542 (2005); Vorenberg, *supra* note 6, at 1548 (1981).

¹⁰⁷ Stuntz, *supra* note 69, at 509.

¹⁰⁸ Barkow, *supra* note 73, at 1354.

“prosecutorial discretion is viewed with less suspicion than the other mechanisms of mercy” in the criminal law.¹⁰⁹

4. Institutional Checks

Institutional pressures also bear upon prosecutors and may serve to constrain prosecutors in their exercise of prosecutorial nullification. One such institutional check comes from the police agencies.¹¹⁰ Even though prosecutorial decisions are often hidden from public view, those law enforcement officials involved in the investigation of crime and apprehension of suspects may become aware—and may protest—when prosecutors nullify.

The judiciary provides another institutional check on prosecutors. Although many early-stage prosecutorial declinations occur before formal court proceedings take place, some undoubtedly happen after the judiciary becomes involved—after an arrest or search warrant is obtained, a preliminary examination or detention hearing held, or even after an indictment or other charging document is filed. Where a prosecutor must obtain leave of court to *nolle pros* or dismiss a case, or otherwise have to answer to the court regarding her decision not to pursue charges in a given case,¹¹¹ this judicial scrutiny may serve as a constraint on her power to nullify.¹¹²

In addition, as mentioned above, there is an internal institutional check present in most prosecutors’ offices. This internal check is represented by the norms which develop among a group of prosecutors working together on numerous cases over a period of time.¹¹³ As Professors Ronald Wright and Marc Miller have observed, prosecutors benefit from the development of norms that help guide their exercises of discretion—including the consideration of whether to engage in

¹⁰⁹ *Id.*

¹¹⁰ See Bowers, *supra* note 42, at 1700–03.

¹¹¹ See FED. R. CRIM. P. 48(a). Even where the court has no ability to compel the prosecution, it may, of course, inquire informally of the prosecutor regarding the reasons for the decision to not proceed.

¹¹² *But see* Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

¹¹³ See, e.g., JOAN E. JACOBY, U.S. DEP’T OF JUSTICE, THE PROSECUTOR’S CHARGING DECISION: A POLICY PERSPECTIVE 15–16 (1976); Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2147–49 (2010); Vorenberg, *supra* note 6, at 1543; Kay Levine & Ronald Wright, *Becoming a Prosecutor: How Prosecutors Grow into Their Professional Roles* 9 (2011) (draft manuscript, on file with author).

prosecutorial nullification.¹¹⁴ Consequently, individual prosecutors in an office setting are required to answer not only to their supervisors, but may also be held accountable to institutional norms.¹¹⁵ In contrast, juries, as one-time players, do not have the benefit of such norms.¹¹⁶ Juries operate in the context of a single, isolated case. Although jurors certainly bring to the task their own notions of justice and mercy, they are severely limited in their ability to ascertain how a particular case fits into a broader pattern of cases and how a particular outcome compares to those for other similarly situated defendants. Juries, therefore, engage in nullification without the broader context and meaning of their decisions to acquit against the evidence.

5. Obligation Constraints on Prosecutorial Discretion

In addition, prosecutors have a number of obligations which may serve as potential constraints on—and may impact any assessment of the legitimacy of—prosecutorial nullification. Of course, when exercising their broad discretion, prosecutors operate under obligations imposed by applicable constitutional or statutory provisions.¹¹⁷ As discussed above, some might argue that prosecutors have an obligation to the legislature, from whom the power to enforce the law was delegated. Also, whatever responsibility prosecutors owe to the legislature to enforce criminal laws, they certainly have an obligation to the community to maintain safety and order.

Prosecutors may also have certain moral obligations that may or may not correspond with formal legal constraints on the prosecutorial function. One may be the obligation of consistency (or non-arbitrariness) and fairness in the treatment of defendants. Such an obligation likely cuts against the legitimacy of prosecutorial nullification, as the practice necessarily advantages some defendants over others. Although some of these reservations may be addressed in circumstances where there is an across-the-board policy of declining to prosecute under a particular statute or in a particular situation, nevertheless, there are very real consistency and fairness concerns raised by prosecutorial

¹¹⁴ See Ronald F. Wright & Marc L. Miller, Comments, *Subjective and Objective Discretion of Prosecutors*, in CRIMINAL LAW CONVERSATIONS, *supra* note 96, at 673, 674.

¹¹⁵ See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 888–93 (2009); Bibas, *supra* note 101, at 961.

¹¹⁶ See Wright & Miller, *supra* note 114, at 674.

¹¹⁷ See *supra* note 18 and accompanying text; see also *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *Oyler v. Boles*, 368 U.S. 448, 456 (1962); Angela J. Davis, *Prosecution and Race: Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 42–46 (1998).

nullification.¹¹⁸ Additionally, it is often said that the prosecutor has a duty to “seek justice.”¹¹⁹ Inherent in such a duty may be the obligation to show “mercy” when the circumstances warrant. Mercy is seen by many to be a desirable feature of criminal law administration.¹²⁰ Prosecutorial nullification is a potent vehicle for such mercy.

III. NORMATIVE CONSIDERATIONS AND IMPLICATIONS

Whether this Article’s characterization of prosecutorial nullification is distinct from garden-variety prosecutorial discretion or is consistent with the rule of law, the reality is that prosecutors have the ability to engage in it. Prosecutorial nullification has implications for the administration of criminal justice. What are the benefits and burdens of prosecutorial nullification and what, if anything, can be done to regulate it? Section A highlights the benefits and burdens that prosecutorial nullification creates for the administration of criminal justice.¹²¹ Finally, Section B examines potential mechanisms that may be used to properly regulate prosecutorial nullification.¹²²

A. *Benefits and Burdens of Prosecutorial Nullification*

Prosecutorial nullification may provide important benefits for the administration of criminal justice. Some scholars, such as Professor

¹¹⁸ Professors Ronald Wright and Marc Miller have highlighted the distinction between the “objective” and “subjective” accounts of discretion within the administrative state. Under the objective account of discretion, as long as decisions are confined within predetermined formal limits, they represent a proper exercise of discretion. On the other hand, the subjective account of discretion requires decision-makers to “justify their choices based on public-regarding reasons.” Wright and Miller, *supra* note 114, at 673–74. In the latter account of discretion, which might be applied to exercises of prosecutorial decision making, Professors Wright and Miller note that discretionary actors emphasize consistency, fairness, and equality of treatment. *See id.*

¹¹⁹ AM. BAR. ASS’N, AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (noting that a prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done”).

¹²⁰ *See, e.g.*, William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000). As Professor Paul Robinson observes, however, consideration of “mercy” often fails to account for “a rich and nuanced concept [of desert] . . .” Paul H. Robinson, *Mercy, Crime Control and Moral Credibility* 1–2 (Univ. of Pa. Law Sch. Pub. L. & Legal Theory Res. Paper Series, Paper No. 10-32, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685221; *see* Bowers, *supra* note 42, at 1678–83 (distinguishing “normative innocence” from “mercy”); *id.* at 1678 (“Roughly, normative innocence is equivalent to a lack of blameworthiness, and, accordingly, it is a retributive concept.”).

¹²¹ *See infra* notes 123–131 and accompanying text.

¹²² *See infra* notes 132–155 and accompanying text.

Paul Butler, have argued that jury nullification has a role to play in pursuing an equitable criminal justice system.¹²³ Perhaps prosecutors similarly use prosecutorial nullification to make their own improvements to the quality of justice. Prosecutorial nullification may serve as a much needed safety valve for when an otherwise justified prosecution does not serve societal needs or the general aims of the criminal law, particularly in an era of overcriminalization.¹²⁴ Furthermore, if mercy is to play an important role in the administration of the criminal law, prosecutorial nullification is a tremendous vehicle for it.¹²⁵ Prosecutorial nullification is more efficient than other mercy mechanism, such as jury nullification, because the case is disposed of before significant resources are expended.¹²⁶ Finally, prosecutorial nullification may provide the flexibility to bring criminal enforcement in line with evolving societal values, even before the legislature has a chance to do so.¹²⁷

These potential benefits of prosecutorial nullification, however, must be balanced against its potential drawbacks. Prosecutorial nullification, it must be remembered, frustrates legislative prerogative. By refusing to enforce a statute because he disagrees with it, a prosecutor substitutes his own judgment for that of the legislature. In addition, prosecutorial nullification undermines the constitutional value of fair notice, as it blurs the picture of which conduct will actually prompt enforcement for would-be defendants.¹²⁸ Furthermore, prosecutorial nullification promotes unfairness and arbitrariness by allowing for the real

¹²³ See, e.g., Butler, *supra* note 22, at 679; see also Weinstein, *supra* note 17, at 240.

¹²⁴ See, e.g., Mary D. Fan, *Beyond Budget-Cut Criminal Justice*, 90 N.C. L. REV. (forthcoming 2011–2012).

¹²⁵ See LINDA R. MEYER, *THE JUSTICE OF MERCY* 102 (2010); *supra* notes 117–120. Additionally, perhaps some of the equality concerns associated with the practice of mercy in the criminal process might be better assuaged at the charging rather than the sentencing stage. For a discussion of how mercy in criminal law administration might burden equality, see generally Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004).

¹²⁶ See Fairfax, *supra* note 15, at 756–57.

¹²⁷ See *supra* 48–53. But see Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 361 (2004) (“There is less fear that enforcers will depart from the preferences of the legislature, because both groups benefit from the public perception of stringent enforcement policies.”).

¹²⁸ See, e.g., Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2117–18 (1989) (arguing that “jury nullification” and “prosecutorial discretion” undermine fair notice and equality of treatment for criminal defendants); Vorenberg, *supra* note 6, at 1550. But cf. Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9, 30 (2010); Vorenberg, *supra* note 6, at 1549–50 (1981); Vorenberg, *supra* note 46, at 664.

possibility that similarly situated defendants will be treated differently.¹²⁹ As Professor Vorenberg observes:

Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly.¹³⁰

Finally, as has been discussed above, prosecutorial nullification helps to conceal deficiencies in criminal justice and obscures legislators' responsibility for making important policy judgments.¹³¹ Therefore, it is important to consider whether and how prosecutors' ability to engage in nullification can be constrained in any meaningful way.

B. *Mechanisms to Regulate Prosecutorial Nullification*

1. External Pressures

Regulation of prosecutorial nullification, as with prosecutorial discretion more generally, is difficult because there is often no standee to raise concerns over the failure to prosecute, particularly in "victimless" crimes. As mentioned above, law enforcement may serve as a check on a prosecutor's decision to nullify.¹³² Law enforcement officers are often invested in cases and remain vigilant to ensure that matters proceed to conviction. They are able to exert institutional pressure on prosecutors who might otherwise be inclined to decline prosecution in a given case. Theoretically, the grand jury could step in and attempt to prompt

¹²⁹ See Markel, *supra* note 125, at 1476; Massaro, *supra* note 128, at 2117–18; cf. Lonnie T. Brown, Jr., *A Tale of Prosecutorial Indiscretion: Ramsey Clark and the Selective Non-Prosecution of Stokely Carmichael*, 62 S.C. L. REV. 1, 34 (2011). Also, prosecutorial nullification, like jury nullification, can also be abused to oppress members of vulnerable or unpopular groups. See, e.g., RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 119 (2007) (recounting historical accounts of when "all-white juries routinely and defiantly nullified DOJ prosecutions" in civil rights cases).

¹³⁰ Vorenberg, *supra* note 6, at 1555; see also DAVIS, *supra* note 2, at 170 ("[T]he power to be lenient is the power to discriminate."). Another potential danger of nullification is that it could result in "underenforcement" that disadvantages disfavored groups. See Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715, 1764 (2006).

¹³¹ See *supra* notes 48–53 and accompanying text; see, e.g., Vorenberg, *supra* note 6, at 1552, 1559–60; Vorenberg, *supra* note 46, at 652.

¹³² See *supra* notes 110–116 and accompanying text.

prosecution in some instances.¹³³ The grand jury presentment, however, is largely extinct.¹³⁴ A second, independent prosecutor might be in a position to conduct a previously-declined prosecution.¹³⁵ Furthermore, in rare circumstances, a private prosecutor may be able to carry forward a prosecution that a public prosecutor declined to bring.¹³⁶ Finally, some have suggested implementing judicial review of decisions not to prosecute.¹³⁷ In the end, however, only those external actors with the ability to step in and usurp the prosecutorial function are likely to constrain prosecutorial nullification in any meaningful way. Pressure from external lobbying may persuade prosecutors to prosecute cases they otherwise would have declined, but given prosecutors' unreview-

¹³³ See SALTZBURG & CAPRA, *supra* note 91, at 868. *But see* Vorenberg, *supra* note 46, at 678–79 (“While supporters of the grand jury system talk of runaway grand juries which keep the prosecutor honest, it is rare for a grand jury to insist on an indictment the prosecutor does not want.”). The prosecutor, however, must sign the indictment. FED. R. CRIM. P. 7(c)(1); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

¹³⁴ See generally Renée B. Lettow, *Reviving Federal Grand Jury Presentments*, 103 YALE L.J. 1333 (1994). For an argument that the grand jury is positioned to aid the prosecutor in the exercise of prosecutorial discretion—and, perhaps, when to nullify, see generally *Fairfax*, *supra* note 15; see also *Fairfax*, *supra* note 59, at 323–356 (proposing various ways in which the grand jury can be adapted to serve the needs of modern criminal justice).

¹³⁵ See KADISH & KADISH, *supra* note 2, at 81 (“[T]he prosecutor’s accountability is sharply limited.”) (referring to provisions that allow for the removal and prosecution of a prosecutor as a remedy against “prosecutorial nonenforcement decisions” and for the state attorney general to overrule the prosecutor’s declination). In New York, when the Bronx D.A. refused to seek the death penalty in the murder of a police officer, the Governor removed him from the case and installed a replacement. Ann LoLordo, *Prosecutor Sticks to His Convictions*, BALT. SUN, Mar. 25, 1996, at 2A.

¹³⁶ See SALTZBURG & CAPRA, *supra* note 91, at 868–70 (mentioning grand jury and private prosecution). The fact that the government prosecutor is solely authorized to bring charges means that a decision not to prosecute essentially shields the putative defendant from criminal liability. See GREENAWALT, *supra* note 1, at 349; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 845–46 (8th ed. 2011). *But see* *Fairfax*, *supra* note 52, at 423–27.

¹³⁷ See, e.g., DAVIS, *supra* note 2, at 216–17; Roger P. Joseph, Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 146–47 (1975). Courts, however, have been generally hostile—on separation of powers and other grounds—to requests that courts prompt prosecutorial action. See *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967) (“Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.”); NAT’L DIST. ATT’YS ASS’N, *THE PROSECUTOR’S SCREENING FUNCTION: CASE EVALUATION AND CONTROL* 5 (1973) (“The Court cannot compel [the prosecutor] to prosecute a complaint, or even an indictment, whatever his reasons for not acting.”) (quoting *Pugach v. Klein*, 193 F. Supp. 630, 634–35 (1961)); Vorenberg, *supra* note 6, at 1546; *cf.* *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Additionally, there remains the question of standing. Interestingly, in some jurisdictions, judges have authority to nullify a prosecutor’s decision to prosecute. See, e.g., *State v. Hermann*, 402 A.2d 236, 239 (N.J. 1979); *People v. Garcia*, 482 N.Y.S.2d 996, 998 (Sup. Ct. 1984).

able discretion to decline prosecution, such pressure would be unable to force a determined prosecutor to pursue a case.

2. Disclosure and Transparency

Another challenge to regulating prosecutorial nullification is that it typically results from a low-visibility charging decision.¹³⁸ Although some high-profile cases are followed by the media or publicized by the victim, most charging decisions are not exposed to public scrutiny. This increases the chances that the power to engage in prosecutorial nullification could be abused. A requirement that prosecutors record and publicly explain all declinations might address this concern and enhance prosecutorial accountability.¹³⁹ Requiring the prosecutor to put on the record her reasons for declining to prosecute could better inform the public (including potential voters) and, perhaps, oversight committees about whether the prosecutorial nullification power is being utilized appropriately.

While the information gleaned from such public explanations would be invaluable,¹⁴⁰ such a reporting policy has the potential to be overly burdensome and unworkable given the many prosecutorial decisions likely subject to the disclosure requirement. It is not advisable to impose a declination reporting requirement on prosecutors that would impede their ability to prosecute the many cases they choose to pursue. Of course, the reporting requirement could be limited to instances of prosecutorial *nullification* rather than prosecutorial declination more generally. This, however, would place the assessment of what is nullification in the hands of the very prosecutor the public is seeking to monitor.

Some commentators have proposed community review boards, made up of members of the bar and community, which would periodically review a cross-section of prosecutorial decisions.¹⁴¹ A cross-section

¹³⁸ See Davis, *supra* note 103, at 443, 448; Fairfax, *supra* note 52, at 444; Miller & Wright, *supra* note 103, at 129; Vorenberg, *supra* note 6, at 1546. As discussed above, the ability to discern an instance of nullification is at its nadir in the context of undercharging and declinations pursuant to plea agreements. See *supra* note 46 and accompanying text.

¹³⁹ See Fairfax, *supra* note 52, at 453 & n.146; see also Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 373 (2010); Gold, *supra* note 101, at 94 (proposing a requirement that prosecutors disclose costs associated with the consequences of prosecutorial decisions); Vorenberg, *supra* note 6, at 1565–66; Wright & Miller, *supra* note 97, at 1609.

¹⁴⁰ See Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 308 (2006); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1279–84 (2009).

¹⁴¹ See, e.g., DAVIS, *supra* note 98, at 184–86; Fairfax, *supra* note 52, at 453–54.

of cases, however, is unlikely to capture isolated instances of prosecutorial nullification. Furthermore, it would likely be unfeasible for these boards to conduct a comprehensive review of all prosecutorial declinations. In the end, bureaucratic burdens and resource limitations would likely frustrate the effectiveness of disclosure and transparency as a way to effectively regulate prosecutorial nullification.

3. Guiding Prosecutorial Nullification

One by-product of acknowledging prosecutorial nullification as a distinct species of prosecutorial discretion is that we can attempt to guide it just as we have attempted to do with prosecutorial discretion.¹⁴² Although various prosecutorial guidelines have not had the impact some may have anticipated,¹⁴³ they do represent clear and objective expectations applicable to prosecutorial conduct.¹⁴⁴ Because few legal standards govern prosecutorial discretion generally, it is difficult to police prosecutorial nullification. Indeed, Professor Donald Dripps has argued for disclosure of “public and enforceable criteria for the exercise of prosecutorial discretion.”¹⁴⁵ According to Professor Dripps, “[p]eople have a right to know the law, and if the real law is made by prosecutors, then people have a right to know which criminal statutes the legislature has authorized prosecutors to nullify.”¹⁴⁶

Furthermore, some criminal statutory schemes establish, limit, or define discretion (e.g., capital punishment statutes), but most make no affirmative statement directing prosecutors in their enforcement discretion.¹⁴⁷ Perhaps legislatures could draft statutes that explicitly direct

¹⁴² See, e.g., Fairfax, *supra* note 52, at 450–52; Pound, *supra* note 104, at 927; Vorenberg, *supra* note 6, at 1562–65.

¹⁴³ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 n.9 (1978) (noting the “many recommendations that the prosecutor’s discretion should be controlled by means of either internal or external guidelines”); Abrams, *supra* note 35, at 2; Sara Sun Beale, *The New Reno Bluesheet: A Little More Candor Regarding Prosecutorial Discretion*, 6 FED. SENT’G REP. 310, 310–11 (1994); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 291, 296 (1980); Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 899–901 (2000).

¹⁴⁴ Non-governmental groups such as bar associations and advocacy organizations have proposed prosecutorial guidelines. See, e.g., BRENNAN CTR. FOR JUSTICE, RACIAL DISPARITIES IN FEDERAL PROSECUTIONS at ii (2010) (proposing prosecutorial guidelines designed to reduce racial and ethnic disparities in the criminal justice system); Fairfax, *supra* note 52, at 450–51 & n.139.

¹⁴⁵ Dripps, *supra* note 30, at 1176.

¹⁴⁶ *Id.*

¹⁴⁷ See GREENAWALT, *supra* note 1, at 349.

prosecutors to enforce the law. In addition, jurisdictions might promulgate guidelines requiring that prosecutors charge every (or at least the most serious) provable offense.¹⁴⁸

Finally, once we acknowledge that prosecutors can and do make declination decisions on grounds unrelated to the sufficiency of the evidence, perhaps we should facilitate the input of various stakeholders in the prosecutor's decision. While it would be inadvisable and unwieldy to have community representatives weigh in on a prosecutor's decision whether to nullify, there might be a formal opportunity for the victim, law enforcement, and, in appropriate cases, even defense counsel to lobby the prosecutor who signals that she is considering nullification in a given case.¹⁴⁹

4. Selection of Prosecutors

One may reasonably be unconvinced that the aforementioned mechanisms will be effective in easing concerns with prosecutorial nullification. In any event, there are very few tools at the disposal of those who would seek to regulate or constrain prosecutorial nullification. In the end, there is little, if anything, to *prevent* a prosecutor from declining a prosecution when he disagrees with the law or would like to avoid application of the law in a given case.¹⁵⁰ Even where there are *ex post* mechanisms to force prosecution or impose sanctions when a prosecu-

For many crimes, no heavy presumption exists in favor of prosecution; for these, one may speak of prosecutors as possessing an implicit delegated discretion to decide whether to go forward. A presumption may exist in favor of enforcement for more serious offenses, but even for them a failure to proceed cannot be described as a violation of any legal duty.

Id.

¹⁴⁸ See, e.g., Memorandum from John Ashcroft, U.S. Att'y Gen., to All Federal Prosecutors 2 (Sept. 22, 2003) (continuing DOJ policy of requiring prosecutors "to charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case"); see also Nancy J. King & Susan R. Klein, *Apprendi and Plea Bargaining*, 54 STAN. L. REV. 295, 297 n.18 (2001); Vorenberg, *supra* note 6, at 1566–67; Vorenberg, *supra* note 46, at 651–52; Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 239 (2004). But see Bibas, *supra* note 101, at 962.

¹⁴⁹ Cf. Vorenberg, *supra* note 6, at 1565 (suggesting "screening conferences" as a mechanism for defense counsel to discuss charging decisions with prosecutors).

¹⁵⁰ See Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 45 GA. L. REV. 769, 787 (2010). In addition, prosecutors enjoy absolute immunity from liability associated with charging decisions. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 260 (1993); *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); Erwin Chemerinsky, *Prosecutorial Immunity*, 15 Touro L. REV. 1643, 1643–44 (1999); Fairfax, *supra* note 52, at 454 n.149.

tor has nullified, it is nearly impossible to identify instances of nullification when pretextual declination rationales can so easily be advanced.¹⁵¹ Given that there are so few controls, it may come down to trusting that those in the position to engage in prosecutorial nullification will do so responsibly.¹⁵²

What qualities should we seek in those attorneys entrusted with the power to nullify? In addition to enforcement priorities, courtroom experience, and other attributes commonly vetted, prosecutor candidates could be probed regarding their views toward the use of prosecutorial nullification to frustrate enforcement of disfavored laws or to deliver mercy in individual cases. We also might want to know whether the prosecutor would be amenable to informing the public when he has engaged in prosecutorial nullification. Certainly those prosecutors who are appointed with the advice and consent of a legislative body go through a confirmation process in which these relevant questions could be posed.¹⁵³ Those prosecutors who are elected directly, theoretically, could be engaged by the voters during electoral campaigns.¹⁵⁴

Where electoral politics fail us or provide perverse incentives to prosecutors,¹⁵⁵ perhaps “hiring boards” comprised of community representatives could help increase community involvement in the selection of prosecutors. This mechanism could also be used to advise chief prosecutors on the civil service hiring of assistant prosecutors. We also might strive to enhance community education about the prosecutorial role and the immense power associated with the exercise of prosecutorial discretion as well as prosecutorial nullification. A populace with the understanding of prosecutorial nullification’s significance for governmental authority and criminal justice administration is more likely to remain vigilant to ensure that the power is not abused.

¹⁵¹ See *supra* notes 36–44 and accompanying text.

¹⁵² See Vorenberg, *supra* note 6, at 1551–52; Wright & Miller, *supra* note 97, at 1589 (“Because *individual* responsibility is the origin of good behavior among prosecutors, it does not generate the level of public trust that one might expect in a government of laws.”).

¹⁵³ See, e.g., Vorenberg, *supra* note 6, at 1567.

¹⁵⁴ But see *supra* 97–104; Gold, *supra* note 101, at 69.

¹⁵⁵ See, e.g., Wright, *supra* note 101, at 582–83; Siddharta Bandyopadhyay & Bryan C. McCannon, The Effect of the Election of Prosecutors on Criminal Trials 32–33 (Oct. 12, 2010) (unpublished manuscript), available at ssrn.com/abstract=1641345.

CONCLUSION

Whether one is prepared to embrace prosecutors' ability to nullify our criminal laws, prosecutorial nullification is an unavoidable by-product of our system of robust prosecutorial discretion and deserves distinct conceptual treatment. Once prosecutorial nullification is acknowledged as a distinct species of prosecutorial discretion, it becomes a salient consideration when determining to whom we entrust prosecutorial power and how we view similar exercises of discretion by other criminal justice actors. Prosecutors have the power to not only pick and choose which individual cases and defendants will be charged but, more fundamentally, which of our laws will be enforced at all. Given the tremendous power prosecutors wield, we must bolster our efforts to ensure that their extraordinary exercises of discretion are consistent with the rule of law, and as transparent, accountable, and fair as possible. We must seek prosecutors with not only legal skill and acumen, but the more elusive attributes of wisdom, fair-mindedness, and good judgment.

