Boston College Law Review

Volume 60 | Issue 8 Article 7

12-2-2019

Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts

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CHARGES TO BE DECLINED: LEGAL CHALLENGES AND POLICY DEBATES SURROUNDING NON-PROSECUTION INITIATIVES IN MASSACHUSETTS

Abstract: The election of "progressive prosecutors" introduces new objectives and tools into the traditional "tough on crime" playbook of local prosecution. Newly-elected District Attorney Rachael Rollins of Suffolk County, Massachusetts has proposed one such tool: non-prosecution of certain criminal laws, chiefly non-violent misdemeanors. This Note explores the likelihood of success of legal challenges to categorical non-prosecution, primarily whether non-prosecution unconstitutionally violates the separation of powers. This Note considers whether non-prosecution implicates the rights of victims and notions of justice as a public or private domain. It also analyzes the merits of non-prosecution as a policy. Some critics challenge the ability of progressive prosecutors to change the criminal justice system from the inside, while others claim that non-prosecution of so-called quality-of-life crimes damages communities rather than enriching them. Alternatively, those supportive of reform herald non-prosecution as a means of allowing local communities to influence the conduct of law enforcement, arguing that petty crime reflects public health failures that should be resolved by social services instead of jail-time. As novel as it is controversial, the proposed non-prosecution policy deserves close attention from legal scholars and criminal reform advocates.

INTRODUCTION

Criminal justice activism in the past few years has shifted from public protests to internal reform.[1] Voters in local district attorney (DA) elections in many urban jurisdictions across the country reward the candidate advocating for less incarceration, upending the traditional platform of a tough-on-crime prosecutor.[2] In Massachusetts, the election of Rachael Rollins as District Attorney of Suffolk County demonstrated popular support for her proposed poli-

[1] *See* Paige St. John & Abbie Vansickle, *Here's Why George Soros, Liberal Groups Are Spending Big to Help Decide Who's Your Next D.A.*, L.A. TIMES (May 23, 2018, 7:00 AM), https://www.latimes.com/local/california/la-me-prosecutor-campaign-20180523-story.html [https://perma.cc/DRG3-YH67] (describing the grassroots support of liberal district attorney campaigns by groups such as Black Lives Matter).

[2] *See* David Weigel, *Down the Ballot, Liberal Reformers Take Over the Criminal Justice System*, WASH. POST (Sept. 5, 2018), https://www.washingtonpost.com/politics/2018/09/05/down-ballot-liberal-reformers-take-over-criminal-justice-system/?utm_term=.55002b60f04d [https://perma.cc/9659-YW54] (identifying recent victories for progressive prosecutors in Chicago, Philadelphia, San Antonio, and St. Louis).

cy of non-prosecution of certain criminal misdemeanors that constitute petty crime.[3] The proposed policy attracted significant local and national attention[4], including a complaint to the Massachusetts Bar Association from the National Police Association.[5] On March 25, 2019, the Suffolk County District Attorney's Office (SCDAO) released a sixty-six page memo (the Rollins Memo) that, in part, outlined the purpose and particulars of the policy.[6] The Governor's Office responded to the formal memo with a missive from the Massachusetts Executive Office of Public Safety and Security.[7] Several months following implementation of the policy, a Boston Municipal Court judge refused to

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[3] *See Charges to Be Declined*, RACHAEL ROLLINS FOR SUFFOLK DA, https://rollins4da.com/policy/charges-to-be-declined/ [https://perma.cc/SNW9-64G9] (identifying fifteen crimes that Rollins' office would not prosecute as a default policy). The crimes identified for non-prosecution are the following: trespassing; shoplifting (including similar conduct charged as larceny); larceny under $250; disorderly conduct; disturbing the peace; receiving stolen property; minor driving offenses (such as driving with a suspended license); breaking and entering (with conditions concerning vacancy, purpose, and damage); wanton or malicious destruction of property; threats (excluding domestic violence); alcohol possession; drug possession (with or without intent to distribute); stand-alone resisting arrest charge; and resisting arrest in combination with other non-prosecution charges. *Id.*

[4] *See* Taylor Pettaway, *Incoming Top Prosecutor Rachael Rollins Firm but Flexible on 'No-Prosecute' Offenses*, BOS. HERALD (Nov. 29, 2018), https://www.bostonherald.com/2018/11/29/incoming-top-prosecutor-rachael-rollins-firm-but-flexible-on-no-prosecute-offenses/ [https://perma.cc/PCB9-4YZZ] (demonstrating Boston-area news coverage); *Boston's New Top Prosecutor to Be Sworn In*, ASSOCIATED PRESS (Dec. 30, 2018, 11:08 AM), https://www.usnews.com/news/best-states/massachusetts/articles/2018-12-30/bostons-new-top-prosecutor-to-be-sworn-in [https://perma.cc/YL48-ZUHG] (demonstrating national news coverage).

[5] *See* Press Release, *National Police Association Files Bar Complaint Against District Attorney Elect Rachael Rollins*, NAT'L POLICE ASS'N (Dec. 28, 2018), https://nationalpolice.org/national-police-association-files-bar-complaint-against-district-attorney-elect-rachael-rollins/ [https://perma.cc/6TXU-7NY6] (filing an ethics complaint with the Massachusetts Bar Association).

[6] *See generally* SUFFOLK CTY. DIST. ATTORNEY, THE RACHAEL ROLLINS POLICY MEMO (Mar. 2019) hereinafter THE ROLLINS MEMO] detailing the non-prosecution policy among other policy initiatives). Although the Rollins Memo still provides for non-prosecution of the above-listed fifteen crimes, it has specially formalized the conditions and circumstances under which a prosecutor should engage in non-prosecution. *See id.* at C-1. Some charges will not be prosecuted unilaterally; for example, there are "no identified exceptions" to the presumption of non-prosecution for a minor in possession of alcohol charge. *See id.* at C-7. Most of the charges, however, have various conditions affecting whether the presumption will be non-prosecution, prosecution, or some other consequence. *See id.* at C-1. For example, a charge of shoplifting garners the presumption of non-prosecution if the property is returned undamaged, the individual has "substance abuse issues," "mental health issues," and/or "the item was taken out of necessity" because of unemployment. *Id.* at C-3. If the item was not taken out of necessity and the individual is a repeat offender or the property was "unrecovered or damaged," the prosecutor can pursue a pre-arraignment restitution agreement. *Id.* Regardless of the state of the property, if the individual is in poverty, or has substance or mental health issues, the prosecutor will consult with a social worker to match the offender with a pre-arraignment diversion program. *Id.*

[7] *See* Joe Dwinell, *Charlie Baker's Team Slams Rachael Rollins' No-Prosecute List*, BOS. HERALD (Apr. 5, 2019, 9:15 AM), https://www.bostonherald.com/2019/04/04/baker-team-slams-da-rachael-rollins-no-prosecute-list-new-memo/ [https://perma.cc/896A-2PR7] (reporting that the Massachusetts department issued a letter to Rollins raising concerns that non-prosecution will hinder state opioid prevention efforts, hurt small-business operators, and jeopardize efforts to replace illicit marijuana markets with state-sanctioned markets).

allow non-prosecution of disorderly conduct charges levied against protesters, drawing rebuke from the Massachusetts Supreme Judicial Court (SJC).[8]

The non-prosecution policy will affect a large amount of currently-charged conduct.[9] The Rollins Memo states that seventeen of the twenty-five charges most frequently filed by the SCDAO, making up thirty-two percent of the criminal charges filed, were nonviolent crimes involving driving, drugs, and real property.[10] Although precise figures are not readily available, estimates calculated using state and federal law enforcement data suggest that between 3987 and 5387 misdemeanor arrests occurred in Suffolk County in 2016 would not have been prosecuted under a comparable non-prosecution policy.[11] Not only does the non-prosecution policy affect a large amount of conduct, it

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[8] *See* Alyssa Vaughn, *Mass. Supreme Court Rules in Rachael Rollins' Favor in Straight Pride Protest Dispute*, BOS. MAG. (Sept. 9, 2019, 1:26 AM), https://www.bostonmagazine.com/news/2019/09/09/rollins-straight-pride-supreme-court-ruling/ [https://perma.cc/TFG4-6L3V] (describing the course of events leading to success for Rollins' policy). During an August 31, 2019 "Straight Pride Parade," police officers arrested protesters for disorderly conduct. *Id.* At arraignment, Boston Municipal Court Judge Richard Sinnott denied the assistant district attorney's recommendation of non-prosecution. *Id.* Rollins' office filed an emergency petition appealing the decision, and Massachusetts Supreme Judicial Court (SJC) Associate Justice Frank Gaziano found that the judge acted without authority and ordered the protesters' records expunged of the charges. *Id*.

[9] *See* Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1063 (2015) (outlining the scope of misdemeanor prosecutions in the United States).

[10] THE ROLLINS MEMO, *supra* note 6, at 4–5. The Rollins Memo states that these figures reflect "preliminary scans" of the Suffolk County District Attorney's Office (SCDAO) charging data since 2013 and that conclusions drawn from said data are tentative, pending completion of a data audit the SCDAO claims to be conducting. *Id.* at 4–5, 42.

[11] *See id.* at 4–5, 42 (noting the absence of completed data analysis). Massachusetts law enforcement made 23,766 arrests in 2016 for offenses like those DA Rollins does not intend to prosecute. FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS tbl.22 (2016), https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-22 [https://perma.cc/WX3D-FEVX]. The Uniform Crime Reporting includes general categories, namely stolen property (buying, receiving, possessing), vandalism, drug abuse offenses, liquor laws (under 18), drunkenness, and disorderly conduct, which overlap with several offenses DA Rollins intends not to prosecute, namely disorderly conduct, wanton or malicious destruction of property, minor in possession of alcohol, drug possession, and drug possession with intent to distribute. *Id.*; *Charges to Be Declined*, *supra* note 3. Although the FBI releases data for both arrests and prosecution of serious "Part I" offenses, such as murder, rape, burglary, etc., it only releases data for the arrests of less-serious "Part II" offenses, such as prostitution and vandalism. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 742–44 (2018). Within Massachusetts, Suffolk County accounted for 22.71% of violent crime and 16.78% of property crime offenses known to law enforcement in 2016. *See* FBI, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, *supra* at tbl.6 (identifying criminal offenses known to law enforcement in Massachusetts municipalities). In Suffolk County, which includes the municipalities of Boston, Chelsea, Revere, and Winthrop, there were 5,474 violent offenses out of a state total of 24,103, and 16,698 property offenses out of a state total of 99,497. *Id.* Applying those rates to the total arrests for misdemeanors suggests that between 3,987 and 5,387 misdemeanor arrests occurred in Suffolk County in 2016 that would not have been prosecuted under a comparable non-prosecution policy. *See id.* (multiplying the percentage of violent and property offenses that took place in Suffolk County municipalities by the total Massachusetts misdemeanor arrests that are substantially like the non-prosecution offenses).

also creates a formal procedure of punishment quite distinct from the punishment procedures identified by the relevant statute.[12]

Although the misdemeanor system is vast and results in millions of annual criminal charges, scholars suggest that misdemeanor charging rates peaked in the 1990s and are presently falling.[13] A shrinking misdemeanor system could reflect public disapproval of prosecution and imprisonment for conduct perceived to result from public health failures rather than criminal intent.[14] Rollins' stated purpose for the non-prosecution policy mirrors the perception that petty crime should be fought with tools other than imprisonment.[15] Rollins characterizes the non-prosecuted crimes as non-violent and relating to quality-of-life, justifying why these crimes can be enforced with measures other than jail time.[16] Under the policy, prosecutors should either dismiss cases or downgrade them to civil infractions with a penalty of community service, restitution, or free community programming, such as job training.[17]

Although prosecutorial discretion is incredibly broad during charging decisions, there are potential legal challenges to the non-prosecution policy.[18] Some scholars argue that non-enforcement of law qualifies as a separation of powers violation, but the most viable claims are under Massachusetts common law and catch-all provisions of Massachusetts ethics rules.[19] These legal chan-

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[12] *Compare, e.g.*, THE ROLLINS MEMO, *supra* note 6, at C-3 (specifying the various individual and property-specific conditions under which penalties of non-prosecution, diversion, or restitution could occur for the charge of shoplifting under Massachusetts law), *with* MASS. GEN. LAWS ch. 266, § 30A (2018) (setting out a progressive punishment scheme for shoplifting, in which the first violation allows a fine of under $250, the second violation allows a fine between $100 and $500, and the third violation allows a fine of under $500 and/or imprisonment in jail for under two years).

[13] *See* Stevenson & Mayson, *supra* note 11, at 765–69, 775 app. B (estimating misdemeanor arrest rates by state since 1985).

[14] *See* Natapoff, *supra* note 9, at 1058 (showing that legislatures are recently trending toward decriminalization of particular misdemeanors); John F. Pfaff, *Boston's New D.A. Pushes Back Against Prosecutors' 'Punishment-Centric' Point of View*, THE APPEAL (Nov. 14, 2018), https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors/ [https://perma.cc/K3KN-UVDL] (identifying research supporting public health initiatives as an alternative to incarceration).

[15] *See 'Jail as a Last Resort': Rachael Rollins Defends Plan Not to Prosecute Certain Crimes*, WGBH NEWS (Jan. 3, 2019), https://www.wgbh.org/news/local-news/2019/01/03/new-suffolk-da-rachael-rollins-on-walking-the-talk-of-criminal-justice-reform [https://perma.cc/9ZTZ-Y45H] (stating that people can be held accountable for committing quality-of-life crimes without sending them to jail).

[16] *Id.*

[17] *See Charges to Be Declined*, *supra* note 3 (identifying the potential consequences for an individual arrested for committing one of the petty crimes).

[18] *See, e.g.*, NAT'L POLICE ASS'N, IN RE: FORMAL COMPLAINT AND DEMAND FOR INVESTIGATION OF ALLEGED ATTORNEY MISCONDUCT BY SUFFOLK COUNTY DISTRICT ATTORNEY-ELECT, MS. RACHAEL ROLLINS 1–2 (Dec. 23, 2018) (urging the Office of Bar Counsel of the Massachusetts Bar Association to pre-emptively find the non-prosecution policy in violation of ethics rules).

[19] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2019) (allowing sanction for miscarriage of justice); Att'y Gen. v. Pelletier, 134 N.E. 407, 434, 438 (Mass. 1922) (dismissing a

nels operate as judicial stopgaps against institutional failure and will only be successful if Rollins' policy results in a substantial public backlash, due to concerns about judicial overreach.[20]

This Note continues in three parts.[21] Part I of this Note outlines the possible legal challenges to Rollins' non-prosecution policy under Massachusetts and federal law.[22] Part II describes the academic scholarship that applies to non-prosecution of petty crime as a policy matter.[23] Part III analyzes the merits of potential legal challenges and policy scholarship in the context of Rollins' non-prosecution policy, arguing that the success of a legal challenge fundamentally depends on public opinion and the immediate effectiveness of imprisonment alternatives.[24]

I. LEGAL BACKGROUND

Rollins' non-prosecution policy has already drawn a formal complaint and request for the Massachusetts Bar Association to investigate the policy as an ethical violation.[25] Section A of this Part considers the constitutional challenges available to the non-prosecution policy, namely, whether or not it is an unconstitutional violation of separation of powers.[26] Section B of this Part examines the policy in the context of victim rights requirements.[27] Section C of this Part analyzes whether the policy would violate ethics rules.[28]

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prosecutor for failing to prosecute particular crimes, among other offenses); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (arguing that the Take Care Clause requires the President to "enforce all constitutionally valid acts of Congress in all situations and cases").

[20] *See* Commonwealth v. Pellegrini, 608 N.E.2d 717, 719 (Mass. 1993) (holding that a judge who orders pre-trial dismissal of a case over the prosecutor's objection claims executive powers in violation of separation of powers doctrine); THE ROLLINS MEMO, *supra* note 6, at app. C (outlining a non-prosecution policy for fifteen low-level criminal offenses and misdemeanors).

[21] *See infra* notes 25–278 and accompanying text.

[22] *See infra* notes 25–143 and accompanying text.

[23] *See infra* notes 144–228 and accompanying text.

[24] *See infra* notes 229–278 and accompanying text.

[25] *See* NAT'L POLICE ASS'N, *supra* note 18, at 1–2 (urging the Office of Bar Counsel of the Massachusetts Bar Association to pre-emptively find the non-prosecution policy in violation of ethics rules).

[26] *See infra* notes 29–106 and accompanying text.

[27] *See infra* notes 107–124 and accompanying text.

[28] *See infra* notes 125–143 and accompanying text.

A. Separation of Powers

Deciding not to prosecute violations of particular criminal statutes could prompt a constitutional challenge for violating separation of powers doctrine.[29] The basic argument would be that non-prosecution is functionally equivalent to the repeal of a law.[30] Although a separation of powers challenge against a district attorney would implicate Massachusetts law, the expansive federal scholarship and case law offers a broader scope of comparative analysis.[31] Under federal law, prosecutors are agents of the executive branch, and the Constitution only grants the legislative branch the power to repeal a law.[32] Although the U.S. Constitution lacks an express separation of powers clause, the doctrine is implicitly located in the document's vesting of unique powers to the distinct branches of government.[33] The Massachusetts State Constitution, however, provides express separation of powers requirements in Articles XX and XXX.[34] This Section examines the separation of powers doctrine under both constitutions in order to help illustrate the particularities of constitutional challenges to non-prosecution.[35]

1. Separation of Powers and the U.S. Constitution.

Separation of powers was an important theoretical principle present at the Constitutional Convention, as illustrated in the tripartite division of government and system of checks and balances of power among the three branches adopted at the Convention.[36] Constitutional challenges to the conduct of one branch, on the basis of actions that usurp the authority of another branch, are

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[29] *See* Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034–53 (2006) (discussing the enforcement of separation of powers in criminal law).

[30] *Id.* at 1044–50.

[31] *See id.* at 993 (noting the predominance of federal law, specifically in the administrative law and regulatory space, in separation of powers scholarship).

[32] *Id.*

[33] *See* U.S. CONST. art. I, § 1 (vesting legislative power in the Congress); *id.* art. II, § 1 (vesting executive power in the President); *id.* art. III, § 1 (vesting judicial power in the Supreme Court and courts created by Congress). Use of the word "vested" denotes that the various powers are absolutely granted to the respective branch and cannot be usurped by another branch. *Vested*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[34] MASS. CONST. art. XX, XXX.

[35] *See infra* notes 36–106 and accompanying text.

[36] *See* Harold J. Krent, *Separating the Strands in Separations of Powers Controversies*, 74 VA. L. REV. 1253, 1259–60 (1988) (arguing that the inherently restrictive function of interdependent branches of government reflected the Founders' goal of promoting individual liberty and accountability). Most commonly associated with the writings of Montesquieu, separation of powers intends to prevent the concentration of power in an individual entity or body to such an extent that a tyrant could gain and retain power. *Id.* at 1254, 1259–60. Among the Founders, James Madison contributed the most to separation of powers theory. *Id.* at 1260.

the source of landmark Supreme Court cases.[37] In recent decades, there has been an increase in cases involving separation of powers issues.[38] The crux of separation of powers cases is the self-aggrandizement of one branch over another.[39]

Constitutional challenges to government conduct on the basis of inaction, however, are less common.[40] A growing body of scholarship recognizes government inaction as a functional method of policy-making.[41] This recognition is visible in strident academic opposition to the decision in *Heckler v. Chaney* in 1985.[42] In *Chaney*, the Supreme Court found that an agency decision to not bring an enforcement action is presumed to be unreviewable unless the agency is committed to enforcement procedures by statute or the agency adopts a policy that abandons statutory responsibilities.[43] Many administrative law scholars vehemently objected to the formalist approach, arguing that agency action and inaction can result in functionally equivalent policy.[44] An academic disconnect, however, remains between functionalist understanding of government inaction and constitutional separation of power concerns.[45]

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[37] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–86 (1952) (finding that President Truman's seizure of steel production facilities in advance of a union strike was unconstitutional in the absence of an authorizing statute); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 167–68 (1803) (turning on President Thomas Jefferson's refusal to grant a commission approved by Congress).

[38] *See* Krent, *supra* note 36, at 1253–54 (citing Morrison v. Olson, 487 U.S. 654 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Bowsher v. Synar, 478 U.S. 714 (1986)) (arguing that separation of powers cases increased following congressional efforts to reign in delegations to the executive branch and executive responses to those efforts).

[39] Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1206 (2014) (citing BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 59 (1967)). For example, *Clinton v. City of New York* found the line item veto unconstitutional as it allowed "'the President to enact, to amend, *or to repeal* statutes,'" which is the province of the Congress. Love & Garg, *supra*, at 1206 (quoting Clinton v. City of New York, 524 U.S. 417, 438 (1998) (emphasis added)).

[40] *See id.* at 1207–08 (noting that Justice Jackson's famous concurrence addresses the "acts" of a president rather than the choice not to act).

[41] *See id.* at 1209–10 (summarizing academic research on nonaction as a means of executive discretion).

[42] *See id.* at 1210 n.65 (noting prominent administrative law scholars who call for judicial review of agency inaction under the APA); *see also* Heckler v. Chaney, 470 U.S. 821 (1985).

[43] *Chaney*, 470 U.S. at 828, 832–33 n.4. The government body was an administrative agency, the Food and Drug Administration, which decided not to take enforcement actions against states that planned to use drugs for lethal injections that had not been specifically approved for such a purpose. *Id.* at 821.

[44] *See* Love & Garg, *supra* note 39, at 1205–06, 1210 (noting that administrative inaction is more attractive from a policy perspective due to low administrative costs).

[45] *Id.* It is noted, however, that some scholars are beginning to evaluate inaction as a constitutional violation. *Id.* at 1210–11 n.70; *see, e.g.*, Delahunty & Yoo, *supra* note 19, at 784 (suggesting that the Take Care Clause demands bright-line enforcement of all constitutional acts of Congress); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 678–79 (2014) (positing a framework for enforcement discretion).

Scholars seeking to evaluate government action or inaction in the form of enforcement of the law through the separation of powers doctrine cite the Take Care Clause as the appropriate constitutional hook.[46] The clause holds the President responsible for executing the law faithfully.[47] When the definition of faithful execution is construed broadly, the executive gains considerable discretion in deciding how to enforce law.[48] Scholars note that considerable enforcement discretion exists in the areas of administrative agencies and criminal prosecution.[49] Rationales for this expansive allowance of discretionary enforcement include allocation of limited resources coupled with broad statutory and regulatory enforcement options, as well as the overabundance of violators.[50] Furthermore, the judicial and legislative branches are typically willing participants in the expansive allowance of discretionary enforcement.[51]

In criminal law, the executive carries out enforcement discretion primarily through prosecutorial charging discretion.[52] Prosecutorial discretion covers a variety of possible conduct, including choosing between different charges (which themselves carry different penalties and sentencing consequences), negotiating plea agreements through the removal of certain charges, and choosing not to bring charges altogether.[53] Scholars argue that criminal law separation of powers cases have attracted less attention from courts and the legal academy than administrative law separation of power cases.[54] This relative lack of attention to separation of powers in the context of criminal prosecution is counterin-

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[46] U.S. CONST. art. II, § 3; Price, *supra* note 45, at 673. The Take Care Clause, which calls for faithful execution of the law, "evokes a notion of 'faithful agency'" according to scholars, as opposed to enforcing law "without failure" or "exactly." *See* Price, *supra* note 45, at 698 (arguing that the text of the Take Care Clause inherently allows for discretion). *But see* Delahunty & Yoo, *supra* note 19, at 799–800 (arguing that the Take Care Clause is an instruction or command to the President that the laws are put into effect 'without failure' and 'exactly'" (quoting *Faithfully*, 1 SAMUEL JOHNSON, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE 763 (1755))).

[47] *See* U.S. CONST. art. II, § 3 (mandating that the President "shall take care that the laws be faithfully executed").

[48] *See* Price, *supra* note 45, at 683–85 (noting that "courts and executive-branch lawyers have come to see prosecutorial discretion as a central constitutional function of the executive branch").

[49] *See id.* at 681–82 (noting that federal criminal prosecution and administrative agency enforcement actions are "shot through with discretion").

[50] *Id.* at 682.

[51] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2357 (2006) (arguing that Congress can enact policy with broader scope and appeal by relying on the executive branch to effectively implement policy); Love & Garg, *supra* note 39, at 1229 (noting that courts are "not well suited to review" the factors involved in enforcement decisions, such as likelihood of success and cost-benefit analysis).

[52] Price, *supra* note 45, at 681. The expansion of federal criminal law in the last fifty years resulted in chargeable offenses for a range of conduct that cannot be realistically enforced to the full extent of the law. *Id.* (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517–19, 525 (2001)).

[53] *Id.* at 681–82.

[54] *See* Barkow, *supra* note 29, at 1010–11 (noting the "paucity of separation of powers cases generally and of criminal cases raising such issues in particular").

tuitive because the Constitution expressly protects the rights of criminal defendants, while administrative agencies rely on implicit constitutional protections identified by judicial interpretation.[55] In spite of these express protections, criminal separation of powers cases are more receptive to functional reasoning that allows for greater executive discretion, while administrative separation of powers cases more often employ restrictive formalist arguments.[56]

Furthermore, federal criminal prosecution is only constrained by the Constitution while modern administrative agencies, with their blend of legislative (rulemaking), executive (enforcement), and judicial (adjudication) powers, receive additional judicial supervision under the Administrative Procedure Act (APA).[57] As a result, criminal law receives scant bright-line protection relative to administrative law, and no statutory judicial oversight like that provided in the APA.[58]

Further difference exists between enforcement discretion and executive nullification of law.[59] There is a historical argument that, despite the absence of an express preclusion of executive nullification in the Constitution, the Founders included the Take Care Clause to forbid nullification.[60] Supreme Court precedent affirms the difference between discretion and nullification by means

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[55] *Id.* at 1012. Barkow notes that the legislature is prohibited from passing ex post facto legislation or bills of attainder, which protect individuals from "trial by legislature." *Id.* at 1013 (quoting United States v. Brown, 381 U.S. 437, 442 (1965)). The judiciary is insulated through lifetime appointments and salary; additionally, all criminal trials must be jury trials. *Id.* at 1014–15; *see* U.S. CONST. art. III, §§ 1–2. The executive power to grant pardon provides an additional check. U.S. CONST. art. II, § 2; Barkow, *supra* note 29, at 1016.

[56] *See* Barkow, *supra* note 29, at 1010–11 (distinguishing between methods of argument in criminal and civil separation of powers cases). Barkow compares the functional approach used in major criminal cases with the formalist approach used in administrative civil cases. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Mistretta v. United States*, 488 U.S. 361 (1989), and *Morrison v. Olson*, 487 U.S. 654 (1988), as major criminal cases).

[57] *See id.* at 1020–25 (noting the public record-keeping and hard-look judicial review requirements of the APA as means for restricting arbitrariness in agency discretionary policy-making and enforcement).

[58] *See id.* at 1032–34 (noting the lack of oversight for criminal prosecution relative to administrative enforcement). Alternatively, administrative agencies dominate their regulatory spheres while the states hold the clear majority of criminal jurisdictions. *Id.* at 1019 & n.166 (noting that less than seven percent of felony convictions occurred in federal court in 2000 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2002, at 421 tbl.5.22, 477 tbl.5.44)). This distinction diminishes the urgency of separation of powers protections against federal criminal law enforcement relative to administrative regulations. *Id.* at 1019.

[59] *See* Price, *supra* note 45, at 689–97 (defining executive nullification as contrary to the constitutional principal that the Congress wields legislative supremacy).

[60] *Id.* Critical to the struggle for independence was American colonial opposition to the authority of the English monarch to suspend existing laws and issue dispensations exempting individual compliance. *See id.* at 692 (noting that several early state constitutions forbid suspension and exemption powers). During the Constitutional Convention, an express anti-nullification provision was removed by the Committee on Detail. *Id.* at 693 & n.75 (citing Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 65–66 (1994)). Scholarship suggests that the Founders considered such a provision to be clearly implicit in the Take Care Clause. *Id.* at 694.

of the executive forbidding enforcement.[61] Scholars argue that the interaction of constitutional provisions, particularly the Take Care Clause, actually supports enforcement discretion by the executive.[62] The Supreme Court extends allowance of enforcement discretion to criminal law as well.[63]

The amount of executive enforcement discretion that is allowable is subject to debate.[64] Historically, there was less enforcement discretion available in the early Republic than in modern times, providing evidence of constitutional support through proximity to the Founding.[65] The expansion of the federal government in the late nineteenth and twentieth centuries built the foundation for the expanded use of executive enforcement discretion.[66] Furthermore, much of the expansion occurred alongside new statutes increasingly regulating and subjecting criminal sanctions on activities outside the reach of common law crimes.[67] These statutes expanded the reach of government power to a

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[61] *See* Kendall v. United States *ex. rel.* Stokes, 37 U.S. (12 Pet.) 524, 612–13 (1838) (finding the President violated separation of powers by refusing to carry out an act of Congress that included a direct order and in effect nullified the law).

[62] *See* Price, *supra* note 45, at 696–700 (arguing that the text of the Take Care Clause, allowing for "faithful" execution of the law, inherently allows for discretion). Scholars also argue that the Pardon Clause and the preclusion of Bills of Attainder provide constitutional support for executive enforcement discretion. *See id.* (noting that the Pardon Clause, in both historical and modern understanding, allows for the President to bar punishment for any completed criminal offense, thereby allowing the executive to limit the enforcement of the law).

[63] *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 747–48 (1996) (noting that in *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979), the Supreme Court upheld government discretion in choosing among different criminal statutes when prosecuting the underlying conduct, so long as the government does not discriminate against any class of defendants).

[64] *Compare* Delahunty & Yoo, *supra* note 19, at 784 (arguing that the Take Care Clause effectively precludes executive enforcement discretion), *with* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2332–37 (2001) (arguing in support of a strong unitary executive through, among other strategies, increasing presidential influence over administrative agency enforcement decisions to advance policy objectives).

[65] *See* Price, *supra* note 45, at 717 n.191 (providing an overview of judicial and scholarly support for analyzing early American practices as indicative of constitutional meaning).

[66] *Id.* at 743–46. Price identifies "population growth, immigration, urbanization," as well as an increase in statutory offenses, as causal factors contributing to the increase in criminal conduct. *Id.* at 743. The failure of the government to respond in kind with enforcement resources increased discretionary non-prosecution as a practical matter. *See id.* at 743–44 (discussing the rise of prosecutorial discretion in the nineteenth century, including the rise of plea bargaining). Price also notes the shift from case-based to salary-based compensation for federal prosecutors as the removal of an economic incentive "to convict as many people as possible." *Id.* at 744–45 (quoting NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE 276–77 (2013)).

[67] *Id.* at 743–44. Price identifies such statutes as creating predominately "malum prohibitum" crimes, conduct criminalized by statute, as opposed to "malum in se" crimes, conduct prohibited by ordinary morality and expressed in common law crimes such as murder and theft. *Id.* at 743 & n.319. *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 257–67 (2011) (discussing the increasing size and scope of criminal law alongside growth of regulatory crimes).

larger range of conduct, while enforcement discretion allowed the executive to adjust the scope of that power relative to the intensity of societal opposition.[68]

Congress, in turn, enacted statutes with broad prohibitions, relying on the executive to carry out a practicable enforcement regime.[69] Some scholars argue that legislators delegated the ability to determine the scope of criminal law to prosecutors.[70] Legislators intentionally write the statutory text of criminal law broadly to encompass a wide range of conduct, with the knowledge that prosecutors will use their discretion in determining when to prosecute a crime.[71] This argument proposes that a policy of non-prosecution against an entire category of cases or charges is within the powers of enforcement discretion.[72] Such a policy is more transparent and consistent than case-by-case discretion, decreasing the potential for arbitrary enforcement.[73] Furthermore, Congress can always express disapproval of non-prosecution by imposing a positive duty of enforcement on the executive, which cannot be circumscribed under the guise of discretion.[74]

The judiciary similarly defers to executive enforcement discretion, particularly in the context of criminal law.[75] Charging, dismissing, and plea bargaining decisions are largely at the discretion of the prosecutor.[76] In 1996, in *United States v. Armstrong*, the Supreme Court affirmed that a prosecutor only requires probable cause to make the discretionary charging decision.[77] Although prosecutors may not base discretionary decisions on "race, religion, or another arbitrary classification," the defendant holds the burden of showing that the government was discriminatory in its discretion.[78] In civil enforcement, courts

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[68] Price, *supra* note 45, at 743–44.

[69] *Id.* at 745.

[70] *See* Carissa Byrne Hessick, *Elected Prosecutors and Non-Prosecution Policies*, PRAWFS BLAWG (Sept. 8, 2018), https://prawfsblawg.blogs.com/prawfsblawg/2018/09/elected-prosecutors-and-non-prosecution-policies.html [https://perma.cc/PP6D-N5HK] (arguing that overly broad laws cannot be enforced without significant delegation of discretion as to charging decisions).

[71] *Id.*; *see* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463, 511–14 (2009) (describing the reliance on discretion as "de facto delegation"); *see also* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 995 (2019) (arguing that broad or imprecise criminal laws delegate the power to determine legal scope to prosecutors instead of judges).

[72] Hessick, *supra* note 70.

[73] *See id.* (arguing that written policies provide a structure for holding law enforcement accountable).

[74] Price, *supra* note 45, at 715 (citing United States v. Morgan, 222 U.S. 274, 279–80 (1911) (affirming a statutory design imposing a duty on the district attorney to "prosecute without delay" once certain administratively determined conditions had been met)).

[75] *See id.* at 683–84 (outlining the breadth of precedent upholding prosecutorial discretion).

[76] Barkow, *supra* note 29, at 1025.

[77] United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

[78] *Id.* at 463–64. Known as a selective prosecution claim, the defendant must provide clear evidence that the government violated equal protection standards by failing to prosecute similarly situat-

outlined another path for finding wrongful enforcement discretion.[79] In 1973, in *Adams v. Richardson*, the United States Court of Appeals for the Circuit of the District of Columbia held that courts may enjoin an agency shown to have engaged in complete non-enforcement of a statute that Congress charged the agency to administer.[80] The Supreme Court cited the action taken in *Adams* with approval in *Cheney*, but noted that judicial review is generally unsuitable for examining non-enforcement decisions.[81]

With a lack of clear guidance from the Supreme Court or Congress, scholars suggest analytical tests to determine constitutional thresholds of discretion.[82] Statutes could be analyzed through factors such as providing a baseline of requisite enforcement, stating legitimate reasons for non-prosecution, and using policy goals to guide the discretion instead of circumstances unrelated to policy.[83]

2. Separation of Powers and the Massachusetts Constitution

Separation of powers in Massachusetts, despite its express inclusion in the state constitution, has been interpreted more flexibly during the last half-century.[84] Regardless of the shift in application, the Massachusetts SJC continues to recognize the core principle of Article XXX: that no branch of government may interfere with the power of other branches.[85] Furthermore, the SJC has occasionally recognized the express language of Article XX precluding non-legislative authorities from suspending the execution of laws.[86] Separation

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ed defendants. *Id.* at 465–66 (citing United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926)). Prosecutorial conduct maintains a "presumption of regularity." *Id.* at 464. In *Armstrong*, the court evaluated the merits of a selective prosecution claim based on past criminal charging statistics as opposed to criminal conduct statistics. *See id.* at 469 (arguing that criminal conduct statistics show higher rates of sentencing for particular crimes among different races).

[79] *See* Price, *supra* note 45, at 684 (distinguishing between criminal and civil enforcement discretion).

[80] Adams v. Richardson, 480 F.2d 1159, 1160–62 (D.C. Cir. 1973) (en banc) (per curiam) (upholding the district court order that the Department of Health, Education, and Welfare commence enforcement proceedings against schools found to be noncompliant with Title VI).

[81] *Cheney*, 470 U.S. at 831, 833 n.4 (contrasting the case before it with the "extreme" case of agency "abdication of statutory responsibilities").

[82] *See* Love & Garg, *supra* note 39, at 1212–20 (identifying important factors for determining the constitutionality of non-prosecution decisions).

[83] *Id.*

[84] *Compare Ex parte* Germain, 155 N.E. 12, 13 (Mass. 1927) (noting that Article XXX provides "strict separation of the powers of the executive and judicial departments of government"), *with* Gray v. Comm'r of Revenue, 665 N.E.2d 17, 21–22 (Mass. 1996) (admitting that overlap between the branches is acceptable).

[85] *See, e.g.*, Op. of the Justices, 309 N.E.2d 476, 478–80 (Mass. 1974) (striking down a data processing commission for exerting powers held by the judiciary).

[86] *See, e.g.*, Mass. Bay Transp. Auth. Advisory Bd. v. Mass. Bay Transp. Auth., 417 N.E.2d 7, 13 (Mass. 1981) (holding that the Governor could not suspend a law imposing conditions and limits on a state agency).

of powers challenges have been successfully raised even under the modern, flexible interpretation.[87]

Prosecution in Massachusetts is enshrined in the constitutional, statutory, and common law as a right of governmental authority.[88] The prosecutor is an agent of the executive branch and has a duty to recognize legal violations and bring enforcement proceedings.[89] Prosecutors hold broad discretion in determining whether to bring a case.[90] This includes the statutory discretion to bring charges and the discretion to drop pending charges, otherwise known as entering a *nolle prosequi*.[91] Statutory resolution of a dispute surrounding the power to drop pending charges was affirmed on the basis of Article XXX, illustrating the viability of separation of powers violations.[92] A judge may not enter a *nolle prosequi* in a case over the objection of the prosecuting attorney.[93]

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[87] *See, e.g.*, *In re* Op. of the Justices to the Senate, 717 N.E.2d 655, 657 (Mass. 1999) (finding a delegation of legislative appropriation power to the Governor to be unconstitutional).

[88] *See* John P. Zanini & Jeremy Bucci, *"The Interests of Public Justice" and the Judicial Decision to Terminate Prosecutions: Silencing the Voice of the People*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 163, 167–69 (2000) (collecting sources). Several articles of the Massachusetts Declaration of Rights suggest that prosecution is a constitutional privilege of the government. *See* MASS. CONST. art. VII (holding that government exists for the common good and to provide safety and protection for Massachusetts residents); *id.* art. X (holding that every individual has right to protection under the standing laws); *id.* art. XI (holding that all Massachusetts residents have recourse to the laws and are not obliged to purchase the means of obtaining justice). Statutory right is found in the duty of the prosecutor to "take cognizance of all violations of law . . . affecting the general welfare of the people . . . [and] institute or cause to be instituted criminal or civil proceedings before the appropriate . . . [courts] . . . as he may deem to be for the public interest . . . ." MASS. GEN. LAWS ch. 12, § 10 (2018). Scholars identify a common law right to prosecutorial discretion throughout Massachusetts precedent. *See* Zanini & Bucci, *supra*, at 164 n.3 (citing Massachusetts case law); *see, e.g.*, Commonwealth v. Franklin, 385 N.E.2d 227, 233 (Mass. 1978) (holding that prosecutors are law enforcement officers and "enjoy considerable discretion in exercising selectivity for purposes consistent with the public interest"); Att'y Gen. v. Tufts, 132 N.E. 322, 326 (Mass. 1921) (holding that the prosecutor carries the authority to decline to prosecute a complaint or indictment).

[89] *See* Commonwealth v. Gordon, 574 N.E.2d 974, 977 (Mass. 1991) (finding that the district attorney is the elected advocate of the people and that judicial interference with prosecutorial decisions usurps the authority of the executive branch); Commonwealth v. Tuck, 37 Mass. (20 Pick.) 356, 364–66 (1838) (finding that the Attorney General carries the power to manage all prosecutions).

[90] *See* Shepard v. Att'y Gen., 567 N.E.2d 187, 189–90 (Mass. 1991) (holding that a prosecutor that held an inquest into a death does not have a duty to bring a case); Manning v. Mun. Court of the Roxbury Dist., 361 N.E.2d 1274, 1276 (Mass. 1977) (holding that the prosecutor carries discretion to discontinue prosecution without approval of another official).

[91] *See* MASS. GEN. LAWS ch. 278, § 15 (noting the power of the district attorney to enter *nolle prosequi*, an order to drop pending charges); *see Pellegrini*, 608 N.E.2d at 718–19 (holding that a judge who orders pre-trial dismissal of a case over the prosecutor's objection claims executive powers in violation of Article XXX); Town of Burlington v. District Att'y for N. Dist., 412 N.E.2d 331, 334 n.11 (Mass. 1980) (noting an exception for town counsel in district court prosecutions that charge under municipal by-laws). *Nolle prosequi* is a term of art referring to the abandonment of a lawsuit or prosecution. *Nolle Prosequi*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[92] *See* MASS. GEN. LAWS ch. 278, § 18 (allowing juvenile defendants and defendants in Boston municipal court to issue a conditional continuance followed by dismissal of charges); Commonwealth v. Cheney, 800 N.E.2d 309, 314 (Mass. 2003) (finding that the procedure for judge-issued continu-

Prosecutors also carry the power to grant immunity in Massachusetts, which is a means of enforcement discretion.[94] The individual authority of a DA, however, is limited to her district.[95] To receive immunity on a state-wide level or against prosecution for a federal crime, the prosecutor must take steps outside of their discretion.[96] Prosecutors may also select among multiple sentence enhancement statutes or multiple criminal charges when charging defendants.[97]

Outside of Article XXX, there is a history in the United States and Massachusetts to enforce prosecutions through judicial mandate.[98] In Massachusetts, the case of *Attorney General v. Pelletier*, decided in 1922, provides precedent for a court to remove a prosecutor on the basis of failure to enforce the law.[99] In *Pelletier*, the Massachusetts SJC found that the prosecutor had knowledge of probable cause that criminal statutes were violated, yet refused to bring charges.[100] The court detailed the various failures to enforce the law, and several instances involving conspiracy and extortion on the part of the prosecutor.[101] The court also lamented ordinary criminal assaults where the prosecutor failed to bring charges without excuse or explanation.[102]

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ance of a case, without first obtaining a guilty plea or a verdict and over the objection of the prosecutor, constituted a constitutionally invalid exercise of executive powers under Article XXX).

[93] *See* Commonwealth v. Vascovitch, 661 N.E.2d 117, 118–19 (Mass. App. 1996) (holding that a decision to *nol pros* cannot be entered over the prosecutor's objection absent a legal basis). *But see* Commonwealth v. Borders, 900 N.E.2d 117, 119–20 (Mass. App. 2009) (noting the exceptions of "egregious prosecutorial misconduct" and "serious threat of prejudice" to the defendant).

[94] *See* Baglioni v. Chief of Police of Salem, 656 N.E.2d 1223, 1224 n.4 (Mass. 1995) (distinguishing an accepted offer of immunity from reliance on an offer which was previously rejected).

[95] *Id.* at 1225.

[96] *Id.* State-wide grants of immunity require proper notice to other prosecutors, as required by statute, and assent by the Attorney General. *Id.* at 1225 n.6; *see* MASS. GEN. LAWS ch. 233, § 20E (defining the procedure for notice to other prosecutors which can lead to assented immunity). Recognition of immunity from federal prosecution requires either grant of immunity from a federal prosecutor or "use and derivative use" circumstances. *Baglioni*, 656 N.E.2d at 1225 n.7; *see* Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that the Fifth Amendment protects witnesses who are compelled to offer self-incriminating testimony from prosecution).

[97] *See* Commonwealth v. Ehiabhi, 84 N.E.3d 13, 20–21 (Mass. 2017) (finding that a judge's decision not to sentence a defendant pursuant to statutes that were properly charged and convicted was error).

[98] *See* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 175 & n.178 (2016) (discussing state cases in the late nineteenth and early twentieth century that disciplined prosecutors for non-prosecution).

[99] *See Pelletier*, 134 N.E. at 434–38 (sanctioning a district attorney on grounds including failure to prosecute).

[100] *Id.* at 438.

[101] *See, e.g.*, *id.* at 434–38 (detailing the prosecutor's involvement in a series of criminal enterprises).

[102] *See, e.g.*, *id.* at 434 (finding a district attorney guilty of failing to prosecute an assault and battery supported by witnesses and the victim).

Non-prosecution of criminal law in Massachusetts has not received significant attention from modern courts or scholarship.[103] When courts have considered non-enforcement of civil law, however, they have found executive encroachment on legislative powers in cases of executive refusal or failure to apply appropriated funds to be unconstitutional.[104] Courts have found executive actions suspending the enforcement of civil laws to violate Article XX as well.[105] Furthermore, courts have found that agents of the executive branch besides the Governor can unconstitutionally tread on legislative power.[106]

B. Victim Rights and Restitution

Massachusetts recognizes a statutory Victim Bill of Rights, which provides specific rights for the victims of crime and their families.[107] Within the Victim Bill of Rights, various requirements turn on the precise moment in criminal proceedings.[108] For example, an individual does not accrue any rights until a complaint or indictment is issued.[109] Massachusetts is one of a minority of states that grant private citizens the right to file an application seeking criminal complaint and appear before a clerk-magistrate to demonstrate probable cause for arrest.[110] If the clerk-magistrate finds there is probable cause, the DA

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[103] *See* Zanini & Bucci, *supra* note 88, at 167–69 (discussing Massachusetts precedent and scholarship surrounding *nolle prosequi* rather than non-prosecution).

[104] *See* Op. of the Justices to the Senate, 376 N.E.2d 1217, 1221 (Mass. 1978) (finding that although the executive branch has discretion to avoid wasteful expenditures, refusal to issue appropriated funds that accomplish disliked objectives would violate Article XXX).

[105] *See Mass. Bay Transp. Auth. Advisory Bd.*, 417 N.E.2d at 13 (holding that the Governor could not suspend a law imposing conditions and limits on a state agency). It is noteworthy that judges commonly evaluate whether the legislature has appropriately delegated suspending power to the executive through the constitutional framework of Article XX. *See* Op. of the Justices, 52 N.E.2d 974, 975, 978 (Mass. 1944) (finding that a state statute empowering the Governor to exercise authority over persons during emergency of war did not authorize the Governor to advance the date of state primary elections).

[106] *See, e.g.*, Curley v. City of Lynn, 556 N.E.2d 96, 98 (Mass. 1990) (finding that a state executive agency, the Civil Service Commission, cannot modify statutory provisions).

[107] MASS. GEN. LAWS ch. 258B, § 3. *See generally* Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 944–51 (1985) (identifying the growth of the victim's rights movement with retributive theories of criminal punishment).

[108] *See* Henderson, *supra* note 107, at 967–68 (noting that victim's rights proposals can be broadly categorized as concerning pre-conviction rights and rights at sentencing). For example, once a complaint or indictment has been issued, victims must be informed by the prosecutor of their "rights in the criminal process." MASS. GEN. LAWS ch. 258B, § 3(a).

[109] *See* MASS. GEN. LAWS ch. 258B, § 1 (defining the term "victim").

[110] *See* MASS. R. CRIM. P. 4(b) (granting right to a private person to apply for issuance of process); Victory Distribs., Inc. v. Ayer Div. of the Dist. Court Dep't, 755 N.E.2d 273, 277 (Mass. 2001) (finding that private right to the criminal complaint process is limited to filing an application and court action on that application).

retains prosecution of the case; there are no private prosecutions in Massachusetts.[111]

After issuance of a complaint or indictment, but prior to prosecution proceedings, victims receive rights that primarily relate to the provision of information.[112] After the prosecutor initiates proceedings, victims receive more substantial rights that can influence the prosecutor's discretion to dismiss the case, namely the right to confer with the prosecutor prior to entry of *nolle prosequi*, to submit a victim impact statement, and to request restitution be part of the disposition.[113] Victims also have the right to the return of personal property that was either stolen or taken for evidence once the property is no longer needed for law enforcement or prosecution purposes.[114]

The statutory framework provides remedies for violation of the Victim Bill of Rights that courts will enforce, subject to limitations.[115] The Victim Bill of Rights broadly calls on actors in the criminal justice system, including prosecutors and judges, to assure the provision of victims' rights.[116] The law does not provide specific procedures for victims to challenge the criminal justice system, though it did create a Victim and Witness Assistance Board to help victims receive their rights.[117] Victims do not have standing as a party in criminal proceeding, even if their rights are denied, and they cannot demand interlocutory appeal due to denial of those rights.[118] Courts have repeatedly urged

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[111] *See* Taylor v. Newton Div. of Dist. Court Dep't, 622 N.E.2d 261, 262 (Mass. 1993) (noting that a private citizen has no "judicially cognizable interest" in the prosecution of another individual); Commonwealth v. Gibbs, 70 Mass. (4 Gray) 146, 147 (1855) (prohibiting Massachusetts prosecutors from receiving compensation from individual persons). Some argue for the allowance of private prosecution. *See generally* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 424 (2009) (discussing appeals within the victim's rights movement for expanded private initiation of criminal complaints and the potential conflicts of interest arising from private prosecution).

[112] *See* MASS. GEN. LAWS ch. 258B, § 3(a) (requiring the prosecutor to inform victims of their "rights in the criminal process"); *id.* § 3(d) (requiring the victim to be informed of available protections); *id.* § 3(e) (requiring victim to be informed of financial assistance and social services); *id.* § 3(h) (requiring the victim to be informed that they may request confidentiality).

[113] *Id.* § 3(n)–(p).

[114] *Id.* § 3(r).

[115] *See, e.g.*, Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002) (finding that a court is obligated to provide the victim opportunity to address the court when the right to a prompt disposition of the case is jeopardized).

[116] MASS. GEN. LAWS ch. 258B, § 12.

[117] *Id.* § 4. The law does require that district attorneys create and maintain programs to facilitate the provision of victim's rights, expressly mentioning court appearances, informational services, case notification, property return, protection, and social service referrals. *Id.* § 5. The programs themselves, however, are overseen by the district attorney and subject to resource availability. *Id.*

[118] *See In re* McDonough, 930 N.E.2d 1279, 1285–87 (Mass. 2010) (refusing to use the SJC's power of discretionary review to grant standing for an interlocutory appeal filed by the victim as a prospective witness (citing MASS. GEN. LAWS ch. 211, § 3)); *Hagen*, 772 N.E.2d at 34 (finding that a victim lacks standing to file a motion to revoke a post-conviction stay of criminal sentence on the ground of a victim's rights violation).

judges and prosecutors to ensure compliance with victims' rights provisions outside of a formal legal process.[119]

Distinct from the constitutional rights granted to victims of crime in Massachusetts is the common law practice of restitution.[120] Restitution in criminal law refers to the court-enforced practice of making whole, typically through monetary compensation, the individual victim of a crime for financial losses suffered as a consequence of the criminal conduct.[121] Both the Victim Bill of Rights and common law provide for restitution.[122] Although restitution is allowable where a crime victim suffers financial injury, it is similarly subject to the discretion of the prosecutor.[123] Further, in 2016, in *Commonwealth v. Henry*, the Massachusetts SJC held that a judge must consider the defendant's ability to pay when determining restitution.[124]

C. Ethics Violations

Prosecutors must abide by the attorney ethical standards of their jurisdiction, presenting an additional avenue for legal challenge to discretionary non-prosecution.[125] The National Police Association already raised such a challenge.[126] In their complaint to the Massachusetts Board of Bar Overseers and Office of the Bar Counsel, the National Police Association alleged that Rollins' non-prosecution policy constituted a violation of several ethical standards.[127]

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[119] *See, e.g.*, *Hagen*, 772 N.E.2d at 37–38 (holding that courts should give victims an opportunity to address the court directly when their "fundamental right" is jeopardized).

[120] *See* Cristina Rodrigues, *The Cost of Justice: The Importance of a Criminal Defendant's Ability to Pay in the Era of* Commonwealth v. Henry, 10 NE. U. L. REV. 204, 211 (2018) (describing the practice of restitution generally and in Massachusetts).

[121] *See id.* (noting that restitution seeks to return the victim to the approximate position held before the crime occurred).

[122] MASS. GEN. LAWS ch. 258B, § 3(o); *see* Rodrigues, *supra* note 120, at 211 ("Victim compensation has been recognized by Massachusetts courts since as early as 1834.").

[123] *See* Rodrigues, *supra* note 120, at 211–13 (describing the state monopoly on prosecution and focus on punishment rather than compensation). Furthermore, in cases where victims have exercised undue influence in determining the amount of restitution sought during plea negotiations, courts have sanctioned the prosecutor for violating ethical rules. *See, e.g.*, *In re* Flatt-Moore, 959 N.E.2d 241, 245 (Ind. 2012) (sanctioning a prosecutor for allowing the victim to dictate the amount of restitution included in a plea bargain). In *Flatt-Moore*, the court held that its sanction of the prosecutor did not violate separation of powers doctrine. *Id.* at 246.

[124] *See* Commonwealth v. Henry, 55 N.E.3d 943, 950 (Mass. 2016) (noting that because a judge may condition probation on payment of restitution, the restitution is enforced by threat of criminal sanction). The court noted that a victim should be notified of their right to civil action independent of a criminal restitution order. *Id.* (citing MASS. GEN. LAWS ch. 258B, § 3(u)).

[125] *See* Green & Levine, *supra* note 98, at 149–53 (outlining the ethics rules bearing on prosecutorial conduct).

[126] *See* NAT'L POLICE ASS'N, *supra* note 18, at 1 (filing an ethics complaint before Rollins even took office).

[127] *Id.* The complaint identifies provisions concerning prosecutor responsibilities in the Massachusetts Rules of Professional Conduct and the American Bar Association Standards for Criminal

Although the Supreme Court, in *Connick v. Thompson* in 2011, highlighted disciplinary challenges as a tool for confronting prosecutorial misconduct, scholars dispute their effectiveness.[128] Similar to the deference shown toward prosecutorial discretion, federal prosecutors infrequently receive disciplinary sanction from federal courts.[129] Some state disciplinary boards and state courts are relatively less deferential.[130] Particular ethical rules written exclusively for prosecutors, however, are often diluted when adopted by state disciplinary authorities.[131]

There are few ethical standards applicable to a legal challenge of Rollins' non-prosecution policy.[132] For example, the standards identified in the National Police Association complaint include both enforceable rules and non-enforceable guidance.[133] Most clearly applicable is Rule 3.8 of the Massachusetts Rules of Professional Conduct, directed exclusively at prosecutors.[134] Rule 3.8(a) is the only provision regulating charging decisions and repeats the constitutional requirement that the prosecutor must hold probable cause for the charge.[135] Although a minimum evidentiary threshold restricts the prosecutor's ability to bring charges, it does not impose an affirmative charging requirement when the threshold is met.[136] Scholars identify additional ethics rules that

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Justice. *Id.* (citing MASS. RULES OF PROF'L CONDUCT r. 3.8(f)(1) (2016); CRIMINAL JUSTICE STANDARDS §§ 3-1.2(b), 3-1.3, 3-1.4, 3-1.6, 3-1.7(f) (Am. Bar Ass'n 2015)).

[128] 563 U.S. 51, 65–70 (2011); *see* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson: *Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 220 (2011), https://www.yalelawjournal.org/pdf/1018_hpkwev93.pdf (citing studies demonstrating that disciplinary reviews, as they are currently conducted, do not effectively enforce prosecutor accountability).

[129] *See* Green & Levine, *supra* note 98, at 144–45 (noting that prosecutors are "rarely disciplined" and that observers feel the punishments that are imposed are often too light).

[130] *See id.* at 169–70 (noting that some state courts recognize authority to review aspects of charging decisions).

[131] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2019) (enumerating the specific responsibilities of a prosecutor); Keenan *supra* note 128, at 227–30 (discussing the common modifications to Model Rule 3.8 as adopted by state disciplinary authorities).

[132] *See* Green & Levine, *supra* note 98, at 151 (distinguishing the ABA Model Rules of Professional Conduct from the non-enforceable guidelines for prosecutor ethics laid out in the ABA Criminal Justice Standards).

[133] *See* NAT'L POLICE ASS'N, *supra* note 18 at 3–6.

[134] MASS. RULES OF PROF'L CONDUCT r. 3.8. The American Bar Association Model Rules of Professional Conduct originally drafted the language of Rule 3.8, which was adopted by the Massachusetts legislature. *Compare* MODEL RULES OF PROF'L CONDUCT r. 3.8, *with* MASS. RULES OF PROF'L CONDUCT r. 3.8.

[135] *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (citing Branzburg v. Hayes, 408 U.S. 665, 686 (1972)) (noting that both the law and the Model Rules forbid prosecution of a charge the "prosecutor knows is not supported by probable cause").

[136] *See* MASS. RULES OF PROF'L CONDUCT r. 3.8(a) (using the operative verb "refrain" to define when a prosecutor may bring charges as opposed to an affirmative requirement).

could apply, including conflict of interest and prejudice to justice provisions.[137] Conflict of interest rules apply where the charging decision is motivated by desire to improve a third party's interest or advance the prosecutor's self-interest, political or otherwise.[138] Rule 8.4(d), the prejudice to justice rule, is a catch-all provision invoked by authorities against abuses of prosecutorial discretion that involve gross misconduct.[139]

Other Rules of Professional Responsibility may apply to the manner in which Rollins announced the non-prosecution policy.[140] Rule 3.8(f) restricts prosecutors from making extrajudicial comments that violate Rule 3.6, which prohibits attorneys from making comments that have a "substantial likelihood" of materially influencing a matter.[141] Also, Rule 8.4(c) restricts conduct involving "dishonesty, fraud, deceit or misrepresentation."[142] These standards could be invoked if individuals relied on Rollins' announcement to carry out the identified conduct and were subsequently prosecuted.[143]

II. NON-PROSECUTION AS POLICY: TOO FAR OR NOT FAR ENOUGH?

As a normative matter, Rollins' non-prosecution policy offers insight into both criminal justice reform and the effect of prosecutorial discretion on the rule of law.[144] Section A first sketches the degree to which advocates of various criminal justice reforms support, and challenge, non-prosecution.[145] Section B then describes the ways in which non-prosecution interacts with theoretical and practical understandings of the rule of law.[146]

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[137] *See* Green & Levine, *supra* note 98 at 154 (citing MODEL RULES OF PROF'L CONDUCT r. 1.7, 1.9, 1.10, 1.11, 8.4(d)).

[138] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 (concerning current clients); *id.* r. 1.9 (concerning former clients); *id.* r. 1.11 (concerning former and current government employees); *see, e.g.*, *In re* Discipline of Bonet, 29 P.3d 1242, 1245, 1249 (Wash. 2001) (disciplining prosecutor for offering to dismiss criminal charges in exchange for the defendant agreeing not to testify at the trial of his coconspirator).

[139] MASS. RULES OF PROF'L CONDUCT r. 8.4(d); *see, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Barry, 762 N.W.2d 129, 134, 140 (Iowa 2009) (suspending prosecutor for quid pro quo contributions to a sheriff's fund in exchange for non-prosecution).

[140] *See, e.g.*, MASS. RULES OF PROF'L CONDUCT r. 3.6(a) (concerning trial publicity), 8.4(c) (concerning misconduct involving misrepresentation).

[141] *Id.* r. 3.6(a), 3.8(f). R. Michael Cassidy argues that the restrictions on political speech enacted by these rules have lost their strength and policy platforms issued by a political candidate for district attorney invoke First Amendment protections. R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 L. CONTEMP. PROBS. 67, 75–79 (2008).

[142] MASS. RULES OF PROF'L CONDUCT r. 8.4(c).

[143] *Id.* r. 3.6(a), 8.4(c). *See generally* Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 1015–20 (2017) (discussing the viability of a common law defense based on a promissory estoppel theory following a pattern or policy of executive non-enforcement).

[144] *See infra* notes 147–228 and accompanying text.

[145] *See infra* notes 147–200 and accompanying text.

[146] *See infra* notes 201–228 and accompanying text.

A. Perspectives in Criminal Justice Reform

Non-prosecution is, in part, analyzed within a vast field of academic scholarship surrounding the policy implications of criminal justice reform, from focus on quality-of-life crime to the merits of diversion.[147] Rollins' policy has already drawn challenge and support from legal scholars and officials.[148] This Section provides an overview of the policy arguments used to both support and oppose prosecutors' use of non-prosecution.[149] First, it discusses the policy arguments of non-prosecution opponents.[150] It then outlines policy favored by the proponents.[151]

1. Challenges

The policy of non-prosecution has been challenged on two principal grounds.[152] First, this subsection outlines the argument of scholars who challenge that non-prosecution cannot address the structural problems of the criminal justice system because it is an insider-led reform.[153] Second, it discusses additional claims that under-enforcement of petty crime already exists and that under-enforcement is itself a detriment to local communities.[154]

a. The Criminal System Requires Structural Change, Not Insider Reform

Some scholars criticize reforms that depend on the election of progressive prosecutors for being incapable of producing structural change.[155] Particularly, prosecutor-led reforms create a principal-agent problem, the exchange of op-

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[147] *See* Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 686 (2018) (arguing that prosecutors use diversion programs to impose sanctions on arrestees when charges would have been otherwise dropped); James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 33–35 (identifying enforcement of quality-of-life crimes increases community stability and decreases criminal conduct).

[148] *See, e.g.*, Zack Budryk, *Barr Predicts Progressive Prosecutors Will Lead to 'More Crime, More Victims,'* THE HILL (Aug. 12, 2019), https://thehill.com/homenews/administration/457120-barr-predicts-progressive-prosecutors-will-lead-to-more-crime-more [https://perma.cc/2Z23-5QRZ] (quoting Attorney General William Barr in a speech to the Fraternal Order of Police as saying that "anti-law enforcement DAs . . . refusing to prosecute various theft and drug cases" will lead to "[m]ore crime, more victims"); Hessick, *supra* note 70 (arguing that broad drafting language in criminal law supports Rollins' non-prosecution policy as a matter of legislative delegation).

[149] *See infra* notes 155–200 and accompanying text.

[150] *See infra* notes 155–184 and accompanying text.

[151] *See infra* notes 188–200 and accompanying text.

[152] *See infra* notes 155–184 and accompanying text.

[153] *See infra* notes 155–178 and accompanying text.

[154] *See infra* notes 179–184 and accompanying text.

[155] *See* Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748, 758–60 (2018) (outlining broad criticisms of reforms initiated by progressive prosecutors).

pressive consequences, and rely on the support of a reactive electorate.[156] The principal-agent problem posits that if agents critical to carrying out the policy objective of the principal have divergent interests, those interests will inhibit cooperation.[157] In this context, the principal is DA Rollins, while the agents are the line prosecutors and police officers necessary to carrying out Rollins' non-prosecution policy.[158] Line prosecutors are the unelected prosecutors hired to execute the elected DA's law enforcement policies in court.[159]

Scholars argue that internal advancement practices incentivize line prosecutors to produce convictions, which encourages the use of enforcement discretion to box defendants into a conviction or guilty plea.[160] Conversely, police officers are removed from the supervisory authority of the DA and carry even greater bargaining power than line prosecutors.[161] DAs rely on police officers to detect and substantiate criminal activity.[162] Moreover, police officers are self-interested in avoiding penalty for their conduct in the field.[163] As exemplified by the complaint filed against Rollins by the National Police Association, the principal-agent problem will be a likely obstacle for a non-prosecution policy.[164]

Progressive prosecutors who seek to reduce incarceration rates often use diversion programs as a substitute, but these programs are not without some

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[156] *Id.* at 760–62 (concerning the principal-agent problem); *id.* at 762–65 (concerning the consequences of diversion); *id.* at 766–68 (concerning electoral problems).

[157] *Id.* at 760–65. Critical race theorists define interest divergence as the position that gains sought through reform are necessarily restricted when the interests of actors within the field would be harmed by enactment of the reform. *See* Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (defining interest convergence as the condition that allows racial reforms); Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HISTORY. 1, 15 (2004) (contrasting interest divergence with the theory of interest convergence as defined by Derrick Bell).

[158] *See* Note, *supra* note 155, at 761 (citing Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989)) (identifying the difference in goals and risk-tolerance among the parties in a hierarchical division of labor as the principal-agent problem).

[159] *Id.* at 760–62.

[160] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2541 (2004) (claiming that self-interest motivates line prosecutors to protect their win-loss ratio and professional reputation by avoiding trial losses).

[161] *See* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 305 (2001) (arguing that prosecutors are averse to challenging police officers because they rely on those officers in their cases).

[162] Note, *supra* note 155, at 762 (noting that a police officer can make a decision to arrest an individual for a crime before a prosecutor ever even gets involved).

[163] *See id.* at 762–65 (noting that district attorneys only exercise persuasive authority over police officers, as the officers are not under their direct supervision like the line prosecutors). Although district attorneys may exercise their prosecutorial powers against police officers, scholars argue that such action eliminates any persuasive authority the district attorney once had with the officers. *See id.* at 764–65 (providing the example of an Albuquerque district attorney who charged two police officers after a civilian shooting, and consequently faced retaliatory investigation by police officers and did not run for reelection).

[164] *See* Press Release, *supra* note 5 (bringing an ethics complaint against Rollins and the non-prosecution policy).

level of burden to the community.[165] Police assist with the organization of diversion programs, which help to increase funding for police departments and entrench their institutional power.[166] Some diversion programs are funded by the assessment of fees against arrestees, in effect offering freedom of movement for a price many cannot afford.[167]

Lastly, progressive prosecutors rely on their election and reelection in order to enact reforms.[168] The initial election of progressive prosecutors is unrealistic in some jurisdictions as progressive prosecutor campaigns have failed, even in liberal, urban jurisdictions.[169] Once elected, it could be difficult for a progressive prosecutor to retain support from the electorate.[170] Historically, the public reflexively responds to perceptions of increased criminal activity, whether accurate or not, with the election of "tough on crime" prosecutors.[171]

The overarching theme of this criticism is that the criminal justice system is fundamentally flawed and requires systemic change, not just individual action by progressive prosecutors.[172] The criminal legal system is systemically flawed because of the large role it plays and has played in the construction of race by distinguishing on the basis of skin color,[173] creating racial hierarchies,[174] and en-

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[165] *See* Feeley, *supra* note 147, at 686 (arguing that prosecutors use diversion programs to impose sanctions on arrestees when charges would have been otherwise dropped).

[166] *See* Marbre Stahly-Butts & Amna A. Akbar, Transformative Reforms of the Movement for Black Lives 6–9 (2017) (unpublished manuscript), https://law.rutgers.edu/sites/law/files/attachments/Stahly%20Butts-Akbar%20-%20Transformative%20Reforms%C20of%C20the%C20Movement%C20for%C20Black%20Lives.pdf [https://perma.cc/6A24-H87Y] (criticizing "reformist reforms" as contributing to the budget and role of compromised institutions such as police).

[167] Note, *supra* note 155, at 766 (citing Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), https://nyti.ms/2hDrOr0 [http://perma.cc/9LXQ-6JJU]) (describing the high economic cost of diversion programs for low-income defendants).

[168] *See id.* at 766–68 (noting that the longevity of prosecutor-led reforms relies on reelection).

[169] *See id.* (noting the failure of campaigns in Sacramento and San Diego).

[170] *Id.* at 766–68.

[171] *Id.* Scholars note the effectiveness of the "Willie Horton" campaign during the 1988 presidential election at influencing voter perception that candidate Michael Dukakis was soft on crime. Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 CRIME & JUST. 273, 303 (2010). Voters are traditionally primed to vote for the district attorney perceived to be the most tough on crime. *See* Stuntz, *supra* note 52 at 509, 534 (describing the historical success of the district attorney candidate with the higher conviction rate and sentencing record).

[172] Note, *supra* note 155, at 756–58, 768–70.

[173] *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1442 (2016) (outlining a critical race theory analysis of the modern criminal justice system). *See generally* IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (2006) (submitting a critical race theory position that criminal laws and statutes throughout American history helped create modern understanding of racial identity).

[174] *See, e.g.*, Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1608–10 (2011) (arguing that criminal slave codes assigned an inferior social position to enslaved Africans).

forcing laws that unequally punish along racial lines.[175] Prosecutors carry substantial discretion to enforce the criminal legal system and are largely protected from liability.[176] Their centrality to the criminal legal system imprints prosecutors with the flaws of that same system.[177] Powerful actors tasked to enforce a flawed system cannot be expected to wield their power justly, much less be granted additional discretionary power.[178]

b. Under-Enforcement of Petty Crime Is Already a Systemic Problem

Some critics of enforcement discretion take the exact opposite view: that the criminal legal system fails to sufficiently enforce criminal laws.[179] These scholars argue that criminal laws are unequally enforced across geographic areas according to race and class; wealthier areas with larger white populations receive more enforcement while poorer areas with larger minority populations receive less enforcement.[180] There are reports of under-enforcement of serious and petty crime alike.[181] Under-enforcement of serious crime, such as murder and rape, can create "a vicious cycle" that emboldens criminals, increases civilian fear, decreases respect for police officers, and discourages cooperation with prosecutors.[182] The under-enforcement of petty crime, such as littering and property defacement, is even more disparate; some experts argue that tacit allowance of petty crime damages the social environment of the area and encourages more serious criminal conduct.[183] Under-enforcement of petty crime

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[175] *See, e.g.*, Jared Keller, *A Tale of Two Drug Wars*, PAC. STANDARD (Dec. 8, 2017), https://psmag.com/social-justice/a-tale-of-two-drug-wars [https://perma.cc/AEW6-PY8H] (comparing primarily retributive reactions to the crack cocaine epidemic of the 1980s with the primarily rehabilitative reactions to the opioid epidemic of the 2010s).

[176] *See generally* Keenan, *supra* note 128, at 213–23 (explaining prosecutor immunity and the infrequency of sanctioning action by state bar agencies).

[177] *See* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 372–91 (2001) (ultimately arguing that systemic forces acting on prosecutors are too powerful for most attorneys to overcome).

[178] *See* Note, *supra* note 155, at 770 (urging de-construction of the criminal justice system and investment in low-income communities).

[179] Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1716 (2006).

[180] *See id.* at 1723 (outlining research demonstrating under-enforcement of criminal law in disadvantaged neighborhoods (quoting Sara Stoutland, *The Multiple Dimensions of Trust in Resident/Police Relations in Boston*, 38 J. RES. CRIME & DELINQ. 226, 231 (2001))).

[181] *Id.* at 1724–28.

[182] *See id.* at 1725 (citing Jill Leovy & Doug Smith, *Mortal Wounds: Getting Away with Murder in South L.A.'s Killing Zone*, L.A. TIMES Jan. 1, 2004, at A1) (providing an account of concentrated criminal activity in South Central Los Angeles and resultant neighborhood upheaval).

[183] *See* Wilson & Kelling, *supra* note 147, at 33–35 (claiming that enforcement of quality-of-life crimes increases community stability and decreases criminal conduct). Although "broken windows" theory is sharply contested as a causal theory of criminal conduct, Natapoff claims that there is agreement as to the harmful effects of under-enforced petty crime on communities. *See* Natapoff, *supra* note 179, at 1728 n.55 (outlining academic arguments and counterarguments regarding "broken windows" theory).

can diminish property values, thereby lowering the material wealth of residents, discouraging investment, and affecting neighborhood quality of life.[184]

2. Policy Support

This Section discusses two principal grounds that provide support for the policy of non-prosecution.[185] First, it discusses how non-prosecution allows local communities to claim influence over the criminalization of conduct that takes place in those communities.[186] Second, it outlines the argument that the types of petty crime Rollins identifies result from public health failures, and social services would resolve these crimes more effectively than imprisonment.[187]

a. Crime Is Local, so Criminalization Should Be Local

Scholars support non-prosecution as a democratic counterbalance to the disparity between the state legislature that passes criminal law and the local community where criminal law is enforced.[188] State legislators represent local communities from the state at-large, while those charged with criminal violations are predominately residents of poor neighborhoods in urban areas that have larger minority populations.[189] Rural residents, who are predominately white, carry disproportionately greater representation in the legislature than urban residents.[190] The result is that white and rural populations have relatively greater influence in the writing of criminal law than the residents of areas most affected by crime.[191]

Although the election of prosecutors can itself be democratically skewed by using county lines to provide jurisdictional boundaries as opposed to city boundaries or individual neighborhoods, residents of high-crime areas have greater opportunities for representation in local elections.[192] This opportunity is realized through the election of progressive prosecutors with the support of

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[184] Natapoff, *supra* note 179, at 1749.

[185] *See infra* notes 188–200 and accompanying text.

[186] *See infra* notes 188–194 and accompanying text.

[187] *See infra* notes 195–200 and accompanying text.

[188] Pfaff, *supra* note 14.

[189] *Id.* (citing David Weisburd, *The Law of Crime Concentration and the Criminology of Place*, 53 CRIMINOLOGY 133, 133–57 (2015)).

[190] *See* Alan Greenblatt, *Rural Areas Lose People but Not Power*, GOVERNING (Apr. 2014), http://www.governing.com/topics/politics/gov-rural-areas-lose-people-not-power.html [https://perma.cc/28PQ-LMVH] (arguing that rural legislators, despite a dwindling rural population, have been successful at forming political blocs and capitalizing on splits among representatives of urban and suburban areas).

[191] *See* Pfaff, *supra* note 14 (arguing that the discrepancy is undemocratic).

[192] *See* John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 580–81 (2018) (noting that voters in the suburbs are disproportionately white and higher-income).

voters from higher-crime urban areas.[193] A non-prosecution policy from such a prosecutor acts as a "prosecutorial veto" against the democratic inadequacies of the legislative system.[194]

b. Petty Crime Is a Public Health Problem

Advocates also support non-prosecution as a means of encouraging treatment of public health problems with social services instead of imprisonment.[195] Rollins' identified crimes are associated with aggravating factors: homelessness, substance abuse disorder, mental illness, and poverty chief among them.[196] Scholars argue that refusing to prosecute those crimes eliminates imprisonment as an available, yet ineffective, resolution to the undesirable conduct and will encourage local governments to invest in public health and social services.[197]

Research shows that responding to such crimes with social services rather than imprisonment can be more fiscally effective at reducing recidivism.[198] Scholars argue that holding prosecutors accountable for the financial cost of their convictions would counterbalance the political incentive to appear tough on crime.[199] Non-prosecution policies could provide a means for prosecutors to demonstrate recognition of the fiscal costs of imprisonment to the electorate.[200]

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[193] *Id.*; *see also* Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), https://prospect.org/article/new-reformer-das [https://perma.cc/SAY4-LYKB] (providing an overview of the recent trend in urban jurisdictions electing reform-minded district attorneys).

[194] *See* Pfaff, *supra* note 14 (arguing that the election of reformer district attorneys negates claims that such policies are undemocratic).

[195] *Id.*

[196] *See id.* (noting that Rollins identified the proper response to the crimes as "community-based, no-cost programming, job training or schooling" (citing *Charges to Be Declined*, *supra* note 3)).

[197] *See id.* (arguing that public health agencies have been given a "free-ride" by the criminal justice system).

[198] *Id.*; *see* Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* (Univ. of Mich. Dep't of Econ. and Population Studies Ctr., Working Paper, 2015) (finding that the deterrence factor of imprisonment does not offset the cost of imprisonment, largely due to the propensity for recidivism; Jennifer L. Doleac, *New Evidence That Access to Health Care Reduces Crime*, BROOKINGS INST. (Jan. 3, 2018), https://www.brookings.edu/blog/up-front/2018/01/03/new-evidence-that-access-to-health-care-reduces-crime/ [https://perma.cc/7CDN-ZQJD] (summarizing research finding that costs of providing medical care, substance abuse, and mental health treatment are outweighed by the reduced social costs of crime); Marie Lawrence, *Locked Up or Locked Out: How Housing Insecurity Undermines Criminal Justice Reform*, KENNEDY SCH. R. (Oct. 10, 2017), http://ksr.hkspublications.org/2017/10/10/locked-up-or-locked-out-how-housing-insecurity-undermines-criminal-justice-reform/ [https://perma.cc/5Y99-2C5X] (discussing the benefits of housing services for released prisoners in reducing recidivism).

[199] *See* Misner, *supra* note 63, at 719–22 (showing that prosecutors, as representatives of the county, bear no responsibility and face no consequences for the financial cost of their convictions, which primarily fall on the state penitentiary system).

[200] *See id.* (advocating for a public metric between prosecutors and the cost of imprisonment to increase prosecutor accountability).

B. Effect on the Rule of Law

Distinct from an analysis as a matter of criminal reform policy, Rollins' non-prosecution policy implicates normative questions of governance.[201] For example, one question is whether an elected official tasked with enforcing criminal statutes should announce a policy of presumptive non-prosecution for violation of those same criminal statutes.[202] This Section considers the legitimacy of executive discretion in the prosecution of criminal law.[203] It then outlines the institutional safeguards against arbitrary or discriminatory prosecution that can result from enforcement discretion.[204]

1. Perceptions of Legitimacy

Prosecutorial discretion is a long-standing component of executive enforcement in the American tradition.[205] Scholars provide multiple explanations for the presence of prosecution discretion, chief among them the practicality of resource constraints and the adaptability of individualized treatment.[206] Others suggest that discretion results naturally from dividing the creation of law and the enforcement of law into separate branches of government.[207]

The concept of non-prosecution as an extension of discretion has received less attention, and for which support is less clear.[208] On the one hand, American theories of separation of powers emerged in opposition to English monar-

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[201] *See* Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390–93 (2008) (providing an overview of the legal philosophy of non-prosecution decisions and the idea of "lawful lawlessness"). *See generally* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1546–60 (1981) (evaluating the positive and negative consequences of prosecutorial discretion as a matter of governance).

[202] *See, e.g.*, THE ROLLINS MEMO, *supra* note 6 (outlining Rollins' new non-prosecution policy for fifteen low-level criminal offenses and misdemeanors).

[203] *See infra* notes 205–220 and accompanying text.

[204] *See infra* notes 221–228 and accompanying text.

[205] *See* Price, *supra* note 45, at 717–18 (discussing the presence of enforcement discretion in the early American Republic).

[206] *See id.* at 743 (discussing resource allocation as a root cause of discretion); *see also* Roger Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1248–49 (2011) (discussing leniency as a cause for discretion so commonly accepted as to be considered "unremarkable").

[207] *See* Price, *supra* note 45, at 675, 701 (identifying Montesquieu and the Federalist Papers as early source material that support enforcement discretion as a by-product of separation of powers); *see also* MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (J.V. Prichard ed., Thomas Nugent trans., 1914) (1748) (arguing against unifying legislative and executive powers in the same authoritative body to reduce the potential for tyranny).

[208] *See* Fairfax, *supra* note 206, at 1246. Roger Fairfax, Jr. has written extensively on the distinction between prosecutorial discretion and categorical non-prosecution, which he refers to as "prosecutorial nullification." *Id.* In the interest of clarity, this Note will continue to use the term non-prosecution.

chical claims to power of suspending and dispensing law.[209] Allowing the executive to use discretionary non-prosecution effectively suspends the law in the executive's jurisdiction, particularly if the conduct continues to occur.[210] On the other hand, non-prosecution is an inevitable extension of prosecutor discretion that can respond to pressing societal concerns.[211]

There are several doctrines that support non-prosecution within the rule of law, namely the existence of jury nullification, democratic accountability, delegation, and prosecutorial obligations, each of which merit attention.[212] If a jury is able to nullify on the basis of their discretion, then the prosecutor should possess similar discretion.[213] Compared with jurors, prosecutors have access to greater information regarding perpetrators and victims in the jurisdiction and are tasked with serving the public interest.[214] Local prosecutors are typically elected in the United States, which provides a cause of legitimacy and a means for enforcing accountability.[215] The absence of affirmative mandates in criminal statutes suggests an implicit delegation of charging authority to prosecutors by the legislature.[216] Prosecutors may also be duty-bound to certain moral obligations that increase the ethical validity of their claims to non-prosecution discretion.[217]

Disputed legitimacy of prosecutorial discretion parallels concerns that discretion allows for arbitrariness, which belies unfairness.[218] Discretionary policies can produce unfair results through lack of notice that particular con-

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[209] *See* Price, *supra* note 45, at 676, 689–93 (providing an historical account of suspending and dispensing powers). Abolishing the ability of the English monarch to allow individual exemptions from laws passed by Parliament was a critical component of the 1689 English Bill of Rights and an "important backdrop to the American constitution enterprise." *Id.*

[210] Fairfax, *supra* note 206, at 1265; Price, *supra* note 45, at 676.

[211] *See* Fairfax, *supra* note 206, at 1245–46, 1272–75 (describing the commonality of non-prosecution and its potential benefits).

[212] *See id.* at 1266–73 (outlining support for non-prosecution).

[213] *Id.* at 1266–68. Jury nullification is "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." *Id.* at 1244 n.5 (quoting William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 225 (1996)).

[214] *Id.* at 1266–68.

[215] *Id.* at 1268–69. Some argue that the accountability provided by democratic election is weak, as demonstrated by high rates of reelection and lack of incumbent challengers. *Id.* at 1269.

[216] *See* Hessick, *supra* note 70, at 26 (arguing that legislatures delegate discretionary powers by drafting overly broad criminal statutes).

[217] *See* Fairfax, *supra* note 206, at 1272–73 (arguing that prosecutorial obligations to consistency and justice may support prosecutorial nullification in particular circumstances).

[218] *See* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1670, 1681–82 (2010) (identifying non-prosecution decisions as a kind of "particularism" that, at its most extreme, could devolve into "justice without law" (quoting Roscoe Pound, *Executive Justice*, 55 AM. L. REG. 137, 144–45 (1907))).

duct could result in punishment, or about the level of punishment entailed.[219] Most concerning is the fact that discretion in the criminal justice system historically burdens poor and minority populations, though scholars offer multiple reasons for the disparity.[220]

2. Institutional Safeguards

Concerns about the impact of discretionary non-prosecution could be mitigated by a combination of institutional safeguards, both in theory and currently in practice.[221] The fundamental goal of such safeguards would be to reduce the ability of non-prosecution to produce arbitrary or unfair consequences.[222] Many scholars have commented on the institutional safeguards currently available to regulate enforcement discretion.[223] Few, however, actively discuss the safeguards in the context of regulating non-prosecution.[224] Scholars advocate that local prosecutors outline their enforcement policies in the interest of accountability and trust-building with the community and constituents.[225] Publicly available prosecutorial guidelines can also be instituted to provide clear definitions for discretion and increase consistency within the office of the prosecutor.[226] Screening decisions can allow regulation of a prosecutor's office

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[219] *See* Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2117–18 (1989) (describing the tension between clear notice of a legal standard and the discretion that helps serve the many interests in a pluralistic society).

[220] *See, e.g.*, Butler, *supra* note 173, at 1448–50 (tabulating use of discretionary stop and frisk tactics against white, black, Hispanic, and Asian populations in American cities and finding that black and Hispanic populations were targeted disproportionately). *Compare id.* at 1455 (identifying systemic racism as the operative reason that discretion in the criminal justice system adversely impacts African Americans), *with* Bowers, *supra* note 218, at 1699 (identifying resource allocation as cause for the focus of "order maintenance" policing in poor and minority communities).

[221] *See, e.g.*, Stephanos Bibas, *Prosecutorial Discretion Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963–64 (2009) (outlining various internal and external institutional tools available to encourage fair prosecutorial discretion).

[222] *See* Massaro, *supra* note 219 at 2117–18 (describing due process concerns in the absence of clear notice of a legal standard).

[223] *See* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 888–93, 895 (2009) (advocating that various safeguards exercised in administrative enforcement be adopted in the criminal prosecutor context); Bibas, *supra* note 221, at 965–1015 (detailing various internal and external institutional tools available to encourage fair prosecutorial discretion); Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087, 1093–97 (2005) (tracking New Jersey court requirements for stricter prosecutorial guidelines).

[224] *But see* Fairfax, *supra* note 208, at 1275–80 (identifying mechanisms that could specifically regulate non-prosecution policies).

[225] *See* Misner, *supra* note 63, at 776–77 (arguing that such a strategy would empower voters to compare the strategies of competing prosecutor candidates).

[226] Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. R. 1155, 1176 (2005) (arguing that if the "real law is made by prosecutors," and prosecutors have a right to not enforce, then the public should be aware of the extent of that right).

through management of implicit biases.[227] Adversely, other scholars argue that institutional safeguards are insufficient to adequately prevent the dangers of discretion.[228]

III. ANTICIPATING THE MERITS OF LEGAL CHALLENGES AND POLICY ARGUMENTS AGAINST ROLLINS' NON-PROSECUTION POLICY

Rollins' non-prosecution policy allows for analysis through a varied spectrum of legal disciplines, ranging from constitutional law to legal ethics to critical race theory.[229] Section A of this part addresses the merits of a legal challenge on the three identified grounds of separation of powers, victims' rights, and ethics rules.[230] Section B then examines the applicability of the normative policy arguments to the non-prosecution policy outlined by Rollins.[231]

A. Merits of a Legal Challenge

The viability of a legal challenge against Rollins' non-prosecution policy is unlikely on the basis that not a single previously-identified ground for illegality is independently sufficient within the case law of Massachusetts.[232] Underlying this proposition is the high degree of discretion permitted to local prosecutors and the concern that a judicial body itself could violate separation of powers by overruling an executive policy.[233] The combined effect, however, of multiple legal concerns could allow a court to utilize a catch-all provision to find the policy a violation of a prosecutor's ethical duty.[234]

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[227] *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 55 (2002) (identifying internal rules and policies as valuable tools for regulation of discretion).

[228] *See* Bowers, *supra* note 218, at 1660 (outlining institutional reasons, such as legalistic thinking and conviction rate maintenance, that prosecutors lack the capacity to effectively wield discretion).

[229] *See* Butler, *supra* note 173, at 1442, 1461–62 (responding to prosecutorial reforms with critical race theory analysis); Massaro, *supra* note 219, at 2117–18 (describing the ethical tension between clear notice of a legal standard and the discretion that helps serve the many interests in a pluralistic society); Price, *supra* note 45 at 678–79 (positing a framework for enforcement discretion).

[230] *See infra* notes 232–256 and accompanying text.

[231] *See infra* notes 257–278 and accompanying text.

[232] *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725–29 (2001) (outlining that the inapplicability of many rules of professional conduct to prosecutors and the special nature of their position as some of the reasons why it is rare for prosecutors to face disciplinary action); *see also* THE ROLLINS MEMO, *supra* note 6 (describing Rollins' non-prosecution policy for fifteen low-level criminal offenses and misdemeanors).

[233] *See* Commonwealth v. Ehiabhi, 84 N.E.3d 13, 22 (Mass. 2017) (finding that a judge's decision "not to sentence a defendant pursuant to statutes that were properly charged and convicted was error"); Commonwealth v. Cheney, 800 N.E.2d 309, 314–15 (Mass. 2003) (finding a judge's restriction of prosecutorial discretion to be constitutionally invalid under Article XXX).

[234] *See* Green, *supra* note 135, at 1578 (identifying Model Rule of Professional Conduct 8.4(d) as a provision used against general abuses of prosecutorial discretion); *see, e.g.*, Iowa Supreme Court Att'y Disciplinary Bd. v. Barry, 762 N.W.2d 129, 141 (Iowa 2009) (suspending prosecutor under Rule

Rollins' non-prosecution policy is likely valid under Article XXX of the Massachusetts State Constitution, current Massachusetts statute, and binding precedent as within the confines of prosecutorial discretion.[235] The Supreme Court provides a constitutional threshold for bringing a criminal charge, but it has not created an affirmative requirement.[236] Similarly, by statute, Massachusetts explicitly provides for discretionary charging on the basis of the prosecutor's opinion of the public interest.[237] Massachusetts courts have not applied Article XXX to restrict a prosecutor's discretion in any case.[238] To the contrary, the courts use Article XXX to restrict judicial override of prosecutorial discretion.[239] While other executive actions have been deemed unconstitutional under Article XXX, these actions involved failure to follow an affirmative instruction from the legislature.[240] If the criminal statutes were amended to include affirmative charging requirements, non-prosecution would violate separation of powers.[241] Alternatively, the Massachusetts SJC could turn to less-yielding separation of powers doctrine, more common in cases of non-criminal executive enforcement discretion, as persuasive support for finding a violation.[242]

8.4(d), as adopted in the Iowa Rules of Professional Responsibility, for accepting quid pro quo contributions to a sheriff's fund in exchange for non-prosecution of the contributor).

[235] MASS. CONST. art. XXX; MASS. GEN. LAWS ch. 278, § 15 (2018); *see* Commonwealth v. Pellegrini, 608 N.E.2d 717, 719 (Mass. 1993) (holding that a judicial order of pre-trial dismissal of a case over the prosecutor's objection was impermissible under Article XXX); Manning v. Mun. Court of the Roxbury Dist., 361 N.E.2d 1274, 1276 (Mass. 1977) (holding that the prosecutor carries discretion to discontinue prosecution without approval of another official).

[236] *See* United States v. Armstrong, 517 U.S. 456, 463–64 (1996) (requiring a prosecutor to possess probable cause to bring a criminal charge).

[237] MASS. GEN. LAWS ch. 12, § 10.

[238] *But see* Curley v. City of Lynn, 556 N.E.2d 96, 98 (Mass. 1990) (finding that a state executive agency, the Civil Service Commission, cannot effectively modify statutory provisions regarding the filing of petitions).

[239] *Cheney*, 800 N.E.2d at 314–15 (finding that the procedure for judge-issued continuance of a case, without first obtaining a guilty plea or a verdict, and over the objection of the prosecutor, constituted a constitutionally invalid exercise of executive powers under Article XXX).

[240] *See, e.g.*, Op. of the Justices to the Senate, 376 N.E.2d 1217, 1221–23 (Mass. 1978) (finding that failure to use appropriated funds for policy reasons as opposed to avoiding waste violated Article XXX).

[241] *See* Price, *supra* note 45, at 715 (noting the constitutionality of affirmative designs for criminal statutes); Hessick, *supra* note 70, at 26 (arguing that legislatures delegate discretionary powers by drafting overly broad criminal statutes).

[242] *See* Adams v. Richardson, 480 F.2d 1159, 1160–62 (D.C. Cir. 1973) (en banc) (per curiam) (upholding the district court order that the Department of Health, Education, and Welfare commence enforcement proceedings against schools found to be noncompliant with Title VI); *Op. of the Justices*, 376 N.E.2d at 1221 (finding that although the executive branch has discretion to avoid wasteful expenditures, refusal to issue appropriated funds that accomplish disliked objectives would violate Article XXX).

There is Massachusetts precedent that supports judicial oversight of prosecutorial discretion without violating Article XXX.[243] The case of *Attorney General v. Pelletier* allows for the removal of prosecutors on the grounds of dereliction of duty, including failure to prosecute.[244] Although this case remains good law in Massachusetts, it is unlikely that modern courts would utilize *Pelletier* absent showing that the non-prosecution at issue was rooted in public corruption.[245] A recent single-justice opinion of the SJC, however, demonstrates the difficulty of successful judicial contestation of the non-prosecution policy in light of Article XXX.[246]

This recent separation of powers determination demonstrated the potential weakness of at least one Massachusetts Victim Bill of Rights argument.[247] A similar challenge to Rollins' non-prosecution policy on the basis of the Massachusetts Victim Bill of Rights would require victims of non-prosecuted offenses to file private criminal complaints.[248] At that point, the prosecutor would be obligated to provide a minimum amount of information to the victim.[249] Com-

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[243] *See* Att'y Gen. v. Pelletier, 134 N.E. 407, 437–38 (Mass. 1922) (allowing for judicial removal of a public prosecutor in Massachusetts on the basis of charges including corruption and non-prosecution of chargeable offenses without violating separation of powers).

[244] *See id.* at 434, 437.

[245] *See* Green & Levine, *supra* note 98 at 173–75 (identifying the late nineteenth century and early twentieth century as a period where non-prosecution was a commonplace indicator of corruption, particularly in refusing to prosecute vice charges or for protecting individuals).

[246] *See* Commonwealth v. Webber, No. SJ-2019-0366, 2019 WL 4263308, at *1 (Mass. 2019) (holding that a judge's refusal to grant a *nolle prosequi* requested by the prosecutor violates Article XXX of the Massachusetts Constitution). Following arrests made against counter-protesters at a "Straight Pride Parade," Rollins' office entered *nolle prosequi* in the cases of persons charged with disorderly conduct. *Id.* at *2. Boston Municipal Court Judge Richard Sinnott refused to accept the *nolle prosequi*, finding that the non-prosecution violated the rights of "Straight Pride Parade" marchers under the Massachusetts Victim Bill of Rights. *Id.* In a single-justice opinion, Associate Justice Frank Gaziano of the Massachusetts SJC held that entry of *nolle prosequi* is a constitutional right of the Commonwealth and cannot be denied by a judge without violating Article XXX. *Id.* at *1 (citing MASS. R. CRIM. P. 16; *Cheney*, 800 N.E.2d at 314–15).

[247] *See id.* at *2 (refusing to accept the trial judge's position that the right of the victim to confer with the prosecutor prior to entry of *nolle prosequi* allows the denial of a non-prosecution decision); *see also* MASS. GEN. LAWS ch. 258B, § 3(g) (granting victims the permissive right to confer with the prosecutor before the commencement of trial and entry of a *nolle prosequi*). Although Associate Justice Gaziano held that the public-at-large, not the individual protesters, were the "victims" of a disorderly conduct violation, the plain language of § 3(g) confers a permissive right to victims and expressly precludes victims' authority "to direct prosecution of the case." *Webber*, 2019 WL 4263308 at *2; *see* MASS. GEN. LAWS ch. 258B, § 3(g).

[248] *See* MASS. R. CRIM. P. 4(b) (granting right to a private person to apply for issuance of process); Victory Distribs., Inc. v. Ayer Div. of the Dist. Court Dep't, 755 N.E.2d 273, 277 (Mass. 2001) (finding that private right to the criminal complaint process is limited to filing an application and court action on that application).

[249] *See* MASS. GEN. LAWS ch. 258B, § 3(a) (requiring the prosecutor to inform victims of their "rights in the criminal process"); *id.* § 3(d) (requiring victim to be informed of available protection); *id.* § 3(e) (requiring victim to be informed of financial assistance and social services); *id.* § 3(h) (requiring victim to be informed of the right to request confidentiality).

munity response to the non-prosecution policy could include organized filing of private criminal complaints.[250] More substantial rights that provide for input from the victim are only available if the prosecutor decides to proceed.[251] Common law restitution is similarly available at the discretion of the prosecutor and prosecutors have been disciplined for allowing too much influence to the victim in determining the restitution sought in plea negotiations.[252]

A challenge on the basis of violation of ethics rules is also likely to fail.[253] Model Rule 3.8(a) is the only enforceable provision that directly relates to the charging decision, and it mirrors threshold constitutional requirements instead of setting affirmative charging requirements.[254] The most viable basis for legal challenge to the non-prosecution policy is use of a catch-all provision of the enforceable ethics rules.[255] In this scenario, the court could use the general language of Rule 8.4(d) as a means for disposing of a policy that raises varied concerns about over-extension of prosecutorial discretion, the interest of victims in receiving restitution, as well as the legitimate imperative of a prosecutor to enforce the law.[256]

B. Normative Assessment of Non-prosecution Policy

Arguments critical of progressive prosecutors focus on the proposition that insider reforms fail to resolve the structural problems of the criminal justice system.[257] Their most meritorious criticism is the principal-agent problem, particularly involving relationships with police officers, as the ethics complaint

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[250] *See* MASS. R. CRIM. P. 4(b) (granting right to a private person to apply for issuance of process).

[251] *See* MASS. GEN. LAWS ch. 258B, § 3 (outlining the express obligations owed to victims by prosecutors during criminal proceedings).

[252] *See* Rodrigues, *supra* note 120, at 213 (describing the state's control over prosecution and the criminal justice system's focus on punishment rather than compensation); *see, e.g.*, *In re* Flatt-Moore, 959 N.E.2d 241, 245–46 (Ind. 2012) (holding that its sanction of a prosecutor for permitting too much influence in setting the amount of requested restitution did not violate separation of powers doctrine).

[253] *See* Zacharias, *supra* note 232, at 725 (describing the "rarity of discipline" of prosecutors).

[254] *Compare* MASS. RULES OF PROF'L CONDUCT r. 3.8 (2016) (imposing a probable cause requirement and using the operative verb "refrain" instead of an affirmative charging requirement), *with Armstrong*, 517 U.S. at 463–64 (requiring a prosecutor to possess probable cause to bring a criminal charge).

[255] *See* MASS. RULES OF PROF'L CONDUCT r. 8.4(d) (concerning conduct prejudicial to administration of justice). The "prejudice to justice" rule is a catch-all provision that authorities can invoke against abuses of prosecutorial discretion that involve gross misconduct. *See, e.g.*, *Barry*, 762 N.W.2d at 129 (suspending prosecutor for quid pro quo contributions to a sheriff's fund in exchange for non-prosecution).

[256] *See* MASS. RULES OF PROF'L CONDUCT r. 8.4(d) (concerning conduct prejudicial to administration of justice).

[257] *See* Note, *supra* note 155, at 756–58, 768–70 (arguing that internal reforms by progressive prosecutors are fundamentally incapable of adequately changing a corrupted criminal justice system); Stahly-Butts & Akbar, *supra* note 166, at 5–9 (criticizing "reformist reforms" as contributing to the budget and role of compromised institutions such as police).

filed by the National Police Association already bears out.[258] Building relationships with police will be a critical endeavor for the DA, and the use of diversionary programs as an alternative to incarceration may provide a satisfactory metric for police departments.[259] The least meritorious are claims that diversion programs are overly burdensome and that prosecutorial reforms rely on democratic election.[260] These criticisms fail to identify alternative consequences for violating laws passed by a legislative majority, doubt the ability of voters to gauge the success of elected prosecutors, and generally dismiss democratic values.[261]

Critics who focus on the neighborhood impact of under-enforcing petty crime raise arguments against non-prosecution that garner merit.[262] The existence of quality-of-life crime in a neighborhood certainly diminishes property values, which undeniably affects the stability and investment of local residents.[263] The crux of applying under-enforcement concerns to non-prosecution policy is whether policing of quality of life crimes will diminish as a result of prosecutors utilizing diversionary programs instead of criminal prosecution.[264]

Supporters of non-prosecution persuasively argue that the election of prosecutors allows democratic values to extend to the enforcement of criminal law.[265] This argument logically extends from the current precedent and constitutionality of broad prosecutorial discretion held by a locally elected prosecu-

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[258] *See* Press Release, *supra* note 5 (filing an ethics complaint against Rollins). *See generally* Eisenhardt, *supra* note 158, at 58 (identifying the difference in goals and risk-tolerance among the parties in a hierarchical division of labor as the principal-agent problem).

[259] *See* Pettaway, *supra* note 5 (addressing local community and police reactions to the policy announcement). The availability of officers to focus on more serious crime may also increase job satisfaction for officers over time. *See* Rich Morin et al., *Behind the Badge*, PEW RES. CTR. (Jan. 11, 2017), http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/ [https://perma.cc/9ZQZ-QUN4] (surveying police officer job satisfaction and correlating satisfaction with holding the trust of the community).

[260] *See* Note, *supra* note 155, at 764–68 (describing diversion programs as reinforcing the institutional power of police and voters as predisposed against electing progressive prosecutors).

[261] *See* Henderson, *supra* note 107, at 944–50 (outlining legislative acts resulting from the victim's rights movement); *see also* Pfaff, *supra* note 14 (arguing that policies instituted by locally elected prosecutors more proximately reflect the interests of local communities); Weigel, *supra* note 2 (identifying a trend of jurisdictions across the country electing progressive prosecutors).

[262] *See* Natapoff, *supra* note 179, at 1724–28 (arguing that criminal law enforcement is disproportionately reduced in low-income and minority neighborhoods); *see also* Stoutland, *supra* note 180 at 231–32 (outlining research demonstrating under-enforcement of criminal law in disadvantaged neighborhoods).

[263] Natapoff, *supra* note 179, at 1749.

[264] *See* Quincy Walters, *Rachael Rollins, New Suffolk DA, Wants to Work with Police for Equitable Justice*, WBUR NEWS (Jan. 3, 2019), https://www.wbur.org/news/2019/01/03/rollins-suffolk-da-work-with-police-equitable-justice [https://perma.cc/RA2F-KJBR] (quoting Boston Police Commissioner William Gross on the non-prosecution policy) ("One of the key things we talked about is that the community still deserves justice if crimes are committed.").

[265] *See* Pfaff, *supra* note 14 (arguing that policies instituted by locally elected prosecutors more proximately reflect the interests of local communities).

tor.[266] The position that legislatures create statutes in a manner different than that desired by local communities is merely a gloss on the conclusion that broad discretion held by locally elected prosecutors allows for voters to influence the manner of enforcement.[267] Should the legislature disapprove of non-prosecution policies, they hold the authority to revise criminal statutes to include affirmative charging requirements.[268]

Supporters of public health solutions as a substitute for incarceration for petty crimes raise points that are compelling, yet impractical.[269] The costs of incarceration are clearly high, both in terms of logistical cost and the cost to families and communities, relative to the costs of public health solutions.[270] Rollins' non-prosecution policy and supporters of public health solutions both lack a strategy for coordinating increases in public health resources to assume the burden currently carried by the incarceration system.[271] Any substantial period between the start of non-prosecution and distribution of increased public health resources would result in a political crisis for Rollins.[272]

The greatest vulnerability of Rollins' non-prosecution policy is the potential for overwhelming demand on public health resources combined with public perception that the policy constitutes an erosion of the rule of law.[273] If the policy overburdens the public health infrastructure in place, then public support will erode, exposing the non-prosecution policy to greater legal vulnera-

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[266] *See* Hessick, *supra* note 71, at 26 (arguing that legislatures delegate discretionary powers by drafting overly broad criminal statutes); *see also Armstrong*, 517 U.S. at 463–64 (creating a minimum evidentiary threshold rather than an affirmative charging requirement); Shepard v. Att'y Gen., 567 N.E.2d 187, 190 (Mass. 1991) (holding that a prosecutor that held an inquest into a death does not have a duty to bring a case).

[267] *Compare* Miller, *supra* note 193 (providing an overview of the recent trend in urban jurisdictions electing reform-minded district attorneys), *with* Greenblatt, *supra* note 190 (noting that predominately white, rural jurisdictions have retained outsized political control of legislatures).

[268] *See* Price, *supra* note 45, at 715 (describing the constitutionality of affirmative enforcement conditions of criminal statutes).

[269] *See* Pfaff, *supra* note 14 (arguing that petty crimes arise from public health failures).

[270] *See* Doleac, *supra* note 198 (finding that costs of providing medical care, substance abuse, and mental health treatment are outweighed by the reduced social costs of crime).

[271] *See* Pettaway, *supra* note 5 (reporting that Rollins claims the onus will rest on public health officials to rise to the demand when the District Attorney's office initiates the non-prosecution policy).

[272] *See* Budryk, *supra* note 148 (quoting Attorney General William Barr as forecasting that non-prosecution policies will lead to "[m]ore crime, more victims"); Pfaff, *supra* note 14 (noting the multifaceted issues, such as homelessness, drug addiction, and mental health problems, currently handled by the criminal justice system); Stuntz, *supra* note 52 at 509, 534 (describing the historical success of the district attorney candidate with the higher conviction rate and sentencing record).

[273] *See* Pfaff, *supra* note 14 (noting that the criminal justice system carries the burden of public health failures). *Compare* Price, *supra* note 45, at 676, 689–93 (providing a historical account of the unfairness associated with executive suspending and dispensing powers), *with* Fairfax, *supra* note 206 at 1245–46, 1272–75 (describing the commonality of prosecutorial non-prosecution and its potential benefits).

bility as an unacceptable rule of law violation.[274] If the policy's public health consequences are less severe, then the DA's office will be able to promote the policy as responsive to public welfare and democratic accountability, the two strongest sources of support under the rule of law.[275]

Rollins' office should use institutional safeguards to more effectively implement non-prosecution policy.[276] Adoption and publication of prosecution guidelines, as illustrated by the Rollins Memo, should reduce claims of arbitrariness and unfairness in the circumstances where the office chooses to prosecute.[277] Additionally, screening processes would reduce the potential harm of the principal-agent problem, at least among line prosecutors.[278]

CONCLUSION

Rollins' non-prosecution policy is constitutionally sound, but courts have access to supportable legal challenges if the policy unsettles public perception of the rule of law. A successful legal challenge is most likely in the event that non-prosecution leads to a substantial gap between public health resources and general quality-of-life expectations. Absent such a public health failure, the non-prosecution policy will be protected by the powers that separation of powers doctrine has granted to the DA. Judicial and ethical challenges to the non-prosecution policy demonstrate this protection. The policy, however, remains a bold and novel measure lacking coordinated planning with public health officials and local police departments. Although institutional safeguards can assist with implementation of the policy and improve internal compliance, opposition from institutions critical to the criminal justice system would cripple the policy. If under-enforcement of quality-of-life crime currently exists in low-

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[274] *See* Fairfax, *supra* note 206 at 1272–73 (arguing that prosecutorial obligations to consistency and justice may support prosecutorial nullification in particular circumstances).

[275] *See id.* at 1268–69 (citing Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010)) (describing the legitimacy of policies enacted by local officials who are held accountable to an electorate); Pfaff, *supra* note 14 (arguing that policies instituted by locally elected prosecutors more proximately reflect the interests of local communities).

[276] *See* Barkow, *supra* note 223, at 888–93 (advocating that various discretionary decisions be made by different prosecutors); Bibas, *supra* note 221, at 965–1015 (detailing various internal and external institutional tools available to encourage fair prosecutorial discretion); Wright, *supra* note 223 at 1093–97 (tracking New Jersey court requirements for stricter prosecutorial guidelines).

[277] *See* Misner, *supra* note 63, at 767–69 (arguing that transparent publication of prosecutorial policies would empower voters to compare the strategies of competing prosecutor candidates); *see also* Dripps, *supra* note 226, at 1176 ("People 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.").

[278] *See* Wright & Miller, *supra* note 227, at 55 (identifying internal rules and policies as valuable tools for regulation of discretion); *see also* Bibas, *supra* note 160, at 2541 (claiming that self-interest motivates line prosecutors to protect their win-loss ratio and professional reputation by avoiding trial losses).

income and minority neighborhoods, Rollins' policy may exacerbate difficulties of daily life in disadvantaged communities.

Because the DA's claim to prosecutorial discretion arises from interest in the public welfare, substantial public opposition to the policy can provide legitimacy to legal challenges based on ethics rules. Furthermore, there is still good law on the Massachusetts books for removing a prosecutor on the grounds of non-prosecution, which provides an additional basis for legal challenge. While removal or sanctioning of prosecutors for invoking prosecutorial discretion is out of step with current legal doctrine, there is precedent that supports judicial response to institutional failure.

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