**The Elected Servant: Limiting Judicial Overview of Prosecutor’s Nolle Prosequi Power to Corruption and Infringement on Defendant’s Rights**

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“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. ”[[1]](#footnote-1)

I. Introduction

Over the last few years, people have elected many progressive district attorneys on a platform of ending mass incarceration.[[2]](#footnote-2) One of the primary tools these progressive district attorneys have utilized to further this goal is the nolle prosequi.[[3]](#footnote-3) The nolle prosequi is “an entry on a record in a criminal case file that the prosecutor or court has discontinued the case.”[[4]](#footnote-4) When given complete discretion to nolle prosequi, the prosecutor has total control over when charges are dismissed prior to trial and even post-conviction .[[5]](#footnote-5)

Despite its influential nature, there is not one unifying theory on the amount of discretion prosecutors should have when it comes to the use of the nolle prosequi.[[6]](#footnote-6) Many state judicial branches view the power of the nolle prosequi as quintessential to a prosecutor’s authority.[[7]](#footnote-7) Others consider judicial oversight to be necessary to prevent evil and corrupt prosecutors from using the nolle prosequi inappropriately.[[8]](#footnote-8) Seven states have decided that the nolle prosequi is too dangerous and have abolished it all together.[[9]](#footnote-9) Seventeen states have required prosecutors to obtain the court’s consent, otherwise known as leave of court, prior to exercising their discretion not to prosecute.[[10]](#footnote-10) Still others have limited the power of prosecutors only in situations where bad faith is clearly shown.[[11]](#footnote-11)

This Note will examine the history of the nolle prosequi as a tool of prosecutorial discretionand how it implicates the power of both state and federal executive branches, judicial branches, and the grand jury.[[12]](#footnote-12) It begins by outlining a national census as to different states approaches to judicial oversight of the nolle prosequi.[[13]](#footnote-13) This Note then discuses the limits and benefits of each of these approaches and argues that judicial oversight of prosecutorial discretion not to prosecute should be limited to circumstances of prosecutorial corruption and infringement of defendant’s rights.[[14]](#footnote-14) Finally, this Note concludes by recommending limited judicial oversight while requiring prosecutors state their reasoning on the record to balance both the autonomy of prosecutors as elected officials and the sanctity of defendants’ rights.[[15]](#footnote-15)

II. History

A. Prosecutor as Servants of the Law

Both state and federal prosecutors are government officials within the executive branch responsible for reviewing evidence and assisting criminal investigations.[[16]](#footnote-16) A prosecutor is also responsible for determining whom to prosecute based on the sufficiency of the evidence.[[17]](#footnote-17) Finally, prosecutors are responsible for overseeing prosecutions according to applicable constitutions, statutes, and precedent.[[18]](#footnote-18) The Supreme Court has described prosecutors as “the servant[s] of the law” tasked to both punish the guilty and ensure that the innocent do not suffer.[[19]](#footnote-19) Federally, the executive branch has a constitutional duty to make sure that laws passed by the legislative branch are faithfully executed.[[20]](#footnote-20)

In response to the requirements of the Constitution, Congress created the Office of the Attorney General by enacting the Judiciary Act of 1789.[[21]](#footnote-21) At the time, the attorney general was only responsible for representing the United States in court and advising the president and agency heads on questions of law.[[22]](#footnote-22) The attorney general’s original obligations were limited to cases argued in front of the Supreme Court.[[23]](#footnote-23) Federal district attorneys, known today as U.S. attorneys, were initially responsible for the representation of the United States in local district and circuit courts.[[24]](#footnote-24) The Attorney General, under the Judiciary act of 1789, had no authority over these federal district attorneys.[[25]](#footnote-25) In 1861, however, the attorney general was given statutory power over these federal district attorneys and could control how they went about their prosecutions.[[26]](#footnote-26) In 1870, the Department of Justice was created to assist the attorney general in their duties and solidified the attorney general as the head.[[27]](#footnote-27)

State constitutions, modeled after the U.S. Constitution, grant state executive branches the responsibility to make sure that “the laws be faithfully executed.”[[28]](#footnote-28) This duty is carried out by state attorney generals and local prosecutors.[[29]](#footnote-29) Most states vest the attorney general with exclusive or concurrent jurisdiction over a specific number of limited issues, such as cases involving public corruption, fraud, regulatory crimes, or when local prosecutors have conflicts of interests.[[30]](#footnote-30) The vast majority of states hold elections for local prosecutors who oversee prosecutions within a geographic-based jurisdiction that fall outside the state attorney general’s responsibility.[[31]](#footnote-31)

B. The Importance and Scope of Prosecutorial Discretion

Because prosecutors are solely responsible for determining which criminal cases to charge and how to proceed with the litigation, the prosecutor’s personal judgement, otherwise known as prosecutorial discretion, can change the direction of a case.[[32]](#footnote-32) Prosecutors’ status as elected officials allowed local prosecutors to exercise more of their own, individual discretion in enforcing the laws because they were no longer subject to the varying opinions and politics of those who appointed them.[[33]](#footnote-33) By 1912, forty-eight states had local prosecutors, all but five of which were elected.[[34]](#footnote-34) There was an increase in crime shortly after World War I, which shined a spotlight on prosecutors and led to a national reexamination of the state prosecutor’s role.[[35]](#footnote-35) Both local and federal crime commissions were created across the country to lead this examination and found that the elective nature of local prosecutors led to undue influence from inappropriate sources.[[36]](#footnote-36)

From the first allegations of criminal conduct to the end of a criminal case, prosecutors have several key moments when they may use their discretion to alter the course of a case.[[37]](#footnote-37) Currently, there is no universal requirement for prosecutors to publicly state how they use this discretion.[[38]](#footnote-38) Although prosecutors are not required to publicly report on how they use their discretion, several independent groups have begun to collect data on the prosecutorial exercise of discretion to allow voters to make educated decisions.[[39]](#footnote-39) Additionally, advocates are fighting for laws which would increase prosecutorial transparency and would require prosecutors to report data on defendants throughout all stages of litigation.[[40]](#footnote-40)

First, during an investigation, a prosecutor can exercise discretion by guiding police toward certain lines of investigation and by deciding whether to use subpoenas and warrants to obtain new evidence.[[41]](#footnote-41) Much of the modern prosecutor’s time is spent exercising discretion during the investigation of criminal charges and making important investigative decisions.[[42]](#footnote-42) The Supreme Court has recognized that the prosecutor’s role as an advocate for the state extends to investigative actions outside the courtroom setting.[[43]](#footnote-43) Other than ethical concerns and constitutional limitations, decision making at this phase is without judicial oversight both to give the prosecutor a necessary amount of autonomy and because oversight at this phase would be practically infeasible.[[44]](#footnote-44)

Second, before charges are filed, prosecutors use their discretion to decide what charges to bring based on the evidence, the prosecutor’s doubts, and the public interest.[[45]](#footnote-45) After the investigation, the decision whether or not to prosecute and the decision of what charges to file or bring before a grand jury generally rests entirely in the prosecutor’s discretion.[[46]](#footnote-46) The prosecutor must weigh the strength of the case, the prosecution's general deterrence policies, enforcement priorities, and the case's relationship to any overall enforcement plan.[[47]](#footnote-47) Because the factors the prosecutor weighs in each case are ill-suited for judicial oversight, discretion at this phase is naturally very broad.[[48]](#footnote-48)

Third, during plea bargaining prosecutor’s use their discretion to decide what offers to make to defendants and which of the defendants offers to accept.[[49]](#footnote-49) There is no constitutional right to plea bargain, and the prosecutor does not need to participate in any negotiation if the prosecutor prefers to go to trial.[[50]](#footnote-50) Nevertheless, state prosecutors rely on discretion during plea bargaining and nearly 90% of all criminal cases in the United States end in plea agreements.[[51]](#footnote-51) Prosecutors have been allowed broad discretion in this stage of litigation because judges are free to accept or not accept guilty pleas and have full control of sentencing.[[52]](#footnote-52)

Fourth, during grand jury proceedings and during and before trial, the prosecutor may choose how best to present evidence of guilt and decide which proper arguments to put forward.[[53]](#footnote-53) Prosecutors have wide latitude to present evidence and make any proper legal arguments in whatever manner they feel is best.[[54]](#footnote-54)

Finally, after charges have been filed, prosecutors may use their discretion to decide to discontinue or abandon a pending case.[[55]](#footnote-55) During litigation, prosecutors have the ability to discontinue or abandon a case through either filing a motion to dismiss the case or a nolle prosequi.[[56]](#footnote-56) Federal prosecutors have wide latitude concerning when to formally dismiss charges, although leave of court is still necessary.[[57]](#footnote-57) Some federal circuits have held that judges may withhold leave of court only if the prosecutor’s request is clearly contrary to manifest public interest.[[58]](#footnote-58) State courts also require judicial approval for any dismissal and have similar standards for when a judge may withhold consent.[[59]](#footnote-59)

C. The Nolle Prosequi as a Tool of Discretion

Prosecutors can similarly enter a nolle prosequi, either with or without the consent of court depending on the jurisdiction, to end a criminal case in favor of the accused.[[60]](#footnote-60) The prosecution may reopen a case in which they have entered a nolle prosequi with a new indictment if the new charges are within the statute of limitations period.[[61]](#footnote-61) Both federally and on the state level, the prosecution may enter a nolle prosequi any time before jeopardy attaches, which occurs when the jury is empaneled or, in a nonjury trial, when the court has begun hearing evidence.[[62]](#footnote-62) Although a nolle prosequi is similar to a motion to dismiss, the requirements for charges to be abandoned via a nolle prosequi vary greatly in each jurisdiction and can have serious implications on prosecutorial autonomy.[[63]](#footnote-63) Although many courts and statutes use the terms nolle prosequi and motion for dismissal interchangeably, the difference is that prosecutors discretion varies across jurisdictions when filing a nolle prosequi, but must always seek the court’s consent when filing a motion to dismiss.[[64]](#footnote-64)

1. Colonial Era Adoption of Nolle Prosequi

Around the Sixteenth Century, the nolle prosequi began in England as a procedural device that the royally-appointed attorney general could use to terminate an ongoing criminal prosecution.[[65]](#footnote-65) During this period, the public prosecuted most offenses and accordingly many prosecutions were frivolous.[[66]](#footnote-66) The attorney general in England used the nolle prosequi to dismiss prosecutions that they regarded as frivolous or in contravention of royal interests.[[67]](#footnote-67) This power was entirely within the domain of the attorney general and thus no form of judicial review existed.[[68]](#footnote-68)

The American-colonial system differed from the English system because American colonies had many more prosecutors than England.[[69]](#footnote-69) The American colonies established a system for processing official prosecutions that was extremely complex and required more prosecutors to handle the increased workload.[[70]](#footnote-70) Due to the increased number of prosecutors, colonial governors, through their general law enforcement powers, had to direct these prosecutors and often did so by requiring them to enter a nolle prosequi on cases the governors thought did not merit prosecution.[[71]](#footnote-71) Prosecutors also used the nolle prosequi to control criminal prosecutions they had begun if they later gathered information that indicated pursuing the prosecution was no longer just or proper.[[72]](#footnote-72)

2. Historic Use of Nolle Prosequi in Federal Prosecution

Debate over the amount of power the federal executive branch should have to use the nolle prosequi began shortly after the United States was founded.[[73]](#footnote-73) The first national debate regarding the nolle prosequi stemmed from public response to presidential decisions made after an individual was arrested in February 1799 in South Carolina and accused of participating in a mutiny on a British ship.[[74]](#footnote-74) This case caused a national outcry because citizens were concerned over the uneven use of the nolle prosequi and the amount of discretion at the executive branch’s disposal and discussion in Congress quickly followed regarding the discretion to nolle prosequi.[[75]](#footnote-75)

Republicans denounced the monarchial tendencies of extreme executive power posed by complete discretion to begin and end prosecutions.[[76]](#footnote-76) Congressman John Marshall argued the executive branch had the power to enter a nolle prosequi and that the court was powerless to review or deny its entry.[[77]](#footnote-77) In 1944, Congress definitively ended the debate regarding the federal nolle prosequi by codifying judicial oversight of the federal nolle prosequi under Rule 48 of the Federal Rules of Criminal Procedure.[[78]](#footnote-78)

3. Modern Use of the Nolle Prosequi Generally

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The power to nolle prosequi implicates the power of state executive and judicial branches as well as state grand juries.[[79]](#footnote-79) State courts have a duty to protect defendants’ rights and provide orderly administration of criminal justice, which gives them the power to supervise all trials and court proceedings.[[80]](#footnote-80) Although the responsibilities and obligations of state grand juries vary, they often are tasked with assessing the propriety of criminal charges.[[81]](#footnote-81) *See* Susan W. Brenner, *Faults, Fallacies, and the Future of Our Criminal Justice System: The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol'y & l. 67, 97 (1995) (stating variety of approaches states take regarding grand juries’ role).

Entry of a nolle prosequi is only allowed at certain times during the course of litigation.[[82]](#footnote-82) Prosecutors cannot unilaterally enter a nolle prosequi once the trial has begun or a jury is impaneled as an additional safeguard to defendant’s rights.[[83]](#footnote-83) Some states also require court’s consent after an indictment is returned in an effort to protect the power and independence of the grand jury.[[84]](#footnote-84) Finally, a prosecutor’s authority to nolle prosequi often returns once the trial has concluded with a guilty verdict because nolle prosequi at this stage no longer infringes upon defendant’s rights to due process.[[85]](#footnote-85)

D. State Approaches to Judicial Oversight of Nolle Prosequi

Despite the common origins of the nolle prosequi, states are disparate in the discretion they grant prosecutors to enter a nolle prosequi without judicial oversight.[[86]](#footnote-86) Notwithstanding subtle nuances in every state, states fall within three major categories in the amount of autonomy given to prosecutors in their entry of a nolle prosequi.[[87]](#footnote-87) The first category of states have given their prosecutors wide authority and autonomy to nolle prosequi with extremely limited oversight.[[88]](#footnote-88) The next category of states have given judges the ability to curtail the prosecutor’s nolle prosequi power, albeit with varying conditions required.[[89]](#footnote-89) The final category of states have limited or abolished the nolle prosequi and require a prosecutor to file a motion to dismiss in any situation where they would like to discontinue or abandon the case.[[90]](#footnote-90)

1. Broad Prosecutorial Authority to Nolle Prosequi

Many states’ constitutions [RB 14.1] directly or indirectly grant [BBS 5.3 – subject/verb agreement] prosecutors the discretion to nolle prosequi.[[91]](#footnote-91) Alaska, Florida, Rhode Island, Nebraska, and Nevada courts have all interpreted that prosecutorial discretion is not subject to judicial review because the power is constitutionally-based [BBS 2.5.1].[[92]](#footnote-92) In these states, the courts have no ability to decline the entry of a nolle prosequi unless the nolle prosequi impedes on the defendant’s rights or is inherently unconstitutional.[[93]](#footnote-93)

Other jurisdictions have continued to give broad discretion to prosecutors even when their constitutions do not directly grant prosecutors total autonomy.[[94]](#footnote-94) DC, Delaware, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, North Carolina, South Carolina, and South Dakota all currently allow prosecutors to enter nolle prosequis with no, or very little judicial, oversight.[[95]](#footnote-95) These states vary as to whether they require a prosecutor to state their reasons on the record for the nolle prosequi.[[96]](#footnote-96) Even though prosecutors are given complete discretion in these states, judicial review is still allowed and expected in certain specific situations that vary in each state but often include corruption, capricious or scandalous behavior, and infringement on defendants’ [BBS 7.4 – plural possessive] rights.[[97]](#footnote-97) For example, in *State v. Reimonenq*, a XXXX court acknowledged that the prosecutor had sole discretion to make decisions regarding prosecution, but stated that the prosecutorial decision to nolle prosequi the case and refile simply to organize their case upset the balance between the prosecutor’s discretion and the accused rights to such a degree that it violated the defendant’s right to due process and fundamental fairness.[[98]](#footnote-98)

2. Discretion to Nolle Prosequi with Leave of Court

Still other jurisdictions, including Alabama, Arkansas, Colorado, Georgia, Hawaii, Kentucky, Michigan, Mississippi, North Dakota, New Jersey, Ohio, Pennsylvania, Tennessee, Texas, Utah, and West Virginia require prosecutors to obtain leave of court.[[99]](#footnote-99) The requirement to obtain leave of court is a statutory requirement [BBS 5.1/RB 14.3(f) – redundant] in a majority of these states.[[100]](#footnote-100) Although these states all allow courts to withhold consent, they [RB 14.3(f)] vary widely regarding *when* a court may withhold consent.[[101]](#footnote-101) Michigan, North Dakota, Ohio, Tennessee, and West Virginia require only that the prosecutor has sound reasons for deciding to file a nolle prosequi and for the prosecutor to state those reasons to the court.[[102]](#footnote-102) Other states, such as Arkansas, Georgia, Hawaii, Kentucky, New Jersey, and Pennsylvania have allowed courts to have much wider discretion to withhold consent as they see fit.[[103]](#footnote-103) Alabama, Colorado, Mississippi, and Texas fall between those two extremes by allowing judges to withhold consent only if they have reasonable justification.[[104]](#footnote-104)

Some jurisdictions, including Iowa, Missouri, Virginia, Wisconsin, and Wyoming walk back judicial discretion [RB 14.1], but only if the prosecutor has met certain threshold requirements.[[105]](#footnote-105) Iowa and Missouri simply require that the prosecutor present their reasoning for entering a nolle prosequi.[[106]](#footnote-106) Similarly, Virginia requires that the prosecutor have good cause for exercising their discretion.[[107]](#footnote-107) Lastly, Wisconsin and Wyoming require the court to consider the public interest and will limit prosecutorial discretion if made in bad faith.[[108]](#footnote-108)

3. Limited Application or Abolishment

The final category of states are those that have completely abolished the nolle prosequi or limited its usage to extremely specific situations.[[109]](#footnote-109) California, Idaho, Maine, New York, Oklahoma, Oregon, and Washington have abolished the nolle prosequi entirely.[[110]](#footnote-110) These states require a prosecutor to file a motion to dismiss.[[111]](#footnote-111)

Arizona and Connecticut outline exactly when a prosecutor is authorized to file a nolle prosequi.[[112]](#footnote-112) In Connecticut, the filing of nolle prosequi without defendant’s consent is limited by state statute unless a material witness has died, disappeared, or become disabled or where material evidence has disappeared or been destroyed.[[113]](#footnote-113) Alternatively, Arizona only allows prosecutors to offer a nolle prosequi in consideration of the accused becoming a witness for the state.[[114]](#footnote-114)

E. Impact of Judicial Oversight (or Lack Thereof) [BBS 2.3.1 – capitalization of titles] on Criminal Justice

Modern experts are currently debating whether the nolle prosequi is a tool that should be used to lower the extremely high rate of incarceration in America.[[115]](#footnote-115)

In Massachusetts for example [RB 14.1], the courts recently had to decide the amount of autonomy prosecutors are allowed when attempting to use the nolle prosequi to address mass incarceration.[[116]](#footnote-116) During a “Straight Pride Parade” in Boston, several protestors were arrested and the local District Attorney, Rachel Rollins, sought to have the non-violent offender’s cases dismissed through a nolle prosequi.[[117]](#footnote-117) The trial judge denied the Commonwealth’s nolle prosequi on the defendant’s charge of disorderly conduct[RB 14.1].[[118]](#footnote-118) The Massachusetts Supreme Judicial Court found that the trial judge had no authority to deny the prosecutor’s nolle prosequi. [[119]](#footnote-119) The court contemplated that curtailment of the power to nolle prosequi may be allowed in “instances of scandalous abuse of authority,” of which this was not one.[[120]](#footnote-120)

III. Analysis

Every variation of state approaches to judicial power over the prosecutor’s discretion to enter a nolle prosequi comes with unique shortcomings and benefits.[[121]](#footnote-121) No approach is perfect and experts can disagree about how to properly balance the nolle prosequi’s power to respect the exclusive domains [RB 14.1] of the executive branch, the judicial branch, and the grand jury.[[122]](#footnote-122) Analyzing the pros and cons of each approach, however, reveals an optimal balance between the executive branches’ [BBS 7.4] discretion and judicial branches’ [BBS 7.4] concern for defendants’ constitutional rights [RB 14.1].[[123]](#footnote-123)

A. Limiting Judicial Oversight Allows Prosecutors to Act as Elected Servants

States that have given their prosecutors autonomy to nolle prosequi with limited judicial oversight correctly allow their prosecutors to act as elected representatives.[[124]](#footnote-124) One problem to this approach is that it may make trial judges unwilling to investigate the reasons behind a nolle prosequi.[[125]](#footnote-125) This could potentially lead to undiscovered corruption or accidental infringement on defendants’ [BBS 7.4] rights.[[126]](#footnote-126) Further, [RB 14.1] courts utilizing this approach tend to be unwilling to discuss or define corrupt or scandalous behavior, which may leave trial judges unable to recognize abuses of authority when they see it.[[127]](#footnote-127) A final problem to this approach for states that do not require the prosecutor to state their reasoning on the record is that voters will be unable to make informed decisions based on the prosecutor’s nolle prosequi usage.[[128]](#footnote-128)

States [RB 14.1] that have given judges the ability to curtail the prosecutor’s nolle prosequi power incorrectly limit the executive branch’s ability to ensure that the laws be faithfully executed.[[129]](#footnote-129) Giving prosecutors discretion allows voters to remedy prosecution policy viewed as either too harsh or too lenient by voting based on said policy.[[130]](#footnote-130) Allowing judges to curtail that discretion simply hinders the ability of the voters to correct problematic prosecutorial decision making on a larger scale.[[131]](#footnote-131) One benefit to this approach, however, is that individual defendants are much more protected and less likely to be caught up in the passing whim of the voters.[[132]](#footnote-132)

States that have abolished or limited the nolle prosequi have inappropriately removed a tool that [BBS 6.2.2] prosecutors have relied on since before the founding of America.[[133]](#footnote-133) In practice, states that have abolished the nolle prosequi behave similarly to states that require leave of court prior to a nolle prosequi entry [RB 14.1] because a motion to dismiss [RB 14.3(f)] also requires the court’s approval.[[134]](#footnote-134) States that have limited the nolle prosequi to specific situations also behave similarly to states that require leave of court because a motion to dismiss is required for in any unspecified circumstances.[[135]](#footnote-135) Both of these categories accordingly have the same benefits and shortcomings as states that have given judges the ability to curtail the prosecutor’s nolle prosequi power.[[136]](#footnote-136)

B. The Ideal Balance of Power Between Judges and Prosecutors

All states recognize that there are certain situations where the entry of a nolle prosequi is inappropriate, and an ideal balance would also recognize these limitations.[[137]](#footnote-137) Judges must be able to intervene if the prosecutor’s use of [RB 14.1] nolle prosequi is deemed unconstitutional.[[138]](#footnote-138) This also means that judges must be impowered to protect defendants’ [BBS 7.4] rights.[[139]](#footnote-139) To ensure that no individual defendant is [BBS 5.3 – subject/verb agreement] not injured or improperly benefits from inappropriate exercise prosecutorial discretion, judges must be able to intervene if there is undisputed evidence of corruption.[[140]](#footnote-140) Judges should not, however, be impowered to intervene in instances of “scandalous behavior,” as any ability to do so might invite inappropriate judicial encroachment into the power of the executive branch.[[141]](#footnote-141)

As elected representatives, however, the prosecutors should have full autonomy outside of these limited exceptions to decide when to nolle prosequi.[[142]](#footnote-142) Allowing prosecutors discretion is consistent with the historical use of the nolle prosequi.[[143]](#footnote-143) Broad discretion to nolle prosequi would also be consistent with the amount of prosecutorial discretion allowed during other stages of litigation.[[144]](#footnote-144) Many states already give prosecutors this appropriate amount of discretion.[[145]](#footnote-145)

The main drawback to allowing prosecutors discretion is the risk of undetected corruption or unconstitutional motives.[[146]](#footnote-146) This can easily be avoided if prosecutors are made publicly accountable by being statutorily required to state their reasons on the record.[[147]](#footnote-147) Requiring prosecutors to state their reasons empowers citizens to vote based on prosecutorial decisions to nolle prosequi.[[148]](#footnote-148) This requirement in no way hinders the prosecution if their motives are constitutional and uncorrupt.[[149]](#footnote-149)

C. The Importance of Democratic Accountability

American democracy is dependent on elected representatives’ ability to perform the central duties of their office with discretion.[[150]](#footnote-150) Although largely behind the scenes [RB 14.1], prosecutors have been able to use their discretion at various stages of litigation to ensure that laws are [RB 14.1] faithfully executed, not just robotically so.[[151]](#footnote-151) Handicapping the executive branch’s [BBS 7.4] discretion and allowing the judicial branch to interfere with the entry of any nolle prosequi outside of constitutional justifications or instances of corruption is a violation of separation of powers and threatens the quintessential balance of power our criminal justice system depends on.[[152]](#footnote-152) Taking discretion away from locally-elected [BBS 2.5.1] prosecutors also harms every voter who might wish to see the nolle prosequi used more or less often.[[153]](#footnote-153)

Imposing arbitrary judicial limits on prosecutorial discretion to enter a nolle prosequi not only harms the system at large, but individual defendants as well.[[154]](#footnote-154) Our country currently faces a mass incarceration crisis which many prosecutors are attempting to fix.[[155]](#footnote-155) Taking discretion away from prosecutors will cause many defendants to be charged even if the general populace is against such an action.[[156]](#footnote-156)

IV. Conclusion

Local prosecutors are the correct wielders of the discretion to nolle prosequi as elected servants. The decision whether or not to prosecute should be made by prosecutors as part of their duty to faithfully execute the laws. Local prosecutors’ [BBS 7.4] elected status makes them accountable to the public for their decisions, including their decisions to nolle prosequi. If the discretion to nolle prosequi is taken away from prosecutors, the power simply transfers to judges. This leads to a fundamental upheaval of separation of powers in an unacceptable manner.

To ensure that prosecutors remain accountable for their actions, certain fundamental safeguards must be put in place. Voters should have the ability to review every reason for every nolle prosequi to make educated decisions when inside the ballot box. Additionally, judges should be able to review the reasons for a nolle prosequi to ensure that the prosecutor hasn’t acted corruptly and to protect the defendant’s constitutional rights. In sum, although every state is free to balance the separations of powers as they see fit, local prosecutors should be given discretion to nolle prosequi within constitutional limits while being statutorily required to explain their reasoning on the record. This approach is the correct way to balance the Executive and Judicial powers and protects both defendants’ and voters’ rights and interests.

1. Criminal Justice Standards for the Prosecution Function Standard 3-1.2(b) (Am. Bar Ass’n 2017). [↑](#footnote-ref-1)
2. *See* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 Hastings L.J. 423, 425 (2013) (defining mass incarceration to mean America’s exceedingly high incarceration rates concentrated within disadvantaged communities); Allan Smith, *Progressive DAs Are Shaking up the Criminal Justice System. Pro-police Groups Aren't Happy,* NBC News, (August 19, 2019), https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286 , [https://perma.cc/ZC2Y-RHTA] (describing new wave of progressive district attorneys). These progressive district attorneys are attempting to upend a system they believe has contributed to the rise in prison populations. *See id.* (outlining shared platform of progressive district attorneys). [↑](#footnote-ref-2)
3. *See generally* Maria Cramer and John R. Ellement; *DA Rollins Handed a Win in Straight Pride Parade Feud with Boston Judge*,The Boston Globe (September 9, 2019), https://www.bostonglobe.com/metro/2019/09/09/sjc-justice-rules-favor-suffolk-district-attorney-rollins-feud-with-boston-municipal-court-judge/mHPnRgxKXT7yaTdJaGhXiO/story.html, [https://perma.cc/5XHZ-LVED] (describing legal battle over progressive prosecutor’s frequent and unilateral use of nolle prosequi in Massachusetts); Tom Jackman, *Arlington Prosecutor Goes to Va. Supreme Court Against Judges Who Challenge Her New Policies*, The Wash. Post, (August 28, 2020), https://www.washingtonpost.com/dc-md-va/2020/08/28/arlington-prosecutor-goes-va-supreme-court-against-judges-who-challenge-her-new-policies/, [https://perma.cc/8RTZ-WGHS] (outlining Virginia progressive prosecutor’s arguments for strengthening autonomy of nolle prosequi usage). [↑](#footnote-ref-3)
4. *Nolle Prosequi,* The Wolters Kluwer Bouvier Law Dictionary Desk Edition(2012) [hereinafter Law Dictionary] (defining nolle prosequi). [↑](#footnote-ref-4)
5. *See* State v. Ericksen, 94 N.M. 128, 131, (1980) (describing “game-playing” prosecutor can engage in without judicial oversight); Graham v. State, 247 P.3d 872, 875 (Wyo. 2011) (accepting prosecutor could convince jury to acquit if denied entry of nolle prosequi). Many states have taken the complete discretion to nolle prosequi away from prosecutors and require judges to confirm that non-prosecution is in the interest of justice. *See* Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 Minn. L. Rev. 843, 882 (2018) (outlining replacements of common-law rule giving prosecutors complete discretion). Despite this additional tool, many of these courts, including Mississippi, Ohio, Tennessee, and West Virginia, refuse to interfere with prosecutorial discretion unless specific circumstances are met. *See id.* (arguing courts do not engage in meaningful review of prosecutorial discretion); State v. Adams Cnty. Circuit Court, 735 So. 2d 201, 205 (Miss. 1999) (explaining aggravation not valid reason for denying consent to nolle prosequi); State v. Bayer, 2015-Ohio-4138, ¶ 32 (Ct. App. 2015) (proscribing court’s denial dependent on abuse or public interest); State v. Harris, 33 S.W.3d 767, 770-71 (Tenn. 2000) (highlighting court’s power to deny used only when public interest is at stake); State *ex rel.* Skinner v. Dostert, 278 S.E.2d 624, 631 (W. Va. 1981) (granting court power to deny nolle prosequi where prosecutor’s actions arbitrary or capricious). [↑](#footnote-ref-5)
6. *See* N.C. Gen. Stat. § 15A-931 (1997) (giving prosecutor’s discretion to dismiss charges if they state and explain their decision on record); State v. Sonneland, 494 P.2d 469, 471 (Wash. 1972) (articulating legislature’s intent when abolishing nolle prosequi); *Bayer*, 2015-Ohio-4138 at ¶ 32 (allowing oversight of dismissal only for abuse of discretion and protection of public interest); *see also* Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 Am. Crim. L. Rev. 1309, 1316 (2002) (outlining modern debate over prosecutorial discretion). *But see* Brown, *supra* note 5, at 883 (arguing U.S. jurisdictions have uniformly rejected to substantially review decisions to prosecute). [↑](#footnote-ref-6)
7. *See* State v. Sandoval, 788 N.W.2d 172, 187 (Neb. 2010) (affirming only constitutional constraints limit nolle prosequi power); State v. Hanson, 295 S.E.2d 297, 302 (Ga. 1982) (declaring prosecutor’s function in criminal justice system demands they have power to nolle prosequi); Brown, *supra* note 5, at 881-82 (arguing lack of judicial oversight with limited exceptions); *see also* Rebecca Krauss, Article, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 Seton Hall Cir. Rev. 1, 2 (2009) (stating discretion central to federal system and judiciary abstains due to separation of powers). [↑](#footnote-ref-7)
8. *See* District of Columbia v. Weams, 208 A.2d 617, 618 (D.C. 1965) (granting judicial oversight when prosecutor’s acts scandalous, corrupt, or capricious and vexatiously repetitious);State v. Charles, 190 S.E. 466, 469 (S.C. 1937) (justifying refusal of nolle prosequi in cases of evil and corruption); *see also* John E. Foster, Note, *Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. Rev. 2511, 2541 (2019) (arguing state law would not support judicial oversight of non-prosecution without showing of corruption); Ramsey, *supra* note 6, at 1316 (describing critical opinion of many individuals regarding invisibility and unprincipled nature of prosecutorial decisions). [↑](#footnote-ref-8)
9. *See* Okla. Stat. Tit. 22, § 816 (1910) (abolishing entry of nolle prosequi); Idaho Code § 19-3505 (1864) (discontinuing nolle prosequi); Cal Pen Code § 1386 (1872) (invalidating nolle prosequi); ORS § 135.757 (eliminating nolle prosequi); People v. Extale, 967 N.E.2d 179, 181 (N.Y. 2012) (confirming abolishment of nolle prosequi continues); Bessey v. State, 297 A.2d 373, 376 (Me. 1972) (suggesting statutory dismissal replaced common law procedure of nolle prosequi); *Sonneland*, 494 P.2d at 471 (affirming legislative intent to grant trial court alone power to dismiss criminal charges). [↑](#footnote-ref-9)
10. *See* Utah Code Ann. § 17-18a-605 (1953) (announcing nolle prosequi requires consent of court); Smith v. State, 70 S.W.3d 848, 854 (Tex. Crim. App. 2002) (affirming dismissal power rests in state’s attorney, but court’s consent required); *see also* Brown, *supra* note 5, at 882 (recognizing many states have statutes requiring judges to confirm non-prosecution in interest of justice); Law Dictionary, *supra* note 4, at *Leave of Court* (defining leave of court). [↑](#footnote-ref-10)
11. *See* State *ex rel*. Koppy v. Graff, 484 N.W.2d 855, 858 (N.D. 1992) (allowing case discontinuation unless entered in bad faith, contrary to public interest, or to intentionally harass). [↑](#footnote-ref-11)
12. *See infra* Part II. [↑](#footnote-ref-12)
13. *See infra* Part II (providing overview of state approaches to nolle prosequi). [↑](#footnote-ref-13)
14. *See infra* Part III. [↑](#footnote-ref-14)
15. *See* *infra* Part IV (arguing benefits of extremely limited judicial oversight). [↑](#footnote-ref-15)
16. *See* Law Dictionary, *supra* note 4, at *Prosecutor (Prosecutor)* (defining prosecutor’s responsibilities); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 Fordham L. Rev. 1695, 1697 (2000) (outlining prosecutors’ ability to exercise executive authority). [↑](#footnote-ref-16)
17. *See id* (expanding on prosecutor’s obligations); *Guide For Users: II Preliminary Proceedings,* 48 Geo. L.J. Ann. Rev. Crim. Proc. 279, 279-281 (2019) (detailing prosecutorial discretion to charge wide if probable cause exists). [↑](#footnote-ref-17)
18. *See* Law Dictionary , *supra* note 4, at *Prosecutor (Prosecutor)* (defining prosecutor’s responsibilities). [↑](#footnote-ref-18)
19. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (describing duties of U.S. attorney). [↑](#footnote-ref-19)
20. *See* U.S. Const. art. II, § 3 (outlining and defining outer limits of executive power and responsibilities). [↑](#footnote-ref-20)
21. *See* 1 Stat. 73 (1789) (creating the role of attorney general)*.* This position was appointed by the president. *See id*. [↑](#footnote-ref-21)
22. *See* Arthur H. Garrison, *The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They Are Significant*, 76 Alb. L. Rev. 217, 225-26 (2012) (contextualizing historic origins of attorney general and outlining original responsibilities). [↑](#footnote-ref-22)
23. *See* Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 Duke L.J. 561, 567 (1989) (discussing attorney general’s role as representative in cases before Supreme Court)*.*  [↑](#footnote-ref-23)
24. *See* *id.* (detailing relationship between attorney general and district attorneys)*.*  [↑](#footnote-ref-24)
25. *See* *id.* (analyzing autonomy of district attorneys)*.*  [↑](#footnote-ref-25)
26. *See* *id.* (confirming attorney generals given control over local cases through congressional act)*.*  [↑](#footnote-ref-26)
27. *See* 16 Stat. 162 (1870) (creating Department of Justice and anointing attorney general head). [↑](#footnote-ref-27)
28. *See, e.g.*, Ala. Const. art. V, § 120 (giving governor responsibility to faithfully execute laws); N.C. Const. art. III, § 5 (stating execution of laws within governor’s responsibility); W. Va. Const. art. VII, § 5 (creating constitutional duty for governor to faithfully execute laws); Ariz. Const. art. V, § 4 (outlining governor’s constitutional obligation to faithfully execute laws); Fla. Const. art. IV, § 1 (proscribing gubernatorial duty to execute laws); Ky. Const. § 81 (affirming governor’s responsibility to faithfully execute the laws). [↑](#footnote-ref-28)
29. *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 Iowa L. Rev. 1537, 1548 (2020) (delineating differences between local prosecutors and attorney generals and their respective responsibilities and powers). [↑](#footnote-ref-29)
30. *See* Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn From the States*, 109 Mich. L. Rev. 519, 545-50 (2011) (examining outer bounds of various state’s attorney generals’ responsibilities and jurisdiction). [↑](#footnote-ref-30)
31. *See* Hessick & Morse, *supra* note 29,at 1548 (discussing local prosecutorial-election processes in states). [↑](#footnote-ref-31)
32. *See* Law Dictionary, *supra* note 4, at *Prosecutorial Discretion (Prosecutorial Discretion)* (defining prosecutorial discretion); Robert L. Misner, *Criminal Law: Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 729 (1996) (outlining history of prosecutorial elections). State prosecutorial discretion began as soon as states started entering the Union after 1850. [↑](#footnote-ref-32)
33. *See* Misner, *supra* note 32 at 729 (addressing increasingly independent nature of public prosecutors). [↑](#footnote-ref-33)
34. *See* *id.* at 730 (analyzing prosecutorial election conditions of forty-eight contiguous states). [↑](#footnote-ref-34)
35. *See* *id.* (evaluating crime increase resulting from World War I and national examination of prosecutorial discretion). At this time, legal scholars and state governments noticed a lack of professionalism from public prosecutors, which led legal experts to question the appropriateness of the prosecutor’s absolute discretion in the exercise of their legal duties. *See* *id.* [↑](#footnote-ref-35)
36. *See* *id.* at 730-31 (detailing commissions created in various cities and states and highlighting findings). The commissions were unable to limit the prosecutors’ ability to use their discretion and very few systemic changes were made other than the requirement in a majority of states that the prosecutor be a licensed attorney. *See id.* at 731 (reviewing lack of systemic changes besides license requirement). [↑](#footnote-ref-36)
37. *See* Law Dictionary, *supra* note 4, at *Prosecutorial Discretion (Prosecutorial Discretion)* (defining prosecutorial discretion). [↑](#footnote-ref-37)
38. *See* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 Temp. Pol. & Civ Rts. L. Rev. 369, 373 (2010) (arguing discretionary power troubling because of its hidden nature). [↑](#footnote-ref-38)
39. *See* Melba Pearson, *The Data that Can Make Prosecutors Engines of Criminal Justice Reform*, Brennan Center For Justice (November 23, 2020) https://www.brennancenter.org/our-work/analysis-opinion/data-can-make-prosecutors-engines-criminal-justice-reform [https://perma.cc/UN6A-ES5M] (describing project launched measuring prosecutors performance); *About Us*, Measures for Justice, https://measuresforjustice.org/about, [https://perma.cc/BC8S-UBS7] (articulating central mission of standardizing and improving criminal justice data); Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 New Crim. L. R. 434, 446 (2019) (describing growing movement to collect more data in regarding U.S. criminal legal system). [↑](#footnote-ref-39)
40. *See* Nicole Zayas Fortier, *Unlocking the Black Box*, ACLU Smart Justice, https://www.aclu.org/sites/default/files/field\_document/aclu\_smart\_justice\_prosecutor\_transparency\_report.pdf [https://perma.cc/7Y9Z-K5M9] (arguing for implementation of Prosecutorial Transparency Act). [↑](#footnote-ref-40)
41. *See* Leslie C. Griffin, *The Prudent Prosecutor*, 14 Geo. J. Legal Ethics 259, 267 (2001) (arguing prosecutorial discretion used during criminal investigations). [↑](#footnote-ref-41)
42. *See* Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 Fordham L. Rev. 723, 728-729 (1999) (outlining ethical concerns regarding prosecutor’s discretion during investigation). [↑](#footnote-ref-42)
43. *See* Burns v. Reed, 500 U.S. 478, 486 (1991) (highlighting prosecutor’s duties prior to litigation). Prosecutors have general immunity from suits when presenting evidence in support of search warrants and when pursuing lines of investigation. *See* *id.* at 492 (holding prosecutor’s support of search warrant and presentation of evidence protected by absolute immunity). Prosecutors, due to their training and experience, provide an important brake on law enforcement during this phase. *See* Little, *supra* note 42, at 729 (demonstrating “healthy balance” that prosecutors provide during investigation). [↑](#footnote-ref-43)
44. *See* Little, *supra* note 42, at 738 (noting broad prosecutorial discretion between criminal offense or offender and deciding charges); Young v. United States *ex rel*. Vuitton Et Fils S. A., 481 U.S. 787, 807 (1987) (developing prosecutorial discretion to include discretion to conduct investigations in manner they see fit); *Guide For Users: II Preliminary Proceedings, supra* note 17, at 281 (confirming prosecutor has authority to decide when to investigate). [↑](#footnote-ref-44)
45. *See* Griffin, supra note 42, at 267 (outlining how prosecutors may weigh various factors before deciding what charges appropriate). [↑](#footnote-ref-45)
46. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) (giving prosecutor wide discretion in charging decisions if probable cause supports decisions to prosecute); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (affirming discretion to charges rests entirely in prosecutor’s discretion); Krauss, *supra* note 7, at 5-6 (explaining full extent of federal prosecutorial discretion); Georgetown University Law Center, *Preliminary Proceedings*, 39 Geo. L.J. Ann. Rev. Crim. Proc. 223, 223 (2010) (confirming decision to prosecute within prosecutor’s discretion if probable cause exists). Although probable cause is a fluid concept based on the particular context of a given case, the Supreme Court has defined probable cause in other areas of law as evidence supporting reasonable and prudent action. *See* Illinois v. Gates, 462 U.S. 213, 231-232 (1983) (highlighting ambiguous and fact-dependent nature of probable cause). [↑](#footnote-ref-46)
47. *See* *Wayte*, 470 U.S. at 607 (confirming factors prosecutor weighed). [↑](#footnote-ref-47)
48. *See* *id.* (outlining potential factors prosecutors consider and finding courts unable and unwilling to analyze determination). [↑](#footnote-ref-48)
49. *See* Griffin, *supra* note 42, at 267 (analyzing prosecutor discretion during plea bargaining). Plea bargaining is a process by which prosecutors negotiate to exchange a defendant’s guilty plea on specific charges for a prosecutor’s recommendation for a reduced sentence. *See* Law Dictionary, *supra* note 4, at *Plea Bargain (Plea Bargain)* (defining plea bargain agreement for guilty plea in exchange for reduced sentencing). [↑](#footnote-ref-49)
50. *See* Weatherford v. Bursey, 429 U.S. 545, 561 (1977) (confirming prosecutor has no requirement to plea bargain). [↑](#footnote-ref-50)
51. *See* Rebecca Hollander-Blumoff, Note, *Getting to “Guilty”: Plea Bargaining as Negotiation,* 2 Harv. Negot. L. Rev. 115, 116 (1997) (arguing and describing centrality of negotiation and plea bargaining in U.S. criminal justice system). [↑](#footnote-ref-51)
52. *See* Law Dictionary, *supra* note 4, at *Plea Bargain (Plea Bargain)* (confirming court may refuse plea bargain and require case tried). [↑](#footnote-ref-52)
53. *See* Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 Geo. J. Legal Ethics 309, 316-17 (2001) (elucidating prosecutorial duty of truthfulness and obligation not to present false evidence). The responsibilities of state grand juries vary, but often involve assessing the propriety of criminal charges. *See* Susan W. Brenner, *Faults, Fallacies, and the Future of Our Criminal Justice System: The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol'y & l. 67, 97 (1995) (stating variety of approaches states take regarding grand juries’ role). State grand juries have varying degrees of independence from the state judicial branch. *See id.* at 67 (explaining relationship between grand jury and judicial branch). The goal of many state grand jury systems is to provide criminal defendants additional protection from prosecutors. *See id.* at 70-71 (contextualizing historical relationship between grand jury and defendant’s right to indictment); *see also* State v. Winne, 96 A.2d 63, 76 (N.J. 1953) (affirming state constitution requires indictment before state holds defendant to answer for criminal offense). Other states have eliminated or reduced the importance of grand juries due to an increasing belief that they are unnecessary because of professional criminal prosecutors. *See* Brenner, *supra* (highlighting reasoning for state reduction in grand jury independence and importance). [↑](#footnote-ref-53)
54. *See* United States v. Young, 470 U.S. 1, 13 n.10 (1985) (contemplating reversal based on prosecutorial remarks exceeding permissible bounds as acceptable); Berger v. United States, 295 U.S. 78, 88 (1935) (confirming prosecutorial duty to use every legitimate means, but requiring restraint from improper methods); *see also* Gregory G. Sarno, *Propriety and Prejudicial Effect of Prosecutor’s Argument to Jury Indicating His Belief or Knowledge as to Guilt of Accused – Modern State Cases,* 88 A.L.R.3d 449, \*2a (2020) (discussing limitations only based on improper prosecutorial arguments). The prosecutor’s available legal arguments are proscribed by the Federal Rules of Criminal Procedure and Evidence or the comparable state court rules. *See* Fed. R. Crim. P. 1(a)(1) (announcing rules apply to all criminal proceedings in federal courts); Fed r. Evid. 1101 (declaring rules apply to all criminal and civil proceedings in federal courts). Prosecutors, like all lawyers, are also bound by rules of professional conduct that, in part, govern and guide how they present evidence to courts. *See* Model Code of Pro. Conduct r. 3.8 (Am. Bar Ass’n 2020) (setting ethical standards for presentation of evidence in criminal prosecution). [↑](#footnote-ref-54)
55. *See* Rinaldi v. United States, 434 U.S. 22, 30 (1977) (confirming decision to seek dismissal within prosecutions power); *Guide For Users: II Preliminary Proceedings, supra* note 17, at 281-82 (describing prosecutor’s authority to dismiss seek dismissal); *see e.g.* U.S. v. HSBC Bank, N.A. 863 F.3d 125, 141 (2d Cir. 2017) (allowing prosecutor’s motion to dismiss because made in good faith). [↑](#footnote-ref-55)
56. *See* Law Dictionary, *supra* note 4, at *Nolle Prosequi* (defining nolle prosequi); Law Dictionary, *supra* note 4, at *Dismissal (Dismiss)* (defining dismissal determination by court for case removal without further hearing). [↑](#footnote-ref-56)
57. *See* Fed. R. Crim. P. 48(a) (requiring leave of court prior to dismissal by prosecutor); Georgetown University Law Center, *supra* note 47, at 225-26 (describing wide latitude judges afforded to public prosecutors). Leave of court is “[p]ermission to do something in an action or hearing before a court that is not allowed by right, custom, or court rules.” *See Leave of Court (Leave of the Court)*, Law Dictionary, *supra* note 4 (defining Leave of Court). [↑](#footnote-ref-57)
58. *See* United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975) (limiting judicial disturbance of prosecutorial discretion to situations contrary to manifest public interest); *In re* United States, 345 F.3d 450, 453 (7th Cir. 2003) (confirming lack of appellate history upholding denial based upon contrary to manifest public interest). The Court has found that prosecution policies that are well thought out and motivated by careful consideration are not clearly contrary to manifest public interest. *See* *Rinaldi*, 434 U.S. at 30 (affirming policy against multiple prosecutions for same act not clearly contrary to manifest public interest). [↑](#footnote-ref-58)
59. *See* Brown, *supra* note 5, at 882 (arguing state courts fail to meaningfully review prosecutors’ applications for dismissal). [↑](#footnote-ref-59)
60. *See* Law Dictionary, *supra* note 4, at *Nolle Prosequi* (defining nolle prosequi). [↑](#footnote-ref-60)
61. Law Dictionary, *supra* note 4, *Nolle Prosequi* (explaining general procedure of nolle prosequi and articulating how case reopens). An indictment is a formal, written accusation against a person or entity authorized by a grand jury which the state uses to open a criminal case. *See* Law Dictionary, *supra* note 4, at *Indictment (Indict)* (defining Indictment). [↑](#footnote-ref-61)
62. *See* Ky. RCr Rule 9.64 (allowing prior to swearing of jury or, in non-jury case, prior to swearing of witness); The Confiscation Cases, 74 U.S. 454, 457 (1868) (affirming public prosecutions within prosecutor’s control and nolle prosequi allowed prior to jury empanelment); Serfass v. United States, 420 U.S. 377, 388 (1975) (noting when jeopardy attaches to nonjury trial); United States v. Woody, 2 F.2d 262, 262-63 (D. Mont. 1924) (affirming prosecution may enter nolle prosequi any time before jury impaneled); State v. Franton, 319 So. 2d 405, 406 (La. 1975) (giving prosecutor arbitrary control over indictments prior to jury being impaneled); State v. Hanson, 295 S.E.2d 297, 302 (Ga. 1982) (granting prosecutors sole discretion to dismiss cases prior to indictment); State v. Brule, 981 P.2d 782, 787 (N.M. 1999) (affirming power to enter nolle prosequi prior to impaneled jury); Sheriff, Washoe Cnty. v. Marcus, 995 P.2d 1016, 1020 (2000) (stating prosecutor may unilaterally dismiss charge without prejudice prior to trial); *see also* Krauss, *supra* note 7, at 27 (2009) (describing history and subsequent judicial interpretation of *Confiscation Cases*). [↑](#footnote-ref-62)
63. *See infra* Part II.C (highlighting differences in jurisdictional approaches to judicial oversight of nolle prosequi). [↑](#footnote-ref-63)
64. *See* N.C. Gen. Stat. § 15A-931 (1997) (announcing prosecutor’s unilateral ability to dismiss charges); State *ex rel*. Koppy v. Graff, 484 N.W.2d 855, 857-58 (N.D. 1992) (discussing dismissal form of nolle prosequi with additional requirements); *Marcus*, 995 P.2d at 1020 (describing nolle prosecutor as power to dismiss charges); *supra* note 58-59 (describing when judge may withhold leave of court). [↑](#footnote-ref-64)
65. *See* Krauss, *supra* note 7, at 20 (explaining history and origins of nolle prosequi). The nolle prosequi was the only form of prosecutorial discretion at the time because private citizens initiated and manages most prosecutions in this period. *See id.* (contextualizing historic use of nolle prosequi in England)*.*  [↑](#footnote-ref-65)
66. *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521, 547 (2005) (explaining two ways Crown prosecuted offenses). The English Monarch did not argue cases, but instead either had the public or, if the Crown had an explicit interest, the attorney general prosecute the cases. *See id.* at 547-48 (explaining general method of prosecution and role of attorney general and solicitor general in England). [↑](#footnote-ref-66)
67. *See* Krauss, *supra* note 7, at 20 (expanding on executive origins of nolle prosequi). The nolle prosequi was exclusively an executive procedure, available only to the attorney general. *See id.* (explaining historical power of nolle prosequi in England). The power was often exercised at the explicit direction of the Crown. *See id.* (exploring historical implementation of nolle prosequi in England). [↑](#footnote-ref-67)
68. *See* *id*. at 20 (clarifying party could not contest propriety of nolle prosequi). When the attorney general issued a nolle prosequi the termination of the prosecution was immediate and without a judicial inquiry. *See id*. (noting differences between American and English nolle prosequi). [↑](#footnote-ref-68)
69. *See* Prakash, *supra* note 66, at 548 (outlining history of prosecutors prior to founding of states). [↑](#footnote-ref-69)
70. *See* *id*. (explaining need for increase in number of prosecutors). Unlike in England, where official prosecutors were only concerned with great matters of state, official prosecutors in the colonies were tasked with prosecuting manners of varying scale and importance. *See id.* (expanding on differences between English and American prosecutors). The increased number of cases required an increased use of the nolle prosequi to control low-level prosecutions. *See id.* (discussing prosecutorial system of colonial America). [↑](#footnote-ref-70)
71. *See* *id*. at 548 (confirming colonial governors, prior to adoption of state constitutions, could direct and end prosecutions). [↑](#footnote-ref-71)
72. *See* Krauss, *supra* note 7, at 20 (explaining American prosecutors used nolle prosequi to terminate prosecutions they had initiated). The nolle prosequi was one of several procedural devices that public officials used to control criminal prosecutions. *See id.* (outlining usefulness of nolle prosequi). [↑](#footnote-ref-72)
73. *See* *id*. at 20 (recalling historical basis for discussions regarding power to nolle prosequi at end of Eighteenth Century). [↑](#footnote-ref-73)
74. *See id.* (reviewing historical origin of national debate over nolle prosequi power); Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229, 237 (1990) (outlining context for mutiny and arrest). Britain formally requested the individual for extradition. *See* Krauss, *supra* note 7, at 20-21 (explaining reason for presidential intervention). Although other crewmates who had participated had been released after an entry of a nolle prosequi on a special command of the president, this individual was delivered to the British and later executed. *See* *id*. at 21 (explaining context for President Adam’s decision). [↑](#footnote-ref-74)
75. *See* Krauss, *supra* note 7, at 21 (expanding on Congressional debate). [↑](#footnote-ref-75)
76. *See* Wedgwood, *supra* note 74, at 237 (outlining disagreement over President’s use of executive power to return individual to British). [↑](#footnote-ref-76)
77. *See* Krauss, *supra* note 7, at 21-22 (explaining John Marshall’s position as stating Federalists’ position). Marshall stated that the executive right to enter a nolle prosequi is not an interference with judicial decisions or an invasion of the province of the court. *See id.* at 22 (expanding on Federalist arguments). [↑](#footnote-ref-77)
78. *See* Fed. R. Crim. P. 48(a) (granting government power to dismiss indictment, information, or complaint only with leave of court); Krauss, *supra* note 7, at 31 (expanding on historical context and practical application). Even though, on paper, the prosecutorial discretion to nolle prosequi in the federal courts has been limited and is now subject to judicial review, judges rarely deny prosecutors motions to dismiss. *See* Krauss, *supra* note 7, at 31 (arguing Rule 48(a) had little impact). [↑](#footnote-ref-78)
79. *See* William P. Marshall, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power,* 115 Yale L.J. 2446, 2252 (2006) (quantifying various law enforcement powers granted to state attorney generals);Law Dictionary, *supra* note 4, *Judicial Branch (Judicial Branch)* (defining judicial branch’s role in interpreting law and evidentiary requirements); Brenner, *supra* note 53, at 69 (describing grand jury’s historical buffer role between state and individual). [↑](#footnote-ref-79)
80. *See* Commonwealth v. Di Pasquale, 246 A.2d 430, 432 (Pa. 1968) (stating state court responsible for court proceeding supervision and protection of defendants rights); State v. Ericksen, 607 P.2d 666, 669 (N.M. Ct. App. 1980) (affirming trial judge’s authority to oversee court resources and control movement of all cases on its docket); Commonwealth v. Dascalakis, 140 N.E. 470, 473 (Mass. 1923) (confirming prosecutorial discretion subject to limitations arising from inherent rights of defendant);State v. Charles, 190 S.E. 466, 469 (S.C. 1937) (stating court has duty to ensure prosecutorial power is not operated to prejudice defendant's rights); State v. Adams Cnty. Circuit Court, 735 So. 2d 201, 205 (Miss. 1999) (describing requirement of court approval for protection of defendant); State v. Reimonenq, 286 So. 3d 412, 420 (La. 2019) (holding violations of defendant’s right to due process and fundamental fairness upset balance of forces). [↑](#footnote-ref-80)
81. *See* Brenner, *supra* note 53, at 97 (stating variety of approaches states take regarding grand juries’ role). [↑](#footnote-ref-81)
82. *See* State v. Winne, 96 A.2d 63, 76 (N.J. 1953) (stating grand jury indictment informs court of facts alleged); People v. Extale, 967 N.E.2d 179, 181 (N.Y. 2012) (confirming nothing grants prosecutor right to refuse to proceed on count of grand jury indictment); Hoskins v. Maricle, 150 S.W.3d 1, 18 (Ky. 2004) (affirming grand jury independence requires judicial oversight of nolle prosequi after indictment filed); Commonwealth v. Webber, No. SJ-2019-0366, 2019 LEXIS 766, at \*6 (Mass. Sep. 9, 2019) (stating power to nolle prosequi prior to trial almost absolute); United States v. Woody, 2 F.2d 262, 262-63 (D. Mont. 1924) (stating nolle prosequi allowed at any time prior to jury empanelment). [↑](#footnote-ref-82)
83. *See* Colo. Crim. P. 48 (limiting prosecutor’s ability to nolle prosequi during trial without defendant’s consent); DC Orders 2016-8 (requiring defendant’s consent before entry of nolle prosequi during trial); O.C.G.A. § 17-8-3 (requiring defendant’s consent before entry of nolle prosequi once case submitted to jury); S.D. Codified Laws § 23A-44-2 (stating defendant’s consent required once trial has begun); Ky. RCr Rule 9.64 (affirming prosecutor’s nolle proseuqi power prior to swearing of jury or of first witness); Sheriff, Washoe Cnty. v. Marcus, 995 P.2d 1016, 1020 (Nev. 2000) (stating prosecutor may unilaterally dismiss charge without prejudice prior to trial); *Dascalakis*, 140 N.E. at 473 (stating defendant’s rights limit prosecuting officer’s powers). *See generally* Klopfer v. North Carolina, 386 U.S. 213 (1967) (stating defendant’s right to speedy trial infringed upon by nolle prosequi). *But see* State v. Kreps, 8 Ala. 951, 955 (1846) (affirming state’s authority to enter nolle prosequi any time before jury retires). In an effort to protect the defendant’s rights to due process, and a speedy and fair trial, most statutes require the defendant’s consent to nolle prosequi [BBS 5.1/R 14.1] once the trial has begun. *See* Colo. Crim. P. 48 (requiring defendant’s consent for nolle prosequi during trial); DC Orders 2016-8 (limiting entry of nolle prosequi during trial without defendant’s consent); O.C.G.A. § 17-8-3 (disallowing entry of nolle prosequi without defendant’s consent once case has submitted to jury); S.D. Codified Laws § 23A-44-2 (requiring defendant’s consent once trial has begun); *Klopfer*, 386 U.S. 213 at 225 (1967) (holding nolle prosequi with leave after mistrial implicated defendant’s right to speedy trial); *Reimonenq*, 286 So. 3d at 420 (La. 2019) (weighing prosecutor’s discretion against defendant’s rights to due process and fundamental fairness); *Dascalakis*, 140 N.E. at 473 (limiting prosecutor’s discretion based on defendant’s rights). [↑](#footnote-ref-83)
84. *See* A.C.A. § 16-85-713 (prohibiting any discontinuation or abandonment of indictment without leave of court); Ky. RCr Rule 9.64 (requiring leave of court to dismiss indictment); Drinkard v. State, 20 Ala. 9, 13-14 (1852) (requiring leave of court once indictment filed); *Hoskins*, 150 S.W.3d at 18 (stating from grand jury independence follows requirement for court’s permission to amend or dismiss indictment). [↑](#footnote-ref-84)
85. *See* Rogers v. Hill, 48 A. 670, 671 (R.I. 1901) (affirming ability to unilaterally nolle prosequi after trial); Commonwealth v. Miller, 56 N.E.3d 168, 218 n.4 (Mass. 2016) (confirming nolle prosequi after trial valid exercise of prosecutorial power). *But see* State *ex rel*. Norwood v. Drumm, 691 S.W.2d 238, 241 (Mo. 1985) (affirming denial of nolle prosequi after guilty verdict to safeguard jury’s determination). [↑](#footnote-ref-85)
86. *See* State v. Sandoval, 788 N.W.2d 172, 225 (Neb. 2010) (deriving state’s broad discretion from constitution); Barnett v. Antonacci, 122 So. 3d 400, 405 (Fla. Dist. Ct. App. 2013) (affirming constitutional discretion of prosecutors); State v. Carlson, 555 P.2d 269, 271-72 (Alaska 1976) (limiting judicial ability to interfere with prosecutorial discretion); *Rogers*, 48 A. at 671 (stating unilateral nolle prosequi only allowed without oversight prior to and after trial); District of Columbia v. Weams, 208 A.2d 617, 618 (D.C. 1965) (giving prosecutor ability to nolle prosequi without judicial oversight); *Charles*, at 469 (1937) (affirming court’s ability to refuse nolle prosequi in instances of corruption); State v. Skillin, No. 2014-0395, 2015 LEXIS 94, at \*1-2 (N.H. July 30, 2015) (allowing courts to deny nolle prosequi intended to inflict confusion, harassment, or other unfair prejudice); Noland v. State, 580 S.W.2d 953, 956 (Ark. 1979) (granting judge oversight of nolle prosequi); *Adams Cnty. Circuit Court*, 735 So. 2d at 205 (requiring court’s approval prior to nolle prosequi)*;* [BBS 3.3] *see also* Law Dictionary [BBS 1.4], *supra* note 4, at *Nolle Prosequi* [BBS 3.5] (stating states vary in amount of judicial oversight of nolle prosequi); Brown, *supra* note 5, at 881-82 (remarking on ways states limit victims’ ability to challenge decisions to nolle prosequi); Krauss, *supra* note 7, at 20-21 (stating public debate regarding nolle prosequi power has existed since end of eighteenth century). [↑](#footnote-ref-86)
87. *See* *Barnett*, 122 So. 3d at 405 (giving prosecutors unilateral discretion); *Noland*, 580 S.W.2d at 956 (allowing judge wide latitude to refuse nolle prosequi); State v. Diaz, 788 P.2d 207, 213 (Idaho 1990) (Bistline, J., dissenting) (replacing nolle prosequi with motion to dismiss). [↑](#footnote-ref-87)
88. *See* *infra* Section II.B.1 (highlighting states where prosecutors given broad discretion to nolle prosequi). [↑](#footnote-ref-88)
89. *See* *infra* Section II.B.2 (examining states where judges have ability to oversee prosecutorial discretion to nolle prosequi). [↑](#footnote-ref-89)
90. *See* *infra* Section II.B.3 (examining states where nolle prosequi limited or abolished). [↑](#footnote-ref-90)
91. *See* Fla. Const. Art. II, § 3 (stating separation of powers); Paul A. Mcgrane for Writ of Habeas Corpus, 130 A. 804, 804 (R.I. 1925) (affirming nolle prosequi power constitutionally exclusively in attorney general and assistants); Rogers v. Hill, 48 A. 670, 670 (R.I. 1901) (confirming power to nolle prosequi derived from constitution, not from statute); *Sandoval*, 788 N.W.2d at 225 (confirming state [BBS 2.3.3]retains power to choose whom to prosecute); *Carlson*, 555 P.2d at 271 (Alaska 1976) (confirming executive branch and grand jury have exclusive charging authority [BBS 14.1]); *Barnett*, 122 So. 3d at 405 (confirming constitution grants exclusive discretion to prosecutors). [↑](#footnote-ref-91)
92. *See* *Mcgrane*, 130 A. at 804 (declaring nolle prosequi power constitutionally-based [BBS 2.5.1] in Rhode Island); *Rogers*, 48 A. at 670 (confirming power to nolle prosequi derived from constitution in Rhode Island); State v. Sandoval, 788 N.W.2d 172, 225 (Neb. 2010) (confirming state limited only by constitutional constraints in Nebraska); State v. Carlson, 555 P.2d 269, 271 (Alaska 1976) (affirming court may not usurp executive branches authority to select charges in Alaska); Barnett v. Antonacci, 122 So. 3d 400, 405 (Fla. Dist. Ct. App. 2013) (articulating constitutional basis for prosecutorial discretion in Florida). [↑](#footnote-ref-92)
93. *See Sandoval*, 788 N.W.2d at 225 (stating state retains broad discretion subject only [RB 14.1] to constitutional limits); *Carlson*,555 P.2d at 271-72 (limiting judicial ability to usurp Executive Branch’s discretion to prosecute cases). For example, in Nebraska prosecutors cannot based their decision whether to prosecute [BBS 5.1]on an unjustifiable standard such as race, religion, or any other arbitrary classification. *See Sandoval*, 788 N.W.2d at 225 (confirming constitutional limits on prosecutorial discretion). [↑](#footnote-ref-93)
94. *See* Commonwealth v. Cheney, 800 N.E.2d 309, 314 (Mass. 2003) (giving prosecutors [BBS 7.4 – this isn’t a possessive] discretion to enter nolle prosequi); State v. Greenlee, 620 P.2d 1132, 1137 (Kan. 1980) (giving prosecutor full discretion to nolle prosequi [RB 14.1]); State v. Franton, 319 So. 2d 405, 406 (La. 1975) (granting prosecutor total discretion to control over indictments prior to jury empanelment [BBS 5.1/BBS 3.4.1]); District of Columbia v. Weams, 208 A.2d 617, 618 (D.C. 1965) (affirming prosecutor’s discretion to nolle prosequi); People v. Byrnes, 341 N.E.2d 729, 731 (Ill. 1975) (giving prosecutor discretionary power to nolle prosequi [RB 14.1]); Ward v. State, 427 A.2d 1008, 1012 (Md. 1981) (giving discretionary power to prosecuting attorney); State v. Blount, No. A08-1259, 2009 LEXIS 243, at \*10 (Minn. App. Mar. 3, 2009) (affirming prosecutorial discretion to dismiss complaint); United States v. Woody, 2 F.2d 262, 262-63 (D. Mont. 1924) (affirming discretionary power of prosecutor not to prosecute); State v. Pond, 584 A.2d 770, 771 (N.H. 1990) (giving prosecutor discretion not to prosecute); State v. Brule, 981 P.2d 782, 787 (N.M. 1999) (affirming discretion of prosecutor); State v. Charles, 190 S.E. 466, 469 (S.C. 1937) (affirming prosecutor’s discretionary power); State v. Patterson, 105 N.E. 228, 230 (Ind. 1914) (giving prosecutor wide discretion). [↑](#footnote-ref-94)
95. *See* Burns Ind. Code Ann. § 35-34-1-13 (stating court shall order dismissal upon motion by prosecuting attorney); N.C. Gen. Stat. § 15A-931 (giving prosecutors authority to dismiss any charges); V.R.Cr.P. Rule 48 (noting [BBS 3.4.1] entry of nolle prosequi does not require court’s approval); S.D. Codified Laws § 23A-44-2 (stating prosecution ends with entry of nolle prosequi); Del. Crim. R. Gov'g C.P. 48 (affirming prosecution ends when [RB 14.1] Attorney General enters nolle prosequi); *Cheney*, 800 N.E.2d at 314 (stating prosecutor’s decision to enter nolle prosequi free from judicial intervention); *Greenlee*, 620 P.2d at 1137 (stating discretion to nolle prosequi sacred domain of prosecutor); *Franton*, 319 So. 2d at 406 (giving prosecutor arbitrary control over indictments prior to jury empanelment [BBS 5.1/BBS 3.4.1]); *Weams*, 208 A.2d at 618 (stating common law gives prosecutors [BBS 7.4] ability to nolle prosequi without judicial oversight); *Byrnes*, 341 N.E.2d at 731 (affirming State’s Attorney’s statutory authority to prosecute implies power to nolle prosequi [BBS 5.1]); *Ward*, 427 A.2d at 1012 (affirming sole discretion of prosecuting attorney to nolle prosequi free from judicial control); *Blount*, No. A08-1259, 2009 LEXIS 243, at \*10 (stating statute allows state to dismiss complaint without leave of court); *Woody*, 2 F.2d at 262-63 (affirming, under common law, prosecuting attorney repository for discretion not to prosecute); *Pond*, 584 A.2d at 771 (N.H. 1990) (affirming court does not have right to interfere with decisions not to prosecute); *Brule*, 981 P.2d at 787 (affirming power to enter nolle prosequi prior to impaneled jury); *Charles*, 190 S.E. at 469 (stating court [BBS 2.3.6.2] has no right to interfere with prosecutor’s discretion); *Patterson*, 105 N.E. at 230 (stating prosecutor given considerable discretion to nolle prosequi). [↑](#footnote-ref-95)
96. *See* Burns Ind. Code Ann. § 35-34-1-13 (mandating reasons for dismissal by nolle prosequi); Mass. R. Crim P. 16(a) (requiring prosecutor state reasons for nolle prosequi in written statement); Md. R. 4-247 ( [BBS 3.4.1] providing no entry of reasons for nolle prosequi requirement); Del. Crim. R. Gov’g C.P. 48 (allowing nolle prosequi without reasoning); D.C. SCR-Crim. Rule 48 (stating nolle prosequi does not require reasoning). [↑](#footnote-ref-96)
97. *See* D.C. SCR-Crim. Rule 48 (noting government may not dismiss prosecution during trial without defendant's consent); State v. Villar, 180 A.3d 588, 592 (2017) (reasoning prosecutorial discretion rooted in Executive Branch’s duty and thus circumscribes court’s discretion [BBS 5.1]); Commonwealth v. Dascalakis, 140 N.E. 470, 473 (Mass. 1923) (noting prosecutorial discretion subject to limitations); Commonwealth v. Webber, No. SJ-2019-0366, 2019 Mass. LEXIS 766, at \*6 (Sep. 9, 2019) (outlining rare circumstances, like [RB 14.1] corruption, where prosecutor’s discretion [BBS 3.4.1] curtailed); State *ex rel*. Miller v. Richardson, 623 P.2d 1317, 1323 (Kan. 1981) (stressing power to nolle prosequi cases not absolute, but qualified); People v. Verstat, 444 N.E.2d 1374, 1385 (Ill. 1983) (stating requirement to enter requested nolle prosequi absent clear abuse of discretion by prosecutor); *Weams*, 208 A.2d at 618 (delineating judicial restraint if nolle prosequi scandalous, corrupt, or capricious and vexatiously repetitious); State v. Reimonenq, 286 So. 3d 412 at 420 (La. 2019) (confirming violating defendant’s right to due process and fundamental fairness may limit prosecutorial discretion); State v. Skillin, No. 2014-0395, 2015 LEXIS 94, at \*1-2 (N.H. July 30, 2015) (empowering courts to remedy prosecutorial discretion intended to inflict confusion, harassment, or other unfair prejudice). [↑](#footnote-ref-97)
98. *See* *Reimonenq*, 286 So. 3d at 417 [BBS 3.4.1 – redundant blurb]. [↑](#footnote-ref-98)
99. *See* A.C.A. § 16-85-713 (providing requirement for leave of court in Arkansas); Colo. Crim. P. 48 (describing requirement for court’s consent and approval in Colorado); O.C.G.A. § 17-8-3 (announcing requirement for consent of court in Georgia); HRS § 806-56 (codifying requirement for consent of court upon written motion of prosecutor in Hawaii); Ky. RCr Rule 9.64 (allowing nolle prosequi only with permission of court in Kentucky); Mich. Comp. Laws Serv. § 767.29 (creating requirement for consent of court in Michigan); Miss. Code Ann. § 99-15-53 (proscribing requirement for court’s consent in Mississippi); N.D.R. Crim. P. Rule 48 (introducing requirement for court’s approval in North Dakota); Tenn. R. Crim. P. Rule 48 (providing requirement for court’s permission to terminate prosecution in Tennessee); Utah Code Ann. § 17-18a-605 (defining requirement of consent of court in Utah); State v. Kreps, 8 Ala. 951, 955 (1846) (announcing leave of court required in Alabama); Drinkard v. State, 20 Ala. 9, 13-14 (1852) (articulating leave of court required in Alabama); Noland v. State, 580 S.W.2d 953, 956 (Ark. 1979) (clarifying leave of court required in Arkansas); Iaea v. Heely, 743 P.2d 456, 457 (Haw. 1987) (finding consent of court required in Hawaii); State v. Adams Cnty. Circuit Court, 735 So. 2d 201, 205 (Miss. 1999) (setting forth consent of court required in Mississippi); State *ex rel*. Koppy v. Graff, 484 N.W.2d 855, 858 (N.D. 1992) (stating court’s consent in North Dakota); State v. Leonardis, 375 A.2d 607, 621 (N.J. 1977) (recognizing requirement for court’s approval in New Jersey); State v. Bayer, 2015-Ohio-4138, ¶ 32 (Ct. App. 2015) (summarizing requirement to obtain court’s leave in Ohio); Commonwealth v. Di Pasquale, 246 A.2d 430, 432 (Pa. 1968) (defining requirement for court review in Pennsylvania); Smith v. State, 70 S.W.3d 848, 854 (Tex. Crim. App. 2002) (delineating court’s consent [BBS 3.4.1]required in Texas); Myers v. Frazier, 319 S.E.2d 782, 792 (W.Va. 1984)(addressing requirement for court review of prosecutor’s reasoning in West Virginia). [↑](#footnote-ref-99)
100. *See* A.C.A. § 16-85-713 (establishing requirement for leave of court prior to entry of nolle prosequi); Colo. Crim. P. 48 (requiring court’s consent for entry of nolle prosequi); O.C.G.A. § 17-8-3 (requiring consent of court); HRS § 806-56 (allowing judicial review of motion stating reasons for entry); Ky. RCr Rule 9.64 (recognizing permission of the court required); Mich. Comp. Laws Serv. § 767.29 (proscribing requirement for court’s consent prior to entry); Miss. Code Ann. § 99-15-53 (highlighting requirement for court’s consent for nolle prosequi); Ohio Rev. Code Ann. § 2941.33 (forbidding entry without leave of court); Tenn. R. Crim. P. Rule 48 (announcing court’s permission required); Utah Code Ann. § 17-18a-605 (barring entry of nolle prosequi without consent of court). [↑](#footnote-ref-100)
101. *See* Mich. Comp. Laws Serv. § 767.29 (requiring prosecutor to state reasons for discontinuance or abandonment); People v. Storlie, 327 P.3d 243, 246-47 (Colo. 2014) (pointing to requirement for court only to give reasoning for withholding consent); Sanders v. State, 631 S.E.2d 344, 345 (Ga. 2006) (stating decline of nolle prosequi within court’s discretion); Hoskins v. Maricle, 150 S.W.3d 1, 13 (Ky. 2004) (acknowledging requirement for attorney to set forth reasons for nolle prosequi prior to court’s consent); *Adams Cnty. Circuit Court*, 735 So. 2d at 205 (reasoning aggravation not valid reason for denying consent); *State ex rel. Koppy*, 484 N.W.2d at 858 (affirming denial of nolle prosequi only if filed in bad faith, contrary to public interest, or harassing); *Leonardis*, 375 A.2d at 621 (discussing strong public policy for judicial superintendence of prosecutorial discretion); State v. Winne, 96 A.2d 63, 74 (N.J. 1953) (confirming requirement for prosecutor to exercise good faith and exercise all reasonable and lawful diligence); *Bayer*, 2015-Ohio-4138 at ¶ 32 (highlighting court’s denial dependent on abuse or public interest); *Di Pasquale*, 246 A.2d at 432 (subjecting power to discontinue to court’s power to supervise trials and protect defendant’s rights); State v. Harris, 33 S.W.3d 767, 770-71 (Tenn. 2000) (stating court’s power to deny used only when public interest at stake); *Smith*, 70 S.W.3d at 855 (stating court’s discretion depends on particular prosecutor and particular case). [↑](#footnote-ref-101)
102. *See* People v. Reagan, 235 N.W.2d 581, 587 (Mich. 1975) (detailing prosecutor’s only requirement to act within its authority in seeking order of nolle prosequi); *State ex rel. Koppy*, 484 N.W.2d at 858 (enhancing requirement not to act in bad faith, contrary to public interest, or intentionally harass); *Bayer*, 2015-Ohio-4138 at ¶ 32 (announcing court’s denial dependent on abuse or public interest); *Harris*, 33 S.W.3d at 770-71 (detailing court [BBS 5.1/RB 14.1] can withhold consent only when public interest at stake); State *ex rel*. Skinner v. Dostert, 278 S.E.2d 624, 631 (W. Va. 1981) (stressing prosecutor’s only requirement of sound reasons). [↑](#footnote-ref-102)
103. *See* *Noland*, 580 S.W.2d at 956 (giving judge wide latitude to refuse nolle prosequi); *Sanders*, 631 S.E.2d at 345 (stating decline of nolle prosequi entirely within court’s discretion); *Iaea*, 743 P.2d at 457 (affirming lower court could accept or reject entry of nolle prosequi); *Hoskins*, 150 S.W.3d at 17 (outlining judges ability to do all things reasonably necessary to administration of justice); *Leonardis*, 375 A.2d at 621 (creating wide latitude for judicial oversight to protect public interest); *Di Pasquale*, 246 A.2d at 432 (subjecting power to discontinue to court’s powers). [↑](#footnote-ref-103)
104. *See* State v. Kreps, 8 Ala. 951, 955 (1846) (applying limits to judicial discretion for review of nolle prosequi); *Storlie*, 327 P.3d at 246-47 (confirming review more than rubber stamp but not allowed to supplant prosecutorial decision making); State v. Adams Cnty. Circuit Court, 735 So. 2d 201, 205 (Miss. 1999) (limiting judicial denial nolle prosequi for unreasonable reasons); *Smith*, 70 S.W.3d at 855 (stating court’s discretion depends on particular prosecutor and particular case). [↑](#footnote-ref-104)
105. *See* Va. Code Ann. § 19.2-265.3 (confirming good cause required for entry of nolle prosequi); Manning v. Engelkes, 281 N.W.2d 7, 13 (Iowa 1979) (recognizing abuse of discretion necessary to allow trial court to deny dismissal in Iowa); State *ex rel.* McKittrick v. Graves, 346 Mo. 990, 998-99 (1940) (articulating prosecuting attorney has minimum requirement to investigate in Missouri); Roe v. Commonwealth, 628 S.E.2d 526, 529 (Va. 2006) (confirming minimal requirement for good cause in Virginia); State v. Kenyon, 270 N.W.2d 160, 163 (Wis. 1978) (highlighting general rule of prosecutorial discretion with specific judicial limits in Wisconsin); Graham v. State, 247 P.3d 872, 875 (Wyo. 2011) (annunciating only factual information supporting recommendation for nolle prosequi in Wyoming). [↑](#footnote-ref-105)
106. *See* *Manning*, 281 N.W.2d at 13 (setting forth requirement for substantial reasons supported by factual basis and compatible with public interest); *Graham*, 247 P.3d at 875 (developing requirement for factual information for nolle prosequi prior to consent of court). [↑](#footnote-ref-106)
107. *See Roe*, 628 S.E.2d at 529 (confirming that Commonwealth not entitled to nolle prosequi unless it demonstrates requisite good cause). [↑](#footnote-ref-107)
108. *See Kenyon*, 270 N.W.2d at 163 (reiterating nolle prosequi discretion subject to trial court in public interest); *Graham*, 247 P.3d at 875 (expressing willingness to deny prosecutor’s motion if “clearly contrary to manifest public interest”). [↑](#footnote-ref-108)
109. *See* 22 Okl. St. § 816 (ending use of nolle prosequi [BBS 5.1/BBS 3.4.1/RB 14.3(f)] ); ORS § 135.757 (abolishing nolle prosequi); Cal Pen Code § 1386 (announcing abolishment of nolle prosequi); Idaho Code § 19-3505 (detailing abolishment of nolle prosequi); Conn. Gen. Stat. § 54-56b (limiting unilateral nolle prosequi to situations where material witness or evidence has disappeared); State v. Diaz, 788 P.2d 207, 213 (Idaho 1990) (Bistline, J., dissenting) (articulating dismissal has replaced [BBS 3.4.1] nolle prosequi); Bessey v. State, 297 A.2d 373, 376 (Me. 1972) (examining how statutory dismissal replaces common-law [BBS 3.4.1] procedure of nolle prosequi); People v. Extale, 967 N.E.2d 179, 181 (N.Y. 2012) (reaffirming nolle prosequi continues abolished); State v. Sonneland, 494 P.2d 469, 474 (Wash. 1972) (announcing no prosecuting attorney shall hereafter discontinue or abandon prosecution except provided by motion of court)*; In re* Parham, 431 P.2d 86, 88 (Ariz. Ct. App. 1967) (stressing promise to nolle prosequi only enforceable in exchange for turning state’s evidence. [↑](#footnote-ref-109)
110. *See* 22 Okl. St. § 816 (stating nolle prosequi abolished in Oklahoma); ORS § 135.757 (abolishing nolle prosequi in Oregon); Cal Pen Code § 1386 (abolishing nolle prosequi in California); Idaho Code § 19-3505 (abolishing nolle prosequi in Idaho); *Diaz*, 788 P.2d at 213 (Bistline, J., dissenting) (stating nolle prosequi no longer allowed in Idaho); *Bessey*, 297 A.2d at 376 (stating statutory nolle prosequi replaced in Maine); *Extale*, 967 N.E.2d at 181 (stating nolle prosequi still abolished in New York); *Sonneland*, 494 P.2d at 474 (stating dismissal replaces nolle prosequi in Washington). [↑](#footnote-ref-110)
111. *See* *Diaz*, 788 P.2d at 213 (Bistline, J., dissenting) (stating dismissal has replaced the nolle prosequi); *Bessey*, 297 A.2d at 376 (stating statutory dismissal replaces common-law [BBS 2.5.1] procedure of nolle prosequi); *Sonneland*, 494 P.2d at 474 (reasoning motion required for discontinuation of prosecution). [↑](#footnote-ref-111)
112. *See* Conn. Gen. Stat. § 54-56b (limiting unilateral nolle prosequi to situations where material witness or evidence has disappeared); *In re* Parham, 431 P.2d 86, 88 (Ariz. Ct. App. 1967) (stating promise to nolle prosequi [RB 14.1] only enforceable in exchange for turning state’s evidence). [↑](#footnote-ref-112)
113. See Conn. Gen. Stat. § 54-56b (outlining nolle prosequi use and limitations in Connecticut). [↑](#footnote-ref-113)
114. *See* *In re Parham*, 431 P.2d at 88 (stating exactly when prosecutors may promise and use a nolle prosequi [BBS 5.1]). [↑](#footnote-ref-114)
115. *See* Ellen Yaroshefsky, *Examining Modern Approaches to Prosecutorial Discretion: Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 343, 343 (2010) (connecting relationship between high incarceration rates [RB 14.1]and prosecutorial discretion). In 2019, the total prison population in the United States was 1,430,800, which is often described by experts as a mass incarceration crisis. *See* U.S. Dep’t of Just., Prisoners in 2019, 1 (2020), https://www.bjs.gov/content/pub/pdf/p19.pdf, [https://perma.cc/NB66-5DLG] (comparing prison population trends over several years);[BBS 3.3] Traum, *supra* note 2, at 425 (defining mass incarceration and arguing harmful and destabilizing effects on communities); Mirko Bagaric et al., *Mitigating America’s Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 Lewis & Clark L. Rev. 3, 59 (2018) (concluding the United States experiencing unprecedented mass incarceration crisis). In the past ten years, prosecutors have examined the operation of the criminal justice and pushed for alternatives to incarceration. *See* Yaroshefsky, *supra* at 343-45 (noting state initiatives with reform focus). These alternatives include community service, electronic monitoring, probation, restitution, or treatment. *See generally* James Austin, *A Guidelines Proposal: How Many Americans are Unnecessarily Incarcerated?*, 29 Fed. Sent. R. 140 (2017) (considering proposed alternatives to incarceration and arguing their superior effectiveness). Many experts assert that prosecutorial discretion, including the power to nolle prosequi, should be used to end the mass incarceration crisis in the United States. *See* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 Mich. L. Rev. 835, 836 (2018) (articulating legal expert’s opinion that prosecutors can alleviate damage caused by mass incarceration); Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration,* 44 Hofstra L. Rev. 1063, 1085 (2016) (concluding prosecutors have ethical duty to end mass incarceration). Other experts feel that prosecutorial discretion, including the power to nolle prosequi has played a significant role in causing the mass incarceration crisis. *See* Bellin, *supra* at 836(highlighting role many experts believe prosecutors played in causing mass incarceration crisis); Davis, *supra* at 1085 (blaming prosecutors for mass incarceration crisis). [↑](#footnote-ref-115)
116. *See generally* Commonwealth v. Webber, No. SJ-2019-0366, 2019 LEXIS 766 (Mass. Sep. 9, 2019). [↑](#footnote-ref-116)
117. *See* Cramer & Ellement, *supra* note 3 (articulating Rollins election pledge to stop prosecuting “low-level” nonviolent offenses). District Attorney Rollins pledged to halt prosecution of low-level and poverty-connected crimes during her campaign. *See id.* [↑](#footnote-ref-117)
118. *See Webber*, 2019 Mass. LEXIS 766, at \*4-5 (discussing trial judge’s purported reasons). The trial judge claimed that the prosecutor had failed to notify the parade members whom the trial judge alleged were the victims of the defendant’s conduct. *See id.* [↑](#footnote-ref-118)
119. *See id.* at \*5 (confirming trial judge lacked authority to deny nolle prosequi). [↑](#footnote-ref-119)
120. *See id.* at \*6(contemplating hypothetical scandalous abuses of authority). [↑](#footnote-ref-120)
121. *See* State v. Sandoval, 788 N.W.2d 172, 225 (Neb. 2010) (requiring clear evidence of failure to properly discharge prosecutorial duty before limiting prosecutorial discretion); Noland v. State, 580 S.W.2d 953, 956 (Ark. 1979) (calling judicial oversight of nolle prosequi [BBS 3.4.1] necessary to protect interest of the state); State v. Sonneland, 494 P.2d 469, 474 (Wash. 1972) (reasoning nolle prosequi power naturally flows from prosecuting attorney’s discretion absent statute)*.* [↑](#footnote-ref-121)
122. *See* State v. Reimonenq, 286 So. 3d 412, 417 (La. 2019) (discussing natural tension between authority of courts and authority of district attorneys); State v. Adams Cnty. Circuit Court, 735 So. 2d 201, 205 (Miss. 1999) (confirming requirement for judicial approval intended to protect defendants)*.* [↑](#footnote-ref-122)
123. *See* People v. Reagan, 235 N.W.2d 581, 587 (Mich. 1975) (stating prosecutors, not trial judges, enjoy a position of high public trust); State *ex rel*. Skinner v. Dostert, 278 S.E.2d 624, 631 (W. Va. 1981) (stressing responsibility of prosecutor to seek justice, not merely to convict); Manning v. Engelkes, 281 N.W.2d 7, 13 (Iowa 1979) (articulating trial courts need [RB 14.1] prosecutor’s reasons before evaluating whether they abused their discretion [BBS 5.1]). [↑](#footnote-ref-123)
124. *See* Commonwealth v. Cheney, 800 N.E.2d 309, 314 (Mass. 2003) (announcing judicial review of decisions within executive discretion intolerable interference); State v. Greenlee, 620 P.2d 1132, 1137 (Kan. 1980) (describing decision to not prosecute sacred domain of prosecutor); People v. Byrnes, 341 N.E.2d 729, 731 (Ill. 1975) (describing power to nolle prosequi impliedly within statutory power to prosecute)*.* [↑](#footnote-ref-124)
125. *See* State *ex rel*. Koppy v. Graff, 484 N.W.2d 855, 858 (N.D. 1992) (highlighting judicial branch’s oversight of nolle prosequi entry not merely rubber stamp); Commonwealth v. Di Pasquale, 246 A.2d 430, 432 (Pa. 1968) (confirming court [BBS 3.4.1/RB 14.1] must provide generally for orderly administration of criminal justice). [↑](#footnote-ref-125)
126. *See* *State ex rel. Koppy*, 484 N.W.2d at 858 (describing trial courts’ [BBS 7.4] important duty to protect public interest and defendant); People v. Verstat, 444 N.E.2d 1374, 1385 (Ill. 1983) (outlining court’s inherent authority to insure fair trial despite prosecutor’s broad discretion). [↑](#footnote-ref-126)
127. *See* Commonwealth v. Webber, No. SJ-2019-0366, 2019 LEXIS 766 at \*7 (Mass. Sep. 9, 2019) (confirming prosecutor’s behavior not “scandalous abuse of authority” without further discussion); *Verstat*, 444 N.E.2d at 1385 (limiting discretion in cases of clear abuse of discretion without defining clear abuse of discretion); District of Columbia v. Weams, 208 A.2d 617, 618 (D.C. 1965) (allowing judicial restraint in instances of scandal or corruption without definition). [↑](#footnote-ref-127)
128. *See* Bibas *supra* note 39, [BBS 4.2.1.1] at 373 ( calling hidden nature of [RB 14.1] prosecutorial discretion [BBS 3.4.1] problematic). [↑](#footnote-ref-128)
129. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (confirming prosecutors’ [BBS 7.4] duty to see [RB 14.1]justice done); State v. Carlson, 555 P.2d 269, 271-72 (Alaska [BB 10 – this needs to be abbreviated] 1976) (stating judicial intervention of executive discretion constitutes usurpation [RB 14.1]); Barnett v. Antonacci, 122 So. 3d 400, 405 (Fla. Dist. Ct. App. 2013) (highlighting centrality of prosecutorial discretion to [RB 14.1] criminal justice system); *see also* *supra* note 28 (discussing constitutional requirement for state executive branches to faithfully execute law)*.* [↑](#footnote-ref-129)
130. *See* Smith, [BBS 4.2.1.1] *supra* note 2 [BBS 7.6 – needs to be linked through Word’s cross-referencing program] (outlining platform of progressive district attorneys); *supra* note 3 (highlighting recently elected prosecutors’ stance on use of nolle prosequi). [↑](#footnote-ref-130)
131. *See Webber*, 2019 Mass. LEXIS 766, at \*6-7 (confirming entry of nolle prosequi based on campaign promises not scandalous abuse of authority); State v. Reimonenq, 286 So. 3d 412, 417 (La. 2019) (highlighting balance still entitles prosecutor discretion absent violation of defendant’s rights). [↑](#footnote-ref-131)
132. *See Reimonenq*, 286 So. 3d at 417 (emphasizing importance of protecting defendant’s rights); State v. Sandoval, 788 N.W.2d 172, 225 (Neb. 2010) (confirming prosecutors cannot make decisions to prosecute [RB 14.1] unconstitutional reasons); Commonwealth v. Di Pasquale, 246 A.2d 430, 432 (Pa. 1968) (highlighting courts duty to protect defendant’s rights). [↑](#footnote-ref-132)
133. *See supra* notes 65-72 and accompanying text (examining historical origins of American nolle prosequi). [↑](#footnote-ref-133)
134. *Compare* Noland v. State, 580 S.W.2d at 956 (1979) (giving judge wide latitude to refuse nolle prosequi) *with* Bessey, 297 A.2d at 377 (confirming dismissal subject to court approval). [↑](#footnote-ref-134)
135. *Compare* *In re* Parham, 431 P.2d 86, 88 (Ariz. Ct. App. 1967) (giving prosecutors authority only to recommend dismissal) *with* State v. Sonneland, 494 P.2d 469, 471 (Wash. 1972) (authorizing trial court alone to dismiss charges). [↑](#footnote-ref-135)
136. *See supra* notes 128-131 [BBS 4.2.1.2 – you can’t internal cross reference a FN that already as an internal cross reference] and accompanying text (discussing benefits and shortcomings states with judicial limits on prosecutor’s discretion to nolle prosequi). [↑](#footnote-ref-136)
137. *See* Wayte v. United States, 470 U.S. 598, 608 (1985) (confirming constitutional limits on prosecutorial discretion); *Sandoval*, 788 N.W.2d at 225 (affirming constitutional limits on prosecutorial discretion); Commonwealth v. Dascalakis, 140 N.E. 470, 473 (Mass. 1923) (confirming limits on prosecutorial discretion arising from inherent rights of defendant). [↑](#footnote-ref-137)
138. *See Wayte*, 470 U.S. at 608 (1985) (outlining constitutional limits on prosecutorial discretion); *Sandoval*, 788 N.W.2d at 225 (confirming prosecution on unjustifiable standard not allowed); Rogers v. Hill, 48 A. 670, 671 (R.I. 1901) (confirming prosecutors power to nolle prosequi not subject to advice or permission of court); State v. Carlson, 555 P.2d 269, 275 (Alaska 1976) (Rabinowitz, J. concurring) (allowing unfettered prosecutorial discretion when discretion within constitutional bounds). [↑](#footnote-ref-138)
139. *See* D.C. SCR-Crim. Rule 48 (requiring defendant's consent during trial to dismiss prosecution); *Dascalakis*, 140 N.E. at 473 (stressing limits on prosecutorial discretion arising from inherent rights of defendant); State v. Charles, 190 S.E. 466, 469 (S.C. 1937) (confirming judicial duty to protect defendant’s rights); State v. Adams Cnty. Circuit Court, 735 So. 2d 201, 205 (Miss. 1999) (requiring court approval to ensure protection of defendant); State v. Reimonenq, 286 So. 3d 412, 420 (La. 2019) (protecting defendant’s right to due process and fundamental fairness[RB 14.1] ). [↑](#footnote-ref-139)
140. *See* Commonwealth v. Webber, No. SJ-2019-0366, 2019 Mass. LEXIS 766, at \*6 (Sep. 9, 2019) (noting corruption [BBS 3.4.1] possible justification for judicial intervention); District of Columbia v. Weams, 208 A.2d 617, 618 (D.C. 1965) (highlighting ability for judicial intervention in instances of corruption); State *ex rel*. Miller v. Richardson, 623 P.2d 1317, 1323 (Kan. 1981) (stressing qualified nature of prosecutorial power); *see also* Misner, *supra* note 33, at 765 (emphasizing need for public confidence in criminal justice system). [↑](#footnote-ref-140)
141. *See supra* note 126 and accompanying text (arguing potentially fluid nature of definition of scandalous). [↑](#footnote-ref-141)
142. *See* Commonwealth v. Cheney, 800 N.E.2d 309, 314 (Mass. 2003) (commenting on prosecutors executive power and calling judicial interference intolerable); State v. Greenlee, 620 P.2d 1132, 1137 (Kan. 1980) (calling discretion and decision whether or not to prosecute sacred domain of executive branch); People v. Byrnes, 341 N.E.2d 729, 731 (Ill. 1975) (implying power to nolle prosequi from authority to prosecute); State v. Pond, 584 A.2d 770, 772 (N.H. 1990) (confirming nolle prosequi power exists in prosecuting officer); State v. Brule, 981 P.2d 782, 787 (N.M. 1999) (announcing nolle prosequi power resides in sole discretion of prosecuting officer); *see also* Misner, *supra* note 33, at 729 (articulating connection between elected status and expanded prosecutorial power). [↑](#footnote-ref-142)
143. *See supra* notes 65-78 and accompanying text (discussing historic use of nolle prosequi). [↑](#footnote-ref-143)
144. *See supra* notes 38-59 and accompanying text (discussing prosecutorial discretion during stages of litigation). [↑](#footnote-ref-144)
145. *See supra* Section II.D.1 (highlighting states where prosecutors have broad constitutional discretion to nolle prosequi); supra Section II.D.2 (examining states with broad prosecutorial discretion despite lack of explicit constitutional powers). [↑](#footnote-ref-145)
146. *See supra* notes 124-126 and accompanying text (arguing downsides of states which have allowed prosecutors broad discretion). [↑](#footnote-ref-146)
147. *See* N.C. Gen. Stat. § 15A-931 (1997) (requiring prosecutor’s reasons on record before allowing nolle prosequi); HRS § 806-56 (allowing entry of nolle prosequi only after reviewing motion stating reasons); State *ex rel*. Skinner v. Dostert, 278 S.E.2d 624, 631 (W. Va. 1981) (stressing prosecutor’s requirement of sound reasons); Manning v. Engelkes, 281 N.W.2d 7, 13 (Iowa 1979) (highlighting trial courts need for prosecutor’s reasons before evaluating whether abuse of discretion has occurred); Bibas *supra* note 39 at 373 (arguing mandated public use of discretion would allow public to judge fairness). [↑](#footnote-ref-147)
148. *See* Misner, *supra* note 33, at 729 (arguing connection between elected status and independent discretion); Smith, [BBS 4.2.1.1] *supra* note 2 (describing progressive district attorneys’ platforms on nolle prosequi use); *supra* note 3 (highlighting recently elected prosecutors’ stance on use of nolle prosequi); Bibas, *supra* note 39, [BBS 4.2.1.1] at 373 (arguing for public availability of better prosecutorial data [BBS 5.1/BBS 3.4.1]). [↑](#footnote-ref-148)
149. *See supra* notes 136-139 and accompanying text (arguing importance of specific restrictions on prosecutorial discretion). [↑](#footnote-ref-149)
150. *See* U.S. Const. art. II, § 3 (describing responsibilities of Executive Branch); *supra* note 28 and accompanying text (articulating constitutional duties of state Executive Branches); *see also* Misner, *supra* note 33, at 729-30 (describing historical origins of elected prosecutors); Hessick & Morse, *supra* note 29,at 1548 (discussing local prosecutorial election processes in states). [↑](#footnote-ref-150)
151. *See* Smith, *supra* note 2 [BBS 7.6] (describing recent changes progressive district attorneys have made [BBS 5.1]); Yaroshefsky, *supra* note 114, at 343-45 (outlining state initiatives with reform focus); Austin, *supra* note 114 (arguing for alternatives to incarceration). [↑](#footnote-ref-151)
152. *See* State v. Reimonenq, 286 So. 3d 412, 420 (La. 2019) (describing balance of forces). [↑](#footnote-ref-152)
153. *See supra* note 129-130 and accompanying text (arguing prosecutorial discretion [BBS 5.1] necessary to protect voters). [↑](#footnote-ref-153)
154. *See* Smith, *supra* note 2 [BBS 7.6] (describing recently elected progressive prosecutors’ pledge to end mass incarceration). *But See* *supra* [BBS 1.3] note 131 and accompanying text (contemplating necessity of judicial intervention to protect defendants’ [BBS 7.4] rights). [↑](#footnote-ref-154)
155. *See supra* note 114 (discussing mass incarceration crisis and suggested remedies). [↑](#footnote-ref-155)
156. *See supra* note 129-130 and accompanying text (articulating argument for prosecutorial discretions ability to protect voters). [↑](#footnote-ref-156)