

Judicial Review of Prosecutorial Blanket Declination Policies

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INTRODUCTION

On January 12, 2021, Washtenaw County's (MI) Prosecuting Attorney announced a set of directives foreclosing prosecution for the use and possession of marijuana and certain psychedelic drugs.¹ The directives prohibit assistant prosecuting attorneys from charging individuals for the "unauthorized use or possession of marijuana or cannabis, regardless of the amount at issue."² Michigan's marijuana and psychedelic statutes had not changed from the previous day. Yet, for Washtenaw County residents, the "law" seemingly changed overnight as a slate of behaviors shifted outside the realm of criminal regulation. All this occurred without a vote by a legislative body or by initiative from Washtenaw County citizens themselves. Still, despite the changes made by the Prosecuting Attorney through this directive, their policies explicitly disclaimed any creation of "substantive or enforceable rights."³

The Prosecuting Attorney's policy represents just one example of blanket nonenforcement measures by prosecutors across the United States. The actions of Florida State Attorney, Andrew H. Warren, presents another example. Florida's legislature enacted a law in April banning abortions at fifteen weeks.⁴ Warren was

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¹ WASHTENAW CNTY. OFF. OF THE PROSECUTING ATTORNEY, POLICY DIRECTIVE 2021-05: POLICY REGARDING CANNABIS & MARIJUANA 5-6 (2021), <https://www.washtenaw.org/DocumentCenter/View/19154/Cannabis-and-Marijuana-Policy> [<https://perma.cc/KZT2-3WCH>] [hereinafter WASHTENAW CNTY. MARIJUANA POL'Y DIRECTIVE]; WASHTENAW CNTY. OFF. OF THE PROSECUTING ATTORNEY, POLICY DIRECTIVE 2021-06: POLICY REGARDING ENTHEOGENIC PLANTS (2021), <https://www.washtenaw.org/DocumentCenter/View/19155/Entheogenic-Plants-Policy> [<https://perma.cc/M92L-Q6J2>].

² WASHTENAW CNTY. MARIJUANA POL'Y DIRECTIVE, *supra* note 1, at 7.

³ *Id.* at 8.

⁴ Patricia Mazzei, *DeSantis, Citing Incompetence, Suspends Prosecutor Who Vowed Not to Criminalize Abortion*, N.Y. TIMES, Aug. 5, 2022, at A16.

among many prosecutors across the United States that vowed not to prosecute those “who seek, provide, or support abortions.”⁵ Florida Governor Ron DeSantis’ removal of Warren made national news,⁶ highlighting the importance of the procedural question this Note seeks to address: Are blanket policies like those of Andrew Warren an appropriate use of prosecutorial discretion or do they violate the separation of powers?

These measures can go by many names, but we will be referring to them throughout this Note as blanket declination policies (“BDPs”).⁷ Conversations have increased regarding BDPs in recent years, a trend that coincides with the increased prevalence of activist prosecutors. BDPs provide an example of why the criminal justice reform movement continues to turn its focus to prosecutorial elections as a means for reform.⁸

Focusing on prosecutors has allowed reform measures via prosecutorial policy directives like the one in Washtenaw County. And it is not difficult to understand why we are observing this trend. In an era of historic political polarization—in which criminal justice features as a prominent dividing issue—legislating is difficult.⁹ The blanket policies offer an opportunity for reform advocates to avoid “dysfunctional” legislatures and to instead implement reforms by attending to individual District and Prosecuting Attorneys.¹⁰ This Note will outline why BDPs like Washtenaw County’s

⁵ JOINT STATEMENT FROM ELECTED PROSECUTORS (June 24, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> [<https://perma.cc/ZU4S-T93S>] (last updated July 25, 2022).

⁶ Mazzei, *supra* note 4.

⁷ *Declination*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/declination> [<https://perma.cc/Q97L-HA4X>] (A declination is defined as “a decision by a prosecutor not to pursue an indictment.”).

⁸ See, e.g., *Prosecutorial Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform> [<https://perma.cc/4A94-NXV8>] (last visited Mar. 4, 2022).

⁹ “Congress has passed fewer pieces of legislation, confirmed fewer appointees, and been less effective at handling the national purse than in recent memory. If we define effectiveness as legislative productivity, the 106th Congress (1999–2000) passed 463 pieces of substantive legislation (not including commemorative legislation . . .). The 107th Congress (2000–2001) passed 294 such pieces of legislation. By 2013–2014, the total had fallen to 212.” POLITICAL EXTREMISM IN THE UNITED STATES 23 (Eamon Doyle ed., 1st ed. Greenhaven Publ’g 2019) (citing Drew DeSilver, *In Late Spurt of Activity, Congress Avoids ‘Least Productive’ Title*, PEW RES. CTR. (Dec. 29, 2014)), <http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/> [<https://perma.cc/6CUP-AQRD>].

¹⁰ Marijuana has featured prominently as a subject of BDPs, especially where legislatures have refused or failed to decriminalize marijuana. However, BDPs have also been used to decriminalize additional crimes, including criminal trespass, public intoxication, violations of COVID-19 laws, and lower-amount thefts. Proposed gun and abortion laws have also led prosecutors to announce anticipatory BDPs. See, e.g., James Queally, *On First Day as L.A. County D.A., George Gascon Eliminates Bail, Remakes Sentencing Rules*, L.A. TIMES (Dec. 7, 2020), <https://www.latimes.com/california/story/2020-12-07/in-first-day-on-job-gascon-remakes-bail->

produce an inherently corrosive effect on the rule of law and separation of powers, an effect that ultimately turns BDPs into an untenable practice. Additionally, it will propose a means by which the judiciary can effectively monitor executive overreach, without the judiciary itself venturing beyond its circumscribed power.

When a county district attorney creates a BDP, they decide the law for the entire county. They do not simply choose which crimes they will prioritize for prosecution but rather determine what crimes all attorneys in their locality will not be permitted to charge. During their tenure, that crime essentially ceases to exist. If elected judges decided to dismiss all public intoxication cases because they disagreed with the law, few would deny that this upends our justice system. Similarly, BDPs go far beyond any appropriate exercise of executive discretion. These policies turn a government of laws into a government of individual prosecutors.

To be clear, our discussion does not take any position on the desirability of the policies or reforms underlying a BDP. Our concern is not the ends; we wish to explain why the means matter. And we are not the first to identify BDPs as an issue.¹¹ However, we hope to contribute to the burgeoning interest in prosecutors and their discretion by providing the judiciary with a method for identifying BDPs and mitigating their risks.

Therefore, in this Note we will address two questions. First, do these policies represent legislation by the executive branch? And second, does the judicial branch have the authority to police this border between executive and legislative powers? We will demonstrate why the answer to both is “absolutely.” In Part I, we will explore the nature of prosecutorial action and why BDPs are outside of executive power. In Part II, we explain why judicial review of BDPs is appropriate. Part III then lays out our suggested judicial test and demonstrates the test’s application through examples.

I. PROSECUTORIAL ACTION

In the United States, criminal prosecution is handled at three levels: local, state, and federal.¹² Prosecutors at each level possess varying degrees of discretion that they can use when a case comes before them. This section will explore the ability of

sentencing-rules [perma.cc/U73B-WPEB]. See Rachel Rollins, *The Rachel Rollins Policy Memo*, SUFFOLK CNTY. DIST. ATT’Y (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [perma.cc/26sq-d83b] (describing policy of presumed refusal to charge for fifteen offenses, including marijuana, shoplifting, and trespass).

¹¹ See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 671–72, 769 (2014).

¹² Overall, we will use the federal framework for our discussion unless we make it explicit otherwise. We acknowledge that this may sacrifice the intrigue and nuance that each State’s unique constitutional and legal framework may provide. However, we believe there is sufficient similarity to allow the federal framework to operate as a proxy for discussing the general understanding of each branch and its powers.

prosecutors to decide not to proceed with prosecution. As will be discussed below, prosecutorial action, or lack thereof, falls on a spectrum. Section I.A analyzes this spectrum and the various components that make it up. Section I.B will explore BDPs in greater detail and survey additional examples of such policies. Section I.C argues that BDPs are distinct from our ordinary conception of prosecutorial discretion and are undesirable. Section I.D will address the various arguments in favor of BDPs.

A. Spectrum of Prosecutorial Action and Inaction

Article II of the United States Constitution bestows upon the president the powers of the executive, along with the duty to “take care that the laws be faithfully executed,” commonly known as the Take Care Clause.¹³ The Take Care Clause does not assign a duty to the executive that demands perfect performance. The ability for the executive to decide whether to pursue prosecution has long been considered a decision left entirely to the executive’s discretion.¹⁴ Zack Price—a leading scholar on prosecutorial discretion and nonenforcement policies—recently articulated a spectrum of prosecutorial discretion that helps break down the concept.¹⁵ On one end of the spectrum is “comprehensive enforcement,” which represents the absence of discretion.¹⁶ Here a prosecutor pursues every violation to its maximal allowance.¹⁷ On the opposite end is “cancellation of legal obligations,” where a prosecutor essentially nullifies, or suspends, a criminal law.¹⁸

Ordinarily, prosecutorial discretion is thought of as a prosecutor deciding whether to proceed with prosecution in an individual case.¹⁹ Significantly, this discretion cuts both ways; it can encompass the decision to move forward or to decline further prosecutorial action. Using Price’s framework, this conception falls under the second category of prosecutorial discretion, case-by-case discretion.

1. **Comprehensive enforcement:** Prosecutors might seek to **fully enforce every substantive law** by punishing every known violation to the maximum extent. Although in most jurisdictions this objective will be practically impossible, it could nonetheless constitute a normative ideal, and in some areas legislatures have affirmatively required it.

¹³ U.S. CONST. art. II, § 3.

¹⁴ The Supreme Court has stated that “the decision to prosecute is particularly ill-suited to judicial review.” *Wayte v. United States*, 470 U.S. 598, 607 (1985).

¹⁵ Zachary S. Price, *Faithful Execution in the Fifty States 10–12* (Mar. 4, 2022) (unpublished manuscript) (available at <https://ssrn.com/abstract=4018711>) [<https://perma.cc/MSW8-L2VF>].

¹⁶ *Id.* at 11–12.

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 9.

2. Case-by-case discretion: Prosecutors might recognize that full enforcement of every law in every case is inappropriate, but limit themselves to **declining enforcement in particular cases** for case-specific reasons.
3. Internal priorities: Prosecutors might go beyond such case-by-case nonenforcement by establishing internal guidelines about how recurrent types of cases should generally be treated within a particular office or jurisdiction. More concretely, prosecutors might establish an internal policy that certain crimes (low-level marijuana possession, say) are **low priorities** for use of enforcement resources, while others (rape, murder, or human trafficking, for example) are **high priorities**.
4. Announced priorities: Next up the chain, prosecutors might **publicly disclose** their internal priorities, while nonetheless making clear that they are only priorities, **not ironclad guarantees** about how particular cases will be treated.
5. Categorical nonenforcement: Prosecutors might go still further by indicating not just that a particular crime is a low priority for enforcement, but also that it **categorically will not be prosecuted** (or at least will not be prosecuted outside of exceptional circumstances).
6. Prospective nonenforcement: Still further, prosecutors might effectively encourage or authorize illegal conduct by providing **prospective assurances that those who engage in it will face no repercussions**. This approach resembles categorical nonenforcement and overlaps with it, but might entail providing more determinate guarantees, either individually or across the board, that future conduct will be treated as if it were lawful.
7. Cancellation of legal obligations: Finally, prosecutors might presume authority not just to establish a policy or guarantee of nonenforcement, but to **affirmatively declare proscribed conduct lawful**. Historically, the power to eliminate legal obligations through executive action was known as a “suspending” or “dispensing” power, depending on whether it was exercised generally or only with respect to a particular party. English monarchs once held these powers, but they were generally repudiated in the Glorious Revolution of 1689 and ever since has been excluded from Anglo-American understandings of executive power.²⁰

²⁰ *Id.* at 11–13 (emphasis added) (citations omitted).

Since America's founding, case-by-case prosecutorial discretion has been a feature of our criminal justice system. Some argue that it is inherent in the constitutional structure and the Take Care Clause itself.²¹ Rather than demanding absolute execution, the Constitution requires only that the laws be "faithfully" executed. Incident to the use of "faithfully" is an inquiry into what qualifies as faithful execution. Drawing additional inferences from the pardon power,²² some may argue that it makes sense for the power to pardon or commute a sentence to also authorize the ability to decline prosecution in the first instance. However, an alternative takeaway may be that the pardon power represents the extent of the executive's authority to excuse actions that are legislatively deemed criminal. Still, since the Judiciary Act of 1789, the authority to indict cases has been vested in federal prosecutors.²³ Since that time, the discretion to decide whether to prosecute an individual case has been consistently acknowledged and respected.²⁴

Exercising this sort of case-by-case discretion is logical and can serve many goals. First, in a world of finite resources, it would be irrational to require prosecutors to pursue every violation of a criminal statute to their fullest extent.²⁵ Not only is this not possible, but in many instances, it would also be unwise and counterproductive to do so. Much like the rationale behind plea bargaining, prosecuting a particular case may not be worth the cost of the investigation or the trial necessary for a conviction.²⁶ Additionally, the explosion of criminal statutes makes it impossible to sanction every technical violation.²⁷ In such a world,

²¹ Zachary S. Bolitho, *The U.S. Constitution, the U.S. Department of Justice, and State Efforts to Legalize Marijuana*, 4 LINCOLN MEMORIAL U.L. REV. 42, 80 (2017) ("Some have defended the Department's nonenforcement policy as a permissible exercise of prosecutorial discretion, rather than an abdication of the 'take care' duty.").

²² U.S. CONST. art. II, § 2.

²³ Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

²⁴ As *infra* Part II will explore later, the courts emphatically recognize that the Take Care Clause does not require prosecution of the law in every case.

²⁵ Joachim Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 468 (1974) ("Prosecuting attorneys in West Germany are required, except in certain situations specified in the codes and statutes, to prosecute all charges for which there is sufficient evidence to justify a conviction.") (citing § 152(2) of the West German Code of Criminal Procedure, which states "[e]xcept as otherwise provided by law, it [i.e., the prosecution] is obligated to take action in case of all acts which are punishable by a court and capable of prosecution, so far as there is a sufficient factual basis.").

²⁶ Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 295 (1983) ("[P]rosecutors do not (because they cannot) bring more prosecutions until, at the margin, the gains from prosecution equal the costs.").

²⁷ GianCarlo Canaparo et al., *Count the Code: Quantifying Federalization of Criminal Statutes*, HERITAGE FOUND. (Jan. 7, 2022), <https://www.heritage.org/sites/default/files/2022-01/SR251.pdf> [<https://perma.cc/HM8V-RTPD>] (U.S. Code Sections that create a federal crime have increased from 1,111 to 1,510 between 1994 and 2019 and the number of federal crimes has increased from 3,825 to

prosecutorial discretion allows the executive to acknowledge its limits and to act prudently—making it is eminently reasonable for a prosecutor to allocate their limited resources in the manner they believe best executes the law.

Second, prosecutorial discretion is validly exercised when it is used to further prosecutorial goals elsewhere. A prime example of this is when an individual is given more favorable treatment in return for cooperation. In this way, prosecutors may build cases against other individuals with greater criminal culpability.²⁸ This helps to illustrate comprehensive enforcement may not best embody what was intended by requiring faithful execution of the law.

Third, prosecutorial discretion may be exercised when mitigating factors make prosecution unwarranted.²⁹ Perhaps a case involves a minor, and rather than subjecting a particular child to adult criminal charges, a prosecutor may allow the juvenile court system to address the illicit behavior. Similarly, there may be instances where a prosecutor and an executive agency can both sanction unlawful behavior. Here, both criminal and civil sanctions are possible. In many cases it may make sense to allow another institution to punish the violator.³⁰

Regardless of the justification for declining prosecution, discretion of this sort is defined by its case-by-case use. In each instance, a single prosecutor uses their discretion to decide a single case based on its unique facts. The prosecutor is not applying discretion to a series of cases or issuing prospective declinations for cases not yet before them. Additionally, the prosecutor unfamiliar with each individual case is not making the decision for other prosecutors who are more familiar with the particular case. Instead, a case involving suspected criminal behavior is brought to the attention of a prosecutor, and from that point forward individualized discretion is exercised.

B. BDPs

It is the blanket and prospective nature of BDPs that materially distinguish them from case-by-case prosecutorial discretion. Looking to Price's framework, BDPs can encompass three categories: categorical nonenforcement, prospective nonenforcement, and cancellation of legal obligations.³¹ This is possible because at

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²⁸ George Beall, *Principles of Plea Bargaining*, 9 LOY. U. CHI. L.J. 175, 176 (1977).

²⁹ *Aggravating and Mitigating Factors in Criminal Sentencing*, JUSTIA, <https://www.justia.com/criminal/aggravating-mitigating-factors/> [<https://perma.cc/GW93-8D3G>] (last visited Apr. 3, 2022).

³⁰ For instance, some state agencies have overlapping authority to punish doctors and nurses for Medicaid fraud.

³¹ Price, *supra* note 15, at 11–13. We are unaware of any BDPs that cancel legal obligations. Present examples of BDPs usually fall under the umbrella of categorical nonenforcement.

its base, a BDP is any blanket measure or policy that makes declining prosecution the default position for prosecutors in a jurisdiction.

Like case-by-case discretion, BDPs are instituted for a variety of reasons. With the rise of BDPs as a tool of policy-minded prosecutors, there are many examples of such policies. BDPs have no subject matter limitation and the types of policies that can constitute a BDP are broad. Many prosecutors have recently focused on marijuana as a subject of blanket nonenforcement.³² Because of this, exploring several marijuana BDPs helps illustrate the flexibility of BDPs and lays out the boundaries of their domain.

The Washtenaw County policy explored in the Introduction is a quintessential example of policy-oriented BDPs. In total, the directive substantively spans nine pages.³³ The policy starts with the heading “The History of Marijuana Criminalization and its Disparate Effects,” and concludes that “America’s long experiment with cannabis criminalization has failed.”³⁴ The document then devotes the next five pages to recounting the history of marijuana criminalization and the negative consequences of prohibition.³⁵ Next, the policy document describes the recent legislative efforts on marijuana in the State of Michigan. In 2018, Michiganders adopted Proposal 1, legalizing marijuana possession for up to 2.5 ounces of marijuana outside a person’s home, and there are no criminal penalties for under 5 ounces.³⁶

The policy then states “[g]iven this factual and legal background” the “Prosecutor’s Office will decline to file criminal charges for the use or possession of marijuana—whatever the amount at issue.”³⁷ The reasoning for this is (1) marijuana is not as dangerous as other controlled substances, (2) it “does not generally lead to violent or destructive behavior,” (3) use of marijuana is widespread and “widely accepted in the community,” and (4) it does not make sense to punish the “unlucky few” caught with “too much marijuana,” especially given the racial disparities of drug enforcement.³⁸

But the directive went on to say more. The Prosecutor’s Office admitted that there is potential concern because marijuana strains have become more potent over time, and “therefore believes that marijuana should be regulated (much like alcohol and tobacco).”³⁹ Exceptions to the BDP are granted only upon a written request to

³² We discuss some BDPs focused on marijuana later in this note.

³³ WASHTENAW CNTY. MARIJUANA POL’Y DIRECTIVE, *supra* note 1.

³⁴ *Id.* at 1.

³⁵ *Id.* at 1–6.

³⁶ *Id.* at 5.

³⁷ *Id.* at 5–7 (“Assistant Prosecuting Attorneys (APAs) are prohibited from authorizing any such charges.”).

³⁸ *Id.* at 5–6.

³⁹ *Id.* at 6.

the Chief Assistant Prosecuting Attorney or the prosecuting attorney showing exceptional circumstances where public safety requires it.⁴⁰

The Washtenaw County marijuana directive is an example of a primarily policy-oriented BDP. Conversely, much like case-by-case discretion, sometimes other considerations make a blanket declination policy a useful tool for the executive. By instituting a BDP, a prosecutor may signal to law enforcement and lawmakers lapses in statutory guidance. An example of this occurred in Columbus, Ohio. In 2019 the Ohio Legislature enacted Senate Bill 57, which legalized hemp and CBD oil.⁴¹ In doing so, the legislature defined hemp as cannabis with less than 0.3 percent THC.⁴² This definition had unintended consequences. According to Columbus City Attorney Zach Klein, the new legislation created prohibitive costs and practical difficulties when prosecuting minor marijuana possession.⁴³ In a letter, Klein said:

[O]ur current drug testing technology is not able to differentiate, so we will not have the evidence to prosecute these cases. . . . Considering the substantial cost of new equipment and testing versus the possible benefit of prosecuting these often-dismissed cases, in addition to the recent ordinance passed by Columbus City Council, we plan on engaging in further discussions on whether to make this new policy permanent.⁴⁴

This excerpt reveals several motivations behind the decision to not prosecute. First and foremost, there appears to be the inability of prosecutors to achieve convictions without expending substantial resources. This, in turn, indirectly reveals a second motivation—policy preferences. According to the City Attorney, the cost-benefit ratio of pursuing minor marijuana possession given the new law does not serve the public interest.⁴⁵ This assessment did not come out spontaneously; rather, Columbus announced its BDP in response to a change in the law, altering the practical considerations of convicting an individual for marijuana possession. Third, Columbus' BDP came as a follow-up to legislative action. While the Ohio law motivated the practical considerations, Columbus' City Attorney cites a local city ordinance as a justification to pursue a permanent policy of declining prosecution.

⁴⁰ *Id.* at 9.

⁴¹ S. 57, 133d Gen. Assemb. (Ohio 2019).

⁴² *Id.*

⁴³ *Columbus City Attorney Zach Klein Issues Policy Dismissing Misdemeanor Marijuana Charges*, COLUMBUS CITY ATT'Y. (2019), <https://city-attorney.columbus.gov/pdf/press/policy872019.pdf> [<https://perma.cc/KF3H-LSF6>].

⁴⁴ *Id.*

⁴⁵ *Id.*

C. BDPs are an Inappropriate Use of Executive Action

BDPs present severe long-term risks to our system of government and civic culture—particularly those instituted for policy reasons. We will advance three reasons why BDPs are both unconstitutional and unwise as a matter of policy.

1. BDPs concentrate too much power in prosecutors.

The most obvious threat of BDPs is to our system of separation of powers. The U.S. Constitution sets up a government of separate but coequal branches, despite never explicitly using the phrase “separation of powers.”⁴⁶ Articles I through III delineate the power assigned to each branch of government. Article I of the U.S. Constitution unambiguously vests specifically enumerated legislative powers in Congress and Congress alone.⁴⁷ Article II gives the executive power to the president.⁴⁸ Finally, Article III sets up the judicial branch to hear and decide cases and controversies.⁴⁹

James Madison expressed the importance of a predominant legislative power in Federalist No. 51.⁵⁰ Within the same paragraph, Madison discusses the “weakness of the executive.”⁵¹ It thus makes no sense to interpret the executive’s power so that it can encroach on the legislature’s power. When the policy broadly prohibits the enforcement of a crime rather than deciding whether to indict in a particular case, the policy effectively legalizes that crime. Prosecutors do not have the power to legislate explicitly or implicitly. And an “encroachment by one branch into the essential powers of another is impermissible.”⁵²

The system of separate branches ensures power is dispersed horizontally to avoid any one branch aggregating too much authority. BDPs disrupt this design and operate as de facto legislation where the authority to draft and pass laws has historically remained solely with the legislative branch. BDPs that contradict legislative acts strain any notion of a prosecutor’s “faithful” execution.

⁴⁶ See ANTONIN SCALIA, *THE ESSENTIAL SCALIA: ON THE CONSTITUTION, THE COURTS, AND THE RULE OF LAW* 41 (Jeffrey S. Sutton & Edward Whelen eds., 2020).

⁴⁷ U.S. CONST. art. I, § 8.

⁴⁸ U.S. CONST. art. II, § 1.

⁴⁹ U.S. CONST. art. III, §§ 1–2.

⁵⁰ *THE FEDERALIST* NO. 51, at 269 (James Madison) (George W. Carey & James McClellan eds., 2001) [hereinafter *THE FEDERALIST*].

⁵¹ *Id.*

⁵² *In re* Petition of Governor, 846 A.2d 1148, 1155 (N.H. 2004).

2. Rule of Law

BDPs also make it difficult to reconcile the principle that we have a government of laws and not a government of individuals. BDPs allow a singular prosecutor to suspend a valid statute with the stroke of a pen. The rule of law suffers when executive edicts become the law of the land rather than codified statutes enacted by the entire legislature, made up of numerous elected individuals compared to the singular or few executive individual(s).

Allowing BDPs to become a regular substitute for legislative actions to legalize marijuana opens the door for BDPs for any unlawful act. Theft charges for specific amounts are already not sought in some areas throughout the country. While theft can be charged as a felony in Chicago if someone steals more than \$500 worth of merchandise,⁵³ Chicago will only pursue prosecution for theft over \$1,000.⁵⁴ At their extreme, BDPs proscribing prosecution would be possible for tax evasion, hate crimes, or domestic violence.⁵⁵ To many, these may sound radical, and the fact that BDPs for such unlawful activity can be so easily implemented is the problem.

No matter the merits of the policy ends underlying these BDPs, the question we must ask is where do such policies stop? There is no eating your cake and having it too; BDPs turn the enforcement of the law into an even more partisan endeavor with no inherent limit.

⁵³ 720 ILL. COMP. STAT. 5 / § 16-1 (2020).

⁵⁴ See Thomas Hogan, *Prosecutorial Indiscretion: Progressive District Attorneys Decline to Pursue Certain Offenses, Usurping the Legislative Role*, CITY-JOURNAL (June 22, 2021), <https://www.city-journal.org/progressive-prosecutors-abuse-prosecutorial-discretion> [https://perma.cc/72EC-N5QR] (“This unchecked interpretation of prosecutorial discretion can lead nowhere good. What if a prosecutor declines to pursue rape offenses where the victim and offender are married or in a relationship? Or to ignore child abuse cases? Or hate crimes? Or theft cases where the victim has a net worth of more than \$1 million? Or shooting cases where the victim and offender are of different races?”).

While an extreme example of the dangers of BDPs, there are individuals who may believe that rape should not be a crime. Some believe we should treat sexual assault as discrimination rather than criminal because the method will be more effective. Others astoundingly believe that men are entitled to sex; in November of 2017, an anonymous online forum “shut down its ‘Incels’ message board, which had 40,000 members, after numerous posts promoted rape and violence against women.” Alia E. Dastagir, *Incels, Alek Minassian and the Dangerous Idea of Being Owed Sex*, USA TODAY (Apr. 26, 2018), <https://www.usatoday.com/story/news/2018/04/26/incel-rebellion-alek-minassian-sexual-entitlement-mens-rights-elliott-rodger/550635002/> [https://perma.cc/LHK4-NRUD].

⁵⁵ There are some who consider domestic violence to be a “quality-of-life” issue alongside homelessness and drug addiction. See Ursula Perano, *Black Lives Matter Co-Founder Explains ‘Defund the Police’ Slogan*, AXIOS (June 7, 2020), <https://www.axios.com/defund-police-black-lives-matter-7007efac-0b24-44e2-a45c-c7f180c17b2e.html> [https://perma.cc/3GZD-EHFH].

3. Unilateral action brings other negative consequences.

Some purported justifications of allowing BDPs include that the executive official is subject to future elections and that prescription by the current officeholder is subject to revocation by a successor.⁵⁶ However, prosecutors going it alone sacrifices compromise and may lead to the further fraying of political ties within a community. When the people of Michigan ratified Proposal 1 legalizing recreational marijuana, they did so as the result of a process requiring negotiation, compromise, and popular sign-off.⁵⁷ The measures in Proposal 1 are there for a reason, and they ultimately reflect the consensus of Michiganders. This consensus is disturbed when a singular individual goes beyond this consensus and can write, interpret, and enforce their proclaimed policy without any input from constituents.

While BDPs may initially appear to be an extension of case-by-case discretion to some, they extend to a point where they become something completely new. We posit they are so divorced from case-by-case discretion that they represent anti-discretion. BDPs deny individual prosecutors the chance to exercise their discretion on a particular case. Instead, BDPs are closer to a second executive veto that hearkens back to colonial times when the English monarch could suspend laws passed by Parliament.⁵⁸ The U.S. Constitution came as a response to English rule; notably, Article II does not explicitly equip the Executive with this ability. Identifying when case-by-case discretion transforms into a BDP is not a straightforward task. We take on the issue of how to distinguish the two in Part III, laying out a test for determining that dividing line.

D. Arguments in Favor of BDPs are Unpersuasive

Supporters of BDPs posit several justifications for prosecutors employing BDPs. These proponents generally advance three major arguments as justifications for BDPs: (1) popular election of head prosecutors, (2) the ends justify the means, and (3) BDPs increase transparency.

1. Prosecutorial reform advocates incorrectly argue the policies are appropriate because the people choose the district attorney through an election.

In a recent article, W. Kerrel Murray, a Fellow at the University of North Carolina School of Law, proposed that some BDPs should be considered “populist

⁵⁶ See W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021).

⁵⁷ See WASHTENAW CNTY. MARIJUANA POL’Y DIRECTIVE, *supra* note 1, at 6.

⁵⁸ Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 690 (2014).

prosecutorial nullification” and be allowed.⁵⁹ Their reasoning for this stems from the “American tradition of localized, populist control of criminal law—best seen in jury nullification....”⁶⁰ They argue that populist prosecutorial nullification “facilitates wholesale the species of democratic local control that jury nullification permits retail.”⁶¹ We agree with Murray’s identification of the problem:

When may a single actor render inert her state’s democratically enacted law in this way? If the answer is anything other than “never,” the vast reach of American state criminal law demands a pertinent framework for ascertaining legitimacy.⁶²

However, we disagree with their solution that immediately follows:

In offering one, this Article provides the first extended analysis of the normative import of the locally elected status of the state prosecutors who make such pledges. If legitimacy is the problem, local elections can be the solution. That is, there may well be something suspect about unilateral prosecutorial negation of democratically enacted law. Yet that same negation can be justified as distinctly democratic when the elected prosecutor can wrap it in popular sanction.⁶³

It is perplexing to attempt to justify a single prosecutor’s modification of a law enacted by many elected legislators.⁶⁴ First, as discussed above, we challenge the premise that one elected prosecutor *appropriately* represents the people when many elected to the state legislature created a law contrary to the prosecutor’s position. But secondly, election to a position does not change that position’s role or authority. When elected, judges remain barred from legislating from the bench. Similarly, elected prosecutors may not effectively create their own laws.

This is due to the fact that the election of prosecutors does not furnish additional authority to the executive’s powers. Further evidence of this is that the American Bar Association prohibits considering “partisan or other improper political or personal considerations” when evaluating whether to indict.⁶⁵ This underscores the

⁵⁹ Murray, *supra* note 56, at 181.

⁶⁰ *Id.* at 180.

⁶¹ *Id.*

⁶² *Id.* at 173.

⁶³ *Id.*

⁶⁴ It is even more perplexing to see how a *county* or *city* prosecutor can decide to make something legal that the *state* legislature determined to be illegal.

⁶⁵ CRIM. JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION STANDARD 3-4.4 (AM. BAR ASS’N 4th ed. 2017).

executive's role being divorced from policy crafting process and focused on executing the laws. And the fact that prosecutors are elected does not change this. Legislation is not within the prosecutor's constitutional power, whether elected or not.

The founders took many precautions when creating the legislature because of the immense power that comes with crafting legislation.⁶⁶ In Federalist 51, Madison stated this very clearly: "The interest of the man, must be connected with the constitutional rights of the place."⁶⁷ Bypassing these protections is dangerous. If one disagrees with the laws as written, that person must convince the current legislature to change them or elect new legislators. Structure remains important. The separation of powers retains significance. Just because one may agree with the result of ignoring structure today does not mean that individual will agree with the result of ignoring structure in the future. "And in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous."⁶⁸

2. BDPs are a double-edged sword.

Many supporters of BDPs justify the policies on the result reached, especially where legislative action is unlikely.⁶⁹ If one supports BDPs due to the result these policies reach today, that individual should ask if all potential BDP results deserve support.⁷⁰ Prosecutors could create a BDP saying they would no longer pursue charges for tax evasion or failure to pay income tax. A newly elected president may instruct federal prosecutors to not pursue charges for destruction of Capitol property related to an insurrection. BDPs could preclude indictments for hate crimes. There is no limit to what BDPs can sanction. Instead, BDPs allow for sweeping exercises of practically unbounded authority and their continued use invites an arms race for

⁶⁶ See THE FEDERALIST, *supra* note 50, at 269.

⁶⁷ *Id.* at 268.

⁶⁸ *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

⁶⁹ E.g., R. Michael Cassidy, (*Ad*)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform, 45 LOY. U. CHI. L.J. 981, 981 (2014) ("a prosecutor's administrative responsibilities as a leader in the criminal justice establishment and her fiduciary responsibilities as a representative of the sovereign should compel her to join in the effort to repeal mandatory minimum sentencing provisions for most drug and non-violent offenses.").

⁷⁰ While the expansive use of BDPs has recently been a method used by left-leaning prosecutors, this has not exclusively been the case. One Tennessee prosecutor decided that he did not recognize same-sex marriages as legal, despite the *Obergefell* decision. He opined that the reason for domestic violence carrying heavier consequences is to "protect the sanctity of marriage" and in his opinion, "there's no marriage to protect" between same sex couples. Tim Fitzsimons, *Tennessee DA Under Fire for Saying He Won't Enforce Domestic Violence Law for Gays*, NBC NEWS (June 4, 2019), <https://www.nbcnews.com/feature/nbc-out/tennessee-da-under-fire-saying-he-won-t-enforce-domestic-n1013796> [<https://perma.cc/95P2-Y68Z>].

partisan prosecutors. With no limits, their use will continue to ratchet up until we find ourselves governed solely by executive fiat.

BDPs invoke far greater implications than any one person could adequately capture in our system of government. We do not have omnipotent leaders, and we have wisely dispersed power across institutions. The Washtenaw policies themselves reflect this limitation. The Prosecuting Attorney recognized that these substances need to be regulated, yet they acknowledged that they had no authority to require such regulation.⁷¹ This self-awareness underscores precisely why legislative action is the proper method for reform. It avoids half-baked measures that obscure the rule of law and blur the boundaries between the executive and the legislature.

3. Transparency does not justify violating the separation of powers.

Some support BDPs because allowing such policies encourages transparency. Supporters advance the argument that prosecutors will have these policies anyway so we should allow the policies so that prosecutors are public about them.⁷² We would posit that encouraging transparency in this way is an even greater transgression against the separation of powers essential to our system of government. Openly declaring certain actions as beyond prosecution—despite criminal statutes to the contrary—invites reliance on the self-proclaimed power of a prosecutor to both write and enforce the criminal laws in a particular jurisdiction.

Even if prosecutors continue to exceed their executive role without announcing their declinations publicly, this does not escape the underlying separation-of-powers issue. Conceding to prosecutors and permitting them to act beyond their role in enforcing the laws, simply because they will do so anyways, is a curious justification. Prosecutors can be completely open when developing a BDP, but it does not change the fundamental fact that the prosecutors are operating outside the bounds of their authority. Courts should not ignore the separation of powers simply to encourage prosecutors to be transparent. And if transparency is one's goal, other methods are more equipped for this, such as legislation. Further, some may not even be transparent now. But judicial review would help determine how many hidden BDPs exist and whether they are violating the separation of powers or not.

II. THE POWER OF JUDGES TO REJECT BDPs

While prosecutors appropriately exercise their executive power when deciding whether to indict or not in a particular case, BDPs instead rewrite the law. Appropriate use of prosecutorial discretion looks at the facts of each case and weighs

⁷¹ WASHTENAW CNTY. MARIJUANA POL'Y DIRECTIVE, *supra* note 1.

⁷² See Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603, 620–22 (2020).

multiple factors when deciding what, if any, prosecutorial action to take.⁷³ Contrary to what some suggest, the executive's responsibility to faithfully execute the laws does not justify the complete lack of judicial intervention regarding BDPs.⁷⁴ The Constitution describes the executive duty to execute and enforce the laws, not a power to draft or suspend them.⁷⁵ The Founders knew how to create power to draft the laws; they granted this power to the legislature.⁷⁶ If the Founders desired the executive to have a share of this power, they certainly would not have assigned "[a]ll legislative Powers" to Congress alone.⁷⁷

Determining whether a BDP violates the separation of powers does not require the court to review every instance of prosecutorial action or inaction. Rather, it only requires the court to determine whether a particular blanket policy falls within the power of the executive outlined by the Constitution. Additionally, court review of blanket policies does not remove the executive power of discretion in individual cases, since the use of prosecutorial discretion by one prosecutor in charge of an individual case does not implicate constitutional separation of powers concerns. But most would likely agree that the head prosecutor requiring all prosecutors in their jurisdiction to ignore all laws would not fall within their discretion. BDPs fall somewhere between the two extremes. While the legislative branch has its own measures it can take in response to BDPs, judicial review of BDPs is still appropriate and necessary. We will survey judicial review of executive actions in other areas to provide context and justify the exercise of judicial review over these policies.

A. *Judicial Review of Executive Action*

Judicial review of executive action is commonplace. However, there is no caselaw that speaks directly to delineating where executive discretion begins to violate the separation of powers.⁷⁸

Federal criminal law tells us that judicial review of case-by-case discretion is all but foreclosed. In a D.C. Circuit case, then Judge Burger stated:

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal

⁷³ The ABA publishes criminal justice standards describing the appropriate function of a prosecutor. See CRIM. JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION STANDARD 3-4.4 (AM. BAR ASS'N 4th ed. 2017).

⁷⁴ See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 16 (2009).

⁷⁵ U.S. CONST. art. II, §§ 1, 3.

⁷⁶ U.S. CONST. art. I, § 1.

⁷⁷ *Id.*

⁷⁸ Hence our Note.

proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.⁷⁹

Notice the language “**precise** charge” and “whether to dismiss **a** proceeding,” this suggests discretion is only appropriate when evaluating an individual case.

State courts also supply examples of judicial intervention in matters related to a prosecutor’s discretion. State courts have already evaluated inappropriate prosecutorial actions, usually involving the death penalty; the courts have also evaluated the appropriateness of a Governor’s decisions to supersede. In New York, the legislature gave prosecutors the option to pursue the death penalty but did not outline “guidelines or procedures for the prosecution to follow in selecting those cases in which it will seek the death penalty.”⁸⁰ In *People v. Harris*, the Defendant argued that this violated their due process rights and violated the prohibition against cruel and unusual punishment guaranteed by both the state and federal constitution.⁸¹ The Supreme Court in Kings County, New York found that the legislature did not need to outline specific prosecutor procedures to use when deciding whether to pursue the death penalty, finding that allowing this prosecutorial discretion did not violate the separation of powers.⁸² However, this was one prosecutor deciding one case. This is evidenced by the court’s reasoning:

Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, **and** the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake *
* * Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine the prosecutorial effectiveness by revealing the Government's enforcement policy.⁸³

To see the distinction between the use of case-by-case discretion and the improper policy decision encompassed in a BDP, one can look at another New York case that was decided the year prior to *Harris*, *Johnson v. Pataki*. Shortly after the legislature passed the death penalty statute, a different New York D.A., Robert Johnson, announced that they would not pursue the death penalty.⁸⁴ Instead, Johnson

⁷⁹ *Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

⁸⁰ *People v. Harris*, 675 N.Y.S.2d 743, 744 (N.Y. 1998).

⁸¹ *Id.*

⁸² *See id.*

⁸³ *Id.* at 744–45 (emphasis added) (citing *Wayte v. U.S.*, 470 U.S. 598, 607 (1985)).

⁸⁴ *See* Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty*:

announced they would only ever seek life without parole.⁸⁵ And even when it meant they would be superseded, Johnson refused to indicate any situation in which they would pursue the death penalty. The highest court of New York upheld the Governor's Executive Order reassigning a case based on this D.A.'s policy, finding that it did not overstep the D.A.'s prosecutorial discretion.⁸⁶ This is because the D.A.'s action was not case-by-case discretion since it was not one prosecutor deciding how to proceed in an individual case. Instead, the prosecutor had changed the law through their BDP, essentially drawing a line through the death penalty statute during their tenure. The distinction is further evidenced by the court's language in *Harris* when they tried to rely on *Pataki*:

Defendant's reliance upon the Court of Appeals decision in *Johnson v. Pataki* is misplaced. In that case a district attorney had announced a blanket policy against seeking the death penalty in any case. In determining whether the Governor had a "rational basis" for issuing an Executive Order removing that district attorney from the prosecution of a particular case, the Court recognized as legitimate the Governor's concern that the prosecutor's announced policy foreclosed him from exercising his statutory discretion in every capital case, thus potentially impacting adversely on state-wide proportionality in the selection of capital cases.⁸⁷

New York is not the only state to have such a holding, and holdings have not been limited exclusively to death penalty BDPs. Recently, a California Superior judge held "mostly in favor of the Association of Deputy District Attorneys for Los Angeles County in a petition brought against District Attorney George Gascón, saying he cannot order his prosecutors to ignore laws that the union says protect the public, including three-strike allegations and sentencing enhancements."⁸⁸ And the Second District of California agreed, upholding a preliminary injunction preventing enforcement of a BDP by Los Angeles D.A. George Gascón: "In essence, the [BDP] prohibited deputy district attorneys in most cases from alleging prior serious or violent felony convictions (commonly referred to as "strikes") under the three strikes law or sentence enhancements and required deputy district attorneys in pending cases to move to dismiss or seek leave to remove from the charging document

Toward an Improved Process, 26 FORDHAM URB. L.J. 767, 778 (1999).

⁸⁵ *Id.*

⁸⁶ *See Johnson v. Pataki*, 691 N.E.2d 1002 (N.Y. 1997).

⁸⁷ *People v. Harris*, 675 N.Y.S.2d 743, 745 (N.Y. 1998) (citation omitted).

⁸⁸ City News Service, *Judge Rules Mostly in Favor of LA County Prosecutors' Union in Lawsuit Against DA Gascon Over Reforms*, ABC7 (Feb. 8, 2021), <https://abc7.com/george-gascon-lawsuit-prosecutors-los-angeles-county/10322037/> [<https://perma.cc/68T7-75JK>].

allegations of strikes and sentence enhancements.”⁸⁹ While Gascón argued his BDP was unreviewable by the court due to prosecutorial discretion, the court found that he “overstates his authority. [Gascón] is an elected official who must comply with the law, not a sovereign with absolute, unreviewable discretion.”⁹⁰ While the court focused on the punishment nature of the three strikes law and stated that prosecutors have discretion regarding what to charge, this being part of the reason that the court found *mandamus relief unavailable* to require prosecutors to only dismiss a prior strike or sentence enhancement on a case-by-case basis and to preclude amendments,⁹¹ what to charge in an individual case still remains substantially different than barring prosecution of a particular crime in any case, violating the separation of powers.⁹²

These cases all demonstrate that prosecutorial discretion does not allow district attorneys to legislate with BDPs, even when the policy involves a broader version of a decision usually within their power. An additional example of this Executive overstepping and the distinction between BDPs and prosecutorial discretion occurred in Florida. The Florida State Attorney, Aramis Ayala, stated that they would not pursue the death penalty in one case where an individual killed his pregnant ex-girlfriend and a police lieutenant.⁹³ The Supreme Court of Florida found prosecutorial discretion did not preclude their Governor’s decision to intervene.⁹⁴ If the decision had been based on only one case and the facts of that case, prosecutorial discretion would have been appropriate. But Ayala’s statements went far past prosecutorial discretion and leaped into performing legislation. Prosecutorial discretion does not make the executive the all-powerful supreme branch of our government. The checks and balances of the separation of powers limit the executive.

The role of the executive has also been hotly debated outside the realm of criminal prosecution. Two aspects of administrative law provide useful clues about

⁸⁹ Ass’n of Deputy Dist. Att’ys for Los Angeles Cnty v. Gascón, 295 Cal.Rptr.3d 1, 11 (Cal. Ct. App. 2022).

⁹⁰ *Id.* at 16.

⁹¹ *Id.* at 37–39.

⁹² *Id.* at 33 (emphasis added) (“Thus, while the charging function of a criminal case is within the sole province of the executive branch, the legislative branch bears the sole responsibility and power to define criminal charges and to prescribe punishment. Under this authority, the Legislature regularly limits the discretion a prosecutor has in charging and a court has in sentencing. (See *People v. Birks*, *supra*, 19 Cal.4th at p. 134, 77 Cal.Rptr.2d 848, 960 P.2d 1073 [a prosecutor has “discretion to choose, **for each particular case**, the actual charges from among those potentially available”].)) (citations omitted) (emphasis added).

⁹³ Tyler Quinn Yeagain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 97 (2018).

⁹⁴ Ayala v. Scott, 224 So. 3d 755 (Fla. 2017).

review of executive discretion.⁹⁵ First comes the Administrative Procedure Act (APA).⁹⁶ The APA sets forward the default standard for executive agencies to follow when regulating. Judicial review of “agency action” is not only allowed but strongly presumed in favor.⁹⁷ The APA itself defines agency action to include an agency’s failure to act.⁹⁸

While there is a general presumption of review under the APA, in *Heckler v. Chaney*, the Supreme Court found there is a presumption against judicial review for decisions by an agency not to undertake enforcement actions.⁹⁹ The Court found that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”¹⁰⁰ However, the fact that it is just that, a presumption, means that this presumption can be overcome when the executive goes too far.

In *Heckler*, the majority acknowledged this, and stated review may be proper in some instances. A footnote spells out where this may be the case.

“Nor do we have a situation where it could justifiably be found that the agency has “consciously and expressly adopted a **general policy**” that is so extreme as to amount to an abdication of its statutory responsibilities. See, e.g., *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not ‘committed to agency discretion.’”¹⁰¹

In short, the decision whether to charge in an individual case is absolutely committed to agency discretion.¹⁰² However, an avenue for review remains available when the executive abandons its responsibilities.

B. Judicial Review of BDPs Is Possible

Constitutions would be mere pieces of paper without judicial accountability.

⁹⁵ See *supra*, note 12.

⁹⁶ 5 U.S.C. § 500 et seq.

⁹⁷ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁹⁸ See 5 U.S.C. § 551(13).

⁹⁹ *Heckler*, 470 U.S. at 825–826.

¹⁰⁰ *Id.* at 831.

¹⁰¹ *Id.* at 831 n.4 (emphasis added) (citing *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

¹⁰² See, e.g., *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

The different branches must “keep[] each other in their proper places.”¹⁰³ The powers outlined in Article I–III would solely exist as recommendations without checks and balances by the other branches.¹⁰⁴ Therefore, the judicial branch must do its part and intervene where one of the branches forays beyond its constitutional authority.

As Sections I.A and I.B described, a prosecutor’s discretion does not fit into a single bucket. Instead, there are meaningful distinctions between the forms in which a prosecutor may attempt to exercise discretion. In evaluating whether the courts can effectively monitor and curtail BDPs, this makes all the difference. While Section II.A demonstrated that there is a high bar to reviewing the executive’s decision not to prosecute a case—we posit that this high bar only applies to prosecutorial discretion as it is applied on a case-by-case basis. When a prosecutor declines to engage in case-by-case determinations, they begin to act legislatively. This is especially true where the prosecutor is primarily motivated by policy ends rather than considerations of executive resources or constitutional concerns.¹⁰⁵

Moreover, this distinction makes sense. BDPs operate as a *de facto* suspension of the laws and a second veto, something the Founders were well aware existed in other governments.¹⁰⁶ And it should be noteworthy that Article II contains no such grant of this authority. Further, where suspension of a law was envisioned, it was explicitly provided for.¹⁰⁷ This cuts against any executive claim of implied authority to act with such a broad brush. To allow the change would contravene the idea that we are a government of laws and not of individual men and women. The Founders did not secure independence from an omnipotent monarch to replace him with another, differing only by popular election. Our constitutional structure envisioned a separation of powers that cannot allow too much concentration of power in a single branch.

It is also not the case that the courts would struggle to review BDPs. In fact, they are well positioned to do so. They are already familiar with reviewing agency action and inaction in the regulatory context. Review of BDPs does not thrust an

¹⁰³ THE FEDERALIST, *supra* note 50, at 267.

¹⁰⁴ Unlike *Morrison v. Olson*, BDPs raise the question of whether the executive, rather than the legislature, violated the separation of powers. And Justice Scalia’s *Morrison* dissent shows why the judiciary does have the ability to evaluate whether an executive BDP has violated the separation of powers. To determine whether the action falls within the constitutionally outlined executive power, first, ask if the conduct exercises “purely executive power” or not. While some may not agree that the executive legislates through these BDPs, these policies are not *purely* executive. These policies effectively change the law, a power held solely by the legislative branch. And thus, the policies violate the separation of powers. *Morrison v. Olson*, 487 U.S. 654 (1988).

¹⁰⁵ See *infra* Part I.

¹⁰⁶ The Pardon Power being an explicit exception.

¹⁰⁷ U.S. CONST. art. I, § 9 (“The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”).

alien concept upon them. We will demonstrate this by developing a legal framework for analyzing whether a prosecutorial policy oversteps the authority of the executive.

III. ACCOUNTABILITY IN PRACTICE

Exercising judicial authority over any sort of executive action or inaction may be fraught with potential challenges. Before laying out the test we propose, we believe it is worthwhile to highlight the considerations we kept in mind when developing and refining our test.¹⁰⁸

A. *Judicial Considerations*

Now that we have established that judicial review of BDPs is plausible and appropriate, we will outline what that review should accomplish. We set out to devise a test that would strike the right balance that acknowledges both the risks of executive overreach and the risk of an ineffective executive. First and foremost, the goal is not to police executive organizational decisions. The need for sufficient flexibility exists to ensure that the executive can faithfully execute the laws. Executive discretion is a vital tool in this regard, and we do not seek to restrain proper case-by-case prosecutorial discretion.

We erred on the side of restraint. As discussed above, the spectrum of executive inaction can range dramatically from comprehensive enforcement to the suspension of legal obligations and wanton disregard of the laws. BDPs fall in between, and reasonable people will have genuine disputes about where it truly lies. Because of this, our test is more cautious to ensure comity between the branches.

We also acknowledge that we are setting off into uncharted territory. Therefore, we believe it is prudent to develop a test that gives the judiciary sufficient direction such that they are not blindly wandering. For this reason, we provide a formalist test that has several steps to follow. While there are several functional features, our test gives sufficiently clear answers.

It is also obvious that if our test were adopted, some members of the executive may merely adopt BDPs in silence. However, even if our test mainly foreclosed

¹⁰⁸ A few possible solutions to a violation of the separation of powers through BDPs are elections, intervention by another executive member, and judicial intervention. While this Note focuses on judicial review, the test we put forward will not be a panacea to the concerns we have identified. Instead, we proffer a test as another check and balance for keeping the executive within the realm of executing the laws. Judicial review can check the executive in ways other solutions cannot. As described above, elections do not change that this power should remain in the hands of the legislative. Simply relying on the intervention by another executive member is inappropriate for the same reasons; if the second executive member decides to allow the nonenforcement of laws created by the executive, it remains outside their role. Suppose the only potential remedy for BDPs was to allow one additional executive to exercise intervention. In that case, this still allows two individuals to legalize an action that many collectively determined should be illegal.

announced BDPs, courts would be able to look at circumstantial evidence to determine whether a non-disclosed BDP exists.¹⁰⁹ Our test outlines how the judiciary can assess if the executive is effectively exercising a second executive veto of law. This part of the test may be more difficult, but because review of BDPs is necessary whether announced or in silence, we provide it to demonstrate that such an inquiry is still feasible.

B. *Judicial Test*

Step One: Is there a Blanket Declination Policy?

Sometimes this will be very clear, like when a prosecutor has formally announced their declination. However, other times this will not be the case. In those situations, the court should look at multiple factors, including (1) Office Changes;¹¹⁰ (2) Charging Patterns;¹¹¹ (3) Prosecutor Statements;¹¹² (4) Internal Correspondences;¹¹³ (5) Office Employee Statements;¹¹⁴ (6) Law Enforcement Action;¹¹⁵ (7) Temporal Relation to Legislation;¹¹⁶ and (8) Reaction to Other Government Institution.¹¹⁷ If the answer to *Step One* is no, then there is no judicial review; the case should be dismissed. But if the answer to *Step One* is yes, then the court should proceed to *Step Two*.

Step Two: Does the Blanket Declination Policy decriminalize the crime?

This step is looking at the prosecutor's proffered reasoning for their BDP. This part of the test recognizes that there can be legitimate reasons for not enforcing a particular law at a particular time. Some of these reasons can include (1) "Difficulty Moving Forward," such as not enough evidence or waiting to let the smaller crime

¹⁰⁹ And even if in some cases prosecutors have policies but do not announce so, and there is not sufficient circumstantial evidence, not allowing BDPs would help since the citizens of that area would not be under the impression that an illegal action has been legalized.

¹¹⁰ Such as getting rid of a dedicated team.

¹¹¹ Such as lack of charges brought and over what amount of time compared to how many times the crime likely occurs or how often charges are brought and then dropped.

¹¹² Any statements with particular importance placed on statements made while campaigning and since taking office.

¹¹³ Such as memos outlining crimes that will not be charged.

¹¹⁴ Whether through emails obtained from office employees, statements made during depositions, testimony, etc.

¹¹⁵ Such as statements by law enforcement or law enforcement policies, particularly why they have certain policies.

¹¹⁶ If changes are made after a bill was recently passed, this is evidence that it is in response to the legislation.

¹¹⁷ Similar to factor (7), changes made soon after another government institution's will be further evidence that this is a policy.

become a bigger crime¹¹⁸ and (2) “Deferral to Another Agency,” such as not prosecuting a doctor because another state department has already started proceedings against them.¹¹⁹ If the reasons are sufficient for the answer to *Step Two* to be no, then the court should proceed to *Step Three*. If the reasons are not sufficient and the answer to *Step Two* is yes, then the court should instead proceed to *Step Four*.

Step Three: Is the reasoning given by the prosecutor for the Blanket Declination Policy pretextual?¹²⁰

If the answer to *Step Three* is yes, then the court should proceed to *Step Four*. If the answer to *Step Three* is no, then there is no judicial review; the case should be dismissed.

After *Step Three*, the burden then shifts from the Plaintiff to the Executive.

Step Four: Is the Blanket Declination Policy based on the prosecutor’s executive oath to uphold the Constitution?¹²¹

Evaluating this question is easy. Does the prosecutor claim that enforcing the law violates a constitutional right? If the answer to *Step Four* is no, then the BDP violates the separation of powers, and the court should hold the prosecutor

¹¹⁸ You will only reach this step, if there was first a finding of a BDP. This factor is within Step 2 to account for crimes that are very difficult to prove, so it may seem like the prosecutor is not enforcing that law. However, they may just not have enough evidence for the cases that have been brought to them.

¹¹⁹ You will only reach this step, if there was first a finding of a BDP. This factor is within Step 2 to account for crimes where another government agency also has the ability to regulate, e.g. Department of Health pursuing action against doctors instead of the prosecutor pursuing charges for a particular crime.

¹²⁰ Pretext can be inferred for many reasons. There has been extensive evaluation of this in the employment discrimination context. A few that could also show pretext for BDPs are: (1) Inconsistent Reasoning, *see Velez v. Thermo King*, 585 F.3d 441 (1st Cir. 2009); *see also Haddad v. Wal-Mart*, 914 N.E.2d 59 (Mass. 2009); *see also City of Salem v. Mass. Comm’n Against Discrimination*, 44 Mass. App. Ct. 627 (1998); (2) Deviation, *see Kouvinov v. Parametric Tech. Corp.*, 537 F.3d 62 (1st Cir. 2008); (3) Lack of Documentation, *see Mass. Comm’n Against Discrimination & Baker v. Plymouth Cnty. Sheriff’s Off.*, No. 03-BEM-02002, 2009 Westlaw 635606, at *13 (2009) (This case focused on “scant evidence” and “lack of supporting documentation” to support the alleged reasoning. This could be evidence of pretext in BDP situations as well.); (4) Post Hoc Rationalizations, *see McKennon v. Nashville Banner Publ’g Co.*, 115 S. Ct. 879, 885 (1995) (“The employer could not have been motivated by knowledge it did not have and it cannot now claim” the alternative.); and (5) Lack of Investigation, *see Trujillo v. PacifiCorp*, 524 F.3d 1149 (10th Cir. 2008) (While different than the subject matter of the case, the lack of evaluating the landscape before implementing a BDP could be evidence of pretext.). This list is not exhaustive, but the employment discrimination precedent regarding pretext is a starting point.

¹²¹ This step in the test is included to make sure the courts are only evaluating constitutional questions *if* the Executive is claiming the BDP is due to a constitutional issue.

accountable. If the answer to *Step Four* is yes, then the court should proceed to *Step Five*.

Step Five: Does the law that Blanket Declination Policy refuses to enforce violate a constitutional right?

The court should evaluate this as they would normally evaluate a criminal statute that is challenged on constitutional grounds. If the answer to *Step Five* is no, then the BDP violates the separation of powers, and the court should hold the prosecutor accountable. If the answer to *Step Five* is yes, then the BDP does not violate the separation of powers. However, since the criminal statute has been found unconstitutional by the court, the BDP will no longer be necessary since the law is unconstitutional.

C. Test Applied

1. Example #1

Early in the Biden Administration, a new policy came down strongly discouraging the detention of pregnant and postpartum migrants.¹²² The policy did not purport to change the decision whether to initiate removal proceedings.¹²³ But for a hypothetical, imagine it did and heavily discouraged instituting a removal action while a migrant is pregnant or less than one-year postpartum.

Step One: Is this a blanket declination policy? The answer to Step 1 is no. This policy is closer to case-by-case prosecutorial discretion. It does not legalize illegal immigration. It simply delays the institution of removal proceedings for individuals who are pregnant, a temporary delay, because of that circumstance. Data suggests this circumstance occurred 4000 times in 2019.¹²⁴ This is different than DACA and DAPA which purported to apply to millions of individuals.

Since the answer to Step 1 is no, the case would be dismissed.

2. Example #2

Federal law prohibits the use of marijuana.¹²⁵ However, some states and the

¹²² See ICE Directive 11032.4: *Identification and Monitoring of Pregnant, Postpartum, or Nursing Individuals*, U.S. IMMIGR. CUSTOMS ENF'T (July 1, 2021), https://www.ice.gov/doclib/detention/11032.4_IdentificationMonitoringPregnantPostpartumNursingIndividuals.pdf [<https://perma.cc/J8TJ-6WVH>].

¹²³ *Id.* at 1.

¹²⁴ Eileen Sullivan, *Biden Will End Detention for Most Pregnant and Postpartum Undocumented Immigrants*, N.Y. TIMES (Oct. 7, 2021), <https://www.nytimes.com/2021/07/09/us/politics/pregnant-postpartum-immigration-biden.html> [<https://perma.cc/L4GK-C4DW>].

¹²⁵ Zachary C. Bolitho, *The U.S. Constitution, the U.S. Department of Justice, and State Efforts*

District of Columbia have legalized marijuana for recreational use.¹²⁶ Even more states have legalized marijuana for medical purposes.¹²⁷

Rather than challenging those state laws under the Supremacy Clause, and instead of continuing to enforce the longstanding federal law equally across the country, the U.S. Department of Justice under Attorney General Eric Holder announced that it would neither seek to preempt state legalization measures nor (absent exceptional circumstances) bring federal marijuana charges against individuals in those states.¹²⁸

Step One: Is this a blanket declination policy? The answer to Step 1 is maybe. While the prosecutors are still pursuing charges in other states, in some states policy is acting as a BDP, so we move to Step 2.

Step Two: Does the Blanket Declination Policy decriminalize the crime? The answer to Step 2 is no, *because charges can still be brought in other states.*

Step Three: Is the reasoning given by the prosecutor for the Blanket Declination Policy pretextual? In this situation, the answer to Step 2 also answers Step 3. The fact that the law is still being enforced in other states is evidence that the reasoning is not pretextual.¹²⁹

*Since the answer to Step 3 is no, the case would be dismissed.*¹³⁰

3. Example #3

The prosecutor's office in Columbus, Ohio announced that it would not be pursuing misdemeanor marijuana possession charges after an Ohio law made hemp legal, and the legislature distinguished hemp from marijuana based on the percentage of THC present.¹³¹ In its reasoning, the prosecutor's office stated that it did not have the technology that could determine THC content, and therefore the office "[would] not have the evidence to prosecute these cases."¹³²

to Legalize Marijuana, 4 LINCOLN MEM'L U. L. REV. 43, 79 (2017).

¹²⁶ *Id.* at 45–46.

¹²⁷ *Id.* at 46.

¹²⁸ *Id.*

¹²⁹ This is not to say that if the law is enforced in *any* state that the reasoning is automatically pretextual. However, in this situation, the reasoning lines up with which states the law is being enforced in and in which ones the law is not being enforced.

¹³⁰ This situation may violate the vertical separation of powers but not the horizontal separation of powers addressed in this Note. *See supra* note 125.

¹³¹ *Columbus City Attorney Zach Klein Issues Policy Dismissing Misdemeanor Marijuana Charges*, COLUMBUS CITY ATT'Y (2019), <https://city-attorney.columbus.gov/pdf/press/policy872019.pdf> [<https://perma.cc/FH42-NKWF>].

¹³² *Id.*

Step One: Is this a blanket declination policy? The answer to Step 1 is yes.

Step Two: Does the Blanket Declination Policy decriminalize the crime? The answer to Step 2 is no *because charges would be brought if evidence was available.*

Step Three: Is the reasoning given by the prosecutor for the Blanket Declination Policy pretextual? Assuming the prosecutor has shown sufficient evidence that drug testing technology was unable to identify the substance, the answer to Step 3 is no. Since the reasoning is honest and true and there is no evidence presented to the contrary, there is no evidence of pretextual reasoning. This may be different if a D.A. had run on a platform that they would not prosecute possession charges and soon after in the elected position, the D.A. announced the same plan with the same reasoning. Then the testing equipment reasoning would be seen as pretextual.

But since the answer to Step 3 in this case is no, the case would be dismissed.

4. Example #4

In Washtenaw County, prosecutors will no longer pursue marijuana possession cases. Their reasoning for doing so is that it does little to protect public safety, disproportionately falls on people of color, saddles defendants with damaging convictions and drains resources that can better be spent on more serious crimes.

Step One: Is this a blanket declination policy? The answer to Step 1 is yes.

Step Two: Does the Blanket Declination Policy decriminalize the crime? The answer to Step 2 is yes because while there is a similar claim about resources here, there is just a general claim that it drains resources rather than a specific issue with the resources. There is no legitimate difficulty in the way of moving forward with charges that have been expressed and no evidence that charges would be brought otherwise. Therefore, we move to Step 4.

Step Three: Not applicable.¹³³

Step Four: Is the Blanket Declination Policy based on the prosecutor's executive oath to uphold the Constitution? The answer to Step 4 is no. The reasoning is simple: the prosecutor *has not claimed* the reasoning for not enforcing the law is that the law itself violates the Constitution.

Since the answer to Step 4 is no, the BDP violates the separation of powers.

5. Example #5

Let's look at Example #4 again but instead of the rationale given, now imagine the D.A. reasoned that the statute itself, marijuana possession, was unconstitutional

¹³³ However, if a court determined the answer to Step 2 (Is the reasoning given by the prosecutor for the Blanket Declination Policy pretextual?) to be no, the answer to Step 3 would be yes, evidenced by the multitude of policy reasons listed alongside the claim that bringing these charges drains resources.

under the equal protection clause because charges disproportionately fall on people of color.

Step One: Is this a blanket declination policy? The answer to Step 1 is yes.

Step Two: Does the Blanket Declination Policy decriminalize the crime? The answer to Step 2 is clearly yes in this hypothetical. Therefore, we move to Step 4.

Step Three: Not applicable.

Step Four: Is the Blanket Declination Policy based on the prosecutor's executive oath to uphold the Constitution? The answer to Step 4 is yes. The reasoning is simple: the prosecutor *has claimed* the reasoning for not enforcing the law is that the law itself violates the Constitution.

Step Five: Does the law that Blanket Declination Policy refuses to enforce actually violate a constitutional right? The answer to Step 5 is no.¹³⁴

Since the answer to Step 5 is no, the BDP violates the separation of powers.

6. Example #6

For this example, let's consider the fact that some states still have laws on the books that make a sexual relationship between individuals of the same sex illegal and the fact that the executive in those states are not currently pursuing charges against individuals violating these laws.¹³⁵ If asked why, these executive officers would almost certainly say that the statute itself is unconstitutional.

Step One: Is this a blanket declination policy? Whether the executive officers have publicly announced this blanket policy or not, the answer to Step 1 is yes. The amount of time that has elapsed since the office has brought a charge compared to the likely amount of the act occurring is evidence that the executive is not enforcing this law.

Step Two: Does the Blanket Declination Policy decriminalize the crime? The answer to Step 2 is clearly yes since there is no reasoning that has been expressed for the nonenforcement, such as another agency pursuing action against the

¹³⁴ Selective prosecution is unconstitutional where it is "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that the system of prosecution amounts to 'a practical denial' of equal protection of the law." *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

¹³⁵ Three states specifically target their statutes at same-sex relations only: Kansas, Kentucky, and Texas. *See* KAN. STAT. ANN. § 21-5504 ("Criminal sodomy is [s]odomy between persons who are 16 or more years of age and members of the same sex"); *see* KY. REV. STAT. ANN. § 510.070 (1975) ("A person is guilty of sodomy in the first degree when: He engages in deviate sexual intercourse with another person by forcible compulsion"); *see also* KY. REV. STAT. ANN. § 510.010 (2021) ("Deviate sexual intercourse' means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by any body part or a foreign object manipulated by another person."); *see* TEX. CRIM. STAT. § 21.06 (amended 1994) ("A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.").

individuals or lack of evidence to prove violation of the statute. Therefore, we move to Step 4.

Step Three: Not applicable.

Step Four: Is the Blanket Declination Policy based on the prosecutor's executive oath to uphold the Constitution? The answer to Step 4 is yes. The reasoning is again simple: in this hypothetical, the prosecutor *has claimed* the reasoning for not enforcing the law is that the law itself violates the Constitution.

Step Five: Does the law that the Blanket Declination Policy refuses to enforce actually violate a constitutional right? The answer to Step 5 is yes.¹³⁶

Since the answer to Step 5 is yes, the BDP does not violate the separation of powers.

CONCLUSION

BDPs are not an appropriate use of executive power. They extend far beyond case-by-case discretion and leap into legislation. Allowing the executive branch to decide which laws are enforceable transforms society into one of individual men and women and not of laws. And the fact that many district attorneys are elected does not change their role, just as the role of judges does not change simply because they are elected. It is important for each branch of government to stay in their lane. It is important for the decision of what is and is not illegal to remain with the legislature, where the power is spread among the many elected to legislate, instead of to the one or few elected to the executive branch. Just as the California court did “not pass judgment on the three strikes law or its intended or unintended consequences”¹³⁷ when it ruled on the preliminary injunction, this Note does not pass judgment on the policies behind any current or future BDP. But as that court said, “[i]t is neither for us nor the district attorney to rewrite [the law].”¹³⁸ While many may agree with some, many, or all current BDPs throughout the country, including the authors of this Note, it is not just the ends that matter; it is the means.

¹³⁶ Cf. *Lawrence v. Texas*, 539 U.S. 558 (2003); cf. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹³⁷ *Gascón*, 295 Cal.Rptr.3d at 37.

¹³⁸ *Id.*